ADVISORY COMMITTEE
ON
CIVIL RULES

Santa Fe, NM
October 28-29, 2004

Volume I

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
OCTOBER 28-29, 2004

1. Report on Judicial Conference Session

   A. Standing Rules Committee report to Judicial Conference
   B. Minutes of June 17-18, 2004, Standing Rules Committee meeting
   C. Pending legislation

2. **ACTION** – Approving minutes of April 15-16, 2004, committee meeting

3. **ACTION** – Approving proposed amendment to Rule 5(e) and transmitting it to the Standing Rules Committee for publication on an expedited basis

4. Style Project:

   A. **ACTION** – Approving publication of proposed restyled Rules 64 to 86 and Rule 23
   B. **ACTION** – Approving publication of noncontroversial style-substance amendments to Rules 64 to 86
   C **ACTION** – Approving proposed amendments resolving "global issues" and "top-to-bottom" review of the entire set of rules for transmittal to Standing Rules Committee for publication

5 **ACTION** – Approving proposed new Rule 5 1 and transmitting it to the Standing Rules Committee for publication

6 **ACTION** – Approving proposed recommendation on sealed settlements

7 Consideration of proposed privacy rule template implementing E-Government Act of 2002

8. Report on proposed projects.

   A. Rule 62.1 – indicative rulings
   B. Rule 48 – polling of jury
   C. Rule 30(b)(6) – limiting use of depositions of corporate officials
   D. Computing time limits consistent with other sets of rules of procedure
   E. Considering deleting rules that overlap Evidence Rules

9. Next meetings: Hearings on electronic discovery in January 2005
   Meeting in Washington, D C in April 2005

ADVISORY COMMITTEE ON CIVIL RULES

October 2004

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Projects

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Dean John C. Jeffries, Jr.
Robert C. Heim, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Class Actions
(Open), Chair
Judge Shira Ann Scheindlin
Andrew M. Scherffius, Esquire
Robert C Heim, Esquire

Subcommittee on Rule 15 and Rule 50
(Open), Chair
Judge Shira Ann Scheindlin
Judge H. Brent McKnight
Judge C. Christopher Hagy
Frank Cicero, Esquire

Subcommittee on Style
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ADVISORY COMMITTEE ON CIVIL RULES

			Start Date	End Date
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Jose A. Cabranes	C	Second Circuit	2004	2007
Frank Cicero, Jr.	ESQ	Illinois	2003	2006
Daniel C. Girard	ESQ	California	2004	2007
C Christopher Hagy	M	Georgia (Northern)	2003	2006
Nathan L. Hecht	JUST	Texas	2000	2006
Robert C. Heim	ESQ	Pennsylvania	2002	2005
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Peter D. Keisler *	DOJ	Washington, DC	----	Open
Paul J. Kelly, Jr.	C	Tenth Circuit	2002	2007
H. Brent McKnight	D	North Carolina (Western)	2001	2007
Thomas B. Russell	D	Kentucky (Western)	2000	2006
Shira Ann Scheindlin	D	New York (Southern)	1998	2005
Chilton Davis Varner	ESQ	Georgia	2004	2007
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open

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

* Ex-officio

Agenda E-18
Rules
September 2004

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure met on June 17-18, 2004 Robert D. McCallum, Associate Attorney General, attended the meeting on behalf of the Deputy Attorney General, James B. Comey All the other members attended.

Representing the advisory rules committees were: Judge Samuel A. Alito, chair, and Professor Patrick J Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Edward E. Carnes, chair, and Professor David A Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary, Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James Ishida and Robert P. Deyling, attorney advisors

considering the amendments to Rule 9036 on an expedited basis along with the proposed amendments to Rules 2002(g) and 9001(9).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 6, 27, and 45 and proposed amendments to Supplemental Rules B and C with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2003. The scheduled public hearing on the proposed rules amendments was canceled because no one asked to testify

The proposed amendment to Rule 6(e) clarifies the method of determining the time to respond when the time is extended after service by mail, by leaving with the clerk of court, by electronic means, or by other means consented to by the party served. It was unclear whether the additional three days provided in the rule were to be added before or after the prescribed period. The amendment makes clear that three days are added after the prescribed period otherwise expires Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days.

The proposed amendment to Rule 27 corrects outdated references to former Rule 4(d). The amendment makes clear that all methods of service authorized under Rule 4 can be used to serve a petition to perpetuate testimony.

Under the proposed amendment to Rule 45, a deposition subpoena must state the method for recording the testimony. The amendment ensures that a nonparty deponent has notice of the recording method, providing the deponent an opportunity to raise objections in a timely and efficient manner.

The proposed amendment to Supplemental Rule B fixes the time for determining whether a defendant is "found" in the district at the time when the verified complaint and the accompanying affidavit are filed. The amendment is intended to prevent a defendant from defeating attachment and evading a security device by waiting until a complaint is filed before appointing an agent to receive service of process.

The proposed amendments to Supplemental Rule C are technical in nature and correct an oversight contained in amendments made in 2000.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 6, 27, and 45, and proposed amendments to Supplemental Rules B and C and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Civil Procedure are in Appendix C with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G, and revisions to Form 35 with a recommendation that they be published for comment. The advisory committee also proposed a style revision of Rules 38 through 63 — except Style Rule 45 which was approved at an earlier meeting — with a recommendation that they be published for public comment, but at a later date. (The Committee had earlier approved publishing for comment proposed style amendments to Rules 1 through 37 and 45.) In addition, the advisory committee proposed amendments to eleven of the restyled rules to be published at the same time as the comprehensive style revision, but as a separate set of proposals. These proposed amendments emerged from the work on the style revision as modest, noncontroversial clear improvements.

Because they arguably exceed the scope of the style project by changing the accepted meaning or effect of the rules, the advisory committee recommended that they be published at the same time as, but separately from, the comprehensive style revision of the rules.

Discovery of Electronically Stored Information

The proposed amendments to Rules 16, 26, 33, 34, 37, 45 and revisions to Form 35 are aimed at discovery of electronically stored information. The advisory committee has been studying these problems intensively since 2000. Bar organizations, attorneys, and members of the public have urged the advisory committee to address the serious problems arising from discovery of computer-based information. The discovery of electronically stored information raises markedly different issues from conventional discovery into paper. Electronically stored information is characterized by exponentially greater volume; computer information, unlike paper, is dynamic; and electronic data, unlike paper, may be incomprehensible when separated from the system that created it. Developing case law is not consistent. Disparate local rules have emerged, and more are under consideration. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop, and will be particularly confusing and debilitating to large organizations. Even small organizations and individuals may be overwhelmed by the uncertainty, expense, delays, and burdens of such discovery. The costs of complying with unclear and at times vague discovery obligations that vary from district to district in ways unwarranted by local variations practice are becoming increasingly untenable.

The advisory committee has monitored the experiences of the bar and bench with these issues for several years. It has found that the discovery of electronically stored information is becoming more time consuming, burdensome, and problematic. Unless timely action is taken,

the federal discovery rules will become increasingly removed from practice, and similarly situated litigants will continue to be treated differently depending on the federal forum.

The proposed amendments to Rule 16 and Rule 26(f), and Form 35 present a framework for the parties and court to give early attention to issues relating to electronically stored information, the preservation of evidence, and privilege. Under the proposed amendment to Rule 26(f), the parties are to include in their conference the preservation of information for discovery and are to include in their proposed discovery plan any issues relating to disclosure or discovery of electronically stored information, including the form of production, and whether the parties can agree on approaches to production that protect against privilege waiver. Form 35 is amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court. The scheduling order under Rule 16, as amended, may include provisions on the disclosure or discovery of electronically stored information and an order adopting the parties' agreements for protection against waiving privilege

A proposed amendment to Rule 26(b)(2) clarifies the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible, an increasingly disputed aspect of such discovery. Under the amendment, a party need not produce electronically stored information that is not reasonably accessible, such as deleted information, information kept on backup tapes for disaster recovery purposes, or legacy data remaining from systems no longer used. If the requesting party moves for the production of such information, the responding party has the burden to show that the information is not reasonably accessible. Even if the information is not reasonably accessible, a court may order discovery for good cause and may impose appropriate terms and conditions

The volume of electronically stored information produced in response to discovery can be enormous, and certain features of such information make it more difficult to review for privilege than paper discovery The inadvertent production of privileged material is a substantial risk. The proposed amendment to Rule 26(b)(5) sets up a procedure to apply when a responding party asserts a production of privileged information without an intent to waive the privilege. The proposed amendment does not address how to resolve whether the privilege has been waived or forfeited, respecting the special statutory process for adopting rules that modify privilege. By providing a procedure to allow the responding party to assert privilege after production and to require the return of the material pending resolution of the claim, the amendment helpfully addresses the burden of privilege review, which is particularly acute in electronic discovery.

The proposed amendment to Rule 33 clarifies that an answer to an interrogatory involving review of a business record should also address electronically stored information and permits the responding party to answer by providing access to the information.

Under the proposed amendments to Rule 34, electronically stored information is explicitly recognized as discoverable matter distinct from "documents." The term "documents" cannot continue to be stretched to accommodate all the differences between paper and electronically stored information. Rule 34 is also amended to authorize a requesting party to specify the form of production, such as in paper or electronic form, or a particular electronic form The rule provides that the responding party may object to that request and provides that absent court order, party agreement, or request for a specific form for production, a party may produce the information in the form in which the party ordinarily maintains it or in an electronically searchable form. Absent a court order, the party need only produce the information in one form.

The proposed amendments to Rule 37 respond to a unique and necessary feature of computer systems — the automatic recycling, overwriting, and alteration of electronically stored information. This is a different problem from that presented by information kept in the static form that paper represents. The routine recycling of backup tapes used for disaster recovery purposes, for example, is necessary to the operation of the information systems used by private and public entities. At the same time, litigants' right to obtain evidence must be protected. There is great uncertainty as to whether and when a party may continue some or all of the routine operation of its computer system without risk of sanctions. The advisory committee has heard strong arguments in support of better guidance in the rules.

Rule 37(f) states that a court may not impose sanctions on a party under the civil rules for a party's failure to provide electronically stored information in discovery if the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; the information was lost because of the routine operation of the party's computer system; and the party did not violate an order in the action requiring it to preserve the information. The advisory committee is specifically seeking comment on the level of fault necessary to make a party ineligible for this narrow "safe harbor" from sanctions under the rules. The proposed amendment is framed in terms of a party's negligent failure to prevent the loss of information in the routine operation of a computer system. The advisory committee is seeking comment on whether the proposal should preclude a court from imposing sanctions under the rules for the loss of information as a result of the routine operation of a computer system unless the deletion or loss of this information was intentional or reckless or a court order was violated

The proposed amendments to Rule 45 conform the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.

Proposed Amendments to Rule 50

A party may, after trial, renew a motion for judgment as a matter of law made during trial in accordance with Rule 50(a) The proposed amendment to Rule 50 deletes the requirement that the original motion be made at the close of all the evidence. Many reported appellate decisions continue to wrestle with the problems that arise when a party has moved for judgment as a matter of law before the close of all evidence but has failed to renew the motion at the close of all the evidence. The proposed amendment reflects the belief that a motion made at any time before the case is submitted to the jury serves all of the functional needs served by a motion at the close of all the evidence. As now, the post-trial motion renews the trial motion and can be supported only by arguments that had been made to support the trial motion.

Proposed New Supplemental Rule G on Forfeiture Actions

Proposed new Supplemental Rule G establishes comprehensive procedures governing in rem forfeiture actions. The new rule consolidates the forfeiture in rem procedures located in several admiralty rules and sets up a unified procedural framework solely intended to address asset forfeiture cases. Conforming amendments to Supplemental Rules A, C, and E are also proposed. Representatives from the Department of Justice and National Association of Criminal Defense Lawyers worked with the advisory committee in developing the rule.

Forfeiture actions are presently litigated under various Supplemental Rules, which has caused problems. The Supplemental Rules are primarily designed to handle admiralty actions and present difficult interpretational issues when applied to asset forfeiture actions. Moreover, the Supplemental Rules have not been revised to take account of many of the provisions of the Civil Asset Forfeiture Reform Act of 2000. Nor have the Supplemental Rules been revised to take account of the constitutional jurisprudence dealing with adequate notice The disconnect between the Supplemental Rules and in rem forfeiture procedures has become acute because the

number of forfeiture actions has increased. The new rule addresses these problems in an integrated and coherent fashion.

Among other things, the new rule sets out procedures governing the filing and response to complaints involving in rem forfeitures, specifies notice provisions — including the anticipated use of the internet to provide a designated government forfeiture web site and a more reliable means of publishing notice — clarifies the timing and scope of certain discovery requests, and establishes procedures to ensure early determination of a claimant's standing.

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to the bench and bar for comment.

Proposed Style Revision of Rules 38 through 63, Except Rule 45 (deferred publication)

The proposed amendments are part of a comprehensive style project to clarify the civil rules, improve and modernize expression, and remove inconsistent uses of words and conventions. The style project follows up on the comprehensive style revision of the Federal Rules of Appellate and Criminal Procedure.

The style revision of Rules 38-63, except Rule 45, is the latest installment of style amendments to the Federal Rules of Civil Procedure proposed by the advisory committee. The final package of proposed amendments is expected to be completed this fall for the Committee's consideration at its January 2005 meeting, at which time the entire set of restyled rules will be ready to be published for public comment. The proposed style amendments are not intended to change the meaning or effect of the rules.

The advisory committee also proposed amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, and 40, addressing minor and noncontroversial amendments to accompany the style proposals. Typical of these noncontroversial amendments are proposals accounting for technological changes, such as adding a reference to an e-mail address on filing papers as well as

telephone and fax numbers. These amendments are so modest and noncontroversial that they could reasonably have been included as style changes in the overall revision of the rules, but they will be published separately consistent with the Committee's stringent policy that only pure style changes be included in the comprehensive revision.

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to the bench and bar for comment to be published at a later date as part of a comprehensive style revision of the entire set of rules and a separate package of noncontroversial amendments that arguably change the meaning or effect of a rule.

Informational Item

Senator Herb Kohl (D-Wis.) had introduced legislation that would require a court to make specific findings before settlement agreements can be sealed (Sunshine in Litigation Act of 2003, S 817, 108th Cong , 1st Sess.) Early in 2003, Senator Kohl requested the Judicial Conference to study the need for a rule amendment to address this issue. At the request of the advisory committee, the Federal Judicial Center undertook an empirical study of sealing settlement practices in nearly half the district courts. On December 16, 2003, Director Mecham, Secretary to the Judicial Conference, sent Senator Kohl a letter reporting the status of the Center's study and its preliminary findings, which showed a very low incidence of settlement agreements sealed by court order. The Center completed the study in April 2004. The findings in the completed study do not vary much from the preliminary findings The advisory committee will review the study at its October 2004 meeting.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 17-18, 2004
Washington, D.C.
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 17-18, 2004. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Professor Steven Gensler, Supreme Court Fellow with the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice was John S. Davis, Associate Deputy Attorney General.

INTRODUCTORY REMARKS

Judge Levi reported that no major amendments to the rules were scheduled to take effect on December 1, 2004. He noted that the Supreme Court had recommitted the proposed amendment to FED. R. EVID. 804(b)(3) — governing the hearsay exception for statements against penal interest — in light of its recent decision in *Crawford v. Washington.* In *Crawford,* the Court substantially revised its Confrontation Clause jurisprudence, thus making the proposed rule amendment inappropriate. He added that the Advisory Committee on Evidence Rules had decided to defer consideration of any

hearsay exception amendments until adequate case law develops to determine the meaning and implications of the *Crawford* case.

Judge Levi pointed out that the federal courts were facing a severe budget crisis that could result in substantial layoffs and furloughs of court staff. He explained that it was important for the committee to consider its rules decisions in the light of their impact on the resources of the courts. He noted that amendments have been proposed to the bankruptcy rules that could save the courts more than a million dollars in postage and handling costs by facilitating electronic notices and use of the national Bankruptcy Noticing Center. He explained that the committee would be asked to expedite the rulemaking process to achieve the anticipated savings earlier.

Judge Levi said that the project to restyle the civil rules was achieving excellent progress. The Style Subcommittee, he noted, had now reached the landmark of having completed a first draft of all 86 rules.

Judge Levi reported that the E-Government Subcommittee had met the day before the committee meeting to refine the guidance that it would provide the advisory committees in drafting rules amendments to implement the E-Government Act of 2002. The statute requires that rules be promulgated under the Rules Enabling Act to protect privacy and security concerns implicated by posting court case files on the Internet.

Judge Levi noted that the Court Administration and Case Management Committee had been working diligently on privacy and security issues for three years and had offered constructive comments on the latest proposed guidance to the advisory committee. He added that the E-Government Subcommittee had made a great deal of progress at its meeting in addressing a number of difficult policy and practical questions raised when court documents that had been practically obscure in the past are now posted on the Internet. He observed that there will likely have to be some differences in detail among the amendments proposed by the advisory committees. The bankruptcy rules, he noted, will be the most affected by privacy concerns because of the heavy use of social security numbers in bankruptcy cases.

Judge Levi reported that he attends most of the meetings of the advisory committees. Each committee, he observed, has a different personality, reflecting in part the style of its chair and reporter and the role of the Department of Justice. He emphasized that the rules process is blessed with great chairs and reporters, and the work product of the committees is truly outstanding.

Judge Levi noted that the Chief Justice had extended Judge Alito's term as chair of the Advisory Committee on Appellate Rules for an additional year. He also reported that Judge Susan Bucklew had been selected to replace Judge Carnes as chair of the Advisory Committee on Criminal Rules and Judge Thomas Zilly had been selected to replace Judge

Small as chair of the Advisory Committee on Bankruptcy Rules. He said that Judge Carnes and Judge Small had been outstanding and successful committee chairs, and they would be sorely missed. He also reported that the Standing Committee would greatly miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — Charles Cooper and Patrick McCartan. Finally, Judge Levi emphasized that one of the highlights of his legal career had been to work closely with Professor Cooper as reporter to the Advisory Committee on Civil Rules.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 15-16, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring 34 bills introduced in the 108th Congress that would affect the federal rules.

He noted that legislation was still pending, proposed by the bail bond industry, that would directly amend the Federal Rules of Criminal Procedure and limit the authority of a judge to forfeit a bond. He said that the bill had been reported out by the House Judiciary Committee, but was opposed by the Judicial Conference. The legislation, he said, had not reached the House floor, thanks to efforts by the Administrative Office and the Department of Justice. He added that: (1) there had been recent communications with representatives of the bail bond industry, but the industry had not changed its essential position; and (2) there has been no action on the bill in the Senate.

Mr. Rabiej noted that legislation sponsored jointly by the Judicial Conference and the Department of Justice should be be enacted shortly to amend the E-Government Act. Under the present law, a party has the right to file an unredacted version of a document under seal with the court. In accordance with the revised E-Government Act, the public file would contain only a redacted version of the document or a reference list identifying redacted information accessible only to the parties and the court. He added that the E-Government Subcommittee and the advisory committees are now implementing the rulemaking requirements of the Act.

Mr. Rabiej reported that the Class Action Fairness Act was expected to be brought to the Senate floor for debate sometime in June.

He noted that comprehensive crime victims' rights legislation had passed the Senate in April 2004 on a 96-1 vote. It would give criminal victims a broad array of rights in such areas as protection against the accused, notice of proceedings, being heard at court proceedings, conferring with prosecutors, and receiving restitution. He added that the legislation was expected to pass the House of Representatives, but the chair of the House Judiciary Committee appeared to be holding up the legislation for tactical reasons.

Mr. Rabiej said that the crime victims legislation will have an impact on the criminal rules. He explained that the Advisory Committee on Criminal Rules had a separate proposal ready for final approval that would amend FED. R. CRIM. P. 32 to extend the right of allocution to victims of all crimes, not just victims of violence or sexual abuse.

Mr. Rabiej reported that two more bills had been introduced in the preceeding week that appeared to be moving quickly through the legislative process. First, he said, a hearing would be held within a week on H.R. 4547, a bill designed to protect children from drug violence. He noted that it would directly amend FED. R. CRIM. P. 11 to impose additional conditions on a court before it may accept a plea agreement. The second new bill (H.R. 4571), designed to limit "frivolous filings," would directly amend FED. R. CIV. P. 11 by mandating that a judge impose sanctions for a violation of the rule.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4)

He reported that the Center was completing work on developing a new weighted caseload formula for the district courts. He explained that the study had been completed without requiring judges to keep detailed diaries of their daily activities.

Mr. Cecil noted that the Center had also completed a report comparing class actions in the federal and state courts. Among other things, the report addresses why attorneys bring cases in one court system rather than the other and finds few differences between federal and state judges and cases. Finally, he pointed to a new Center report on sealed court settlements. One of the findings of the report is that only 1 of every 227 civil cases in the federal courts contains a sealed settlement.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of May 14, 2004. (Agenda Item 6)

Amendments for Final Approval

FED. R. APP. P. 4(a)(6)

Judge Alito said that the proposed amendments to Rule 4(a)(6) (reopening the time to file an appeal) provides an avenue of relief for parties who fail to file a timely appeal because they have not received notice of the entry of judgment against them. The amendment allows a court to reopen the time to appeal if certain conditions are met. First, the court must find that the party did not receive notice of the judgment within 21 days after entry. Second, the party must move to reopen the time to appeal within 7 days after receiving notice of the entry of judgment. And third, the party must move to reopen within 180 after entry of the judgment.

Judge Alito pointed out that use of the word "notice," appearing twice in the rule, has been unclear. Most courts have interpreted the existing rule as requiring that the type of notice required to trigger the 7-day period to reopen be written notice. Others, though, have included other types of communications. The proposed amendment, he said, offers a clear solution by specifying that notice must be the formal clerk's office notice required under FED. R. CIV. P. 77(d).

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

FED. R. APP. P. 26(a)(4) and 45(a)(2)

Judge Alito stated that the proposed amendments to Rule 26 (computing time) and 45 (when court is open) would replace the incorrect phrase "President' Day" with "Washington Birthday," the official, statutory name of the holiday.

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

FED. R. APP. P. 27(d)(1)(E)

Judge Alito explained that Rule 32 (form of briefs) sets out typeface and type-style requirements. But Rule 27, which specifies the requirements for motions, does not. The proposed amendment would add a new Subdivision (E) to Rule 27(d)(1) to make it clear

that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motions papers.

Judge Alito said that the proposed amendment had received support during the public comment period, although one comment suggested increasing the number of words allowed in motions. He said that there was also some sentiment to express the length limits in terms of words, rather than pages. But, he explained, clerks of court favor a page limit because it is much easier to verify.

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

FED. R. APP. P. 28(c) & (h), 28.1, 32(a)(7)(C), and 34(d)

Judge Alito reported that the current rules say very little about briefing in cases involving cross-appeals. As a result, local rules fill in the gaps with procedural guidance. The advisory committee, he said, recommended moving the few provisions in the current national rules addressing cross-appeals into a new Rule 28.1 and adding several new provisions to fill the gaps in the existing rules. The new Rule 28.1 (cross-appeals) would parallel Rule 28 (briefs). In addition, conforming amendments would be made to Rule 28(c) (briefs), 32(a)(7)(C) (certificate of compliance), and 34(d) (oral argument).

The provisions of the new rule, he said, follow the local rules of every circuit save one. They would authorize four briefs and specify their lengths and colors. (1) The appellant's principal brief would be limited to 14,000 words. (2) The appellee's combined response brief and cross-appeal principal brief would be limited to 16,500 words. (3) The appellant's response and reply brief would be limited to 14,000 words. (4) Finally, the appellees's reply brief would be limited to 7,000 words.

Judge Alito said that the lawyers who had commented on the proposal uniformly had recommended higher word limits, while the judges who had commented wanted fewer words. Professor Schiltz added that the local rules of the circuits generally prescribe word limits of 14,000, 14,000, 14,000, and 7,000 for the four briefs. The advisory committee, he said, had decided to increase the second brief to 16,500 words because it serves two functions — responding to the appellant's principal brief and initiating the principal brief in the cross-appeal.

Several members said that the advisory committee's proposal to authorize an additional 2,500 words for the second brief was a sound compromise that should accommodate most cases and result in fewer motions by attorneys seeking word extensions.

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

FED. R. APP. P. 32.1

Judge Alito reported that the the proposed new Rule 32.1 (citing judicial dispositions) had attracted more than 500 public comments.

He noted that the proposed rule enjoyed the support of the major bar associations. It would equalize the treatment of unpublished opinions with other types of non-precedential materials presented to the courts of appeals. The rule, he emphasized, would merely prevent a court of appeals from prohibiting the ~~citation~~ of unpublished opinions. It would not require a court to give unpublished opinions any weight or precedential value, or even to pay any attention to them. It would just allow the parties to cite them. He said that prohibiting the citation of court opinions undermines confidence in the courts of appeals and the judiciary. It implies that there is something second-class about unpublished opinions. The practice, he said, is very difficult to explain to lay people and most practitioners.

On the other hand, he pointed out, opponents of the rule claim that it will have an adverse impact on judges because they will have to spend more of their limited time on crafting unpublished opinions. This, it is claimed, would both detract from the quality of judges' published opinions and lead to the issuance of more one-sentence orders. He noted, too, that opponents of the rule assert that it will inevitably require lawyers to take the time to read unpublished opinions and increase expenses for their clients.

Judge Alito emphasized that the advisory committee had taken the adverse comments very seriously, but it had concluded that there is simply no empirical support for them. He noted that a number of the federal circuits currently permit citation of unpublished opinions. The committee, he said, had not received any comments from judges on the courts allowing citation that the practice has increased their work. Moreover, he added, the trend at both the federal and state levels is moving away from non-citation rules.

Judge Alito said that, as a result of the public comments, the advisory committee had deleted from the proposed rule a clause that would have prohibited a court of appeals from prohibiting or restricting citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispostions."

Judge Levi observed that the sheer size of the body of comments was daunting, even though many of the comments seemed to copy each other. He congratulated Professor Schiltz for a superb job in summarizing the comments.

One of the members suggested that the key issue was not citation, but the status of unpublished opinions. He pointed out that the committee note refers to unpublished opinions as "official actions" of the court. But, he noted, they are commonly crafted by law clerks and only endorsed by judges. They do not receive the same scrutiny as published opinions and clearly do not represent the views of the full court. The proposed rule, he said, would elevate unpublished opinions into actions of the court and give them a status that they do not presently have. He recommended that the proposal be deferred and the circuits be given time to issue their own rules addressing the contents and effect of unpublished opinions. He added that this approach would promote transparency, for the circuits would articulate what they are doing with regard to unpublished opinions.

One lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court. He added that, regardless of precedential value, an unpublished opinion is in fact an official disposition by a government body.

Two members pointed out that the proposed rule had given rise to concern among state-court leadership as to the use by the federal courts of unpublished state-court opinions. For example, a federal court applying the doctrine in *Erie R.R. Co. v. Tompkins* might cite an unpublished state-court opinion as establishing binding state law in a way that the opinion was not intended to be used. Judge Alito responded that the advisory committee's deliberations had focused on citing a federal circuit court's own decisions, not on citing state-court opinions. Moreover, he said, the rule does not address what weight is to be given to unpublished opinions. He added, though, that he would not object to amending the rule to limit its application specifically to federal opinions.

One participant pointed out that unpublished opinions are widely available today, and the circuits are free to give them precedence or not, as they see fit. He argued that lawyers should be free to call a court's attention to cases decided by their colleagues that have similar facts and issues. Other panels of the court, he said, should be made aware of what one panel has done with a similar pattern of facts, particularly in sentencing guideline cases. He added that it would be beneficial for courts to look at their unpublished opinions as part of their efforts to achieve consistency and reliability in circuit case law.

One member observed that there are very strong arguments on both sides of the issue, but on balance he favored allowing the courts of appeals to continue their non-

citation policies. He said that the adverse consequences predicted by opponents of the rule might well come to pass. He emphasized the vital need for courts to have a two-tiered opinion system because some cases simply do not deserve the same time and attention as others. He also said that he was not convinced that it is appropriate to compare unpublished opinions of a court of appeals with other types of nonprecedential materials cited to the court. Unpublished opinions, he said, inevitably carry far more weight with the lawyers and the court because they have been signed off on by three judges of the deciding court.

One member noted that he had been struck by how strongly a number of judges feel about the issue. He said that the arguments on both sides appear to be empirical in nature, but they are essentially not provable at this point. He stressed the need for empirical research and suggested that the committee not be put in the position of accepting one side of the argument and rejecting the other without further data. He argued that appropriate research would focus on the practices and results in those circuits that allow citation of unpublished opinions. He conjectured that it should be possible to obtain good empirical data because several circuits now allow citation.

Judge Levi said that he agreed and had spoken with the Federal Judicial Center about what shape an empirical study might take. He emphasized that the proposed rule was very controversial. And in dealing with controversial matters, he said, the rules committees have consistently sought strong empirical support for proposed amendments. In this case, he noted, nine circuits now allow citation of unpublished opinions, and four do not. Researchers, for example, could examine the courts that allow citation to see whether disposition times have lengthened or the number of judgment orders has increased. In addition, judges and lawyers might be surveyed to examine the practical impact of citation policy on their work. Lawyers might be surveyed to examine whether citation policy affects the costs of legal practice. Attention might also be directed to the four circuits that prohibit citation to see whether there are any special conditions in those circuits that make them different.

Judge Levi added that it would be seek to proceed to the Judicial Conference's approval at this time of the proposed new rule without appropriate empirical data. Obtaining the data would better inform the committee and take much of the passion out of the debate. If the data turn out to support the proposed rule, he said, the committee would be in a much better position to secure Conference approval.

Several participants endorsed Judge Levi's approach, citing the great sensitivity of the issue among circuit judges, the need for a period of reflection, and the value of gathering whatever empirical data can be produced. One member added that there were powerful arguments in favor of the proposed amendment, but it would be a mistake institutionally to go forward with a rule that has generated so much opposition. He said

that, as a matter of basic policy, the committee should proceed with a controversial proposal only if: (1) there is a compelling need for the rule; and (2) the committee is convinced that the opposition is clearly wrong. Other participants endorsed this analysis, emphasizing the need for empirical information and institutional restraint. They added that a year's delay for study would not cause any harm and may even lead some opponents to reassess their positions.

Judge Alito agreed that a study would be helpful, especially since opposition to the rule was based largely on empirical observations. Mr. Cecil added that the Research Division of the Federal Judicial Center was prepared to conduct the research. He cautioned, however, that the results of the study may not in fact solve the committee's problems. The key issue, he said, is how judges perform their work in chambers. That, he said, is a matter of utmost sensitivity.

Judge Kravitz moved to have the committee take no action on the proposed new Rule 32.1 and return it to the advisory committee, with the expectation that the advisory committee will work with the Federal Judicial Center to conduct appropriate empirical studies. The studies, for example, would explore the practical experience in the circuits that have adopted local rules allowing citation of unpublished opinions. The advisory committee would then have the discretion to make a fresh decision on the matter and return to the standing committee with a proposal, or not.

One member asked that the record reflect that the committee's discussion of the matter and its returning the rule to the advisory committee did not reflect a judgment by the Standing Committee on the merits of the proposal. Rather, he said, the committee's concerns were directed purely to instutional values and the rulemaking process. Judge Kravitz agreed to the clarification.

One member added that the advisory committee should take advantage of the delay to explore the impact of the rule on citing unpublished state-court opinions.

The committee without objection approved Judge Kravitz's motion by voice vote. Therefore, it decided to take no action on the proposed new Rule 32.1, return it to the advisory committee, and recommend that appropriate empirical study be undertaken.

FED. R. APP. P. 35(a)

Judge Alito reported that Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) both specify that "a majority of the circuit judges who are in regular active service" may order that an appeal or other proceeding be heard or reheard en banc. Although the standard applies to all the courts of appeals, he said, the circuits are divided in

interpreting the provision when one or more active judges are disqualified in a particular case. Seven circuits follow the "absolute majority" approach, counting disqualified judges in the base to calculate a majority. Six circuits follow the "case majority" approach, requiring a majority only of the active judges who are not recused.

Judge Alito emphasized that the advisory committee believes that whatever the rule means, it should mean the same all across the country. There is no principled basis, he said, for having different interpretations of the same rule. The primary objective of the proposed amendment, thus, was to promote national uniformity. The advisory committee, he said, believed that the better interpretation is the case majority approach because it is most consistent with what Congress must have intended in enacting the statute. He noted that 28 U.S.C. § 46(c) uses the phrase "circuit judges . . . in regular active service" twice. In the second sentence, the phrase clearly does not include disqualified judges, since disqualified judges obviously cannot participate in a case heard en banc. The proposed amendment to Rule 35(a), he added, was not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d).

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. BANKR. P. 1007

Judge Small reported that the proposed amendment to Rule 1007 (lists, schedules, and statements) would require a debtor to file a mailing matrix with the court, a practice now required universally by local court rules. The matrix must include the names and addresses of all entities listed on Schedules D-H, including holders of executory contracts and unexpired leases.

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

FED. R. BANKR. P. 3004 and 3005

Judge Small explained that the proposed amendments to Rules 3004 (filing of claims by a debtor or trustee) and 3005 (filing of a claim, acceptance, or rejection by codebtor) deal with the situation where an entity other than the creditor files a proof of claim. The amendments to Rule 3004 make it clear that the third party may not file a proof of claim until the exclusive time has expired for the creditor to file its own proof of claim. In addition, FED. R. BANKR. P. 3005 would no longer permit the creditor to file a proof of claim to supersede the claim filed by the debtor or trustee. Instead, the creditor could amend the proof of claim filed by the debtor or trustee. The changes would make the rules consistent with § 501(c) of the Bankruptcy Code.

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

FED. R. BANKR. P. 4008

Judge Small reported that Rule 4008 (reaffirmation agreement) would be amended to establish a deadline of 30 days after entry of the order of discharge to file a reaffirmation agreement with the court. He said that some public comments had recommended a shorter period, and the advisory committee had considered a deadline of 10 days following discharge. But, he explained, the shorter time limit would not be practical because it takes several days for the the noticing center to process and distribute discharge notices.

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

FED. R. BANKR. P. 7004

Judge Small reported that the proposed amendment to Rule 7004 (process and service) would authorize the clerk of court to sign, seal, and issue a summons electronically. He noted that the rule does not address the service requirements for a summons, which are set out elsewhere in Rule 7004.

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

FED. R. BANKR. P. 9006

Judge Small stated that Rule 9006 (time) would be amended to remove any doubt that the additional three-day period given a responding party to act when service is made

on the party by specified means — by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served — are added after a rule's prescribed period to act expires.

The committee considered and approved the proposed amendment to Rule 9006 in conjunction with a proposed parallel amendment to FED. R. CIV. P. 6(e).

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

OFFICIAL FORMS 6-G, 16-D, and 17

Judge Small reported that the proposed amendments to the forms had not been published because they were technical in nature. The change to Form 6-G is required to conform the form to the proposed amendment to Rule 1007, and the revisions to Forms 16-D and 17 reflect the abrogation of Official Form 16-C in 2003. He asked that: (1) the changes to Form 16-D and 17 take effect on December 1, 2004; and (2) the change to Form 6-G take effect on December 1, 2005, to coincide with the effective date of the proposed amendments to Rule 1007.

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

Amendments for Publication

FED. R. BANKR. P. 1009, 4002, and OFFICIAL FORM 6-I

Judge Small pointed out that the proposed amendments to Rule 1009 (amendments to schedules and statements), Rule 4002 (debtor's duties), and Form 6-I (schedule of debtors' current income) had been proposed by the Executive Office for United States Trustees. He noted that the amendment to Rule 4002 was controversial.

The U.S. trustee organization had asked the committee for a rule that would require debtors to bring a substantial number of documents with them to the meeting of creditors under § 341 of the Code. The proposal, he said, had attracted the attention and strong opposition of the debtors' bar. The advisory committee had received more than 80 letters from attorneys opposing the proposal, even though the committee had not approved or published it.

Judge Small noted that the advisory committee's consumer subcommittee had met in Washington to consider the proposal, and it had invited several knowledgeable trustees and attorneys to participate, along with representatives of the U.S. trustee organization. At the meeting, the subcommittee decided that the most of the proposed changes were not needed.

The full committee, however, decided to adopt a compromise amendment to Rule 4002 that would require debtors to bring with them to the § 341 meeting a government-issued picture identification, evidence of their social security number, evidence of their current income (such as a pay stub), their most recent federal income tax return, and statements for each of their depository accounts. That, he said, was the proposal that the advisory committee sought authority to publish.

Judge Small said that the proposed amendment to Rule 1009 specifies that if the debtor files an incorrect social security number, he or she must correct it and notify all those who received notice of the incorrect number.

The proposed change to Form 6-I would extend to Chapter 7 cases the requirement that a debtor divulge a non-filing spouse's income. The form's mandate to divulge currently applies only to Chapter 12 and 13 cases.

The committee without objection approved the proposed rule amendments for publication by voice vote. It also approved without objection the proposed amendment to the Official Form by voice vote.

FED. R. BANKR. P. 7004

Judge Small explained that under the current Rule 7004 (process and service), the debtor's attorney must be served only if the summons and complaint are served on the debtor by mail. The proposed amendment would make it clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor, regardless of the manner of service on the debtor. The rule would also allow the attorney to request that service be made electronically.

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

FED. R. BANKR. P. 2002(g) and 9001

Judge Small reported that the changes to Rule 2002 (notices) and 9001 (general definitions) were designed in large part to facilitate noticing national creditors. The proposed amendment to Rule 2002(g) would allow creditors to make arrangements with a

"notice provider" to have notices sent to them at a preferred address or addresses. Notices would normally be sent electronically, but the rule also covers the sending of paper notices to central addresses. The amendment to Rule 9001 would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors at a preferred address or addresses under the proposed amendment to Rule 2002(g).

Judge Small explained that the amendments could result in significant financial benefits to the judiciary and taxpayers because more creditors would sign up for electronic service of court notices. In light of the potential cost savings, the advisory committee had decided to pursue "fast track" promulgation of these two amendments — as well as the amendment to Rule 9036 approved by the Standing Committee in January 2004, which specifies that notice by electronic means is ~~com~~plete on transmission.

Under the fast track proposal, the rules would become effective on December 1, 2005, rather than December 1, 2006. They would be published for public comment in August 2004. Comments would be due by mid-February 2005. The advisory committee and Standing Committee could approve them by mail ballot and submit them to the Judicial Conference for approval at its March 2005 session. They would then be sent immediately to the Supreme Court, which could act on them before May 1, 2005. Mr. Rabiej added that the Court would be given copies of the amendments well in advance of the March 2005 Conference session to give the justices time to review them carefully.

Judge Small said that the advisory committee had carefully considered the rules at three meetings, and he did not anticipate any controversy over them. Professor Morris added that even though the primary thrust of the rules was to facilitate electronic notice, there would also be savings in processing paper notices under the rules because notice providers will be able to bundle notices to creditors and save postage costs.

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

The committee also approved expediting approval of the amendments, together with the proposed amendment to Rule 9036 approved by the Standing Committee in January 2004.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of May 17, 2004. (Agenda Item 8)

Amendments for Final Approval

FED. R. CIV. P. 6(e)

Judge Rosenthal reported that the proposed change to Rule 6(e) (additional time allowed following certain kinds of service) had been referred by the Advisory Committee on Appellate Rules, which was considering parallel changes to FED. R. APP. P. 26(c). Under the existing Rule 6(e), there is some uncertainty in calculating the three additional days given a party to act when service is made on the party by mail, leaving it with the clerk of court, electronic means, or other means consented to by the party served.

The proposed clarifying amendment would specify that the three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and holidays would be included in counting the additional three days, but the last day cannot be a Saturday, Sunday, or holiday. Judge Rosenthal added that the committee note sets forth a number of practical examples calculating the time period.

One member asked why the advisory committee had not used the term "calendar days," as used in the appellate rules. Judge Rosenthal responded that the committee had considered that option, but had decided not to use "calendar days" because it is not found anywhere else in the civil rules.

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

FED. R. CIV. P. 27(a)(2)

Judge Rosenthal said that the proposed change in Rule 27 (deposition before action or pending appeal) would merely correct an outdated reference in the rule to former Rule 4(d), which deals with serving a copy of the petition and a notice stating the time and place of a deposition hearing. The corrected reference makes clear that all forms of service under Rule 4 can be used to serve a petition to perpetuate testimony.

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

FED. R. CIV. P. 45(a)

Judge Rosenthal reported that the proposed amendment to Rule 45 (subpoena) would close a small gap in the rule by requiring that a deposition subpoena state the method for recording testimony.

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

SUPPLEMENTAL RULE B(1)(a)

Judge Rosenthal stated that the proposed amendment to Supplemental Rule B (attachment and garnishment) would bring the rule into conformity with case law. The amendment specifies that the time for determining whether a defendant is "found" in a district is the time the verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed.

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

SUPPLEMENTAL RULE C(6)(b)

Judge Rosenthal reported that the proposed amendment to Supplemental Rule C(6) (responsive pleadings and interrogatories) would correct an oversight made during the course of the 2000 amendments to the rule. It would delete the rule's reference to a time 10 days after completed publication under Rule C(4). That rule requires publication of notice only if the property is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

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

Amendments for Publication

SUPPLEMENTAL RULE G

Professor Cooper explained that civil forfeiture proceedings have long been governed by the Supplementary Rules for Certain Admiralty and Maritime Claims because of tradition, the in rem nature of forfeiture proceedings, and many forfeiture statutes expressly invoking the supplemental rules. But, he said, the relationship had come under considerable strain because of an explosion in the number of civil forfeiture proceedings. In particular, court interpretations of the supplemental rules by the courts in forfeiture cases have been cited by the admiralty bar as creating problems for maritime practice.

Professor Cooper noted that the supplemental rules had been amended in 2000 to draw some distinctions between forfeiture and admiralty practice. At about the same time, Congress enacted the Civil Asset Forfeiture Reform Act, which required a number

of other changes in the rules as they apply to civil forfeiture proceedings. Soon after enactment of the legislation, the Department of Justice approached the Advisory Committee on Civil Rules, suggesting that it was time to consolidate all the civil forfeiture procedures into a single supplemental rule that would be consistent with the new statute.

Professor Cooper said that the advisory committee had appointed a subcommittee that produced a proposed new Rule G after several conference calls, a meeting in December 2003, and substantial input from the Department of Justice and the National Association of Criminal Defense Lawyers. The new rule, he said, was ready for publication, together with conforming amendments to SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E).

Professor Cooper pointed out that the advisory committee had devoted a great deal of attention to a proposal by the Department of Justice to define in the rule what "standing" is needed to assert a claim to property once the government initiates a civil forfeiture action. The Department had proposed that the rule limit standing to a person qualifying as an "owner" within the statutory definition of the innocent-owner defense. The committee, however, concluded that defining standing to file a claim should be left to developing case law, not the rules. Instead, proposed Rule G(8) only sets forth the procedural framework for determining a claimant's standing and deciding a claimant's motion to dismiss.

In the same vein, Professor Cooper reported that the advisory committee had not included a provision in the new rule barring the use FED. R. CRIM. P. 41(g) to accomplish the return of property outside Rule G. This issue, too, would be left to case law development.

Professor Cooper proceeded to describe the provisions of the new rule. He noted that subdivision (1) specifies that Rule G governs in rem forfeiture actions arising from federal statutes. It also states that Supplemental Rules C and E and the Federal Rules of Civil Procedure apply to the extent that Rule G does not address an issue.

Subdivision (2) would replace the particularized pleading in the existing rule with a statement of sufficiently detailed facts to support a reasonable belief that the government will be able to meets its burden of proof at a trial.

Subdivision (3), dealing with arrest warrants, would provide that only the court, on a finding of probable cause, may issue a warrant to arrest property not in the government's possession or not subject to a judicial restraining order. The existing rule allows issuance of a summons and warrant by the clerk without a probable-cause finding. In addition, the proposed rule would require the warrant and any supplemental service to

be served as soon as practicable, unless the court orders a different time. Professor Cooper noted that the National Association of Criminal Defense Lawyers had expressed concern that the change would encourage courts to permit more filings under seal. But, he added, the rule does not address when it is appropriate to file under seal. It merely reflects the consequences for execution when sealing or a stay is ordered.

Professor Cooper noted that subdivision (4), the basic notice requirement, reflects the traditional practice of publishing notice of an in rem action. For the first time, the rule would recognize publication on an official government-created Internet forfeiture site to provide a single, easily identified means of notice. He pointed out that there is no such site now, but if the government were to establish one, it would provide more effective notice than newspaper publication.

In addition, proposed paragraph (4)(b) would require the government to send individual notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant, based on the facts known to the government. Although the National Association of Defense Lawyers had asked for formal service of the summons in the manner required by FED. R. CIV. P. 4, the proposed rule does not require that level of service. Rather, due process requirements are satisfied by practical means reasonably calculated to accomplish actual notice.

The proposed rule also specifies that the notice must be sent by means reasonably calculated to reach the potential claimant. Notice may be sent to the attorney if the potential claimant has an attorney, and that this may be the most effective notice in many cases. Notice to an incarcerated person must be sent to the place of incarceration. The rule, however, does not attempt to deal with the due process problems implicated by *Dusenbery v. United States,* 534 U.S. 161 (2002), where a particular prison has deficient procedures for delivering notice to prisoners.

The proposed paragraph also sets out deadlines for filing claims and motions. Professor Cooper pointed out that the provision dealing with filing an answer or motion under FED. R. CIV. P. 12 had generated advisory committee discussion. Contrary to an ordinary civil action, where Rule 12 suspends the time to answer, the proposed rule requires that an answer or motion be filed no later than 20 days after a claim is filed.

Professor Cooper pointed out that under subdivision (5), a claim must identify the claimant and state the claimant's interest in the property. If the claim is filed by a person asserting an interest in the property as a bailee, it must identify the bailor.

Subdivision (6) would allow the government to serve special interrogatories under FED. R. CIV. P. 33 limited to the claimant's identity and relationship to the property. The purpose, he said, is to elicit information promptly so the government can move to dismiss

for lack of standing. The government need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered the interrogatories.

Professor Cooper noted that subdivision (7) would allow property to be sold on an interlocutory basis. The court could order the property sold, for example, if it were perishable or at risk of diminution of value. Likewise, it could be ordered sold if the expense of keeping the property is excessive, or if the court finds other good cause.

Professor Cooper pointed out that subdivision (8) govern motions. He noted that paragraph (8)(A) states that a party with standing to contest the lawfulness of the seizure of property may move to suppress use of the property as evidence. He explained that the advisory committee had deleted a reference in the proposed rule to constitutional standing under the Fourth Amendment. Likewise, a party who establishes standing to contest forfeiture may move to dismiss the action under FED. R. CIV. P. 12(b). At any time before trial, the government may also move to dismiss because the claimant lacks standing. Professor Cooper pointed out that the court must decide the government's motion before any motion by the claimant to dismiss the action. The claimant has the burden of establishing standing based on a preponderance of the evidence.

Professor Cooper stated that paragraph (8)(d) deals with a petition to release property under the Civil Asset Forfeiture Reform Act. The venue provision in the rule had been inserted at the request of the Department of Justice. It is derived from the statute and serves as a guide to practitioners. It makes clear that the status of a civil forfeiture action is a "civil action" eligible for transfer under 28 U.S.C. § 1404. Finally, Professor Cooper noted that the rule contains a provision allowing a claimant to seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment.

Judge Rosenthal reported that the Style Subcommittee had reviewed the proposed rule and had suggested a few improvements in language. She asked for and received permission to adopt the Style Subcommittee suggestions without having to return to the Standing Committee before publication.

Judge Rosenthal added that the advisory committee anticipated that a significant number of comments would be received during the publication period, but from a narrow section of the bar. Judge Levi and Professor Cooper pointed out that the committee had benefitted greatly as a result of excellent suggestions and input from the Department of Justice and the National Association of Criminal Defense Lawyers.

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

SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E)

Professor Cooper reported that the proposed changes to Supplemental Rules A, C, and E and FED. R. CIV. P. 26(a)(1)(E) were conforming amendments to account for the consolidation of civil forfeiture provisions into the new Rule G. He noted that the amendment to Rule 26(a)(1)(E) (initial disclosures) would add civil forfeiture actions to the list of cases exempted from the initial disclosure requirements.

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

FED. R. CIV. P. 50(b)

Judge Rosenthal reported that the proposed amendments to Rule 50(b) would remove a trap that occurs when a party moves for judgment as a matter of law under Rule 50(a) before the close of all the evidence and then fails to renew the motion at the close of all the evidence. The revised rule, she said, would delete the requirement that a renewal motion be made at the close of all the evidence. It responds to court decisions that have begun to move away from a strict interpretation of the current rule requiring a motion for judgment as a matter of law at the literal close of all the evidence. Professor Cooper added that the amendments are fully consistent with the Seventh Amendment.

In addition, the rule would be amended to add a time limit of 10 days after discharge of the jury for a party to make a post-trial motion when a trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict.

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

ELECTRONIC DISCOVERY
FED. R. CIV. P. 16, 26, 33, 34, 37, and 45 and FORM 35

Judge Rosenthal reported that the package of "electronic discovery" amendments was the product of a lengthy and thorough examination by the advisory committee into whether the current rules are adequate to regulate discovery of electronically stored information. She pointed out that the committee had enjoyed invaluable cooperation and input from the bar on the project, and it had conducted three productive conferences with lawyers, judges, and law professors on electronic discovery. She thanked Professor Capra and Fordham Law School for hosting the most recent conference, held in New York in February 2004. She also thanked Kenneth Withers of the Federal Judicial Center for his major assistance and wise counsel.

Judge Rosenthal explained that the advisory committee had initiated the electronic discovery project with a good deal of skepticism regarding the need for rule changes. But as the project progressed and lawyers articulated their experiences, she said, the committee moved to a consensus that the existing discovery rules do not fit current practice as well as they should. The committee, she emphasized, had reached the conclusion that the national rules needed to be amended and the amendments were needed now.

Judge Rosenthal pointed out that the materials in the committee's agenda book demonstrate that there are many real differences between electronic discovery and other types of discovery. For one thing, computer-stored information is dynamic and often changes without active human intervention. Unlike paper information, moreover, computer information may be incomprehensible without the machine and software that created it.

She said that the bar had informed the committee that discovery had become more difficult, burdensome, and costly because the current rules — even though they are very flexible — are simply not specific enough with regard to electronic discovery. She pointed out that some federal district courts now have local rules in place governing electronic discovery, and pertinent case law is beginning to develop. In addition, state court systems have issued or are considering rules to deal with electronic discovery. She concluded that if the advisory committee were to wait too long to propose amendments to the national rules, it would run the risk of having local rules proliferate and wide variations develop in federal practice.

Judge Rosenthal summarized the advisory committee's key proposals, pointing out that they would: (1) require parties and the court early in a case to discuss issues relating to electronicaly stored information and privilege waiver; (2) clarify and modernize the definition of discoverable electronic information; (3) address the form in which electronically stored information must be produced; and (4) provide a procedure for handling inadvertent privilege waivers.

She explained that the committee had heard repeatedly from lawyers that privilege review of discovery materials is very time consuming and expensive. Electronically stored information, moreover, presents special problems because privileged information, though not readily visible, may be embedded in electronic documents or found in metadata. She emphasized that the proposed amendments respect the Rules Enabling Act and avoid dealing with the substance of privilege law. Rather, they only set forth a procedure for retrieving inadvertently produced privileged information.

FED. R. CIV. P. 26(f) and FORM 35

Professor Cooper said that the proposed amendments to FED. R. CIV. P. 26(f) (conference of the parties) were non-controversial. They would require the parties at the 26(f) conference to discuss any issues relating to preserving discoverable information and to include in their discovery plan: (1) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and (2) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information. He noted that the latter item was a response to concerns expressed to the committee by members of the bar regarding the enormous burden imposed by having to screen voluminous documents for privilege.

He said that it was generally accepted that the discovery process moves much more quickly and efficiently when the parties in a case agree on how to deal with privilege issues. He said that the proposed amendment contemplates that the parties will enter an agreement. The court order will enhance the status of the agreement and may well affect future waiver litigation. In addition, Form 35 would be amended to include a new section dealing with disclosure of electronic information and privilege protection.

FED. R. CIV. P. 16(b)

Professor Cooper reported that the proposed amendments to FED. R. CIV. P. 16(b) (scheduling and planning) would alert the court to the need, early in the litigation, to address the handling of discovery of electronically stored information and to consider adopting the parties' agreement for protection against privilege waiver.

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that the proposed amendment to FED. R. CIV. P. 26(b)(5) (claims of privilege or protection of trial preparation materials) specifies that when a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party receiving the information that it claims a privilege. The receiving party must then promptly return or destroy the specified information and any copies. Professor Cooper added that the committee note specifies that the amendment does not address the controversial question of whether there has in fact been a privilege waiver. It merely provides a procedure for addressing privilege issues.

One member said that the proposed waiver provision would not make a real difference in practice. Parties, he said, will still have to review all documents in order to avoid the danger that a state court may find a waiver of privilege. He urged the

committee to publish a much more ambitious proposal that would address the waiver issue itself. He suggested that this would be a great opportunity for the committee to make a major improvement in practice.

Judge Rosenthal responded that the advisory committee was very sympathetic to that approach, but it had opted for a more cautious amendment because of concerns over the limits of the Rules Enabling Act. The statute specifies that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." (28 U.S.C. § 2074) Another participant added that privilege issues implicate fundamental questions of federalism that rules committees should approach with hesitancy.

Other participants countered, though, that a bolder waiver proposal to protect parties against inadvertent waiver of privilege would in fact be consistent with the Rules Enabling Act. They asserted that a federal rules provision could specify that an inadvertent turnover of privileged material through the federal discovery process does not constitute a waiver of privilege. The provision, they said, would be procedural in nature, not substantive. It would not address the scope of the privilege itself. Instead, it would merely address the procedural consequences arising as a result of the mandatory federal discovery process. In other words, if a court requires a party to produce materials through the federal discovery rules, those rules can prescribe the character of the privilege waiver without modifying the content of the privilege itself.

One member pointed out that the advisory committee's proposed amendment may put a court in an awkward position because its order may not effectively bind third parties or prevail in a later proceeding before another court. He noted that there is a split in state law as to whether third parties are bound.

One member pointed out, though, that the proposed amendment would still be a valuable change because — despite uncertainty as to the scope of the privilege protection — parties are in a much better position with a court order than without one. Judge Rosenthal added that the pertinent committee note addresses the issue in general terms by stating that a court order adopting the parties' agreement "advances enforcement of the agreement betweeen the parties and adds protection againt nonparty assertions that privilege has been waived."

Another member noted that the proposed new Rule 26(b)(5)(B) states that a party receiving privileged information must promptly return or destroy it upon being notified by the producing party that it intends to assert a claim of privilege. He suggested that the rule might be amended to require the receiving party to certify that they have in fact destroyed the information in question.

FED. R. CIV. P. 26(b)

Judge Rosenthal reported that the proposed new Rule 26(b)(2)(C) (discovery scope and limits) would establish a two-tiered approach to electronic discovery. A producing party would automatically have to turn over requested information that is "reasonably accessible." Even if it makes a showing that the information sought is not "reasonably accessible," the requesting party may then ask the court to order discovery of the information "for good cause." She pointed out that this approach is similar to the two-tiered approach embodied in the 2000 amendments to Rule 26(b)(1), under which parties may obtain discovery automatically as to matters "relevant to the claim or defense of any party," but they may ask the court for good cause to order discovery of any matter "relevant to the subject matter involved in the action."

One member pointed out that there is no provision in the proposed amendments explicitly addressing the sharing of discovery costs. He noted that judges already have general authority under Rule 26 to shift discovery costs, but recommended that the proposed amendments themselves, or the accompanying committee notes, specify that a judge may assess part or all of the costs of certain discovery requests on the requesting party. One member suggested that language covering cost sharing be added to the proposed amendment to Rule 26(b)(2)(C). Judge Rosenthal responded that it might be preferable to include such language in the committee note, rather than the rule.

Professor Cooper pointed out that the committee note in fact quotes the *Manual for Complex Litigation*, instructing that certain forms of production be conditioned upon a showing of need or the sharing of expenses. He pointed out, however, that the Standing Committee has been very sensitive to cost sharing or cost bearing, and it is a controversial concept for many members of the bar. Mr. Rabiej added that language regarding cost-shifting had been proposed by the Advisory Committee on Civil Rules in the 2000 amendments to Rule 26, but it had been removed by the Standing Committee.

Judge Kravitz moved to add language at the end of the proposed amendment to Rule 26(b)(2)(C) to specify that if a responding party shows that requested information is not reasonably accessible, the court may order discovery of the information "on such terms as the court may determine." He added that no explicit language as to cost sharing should be included in the text of the rule itself, but a reference to costs could be included in the committee note.

The committee without objection approved Judge Kravitz's motion by voice vote.

FED. R. CIV. P. 33

Judge Rosenthal noted that the proposed amendment to Rule 33(d) (option to produce business records in response to interrogatories) makes it clear that a party may respond to interrogatories by using electronically stored information.

FED. R. CIV. P. 34

Judge Rosenthal explained that the proposed amendments to Rule 34(a) (production of documents and inspection of tangible things) draw a new distinction between "electronically stored information" and "documents." The word "document" in the current rule, she said, is simply not adequate to capture all the types of information stored on computers. The proposed rule, thus, would acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. She also pointed out that under the amendment copying, testing, and sampling would apply explicitly both to electronically stored information and tangible things.

She noted that the proposed amendments to Rule 34(b) permit a party to specify the form in which it wants electronically stored information to be produced. If no request is made as to form, or if there is no agreement by the parties, the producing party may turn over the information in the form in which it is ordinarily maintained or in an electronically searchable form. One member suggested that the term "electronically accessible" might be more appropriate than "electronically searchable."

FED. R. CIV. P. 45

Judge Rosenthal reported that Rule 45 (subpoenas) would be amended to conform it to the various changes proposed in the discovery rules to address electronically stored information.

The committee without objection approved the proposed amendments to Rules 16, 26, 33, 34, and 45 and Form 35 for publication by voice vote.

FED. R. CIV. P. 37

Judge Rosenthal reported that the committee had approved a limited "safe harbor" provision in Rule 37 (sanctions for failure to cooperate in discovery) that would give a party protection when information that it is asked to produce has been destroyed or lost through the routine business operation of its computer systems. The loss would occur, for example, when information is destroyed as a result of recycling back-up tapes or automatically overwriting deleted information. She reported that this was the only provision among the proposed amendments in which there had been any disagreement

within the advisory committee. She pointed out, though, that the disagreement had been only as to the actual language of the proposed amendment, and not as to the need for including a limited safe harbor provision in the rules.

As a consequence, she explained, the advisory committee had decided to present the Standing Committee with two alternative versions of a safe harbor provision in FED. R. CIV. P. 37(f). She added that the committee clearly preferred Alternative 1, but several members also wanted to publish Alternative 2 for public comment. Both alternatives, she said, are very narrow. The essential difference between them concerns the standard of culpability applicable to the producing party. Alternative 1 would establish a reasonableness standard, while Alternative 2 would require intentional or reckless conduct. She reported that one member of the advisory committee strongly opposed publishing the second alternative because it would inappropriately limit a court's discretion.

Judge Rosenthal said that whether or not both alternate versions are published, it should be made clear in the publication that the committee is continuing to consider both culpability standards and would like to generate public comment specifically directed to them.

One participant emphasized that Rule 37 deals with sanctions for violation of discovery obligations. But, he said, spoliation issues are generally governed by a separate body of law. He pointed out that what occurs before a case is filed in the district court is not, and cannot be, covered by the rules. Thus, he said, the rules committees should focus on a party's obligation under applicable discovery law, not on spoliation. He suggested that the committee note state explicitly that spoliation is governed by a different body of law, even though discovery and spoliation issues often tend to blend in practice.

He added that the culpability standard under discovery law is negligence, including intentional neglect. But, he said, the key problem is not so much the applicable standard as the boundary of obligations arising before a case is filed and discovery obligations that attach after a case has been filed. Other members pointed out that lawyers' legal and ethical obligations before filing are clearly established by existing law.

One member said that even though the bar had made a compelling case for a safe harbor at the recent Fordham conference, it appeared that any effective protective provision would lie outside the scope of the rules. He suggested that it would take legislation to achieve the sort of protection that the bar seeks. Other members responded, though, that an effective safe harbor provision could indeed be crafted with some additional work.

In light of the difficult competing considerations and the committee discussions, Judge Rosenthal agreed to craft some additional language to address the concerns expressed by the participants. She emphasized the need to include a safe harbor provision together with the rest of the proposed electronic discovery amendments because all the amendments fit together as part of a single, interrelated package.

On the second day of the meeting, Judge Rosenthal presented the committee with revised language for both the text of the proposed Rule 37 amendments and the accompanying committee note. She noted that the proposed revisions would make it clear that the rule does not address the actions of a party before a case is filed.

Judge Rosenthal said that the recommendation of the advisory committee was to publish only one alternative for public comment. But, she said, that version would include appropriate brackets and footnotes to draw the attention of the public to the fact that the committee would continue to study what standard of fault must be met to take a party out of the safe harbor protection.

Dean Kane moved to approve publication of the proposed amendment, together with appropriate cover language — to be drafted by the advisory committee — directing the public's attention to the committee's desire to receive public comment on the applicable culpability standard and the other issues identified by the committee. The motion was approved without objection by voice vote.

Amendments for Delayed Publication

1. Pure Style Revisions

FED. R. CIV. P. 38-63, except FED. R. CIV. P. 45

Judge Rosenthal reported that the advisory committee was planning to publish the complete set of restyled civil rules as a single package in February 2005. She noted that the Standing Committee at earlier meetings had approved publication of restyled Rules 1-37. She asked for authority to publish the current batch of proposed amendments — Rules 38-63, except Rule 45 — subject to further refinement before publication. And she reported that the remaining civil rules, Rules 64-86, would be presented to the Standing Committee at its January 2005 meeting.

Judge Rosenthal said that the advisory committee, in partnership with the Style Subcommittee of the Standing Committee and its consultants, would continue to make refinements in the language of the rules. It would also resolve a series of "global" style

issues and present a completed style package of all the civil rules at the January 2005 meeting.

The committee without objection authorized delayed publication of the proposed amendments by voice vote.

2. "Style-Substance" Amendments

FED. R. CIV. P. 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40

Judge Rosenthal reported that the goal of the restyling project was very narrow — simply to restate the present language of the civil rules as clearly as possible in consistent English without any change in meaning. Nevertheless, she said, as part of the restyling effort, the advisory committee had approved a limited number of minor, non-controversial improvements in language that are arguably more than purely stylistic in nature. She pointed out that the proposed changes, although possibly substantive, reflect sound common sense, universal current practice, or the likely intention of the drafters. Accordingly, she said, the advisory committee would like authority to publish in tandem with the style package a separate track of proposed "style-substance" changes to Rules 4(k), 8(a) & (d), 9(h), 11(a), 14(b), 16(c)(1), 26(g), 30(b), 31(c), 36(b), and 40. She added that a few additional minor "style-substance" changes might be presented to the Standing Committee at the January 2005 meeting.

One member spoke against the proposed deletion of Rule 8(d)(1) as part of the "style-substance" package. Although the proposed committee note suggested that the current rule is redundant and no longer needed, the member said that it might be helpful to retain it. Judge Rosenthal responded that it was important to restrict the "style-substance" package to purely non-controversial items. Thus, in light of the objection expressed, the advisory committee would drop the proposal from the list of proposed amendments.

The committee without objection approved the proposed "style-substance" amendments for deferred publication by voice vote.

Informational Item

Judge Rosenthal reported that the advisory committee had published a proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) to implement 28 U.S.C. § 2403 and replace the final three sentences of FED. R. CIV. P. 24(c). The statute and current rule require a court to certify to the attorney general of the United States or a state when a federal or state statute has been drawn into question. In addition, the rule requires

a party challenging the constitutionality of a statute to call the court's attention to its duty to certify.

Judge Rosenthal pointed out that the reporting obligation is routinely — and unintentionally — violated, perhaps because it is buried in Rule 24. Thus, the advisory committee had proposed moving the reporting requirements from Rule 24 to the proposed new Rule 5.1 in order to attract attention to the reporting obligations by locating them next to the rules that require notice by service and pleading.

In addition, the new rule would have added a requirement that a party drawing into question the constitutionality of a statute serve the pertinent attorney general by mail with a Notice of Constitutional Question and a copy of the underlying court pleading or motion. The advisory committee had thought that the additional requirement would impose only a slight burden on the challenging party.

Judge Rosenthal pointed out that there had been few public comments on the rule. But, she said, concerns emerged in the advisory committee that the new notice and mailing obligation was unwise and should be reexamined. Accordingly, the committee decided to defer the proposed new rule and not present it at this time to the Standing Committee for final approval.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachment of May 18, 2004. (Agenda Item 9)

Amendments for Final Approval

FED. R. CRIM. P. 12.2(d)

Judge Carnes reported that the proposed amendment to Rule 12.2(d) (failure to comply with the requirement to give notice of an insanity defense or submit to a mental examination) would fill a gap created in the 2002 amendments to the rule. The current rule provides no sanction when the defendant does not comply with the requirement to disclose the results and reports of an expert examination. He pointed out that a comment had been received from the defense bar that the proposed amendment goes too far. But, he noted that the decision to impose a sanction is discretionary with the court.

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

FED. R. CRIM. P. 29(c), 33(b), 34(b), and 45(b)

Judge Carnes explained that the proposed amendments to Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), Rule 34 (motion to arrest judgment), and Rule 45 (computing time) would remove the requirement that the court rule on a post-trial motion within seven days after a guilty verdict or after the court discharges the jury.

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

FED. R. CRIM. P. 32(i)~~(4)~~

Judge Carnes said that the proposed amendment to Rule 32(i)(4) (opportunity to speak at sentencing) would extend the right of allocution — which currently applies only to victims of crimes of violence or sexual abuse — to victims in all felony cases. The rule, he said, allows the victim either to speak at sentencing or submit a written statement to the judge. If a crime involves multiple victims, the rule gives the court discretion to limit the number of victims who will address the court.

Judge Carnes added that Congress was likely to pass comprehensive legislation in the near future dealing with victims' rights. He said that the legislation, among other things, would give a wide array of rights to victims of all offenses, including victims of petty offenses and other misdemeanors. He stated that if the pending legislation were enacted, the committee should ask to withdraw the rule.

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

FED. R. CRIM. P. 32.1(b) and (c)

Judge Carnes reported that the proposed amendments to Rule 32.1 (revoking or modifying probation or supervised relief) would address an oversight in the rules by giving the defendant the right to allocution at a revocation or modification hearing.

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

FED. R. CRIM. P. 59

Judge Carnes reported that the proposed new Rule 59 (matters before a magistrate judge) would set forth the procedures for a district judge to review the decision of a

magistrate judge. He explained that the rule is derived in part from FED. R. CIV. P. 72. It distinguishes between "dispositive" and "nondispositive" matters, but does not attempt to define the terms, which are widely used in case law.

Judge Carnes pointed out that on a nondispositive matter, the district judge must consider any timely objections to the magistrate judge's order and set aside any part of the order that is contrary to law or clearly erroneous. But if a party fails to object within 10 days after being served with a copy of the magistrate judge's order, it waives its right to review.

As for dispositive matters, the district judge must decide de novo any recommendation of the magistrate judge to which an objection has been filed. A party's failure to object within 10 days after being served with a copy of the magistrate judge's recommended disposition waives its right to review. There is no need for the district judge to review de novo any matter to which there has not been a timely objection. Nevertheless, despite the waiver provision, the district judge retains authority to review any decision or recommendation of the magistrate judge, whether or not objections are timely filed.

One member said that he supported the rule, but he had a general problem with the way time is computed under this and some other rules. The proposed rule, he pointed out, states that a party must file an objection "within 10 days after being served with a copy" of the magistrate judge's order or recommendation. He pointed out that judges have no way of telling when a party has actually been served with a copy of a particular document. He suggested that consideration be given at a future committee meeting to addressing this uncertainty in computing time.

The committee without objection approved the proposed new rule for final approval by voice vote.

Amendments for Publication

FED. R. CRIM. P. 5(c)

Judge Carnes reported that two amendments were proposed to Rule 5(c)(3) (initial appearance in a district other than the one where the offense was committed). First, the amendment to Rule 5(c)(3)(C) would remove a reference to Rule 58(b)(2)(G). That rule, in turn, would be amended to eliminate a conflict with Rule 5.1(a) regarding the defendant's right to a preliminary examination. Second, the amendment to Rule 5(c)(3)(D) would take account of advances in technolgy and permit a magistrate judge to accept a warrant by any "reliable electronic means," rather than just by "facsimile."

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

FED. R. CRIM. P. 32.1(a)(5)

Judge Carnes explained that the proposed change to Rule 32.1 (revoking or modifying probation or supervised release) was similar to that proposed for Rule 5(c). It would authorize a magistrate judge to accept a copy of a judgment, warrant, or warrant application by "reliable electronic means."

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

FED. R. CRIM. P. 40(a) and (e)

Judge Carnes said that the proposed revision of Rule 40(a) (arrest for failing to appear in another district) would fill a gap in the rules by giving a magistrate judge explicit authority to set conditions of release for a defendant who has been arrested only for violation of conditions of release set in another district. He pointed out that the current rule refers only to a defendant who has been arrested for failure to appear altogether, and not to one who has only violated conditions of release.

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

FED. R. CRIM. P. 41

Judge Carnes reported that the proposed amendment to Rule 41(e) (issuing a search warrant) would permit a magistrate judge to use "reliable electronic means" to issue warrants. In that respect, it parallels the proposed amendments to Rules 5 and 32.1.

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

FED. R. CRIM. P. 58(b)

Judge Carnes explained that the proposed amendment to Rule 58(b)(2)(G) (initial appearance in a petty offense or other misdemeanor case) would remove a conflict between that rule and Rule 5.1 (preliminary examination) and clarify the advice that must be given to a defendant during an initial appearance.

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

Informational Items

FED. R. CRIM. P. 29

Associate Attorney General McCallum expressed the concerns of the Department of Justice regarding the May 2004 decision of the Advisory Committee on Criminal Rules to reject the Department's proposed amendments to Rule 29 (motion for a judgment of acquittal). The proposal would have required a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. The current rule gives a judge discretion to rule on an acquittal motion either before or after verdict.

Mr. McCallum pointed out that a district judge's granting of an acquittal motion before a jury verdict is a non-appealable action due to the Double Jeopardy clause of the U. S. Constitution. It is the only area, he said, in which the government has no right to correct an improper action of a trial judge. An appeal does lie, however, when a judge grants a motion for acquittal after a jury verdict.

He emphasized that United States attorneys are deeply troubled by the current rule and certain specific experiences that they have had under it. He noted that the original proposal of the Department had been to amend the rule to require a district judge to defer a ruling on an acquittal motion until after the jury returns a verdict. The aim, he said, was not to limit judicial discretion, but to address the timing of the judge's action, which has important constitutional consequences.

He explained that members had expressed concerns at the October 2003 advisory committee meeting that the Department's proposal might be too broad. They suggested that it is entirely appropriate for a judge to grant a dismissal before judgment in certain circumstances — particularly in the case of a hung jury or a multiple-defendant or multiple-count case. The advisory committee, he said, had asked the Department to consider crafting modifications to its proposal to address these two situations.

Mr. McCallum reported that the Criminal Division had prepared an amendment to deal with hung juries, but it was unable to devise a satisfactory amendment to address the problems of multiple defendants and multiple counts. But, he said, Judge Levi developed a very helpful, alternate proposal that would allow a judge to grant a dismissal before verdict conditioned upon the defendant waiving double-jeopardy rights and permitting an appeal by the government.

He said that because of the importance of this matter, the Department would like to present additional written materials and make a case for amending Rule 29 to the Standing Committee at its next meeting. If the Standing Committee were then to agree with the Department's recommendation — or with Judge Levi's alternate proposal or some other variation — it might propose an amendment itself. But, he noted, a more likely result would be for the Standing Committee to remand the matter back to the advisory committee with a direction to explore every possible alternative to achieve the result of preserving the government's right to appeal. He added that the Department would provide a comprehensive constitutional-law analysis of the Double Jeopardy clause and craft appropriate devices to avoid procedural traps. In short, he emphasized, the Department would like to work cooperatively with the Standing Committee to figure out a way to meet the government's concerns.

Judge Carnes reported that Administrative Office staff had prepared statistics on how often pre-verdict dismissals are granted in the federal courts. In the Fiscal Year 2002, for example, more than 80,000 felony defendants were disposed of in the district courts. Of that total, 3,000 were tried before a jury, and Rule 29 motions were granted in only 37 cases. He warned that the numbers may not be exact because of reporting difficulties in trying to pinpoint pre-verdict acquittals. Nevertheless, he said, the number of dismissals under Rule 29 is extremely small. This, he explained, was a primary reason why the majority of the advisory committee were persuaded that there was no compelling case to amend the rule. He pointed out, though, that several members of the advisory committee were very much concerned that when a judge grants a pre-verdict dismissal mistakenly or in questionable circumstances, it reflects badly on the judicial system. In that regard, he noted that the Department had presented the committee with some anecdotes of district judges arguably abusing the process.

Judge Carnes further explained that several members of the advisory committee were concerned that certain prosecutors overcharge. Thus, judges should be able to winnow out groundless charges before a case is submitted to the jury. For that reason, he said, the advisory committee had asked the Department to consider amending its proposal to retain the authority of a trial judge to dismiss specific counts in a multiple-count case or certain defendants in a multi-defendant case. But, he explained, neither the Department nor the advisory committee could fashion a satisfactory proposal addressing those situations.

Judge Carnes said that the issues had been thoroughly explored by the advisory committee, including Judge Levi's alternate solution. If the matter were referred back to the advisory committee, he said, the same result would prevail again. Judge Levi agreed with this assessment, but he added that the Department should have a further opportunity to make a case. He pointed out that the Department has a vital role in the Rules Enabling Act process, and it has been supportive of the process. Therefore, he said, if the

Department concludes that a matter is very important to the government and it asks the Standing Committee to take a second look, the committee should accommodate the request.

Judge Levi pointed out that it is very common in rulemaking for empirical data to show that a particular problem is statistically insignificant. But the rejoinder by proponents of an amendment is always that the small number of problem occurrences in fact represents important matters. He recommended that the committee allow the Department to make its case at the January 2005 meeting. He suggested that the Department consider producing additional information, focusing particularly on the character of the actual cases in which it believes a pre-verdict dismissal was improperly granted and the government denied its right to appeal. He added that the Standing Committee might decide to return the proposal to the advisory committee with instructions.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 15, 2004. (Agenda Item 5)

Judge Smith explained that it is the policy of the advisory committee for proposed amendments to evidence rules generally to be limited to resolving case law conflicts in the courts. The committee's presumption, thus, is strongly against amending the rules. The four rules amendments recommended for publication, he said, would resolve serious conflicts in the courts.

Amendments for Publication

FED. R. EVID. 404(a)

Judge Smith reported that the proposed amendments to Rule 404(a) (admissibility of character evidence) would resolve a case law conflict regarding the admissibility in a civil case of character evidence offered as circumstantial proof of conduct. He noted that courts routinely admit such information into evidence in criminal cases. A minority of courts have also permitted its use in civil cases. The proposed amendment would allow the evidence only in criminal cases.

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

FED. R. EVID. 408

Judge Smith reported that the proposed amendments to Rule 408 (compromise and offers to compromise) would resolve three important conflicts in the case law as to the admissibility of statements and offers made in settlement negotiations. He added that the proposals had been substantially debated and reworked by the advisory committee.

Judge Smith pointed out that the first amendment would resolve the split in the case law regarding the admissibility in later criminal prosecutions of statements and offers made in civil settlement negotiations. He pointed out that the Department of Justice strongly supported allowing the use in criminal cases of admissions made earlier during settlement negotiations, noting that they can be critical evidence to establish guilt in certain cases. After much debate, he said, the advisory committee agreed to present an amendment that would authorize the use of admissions of fault in later criminal prosecutions, but not allow admission of the fact that there has been a civil settlement or negotiations. He emphasized that the committee had worked hard to reach the proper balance between protecting settlement negotiations and allowing critical evidence to be used in criminal cases.

Second, Judge Smith reported that the proposed amendments would resolve a conflict in case law by prohibiting the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. He noted that the proposal reinforces the main purposes of the rule — to promote unfettered settlement discussions.

Third, the proposed amendments would resolve a conflict over whether offers of compromise may be admitted in favor of the party who made the offer. The proposal would bar a party from introducing its own statements and offers when offered to prove the validity, invalidity, or amount of the claim. Judge Smith said that the advisory committee was of the view that a party should not be able to waive unilaterally the protections of the rule because introduction of the evidence would show implicitly that the opposing party had also entered into a settlement agreement. Exclusion of such evidence would not be required, though, when offered for other purposes, such as to prove the bias or prejudice of a witness.

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

FED. R. EVID. 606(b)

Judge Smith reported that the proposed amendment to Rule 606(b) (juror as a witness) would limit the testimony of a juror regarding the validity of a verdict to whether

there has been a clerical mistake in reporting the verdict. He explained that some courts have also allowed juror tetimony on a broader basis, such as to explore whether the jury understood the court's instructions or the impact of their actions. He added that the proposed amendment is very narrowly designed to protect jury deliberations and prevent invasions of the jury process. He pointed out, however, that testimony could still be allowed from a juror as to fraud or outside influence.

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

FED. R. EVID. 609(a)(2)

Judge Smith reported that Rule 609(a)(2) (impeachment by evidence of conviction of a crime) provides for automatic impeachment of a witness with evidence that the witness has been convicted of a crime that "involved dishonesty or false statement." The problem, he said, is in determining which crimes involve dishonesty or false statement.

Most prior convictions, he noted, occur in other jurisdictions, especially state courts. The issue for the federal court is to determine the extent to which it may look behind the prior conviction to determine whether it involved dishonesty or false statement. Some courts, he said, make the determination by looking only at the actual elements of the crime for which the witness was found guilty. Other courts, though, allow a more detailed inquiry into the facts of the case.

Judge Smith explained that the proposed amendment takes a middle position. It would allow automatic impeachment of a witness if an underlying act of dishonesty or false statement can be "readily determined." Judges, thus, would have discretion to look behind the elements of the crime to the facts of the case. But it is contemplated that their review would be to make a quick determination, such as by reviewing the charging documents, that a crime involved dishonesty or false statement. The court, though, should not conduct a minitrial on the issue. He added that a similar problem exists under the Sentencing Guidelines, where district judges may have to look behind the elements of a crime to determine whether a prior conviction of the defendant had been for a crime of violence. Professor Capra added that the committee note sets forth some examples of key documents that could be used by judges to make the determination of dishonesty or false statement.

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

Informational Items

Professor Capra explained that these four proposals complete a package of amendments that the advisory committee had been considering for several meetings. He said that the advisory committee did not have plans to bring forward to the Standing Committee in the near future other potential amendments that it had under consideration. In addition, he said, the advisory committee would continue to examine the hearsay exceptions, but it will not propose any amendments until the full impact of *Crawford v. Washington* has been determined.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. (Agenda Item 10)

He reported that the E-Government Act of 2002 requires all federal courts to post on the Internet all case documents filed electronically or filed in paper and converted to electronic form. The Act also mandates the promulgation under the Rules Enabling Act of new federal rules addressing security and privacy concerns raised by electronic posting of case documents. The Standing Committee, he noted, had created the E-Government Subcommittee to coordinate the task of drafting appropriate revisions to the rules, and it asked representatives of other Judicial Conference committees to serve on the subcommittee.

He explained that the subcommittee had asked Professor Capra to develop a template that each advisory committee could use to develop appropriate amendments to their own rules. He pointed out that each of the advisory committees had reviewed the template and had raised a number of policy issues. In addition, the Department of Justice and other interested parties had offered practical and helpful comments on the template.

Judge Fitzwater reported that the E-Government Subcommittee met just before the Standing Committee meeting and revised the template in several respects. He emphasized that in making policy choices, the subcommittee had worked from the Judicial Conference's recent privacy policy statements and the assumptions made by the Court Administration and Case Management Committee. The revised template, he said, would now be sent back to the advisory committees for further consideration at their autumn meetings.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, January 13-14, 2005.

Respectfully submitted,

Peter G. McCabe
Secretary

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 16, 2004

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

On behalf of the Judicial Conference, I write to urge you to oppose the "Lawsuit Abuse Reduction Act of 2004" (H.R. 4571). The House of Representatives passed the bill on September 14, 2004.

Section 2 of the bill would reinstitute a sanctions provision of Rule 11 of the Federal Rules of Civil Procedure that was eliminated in 1993 on the recommendation of the Judicial Conference, with the approval of the Supreme Court and after review by Congress. The provision 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 and generated wasteful satellite litigation that had little to do with the merits of a case. The proposal conflicts with the view of a majority of federal judges (70%) surveyed by the Federal Judicial Center in 1995, who supported Rule 11 as amended in 1993.[1] The amendment of Rule 11 would also be inconsistent with the longstanding Judicial Conference policy opposing direct amendment of the federal rules by legislation.

Section 3 of H.R. 4571 would apply the revised federal Rule 11 to certain state court actions, while section 4 would amend the venue standards governing the filing of tort actions in both the federal and state courts. Sections 3 and 4 implicate federal-state comity interests and raise important policy and practical concerns. Sections 6 and 7 were added at the House

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[1]The 1995 study was conducted after the most recent amendments to Rule 11 took effect in 1993. The study superseded a 1991 survey of federal judges who at that time concluded (about 80%) that the 1983 rule was "slightly or moderately effective in deterring groundless papers, but ... found other methods more effective for handling such litigation."

Judiciary Committee's mark-up session held on September 8, 2004. Section 6 would require a court to suspend an attorney from practicing law before the federal district court for at least one year after that attorney had violated Rule 11 three or more times. Section 7 would require that every court, state or federal, impose a civil sanction on any person who willfully or intentionally destroys a relevant document in order to impede, obstruct, or influence a court proceeding.

Section 2

Section 2 would directly amend Civil Rule 11 to remove a court's discretion to impose sanctions on a frivolous filing and eliminate the rule's "safe-harbor" provisions. The bill undoes amendments to Rule 11 that took effect on December 1, 1993. The bill would bring back the provisions that were first enacted in 1983 and removed from the rule in 1993, after a decade of signally bad experiences with the operation and effects of the 1983 rule.

Like H.R. 4571, the 1983 version of Rule 11 required sanctions for every violation of the rule. Like H.R. 4571, the 1983 version of Rule 11 was intended to address certain improper litigation tactics by providing some punishment and deterrence. The effect was almost the opposite. The 1983 rule presented attorneys with financial incentives to file a sanction motion. The rule was abused by resourceful lawyers, and 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 or with the behavior it attempted to regulate. 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, sowed discord in the bar, and generated widespread criticism.

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 possibility of monetary penalty;
(2) engendering potential conflict 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 little incentive, and perhaps a distinct disincentive, 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.

The 1993 amendments to Rule 11 were designed to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. The rule establishes 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.

Rule 11 does not supplant other remedial actions available to sanction an attorney for a frivolous filing, including punishing the attorney for contempt, employing sanctions under 28 U.S.C. § 1927 for "vexatious" multiplication of proceedings, or initiating an independent action for malicious prosecution or abuse of process.

The 1983 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. Section 2 of the bill would reinstate the 1983 provision, adding needless confusion and unnecessary litigation. A Federal Judicial Center study conducted in 1991 found that under the 1983 version, Rule 11 issues could be expected to be raised in 2%-3% of the cases filed in federal court. If the same experience emerged under a new Rule 11, at current caseloads, a Rule 11 issue could be expected to arise in 5,000 to 7,600 cases, representing a tremendous drain on already stretched judicial resources.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee on Civil Rules (Advisory Committee) reviewed a significant number of empirical examinations of the 1983 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. The Advisory Committee took note of several book-length analyses of Rule 11 case law.

The 1991 Federal Judicial Center survey noted that most federal judges believed that the 1983 version of Rule 11 had some positive effects. But the study also noted that most judges found several other methods more effective than Rule 11 in handling such litigation and, most significantly, that about one-half of the judges reported that Rule 11 exacerbated undesirable litigation behavior by counsel. 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, calling for a change in the rule.

The Rules Committees 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 (28 U.S.C. §§ 2071-2077).

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. A majority of the judges and lawyers, both plaintiffs' and defendants' lawyers, believed that groundless litigation was handled effectively by judges.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Judicial Conference rules committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. Section 2 of H.R. 4571 would effectively reinstate the 1983 version of Rule 11 that proved so contentious and wasted so much time and energy of the bar and bench. Section 2, indeed, in some ways seems to go beyond the provisions that created serious problems with the 1983 rule. It may cause even greater mischief. Rule 11 in its present form has proven effective and should not be revised.

Sections 3 and 4

Section 3 would extend the new requirements of a mandatory Rule 11 to all state court litigation that the state court deems, on motion, to affect interstate commerce. Two features of this provision stand out. First, it would directly regulate the practice and procedure of state courts, mandating a federal standard for the imposition of sanctions for the filing of frivolous or ungrounded complaints and other papers in state court. At present, states have been free to adopt their own rules of practice, including a version of Rule 11, if a state so chooses. Second, section 3 does not specify the actions to which it would apply. Rather, it imposes on state judges a broad generalized test to determine whether federal Rule 11 would apply in a given case. If enacted, this section could affect the cost and duration of a very large number of civil actions in state courts.

Section 4 seeks to prevent forum-shopping by specifying the places where a plaintiff may bring a "personal injury" claim by imposing a federal standard for determining the venue of state law personal injury claims, in both state and federal court. Such a federal standard would displace existing state venue rules or statutes. It would also significantly alter the statutes in title 28, United States Code, that now govern venue (section 1391) and transfer of venue (section 1404) in the federal courts. The Judicial Conference has not had an opportunity to study either section 3 or section 4.

Sections 6 and 7

A federal district court must suspend an attorney from the practice of law in the district under section 6 if the attorney has violated Rule 11 three or more times. The Judicial Conference has not had an opportunity to study this provision. The provision raises important questions concerning the regulation of the practice of law, an area largely reserved to the state courts. Most federal courts do not have an administrative process or records-keeping system in place to handle the sanctioning of attorneys. The additional burdens that the proposed provision would impose

on courts have not been examined. But even if the ambiguous language of the bill requires suspension only if the prior Rule 11 violations have been adjudicated by earlier court orders, mandatory suspension will raise the stakes of the third Rule 11 proceeding, create powerful strategic incentives on all sides, and transform the already burdensome character of Rule 11 satellite litigation.

Section 7 establishes a stand-alone statutory provision that would sanction any person who "willfully and intentionally influences, obstructs, or impedes, or attempts to influence, obstruct, or impede, a pending court proceeding through the willful and intentional destruction of documents sought in, and highly relevant to, that proceeding...." The Judicial Conference has not had an opportunity to study the provision. Presently, Civil Rule 37 and the common law provide the courts with a broad range of potential sanctions for the spoliation of relevant evidence and repose considerable discretion in the district courts in the selection of the appropriate sanction when spoliation is found. Section 7 would impose a mandatory civil sanction "of a degree commensurate with the civil sanctions available under Rule 37." The likely effects of such a provision have not been studied. But it undercuts the current rule's reliance on the discretion of the trial court judge, a hallmark of present practices. Given the broad range of sanctions authorized under Rule 37, compliance with section 7 may prove particularly problematical for state courts commanded to identify the sanction "commensurate" with those provided by Rule 37, which does not necessarily apply in state court. There is also a serious question about how a "commensurate" Rule 37 sanction can be imposed on nonparties.

The provision raises additional questions. For example, virtually every corporation and government office recycles back-up tapes as part of the routine and necessary operation of its computers. Would the proposed provision make that sanctionable in every instance? The Committee on Rules of Practice and Procedure published for comment proposed amendments to the civil rules addressing this thorny issue in August 2004. Like the mandatory sanction provision that provided financial incentives to file numerous and ill-founded motions under the 1983 version of Rule 11, this mandatory sanction provision may also lead to wasteful satellite litigation, without providing meaningful or useful tools to police the behavior it is meant to address.

Conclusions

The Judicial Conference opposes the enactment of H.R. 4571 for the reasons stated above as to section 2. Sections 3, 4, 6, and 7 would make important changes in the administration of civil justice in both federal and state courts. The Judicial Conference has not had the opportunity to formally assess the advisability or impact of these sections, but notes that they may substantially affect federal-state comity interests and raise important policy and practical concerns.

The Judicial Conference greatly appreciates your consideration of its views. If you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Administrative Office of the U.S. Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick Leahy, Ranking Democrat
Members of the Committee on the Judiciary of the Senate

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

July 9, 2004

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Judicial Conference, I write to urge you to reconsider your position on the "Lawsuit Abuse Reduction Act of 2004" (H.R. 4571). Section 2 of the bill would reinstitute a rule eliminated in 1993 upon the recommendation of the Judicial Conference, approval by the Supreme Court, and after review by Congress, because of the serious problems it engendered during a ten-year period of operation. Section 2 also would amend Rule 11 of the Federal Rules of Civil Procedure in a manner inconsistent with the longstanding Judicial Conference policy opposing direct amendment of the federal rules by legislation. Section 3 of H.R. 4571 would apply the revised federal Rule 11 to certain state court actions, while section 4 would amend the venue standards governing the filing of tort actions in both the federal and state courts. Sections 3 and 4 implicate federal-state comity interests and raise important policy and practical concerns.

Section 2

Section 2 would directly amend Civil Rule 11 to remove a court's discretion to impose sanctions on a frivolous filing and eliminate the rule's "safe-harbor" provisions. The bill undoes amendments to Rule 11 that took effect on December 1, 1993, and would bring back the provisions that were first introduced in 1983 and removed from the rule in 1993, after a decade of signally bad experiences with the operation and effects of the 1983 rule.

Like H.R. 4571, the 1983 version of Rule 11 required sanctions for every violation of the rule. It spawned thousands of court decisions and generated widespread criticism. The rule was abused by resourceful lawyers, and 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.

Some of the other 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 possibility of monetary penalty;
(2) engendering potential conflict 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 little incentive, and perhaps a distinct disincentive, 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.

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The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee on Civil Rules (Advisory Committee) reviewed a significant number of empirical examinations of the 1983 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. The Advisory Committee took note of several book-length analyses of Rule 11 case law.

The 1991 Federal Judicial Center survey noted that most federal judges believed that the 1983 version of Rule 11 had positive effects. But the study also noted that most judges found several other methods more effective than Rule 11 in handling such litigation and, most significantly, that about one-half of the judges reported that Rule 11 exacerbates behavior between counsel. 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, calling 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 (28 U.S.C. §§ 2071-2077).

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. A majority of the judges and lawyers, both plaintiffs' and defendants' lawyers, believed that groundless litigation was handled effectively by judges.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Judicial Conference rules committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. Section 2 of H.R. 4571 would effectively reinstate the 1983 version of Rule 11 that proved so contentious and wasted so much time and energy of the bar and bench. Section 2, indeed, in some ways seems to go beyond the provisions that created serious problems with the 1983 rule. It may cause even greater mischief. Rule 11 in its present form has proven effective and should not be revised.

Sections 3 and 4

Section 3 would extend the new requirements of a mandatory Rule 11 to all state court litigation that the state court deems, on motion, to affect interstate commerce. Two features of this provision stand out. First, it would directly regulate the practice and procedure of state courts, mandating a federal standard for the imposition of sanctions for the filing of frivolous or ungrounded complaints and other papers in state court. At present, states have been free to adopt their own rules of practice, including a version of Rule 11, if a state so chooses. Second, section 3 does not specify the actions to which it would apply. Rather, it imposes on state judges a broad generalized test to determine whether or not federal Rule 11 would apply in a given case. If enacted, this section could affect the cost and duration of a very large number of civil actions in state courts.

Section 4 seeks to prevent forum shopping by specifying the places where a plaintiff may bring a "personal injury" claim by imposing a federal standard for determining the venue of state law personal injury claims, in both state and federal court. Such a federal standard would displace existing state venue rules or statutes. It would also significantly alter the statutes in title

28, United States Code, that now govern venue (section 1391) and transfer of venue (section 1404) in the federal courts.

The Judicial Conference opposes the enactment of H.R. 4571 for the reasons stated above as to section 2. Sections 3 and 4 would make important changes in the administration of civil justice in both federal and state courts. The Judicial Conference has not had the opportunity to formally assess the advisability or impact of these sections, but notes that they may substantially affect federal-state comity interests and raise important policy and practical concerns.

The Judicial Conference greatly appreciates your consideration of its views. If you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Administrative Office of the U.S. Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the Committee on the Judiciary of the House of Representatives

Defending Liberty
Pursuing Justice

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September 10, 2004

Dear Representative:

I am writing to you regarding H.R. 4571, legislation to make changes in Rule 11 of the Federal Rules of Civil Procedure; make an amended Rule 11 of the Federal Rules of Civil Procedure applicable to cases filed in state courts if such cases affect interstate commerce; and make changes relating to jurisdiction and venue for personal injury cases filed in state and federal courts. We understand that the legislation will be brought to the floor of the House of Representatives next week.

The ABA opposes the provisions in the legislation that would change the Federal Rules of Civil Procedure without going through the process set forth in the Rules Enabling Act. The ABA fully supports the Rules Enabling Act process, which is based on three fundamental concepts: (1) the central role of the judiciary in initiating judicial rulemaking, (2) procedures that permit full public participation, including by the members of the legal profession, and (3) recognition of a congressional review period. We view the proposed rules changes to the Federal Rules in H.R. 4571 as an unfortunate retreat from the Rules Enabling Act.

In 28 U.S.C. §§ 2072-74, Congress prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, Congressionally-specified procedure contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by committees of the United States Judicial Conference, will thereafter be subject to thorough public comment and reconsideration, will then be submitted to the United States Supreme Court for consideration and promulgation, and will finally be transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

This time-proven process proceeds from separation-of-powers concerns and is driven by the practical recognition that, among other things:

1) Rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis;

2) Each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential to avoid unintended consequences; and

3) The Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

We do not question Congressional power to regulate the practice and procedure of federal courts. Congress exercised this power by delegating its rulemaking authority to the judiciary through the enactment of the Rules Enabling Act, while retaining the authority to review and amend rules prior to their taking effect. We do, however, question the wisdom of circumventing the Rules Enabling Act, as H.R. 4571 would.

We also have serious concerns about the provisions in H.R. 4571 that would impose the Federal Rules on the state courts and would impose the changes relating to jurisdiction and venue for personal injury cases filed in state and federal courts. We hope the House will not move forward on legislation containing such departures from current law until we and others have had sufficient time to analyze the impact they would have on the state courts and on the principle of federalism and are able to present our views to you on these very important matters.

We respectfully urge you to vote "no" on this legislation.

Sincerely,

Robert D. Evans

Robert D. Evans

108TH CONGRESS
2D SESSION

H. R. 4571

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

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IN THE HOUSE OF REPRESENTATIVES

JUNE 15, 2004

Mr SMITH of Texas (for himself, Mr SENSENBRENNER, Mr FORBES, Mr GREEN of Wisconsin, Mr GALLEGLY, Mr CHABOT, Mr GARRETT of New Jersey, Mr KING of Iowa, Mr DELAY, Mr FRANKS of Arizona, Mr CULBERSON, Mr KELLER, Mr CARTER, Mr PEARCE, Mr CALVERT, and Mr GOODLATTE) introduced the following bill, which was 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 2004".

SEC. 2. ATTORNEY ACCOUNTABILITY.

Rule 11 of the Federal Rules of Civil Procedure is amended—

(1) in subdivision (c)—

(A) by amending the first sentence to read as follows: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to the other party or parties to pay for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.";

(B) in paragraph (1)(A)—

(i) by striking "Rule 5" and all that follows through "corrected." and inserting "Rule 5."; and

(ii) by striking "the court may award" and inserting "the court shall award"; and

(C) in paragraph (2), by striking "shall be limited to what is sufficient" and all that follows through the end of the paragraph (including subparagraphs (A) and (B)) and inserting "shall be sufficient to deter repetition of such

conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee."; and

(2) by striking subdivision (d).

SEC. 3. APPLICABILITY OF RULE 11 TO STATE CASES AFFECTING INTERSTATE COMMERCE.

In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action affects interstate commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted If the court determines such action affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.

SEC. 4. PREVENTION OF FORUM-SHOPPING.

(a) IN GENERAL.—Subject to subsection (b), a personal injury claim filed in State or Federal court may be

filed only in the State and, within that State, in the county (or Federal district) in which—

(1) the person bringing the claim, including an estate in the case of a decedent and a parent or guardian in the case of a minor or incompetent—

(A) resides at the time of filing; or

(B) resided at the time of the alleged injury; or

(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred; or

(3) the defendant's principal place of business is located.

(b) DETERMINATION OF MOST APPROPRIATE FORUM.—If a person alleges that the injury or circumstances giving rise to the personal injury claim occurred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this subsection.

(c) DEFINITIONS.—In this section:

(1) The term "personal injury claim"—

(A) means a civil action brought under State law by any person to recover for a person's personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury, or the costs of medical monitoring or surveillance (to the extent such claims are recognized under State law), including any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate; and

(B) does not include a claim brought as a class action.

(2) The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, but not any governmental entity.

(3) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and any other territory or possession of the United States.

(d) APPLICABILITY.—This section applies to any personal injury claim filed in Federal or State court on or after the date of the enactment of this Act.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in section 3 or in the amendments made by section 2 shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law.

○

Congress takes up Rule 11 sanctions

House bill seeks tort reform through procedural changes.

By Marcia Coyle
STAFF REPORTER

WASHINGTON—When it comes to rule-making, the Judicial Conference of the United States generally has the corner on what works best in the federal courts. But last week, the U.S. House of Representatives resurrected and approved a rule on attorney sanctions that the conference, as well as most academics, judges and lawyers, believed had been justly interred in the old-rule graveyard more than a decade ago.

Election-season politics, a last-gasp effort to enact any so-called tort reform law this year, and a weak relationship between the judicial and legislative branches, coalesced in final passage of H R. 4571. The bill would reinstate mandatory sanctions for lawyers who file frivolous lawsuits under Rule 11

SEE 'SANCTIONS' PAGE 25

'SANCTIONS' FROM PAGE 1

of the Federal Rules of Civil Procedure, and would eliminate the current "safe harbor" that gives lawyers 21 days to withdraw a suit after a motion for sanctions has been filed.

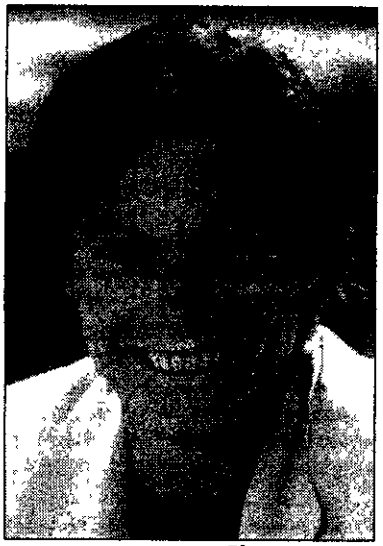
The legislation, sponsored by Representative Lamar Smith, a Texas Republican, passed the House, 229-174, last week. It not only revives the 1983 version of Rule 11 but also would create a "three strikes and you're out for one year" requirement. Lawyers who have had sanctions imposed three times in the same court—federal or state—would be suspended from practicing for one year after the third time.

The current Rule 11 provision excluding sanctions for discovery violations would be eliminated by the House bill. And, the bill would apply its new Rule 11, for the first time, to state cases affecting interstate commerce. State judges would be required to make the interstate commerce determination within 30 days after a motion for sanctions has been applied.

New venue provisions, also in the House bill, would allow a plaintiff to sue only where he or she lives or was injured, or where the defendant's principal place of business is located. This is an attempt to eliminate what the bill's supporters call "judicial hellholes" favoring plaintiffs

"I think it's a bad idea, period," emphasized procedural scholar Georgene Vairo of Loyola Law School, Los Angeles, who has written extensively on Rule 11.

"If you don't have the political muscle to get your substantive proposals through, it's a really bad idea to do it through your procedural rules," Vairo said. "Judges do a pretty good job of coming up with rules they need. This is tort reform through the backdoor."



GEORGENE VAIRO: *She says substantive changes should not be made by procedural rules.*

House bill seeks tort reform through rule change

But Matt Webb, director of legal reform policy at the U.S. Chamber of Commerce Institute for Legal Reform, said, "There's really a philosophical difference here [over the two versions of Rule 11]. There's a lot of stuff out there that obviously folks in the business community and the legal reform world would consider in the way of frivolous filings. A lot of times Rule 11 ends up being a toothless tiger."

Dead on arrival?

The question now is whether the legislation will be dead on arrival in the Senate. There is no companion bill in the Senate as has been the case with other tort measures passed by the House, so there is no easy vehicle to move. And supporters of changes in the tort system have been unable to garner enough votes in the Senate this session to pass any of the major tort-related measures, such as class action, medical malpractice and asbestos.

"I really don't think this has any seriousness behind it," said Jackson Williams, legislative counsel to Public Citizen's Congress Watch, an opponent of the bill

"The House majority has a lot of time on its hands. They've been passing bills a second time because they don't have anything to do. Idle hands are the devil's workshop."

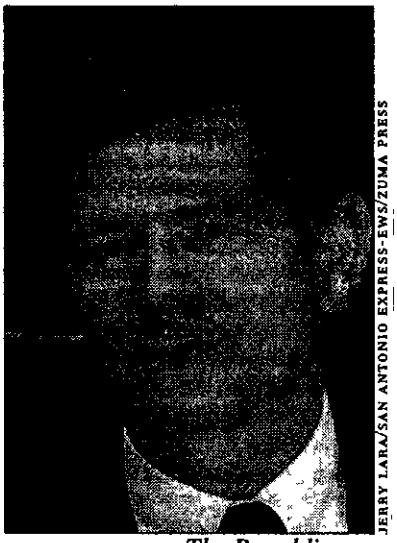
But Webb countered, "There's always a possibility, particularly because of the way Senate rules are. Any senator can offer any amendment. It's not outside the realm of possibility that something could happen. The House wanted to take the lead. Now that they've done their job, we'll go talk to the folks in the Senate."

Old v. new

Congress has not always deferred completely to judicial-rule revisers, said another procedural scholar, Carl Tobias of the University of Richmond School of Law. When Congress has gotten involved, he explained, it has been more in the area of criminal law and evidence than in the civil area

By the time of the 1993 changes to Rule 11, Tobias recalled, "There was pretty broad consensus that the '83 amendment had not worked in a number of ways."

In a letter to House Judiciary Chairman F. James Sensenbrenner, R-Wis., Leonidas Ralph Mecham, secretary to the Judicial Conference, said that the 1983 version of Rule 11, like H.R. 4571, required sanctions for every violation of the rule.



JERRY LARA/SAN ANTONIO EXPRESS-EWS/ZUMA PRESS

LAMAR SMITH: *The Republican congressman from Texas sponsored the bill, H.R. 4571.*

"It spawned thousands of court decisions and generated widespread criticism," he wrote. "The rule was abused by resourceful lawyers, and 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 "

Before the 1983 version came about, Vairo recalled, "The culture was very, very anti-sanctions. Judges just wouldn't do it. It took a couple of years for the '83 version of rule to start rolling. But once it did, it really did. That's why we saw the 1993 version rolling back some of the draconian aspects of the '83 rule—not so much in the language as in the way it was being used.

"To the extent the '83 rule was bad, it was a good thing because most people agree and most judges agree the '83 version increased everybody's consciousness about the need to impose sanctions in appropriate cases," she added.

Tobias and Mecham, in his letter to Sensenbrenner, noted that the Advisory Committee on Civil Rules spent nearly five years studying the impact of the 1983 rule. One of the studies conducted became a major point of contention in the debate over H.R. 4571.

Sensenbrenner, both on the day his committee

H.R. 4571: THE DETAILS

The House bill to beef up Rule 11 of the Federal Rules of Civil Procedure would:

- Add a "three strikes and you're out for one year" provision for attorneys sanctioned in the same state or federal court.
- Provide sanctions for discovery violations in federal cases, or in state cases deemed by the judge to affect interstate commerce.
- Allow plaintiffs to sue only where they live or were injured, or where the defendant's principal place of business is located.

approved the bill and on the day the House finally endorsed it, pointed to a 1991 study by the judiciary's research arm, the Federal Judicial Center, as evidence that the 1983 version was preferable.

"At that time, 751 federal judges found that an overwhelming majority of them, 95%, believed Rule 11 did not impede development of the law; 72% believed that the benefits of the rule outweighed any additional requirement of judicial time; 81% believed that the 1983 version of Rule 11 had a positive effect on litigation in the Federal courts; and 80% believed that the rule should be retained in its then-current form," Sensenbrenner told his House colleagues.

"That is what the judges who were on the bench at the time this rule was in effect said.

"The Judicial Conference ought to spend their time looking back at their own records and their own surveys rather than sending these types of letters advising us that what we are doing here is no good," he concluded.

But the Judicial Conference, in its letter to Sensenbrenner, said the 1991 study also showed that most judges found other methods more effective than Rule 11 in handling frivolous litigation, and that about one-half of the judges reported that Rule 11 exacerbated behavior between lawyers. Additionally, Mecham wrote, a call for comment on the rule issued a year earlier produced a substantial response calling for changes in the rule.

A number of Democratic judiciary lawmakers used the conference's letter on the floor to oppose the bill. But Sensenbrenner and other Republican supporters continued to emphasize the 1991 study.

At the time of the 1993 rule change, there were groups, noted Vairo, particularly trade associations representing businesses often sued, that did not want the 1983 rule amended.

"They were concerned it would result in judges not imposing sanctions anymore," she recalled.

But a 1995 study by the Federal Judicial Center on the effect of the 1993 amendments found that more than 75% of the judges and lawyers who responded would oppose mandatory sanctions for rule violations, and a majority believed that frivolous litigation was being handled effectively by judges.

Tort torte

"The problem is a small-business problem," said Victor Schwartz of Kansas City, Mo.'s Shook, Hardy & Bacon, who represents the American Tort Reform Association, a bill supporter. "We're not talking about civil rights actions, but stuff not in the headlines—nickel and dime, $10,000, $15,000, $20,000 claims. They have no weaponry to fight them.

"This is the bottom of the barrel of the plaintiffs' bar," he added. "They bring a $20,000 claim against a restaurant owner for a person who was never in the restaurant. The lawyer calls and tries to settle for just under the cost of the defense."

The chamber's Webb agreed, adding, "You have the safe harbor in there and they think no harm, no foul. Unfortunately, if you're on the receiving end of that, you still have to litigate that matter and you not only have to litigate the substance but whether or not it was frivolous. There is a cost associated with that."

State court extension

Schwartz and Webb said they know that the extension of Rule 11 to state courts will be controversial. But Schwartz added, "Small businesses are in state courts. A number of states have automatic trigger provisions in their rules, so if the federal rule changes, the state rule changes. That's why a lot of small businesses were upset by the 1993 changes. They got caught in the tripwire."

Vairo and others counter that the state court provisions raise serious constitutional problems and run counter to federalism concerns, which, ironically, is a traditional concern of the Republican supporters of the bill.

Tobias agreed and noted that the passage of H.R. 4571 was another example of Congress rejecting the judiciary's advice this session.

He pointed to the so-called Feeney Amendment, dealing with judicial sentencing, and as-yet unsuccessful bills to strip court jurisdiction over challenges to the pledge of allegiance and the Federal Defense of Marriage Act

"It's a little hard to understand in the face of the chief justice's almost pleading on a number of fronts," said Tobias. "I think this bill is tort reform politics and election politics."

In the end, Vairo said, "This is more about ideology and symbols. The rule is virtually as potent today as it used to be, not to mention that you have other tools out there, all sorts of things to sanction lawyers who are bad, and judges are now much more attuned to using those tools.

"I think Rule 11 has become, in some respects, the bellwether for a lot of what we see and perceive as problems with litigation," she added. NLJ

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 15-16, 2004

The Civil Rules Advisory Committee met on April 15 and 16, 2004, at the Administrative Office of the United States Courts in Washington, D.C.. The meeting was attended by Judge Lee H. Rosenthal, Chair; Frank Cicero, Jr., Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Judge H. Brent McKnight; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr , attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee members Judge Thomas W. Thrash, Jr., and Dean Mary Kay Kane also attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, were present. Peter G McCabe, John K. Rabiej, James Ishida, Robert Deyling, and Professor Steven S. Gensler, Supreme Court Fellow, represented the Administrative Office. Thomas E. Willging, Kenneth Withers, and Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., and Elizabeth Shapiro, Esq., Department of Justice, were present. Stefan Cassella, Esq , also attended for the Department of Justice. Observers included Jim Rooks (ATLA); David Smith (National Association of Criminal Defense Lawyers); Ralph Lindeman; Andrea Toy Ohta; Judge Christopher M. Klein; Peter Freeman, Esq. (ABA Litigation Section); Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison); and Alfred W. Cortese, Jr., Esq..

Judge Rosenthal began the meeting by noting that much hard work had been done since the October meeting, including the February meeting and conference, meetings of the Discovery, Forfeiture, and Style Subcommittees, conference calls, and ongoing drafting.

Minutes

The Minutes for the October 2003 meeting were approved.

March Judicial Conference

Judge Rosenthal reported that the March Judicial Conference meeting was devoted in large part to budget matters. Few rules matters were on the agenda. But it is likely that in the course of this meeting the Advisory Committee will recommend that the Standing Committee transmit some or all of the rules amendments published last August for approval by the Judicial Conference and submission to the Supreme Court.

Administrative Office Staff

The Committee formally recognized Administrative Office staff who support the Committee's work. The staff collectively contribute the essential work that is an indispensable part of the Committee's functioning. The work is always timely, cheerful, and good. Those present to be thanked included Robert Deyling (attorney), Rick White (information technology); Barbara Aron (operations); Peter Kelly (attorney); David Hollenbeck (information technology); Judy Krivit (operations); Dianne Smith (operations); David Van Dyke (information technology); Anne Rustin (operations), and James Ishida (attorney).

Special recognition and thanks were expressed for the many and varied contributions made by Professor Steven S. Gensler, the Supreme Court Fellow who will continue to support Committee projects through the summer. His work has been invaluable. He is a great proceduralist and an indefatigable worker.

Administrative Office Report

John Rabiej delivered the Administrative Office Report. There is little to report on the legislative front. The asbestos bill is expected to come up for a vote during the week of April 19; there is no sense how it will fare. The Class Action Fairness Act may come up soon after the asbestos bill, but it has so often failed to come up as predicted that the timing remains uncertain.

Rules Published for Comment in August 2003

Rule 5.1

Rule 5.1 emerged from public comments on amendments of Appellate Rule 44. The comments showed that the part of Civil Rule 24(c) implementing 28 U.S.C. § 2403 is obscure to many lawyers and perhaps to some judges. Section 2403 requires a court to certify to the Attorney General of the United States or of a state the fact that the constitutionality of an Act of Congress or a state statute has been drawn in question. The purpose of notice is to support the Attorney General's statutory right to intervene. The last part the intervention rule, Rule 24(c), reflects the statute and calls on a party who draws into question the constitutionality of a statute to "call the attention of the court to its consequential duty." Proposed new Rule 5.1 would transfer these provisions to a more prominent place and substantially change them.

Discussion began with a question raised by the Style Subcommittee. The Style Subcommittee prefers to adopt a uniform term for referring to federal legislative enactments; the leading candidate at the moment is "federal statute." "Act of Congress" is not in the running. Section 2403, however, refers to an "Act of Congress." The experts in Congress are uncertain whether "federal statute" would cover everything embraced by "Act of Congress." They are confident that "Act of Congress" embraces everything that Congress enacts. Professor Kimble observed that if indeed Rule 5.1 is intended to include things that do not qualify as federal statutes, the rule should use a different term. But it was agreed that "federal statute" is sufficiently broad; the Committee Note should observe that "federal statute" in Rule 5.1 includes anything that would qualify as an "Act of Congress" in Section 2403.

A second style question arises from the reference to a paper "drawing into question the constitutionality of a federal statute * * *." This is the language of § 2403, and was deliberately restored to earlier drafts of Rule 5 1. The Attorney General may want to be involved when there is a constitutionally based argument that a statute must be construed narrowly. Professor Kimble, however, defended substitution of "challenge" in later subdivisions, pointing out that the rule caption is "Constitutional Challenge," and asserting that the cases refer to constitutional challenges. This is a convenient shorthand. And subdivision (b) begins by requiring certification of a constitutional challenge under § 2403 — that should show that "challenge" has the same meaning as "drawn in question." In the end, "drawing into question" was accepted in subdivision (a), while "constitutional challenge" was retained in (b). In what will become subdivision (c) — published as (d) — the reference to the court's failure to certify the "challenge" will be changed to avoid the issue: "the court's failure to certify ~~the challenge~~ does not forfeit * * *."

A third style question goes to the Style Subcommittee recommendation that the intervention provision published as subdivision (c) should be transferred to become a second sentence of

subdivision (b). It was argued that continued exposition as a separate subdivision might better call attention to the question of intervention time, but the transfer was accepted.

Turning to the merits of the proposal, a challenge to the dual notice requirement, rejected at the time of the decision to recommend publication, was renewed. Since 1937, the statute has required that the court certify the fact that the constitutionality of a statute has been drawn in question. If certification does not occur as often as it should, we can educate judges to do better; some judges are not even aware of § 2403. It is a mistake to add a party-notification requirement not in the statute. The Michigan State Bar Committee comment opposes the party-notice requirement, and they have it right. The public comment process, moreover, is inherently limited. There are only a few comments; the general approval of the proposal should not carry the day. The party-notice requirement will affect pro se litigants, and pro se litigants seldom offer comments on proposed rule amendments. This is not the best use of the rulemaking process. Court certification should suffice.

As a separate matter, it also was protested that although subdivision (c) states that failure to file and serve the required notice does not forfeit a constitutional right otherwise timely asserted, the Committee Note does not comment on this provision. What "right" is it that is not forfeit? That this language is drawn straight from present Rule 24(c) does not justify the failure to comment now.

The response on the party-notice requirement was that the Attorney General experiences "a shockingly low rate of notice." The courts as well as the government are helped by early government intervention. Intervention in some cases has been possible only on appeal. That is far too late. Rule 24(c) now says that a party should call the court's attention to the duty to certify. Framing that as notice, and requiring that the notice also be served on the Attorney General by mail, adds very little to the burden now imposed by Rule 24(c). Retaining these provisions in the rules, moreover, is important. Practitioners are more likely to check the rules books for such issues than to scour the statute books.

It was suggested that lawyers are "overburdened." The judge is in a very good position to decide whether notice is required. But it was responded that during the early stages of an action, the practitioners understand the case better than the judge does. And the value of early notice makes it important that the party have a duty to give notice.

The next question was whether there have been any cases in which a statute has been held invalid without the Department of Justice getting notice? This is the first rule that requires a party to give notice to a nonparty. A lawyer may think it not in his client's interest to give notice. The potential for confusion and burden is great. It is better to educate the judges.

The Department of Justice has no organized records to show how often a statute has been held invalid before the Attorney General got notice of the question. It has looked at the 1996 Telecommunications Act, which attracted many constitutional challenges. In an overwhelming majority of the cases, the Attorney General did not get notice of the challenge. At least one district court held the statute unconstitutional before the Attorney General got notice The only opportunity to intervene and argue was on appeal in the Fifth Circuit And there are more examples of failure to certify before the district court decides; in most of these cases the district court upholds the statute, but the Attorney General has lost the opportunity to help build the trial record.

Another example was given of a case in which a defendant asserted First Amendment defenses to sanctions sought under provisions of the wire tap law. The district court held the statute valid without giving notice to the Attorney General. Notice was given only after appeal was taken to the Third Circuit. Eventually the Supreme Court upheld the defendant's position

It was observed that Appellate Rule 44 does not require a party to give notice to the Attorney General. It says that the party must give notice to the circuit clerk; it is the clerk who certifies the fact of the question to the Attorney General. Why should the Civil Rule be different?

Another question was what happens if you do not give notice. Is the rule only advisory? Will the court devise a sanction as a matter of discretion when a party fails to give or serve the required notice? And this will be another obstacle for attorneys who accept pro bono appointments; they help the court by accepting appointment, and should not be subjected to unnecessary burdens. It was responded that the rule is not simply advisory. It is on the same footing as many other rules that do not provide specific sanctions. The express provision that bars forfeiture of a constitutional right otherwise timely asserted is important. Explicit recognition of other sanctions is not.

A motion was made to adopt a new Rule 5.1 to receive the § 2403 provisions of present Rule 24(c), but to delete the requirement that the party serve the notice on the Attorney General. The party need only give notice to the court. Paragraph (a)(2) of the published proposal would be deleted.

Discussion of the motion began by asking whether the recommendation to the Standing Committee would be to advance the revised Rule 5.1 for adoption, or instead would be to republish the rule. Republication might be appropriate because observers who approved the provisions of Rule 5.1(a)(2) may have refrained from the seemingly unnecessary gesture of telling the Committee that the published rule got it right. In addition, local district rules that require counsel to notify the Attorney General have been caught up in the Local Rules Project. These local rules are inconsistent with present Rule 24(c). But in informing those districts of the inconsistency, it has already been pointed out that the local rules would become consistent with the national rules if Rule 5.1 should be adopted as published. The Bankruptcy Rules Committee, moreover, has an interest — the 60-day intervention period makes it impossible to adopt Rule 5.1 for contested matters, but it would be adopted for adversary proceedings.

The motion to delete 5.1(a)(2) as published, retaining only paragraph (1), was approved, 10 yes and 3 no. A motion to recommend republication was approved. The proposed conforming amendment of Rule 24(c) will carry forward in tandem.

As a result of these motions, the version of Rule 5.1 proposed for republication would read:

Rule 5.1 Constitutional Challenge to a Statute — Notice and Certification

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal statute or a state statute must promptly file a Notice of Constitutional Question stating the question and identifying the paper that raises it.

(b) Certification by the Court; Intervention. The court must, under 28 U.S.C. § 2403, certify to the Attorney General of the United States or of a state that there is a constitutional challenge to a statute. The court must set a time no less than 60 days after the certification for the Attorney General to intervene.

(c) No Forfeiture. A party's failure to file the required notice, or the court's failure to certify, does not forfeit a constitutional right that is otherwise timely asserted.

Following discussion of other matters, a motion was made to reconsider the decision to delete the requirement that a party serve the notice of constitutional question on the Attorney General. The service provision "seems well-intended." In voting to delete this requirement, the movant was concerned that "drawn in question" is not sufficiently pointed. Others who voted to delete were concerned that there is no explicit sanction. But present Rule 24(c) says that a party should call the

court's attention to its § 2403 duty and has no express sanction. On balance, Rule 5.1 seems useful, including the requirement that the party notify the Attorney General.

The motion to reconsider was supported by another member who had voted with the majority. The government's concerns about timely notice deserve to be treated with respect. The duty to serve the notice on the Attorney General by registered or certified mail is slight, given that 5.1(a) requires that notice be filed with the court.

It was responded that it is enough to have the party notify the court. The court can then certify as the statute requires. But it was rejoined that service by the party comes earlier. That is better. Everyone gains when the government comes in earlier rather than later. And it was further rejoined that giving notice to the court does not ensure that the judge will see the notice promptly. There may be an extended delay before any procedural step is taken that brings the notice to the judge's attention. In addition, the situation of the pro se party is not much aggravated by the service requirement — the notice requirement continues to be imposed on all parties, pro se and represented parties alike.

The motion to reconsider was opposed on the ground that once an issue has been argued through, repose should be honored. It was not a close vote. Rule 5.1 should be republished without party service and revisited in light of the public comments on that form. This argument was met with the counter that the Committee is obliged to reach the right decision while it continues to sit in a single meeting.

Reconsideration was further opposed on the ground that "we got it right." Practical reasons make it right. It is good to separate these provisions into a new rule and to locate them at a place in the rules where they are more likely to be seen. A party who has a substantial constitutional argument will want the government to come in early, to avoid the delays and burdens that may result from late intervention. When there is a frivolous challenge, on the other hand, there is no need for notice or certification. The court can uphold the statute and move on. Similar comments observed that the district court can function as gatekeeper, refusing to certify an insubstantial question, and avoiding the burden on the Attorney General of receiving notice of questions that will be rejected even before the Attorney General might respond. There will be many cases with "non-serious questions."

The concern about inevitably failing constitutional questions was addressed by observing that the Committee Note says that the court can reject the challenge during the period set for the Attorney General to intervene. It also says that the court may grant an interlocutory injunction during this period. Early notice will not add to delay, and often will expedite proceedings. If it would make the notice and service burden seem less onerous to refer to a constitutional challenge rather than the constitutional question, that change might be made. This observation was repeated later: reference to a "challenge" rather than a "question" would "produce more wheat, less chaff."

The question of sanctions returned. What is the sanction for failure to honor Rule 5.1 requirements? The response was that the situation would be the same as it is today with the Rule 24(c) statement that a party should notify the court. But this response was met with the suggestion that a heightened duty — the party must file a notice, and perhaps must serve the Attorney General — may invite heightened sanctions. A different perspective suggested that the court is able to decide the constitutional question without separate notice when the question is raised for decision on the pleadings, by motion, or at trial. But creation of a new duty to notify the Attorney General "creates a greater injury." The Attorney General, moreover, will take seriously a certification from a court

The earlier observation about certification was repeated. In a majority of cases, the Department does not get the required certification. The absence of certification is a real injury even

when the challenge is rejected. The Department comes into the action late, perhaps only on appeal, and is unable to shape the trial record. But, it was asked, why then should the Note say that the court can reject the challenge before the Attorney General intervenes? Rejection will deprive the Department of the opportunity to shape the record, just as much as would invalidation before intervention. The Department does not want a 60-day freeze. Its interests are engaged only in cases that involve substantial questions. But how can a Note trump a rule provision that requires a 60-day period to intervene? Should the rule, if reconsidered, be amended to state specifically that a statute may be upheld before intervention? And perhaps also to say that interim relief can be granted before intervention?

The motion to reconsider was approved, 7 yes and 6 no.

Further discussion began by suggesting that "challenging" be substituted for "drawing into question" in 5.1(a): "A party that files a pleading, written motion, or other paper ~~drawing into question~~ challenging the constitutionality of a federal statute or a state statute * * *." It was observed that § 2403 requires the court to certify the fact that constitutionality has been drawn into question; using different words in Rule 5.1 cannot reduce the certification obligation, and the purpose of Rule 5.1 is to support and advance certification. It might do to say "questioning the constitutionality," but it is difficult to find any advantage in that formula over the statutory formula.

The question was again characterized as an effort to separate the few serious cases where timely notice is important from the many where it is not

A new observation was made. Some states have statutes that require a party to give notice to the state attorney general. Texas and Pennsylvania are examples. It might be useful to find out how well these statutes work in practice.

Then it was asked what happens if the party serves the Attorney General, who does not respond. Then the court certifies the fact of the challenge: can the Department intervene then?

And it was suggested that the party service requirement should be deleted. The court will treat this as a 60-day freeze. The Note cannot properly say that the court can dismiss during this period.

The Committee was reminded that some districts have local rules that require the party to notify the Attorney General. If Rule 5.1 does not, these local rules will be invalid.

Yet another member renewed the observation that the burden of service by mail is slight, and that early notice to the Attorney General will move the case along.

A motion was made to table the Rule 5.1 and parallel Rule 24(c) proposals. Time is not available for adequate further discussion at this meeting The Standing Committee will be informed that these questions are being held for further study.

Rule 6(e)

Rule 6(e) provides three additional days to respond when service is made by mail, leaving a copy with the clerk's office, electronic means, or other means agreed to in writing. The means of counting these additional days has been uncertain A proposal to amend Rule 6(e) was published to establish that the 3 days are added after the original period. Public comments, however, revealed continuing ambiguity. The Appellate Rules Committee has worked on the same question as framed by the Appellate Rules, and has urged that Civil Rule 6(e) should be adopted in a form that makes it clear that the extension should be counted by rules that give the maximum additional time. This resolution, so long as it is made clear, will conform to lawyers' instincts to seek the longest time

possible. And it will do no harm; the times involved are seldom critical for any purpose other than setting a clear deadline.

Two specific questions frame the inquiry. Suppose the original period ends on a Saturday. Should Sunday and any intervening legal holiday be counted against the additional 3 days, even though the original period would be extended under Rule 6(a) to the next day after Saturday that is not a Sunday or legal holiday? The Appellate Rules Committee suggests that the 3 days should not start until the original period would end without considering the 3 additional days. Thus if the last day is a Saturday and the following Monday is a legal holiday, the original period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the final day to act.

The second question is illustrated by a period that ends on Friday. Should the following Saturday, Sunday, and perhaps a legal holiday Monday be counted against the 3 additional days? Again, the Appellate Rules Committee recommends that these days should be excluded for reasons similar to the reasons that exclude them in counting periods shorter than 11 days.

Discussion of these questions began with support for extending time as liberally as can be done. If the last day is a Friday before Memorial Day weekend, three days are not really given if Saturday, Sunday, and Memorial Day Monday are counted, requiring filing on Tuesday.

It was suggested that the rule might be made clear by distinguishing business days from calendar days, but it was responded that the Civil Rules have not used these terms anywhere. The Appellate Rules have adopted the calendar day term, but it would be risky to import it into the Civil Rules without a thorough review of all time provisions

It was agreed that the Civil and Appellate Rules counting procedures should be the same.

It was agreed that the purpose to achieve the maximum extension along with clear expression can be achieved by recommending to the Standing Committee adoption of this modified version of Rule 6(e):

> **(e) Additional Time After Certain Kinds of Service.** 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 — excluding intermediate Saturdays, Sundays, or legal holidays — are added after the prescribed period would otherwise expire under [subdivision] (a).

The Committee Note will be revised, drawing on examples suggested by a draft Appellate Rules Note. Thought will be given to adding a statement that the Rule 6(a) problem of days when the clerk's office is inaccessible is adequately covered by Rule 6(a). Inaccessibility of the clerk's office does not bear on the ability to continue work on the response. Only if the office is inaccessible on the day that ends the extended period should inaccessibility cause a further extension.

[After the meeting concluded the draft set out above was circulated to the reporters for the Appellate Rules Committee and the Bankruptcy Rules Committee. The Reporter for the Appellate Rules Committee responded that there had been a failure of communication. The Appellate Rules Committee preferred the counting method contemplated by Rule 6(e) as published: Saturdays, Sundays, and legal holidays count in applying the three days added at the end of the original period. More than three "calendar days" are allowed only if the final day of the three-day extension is a Saturday, Sunday, or legal holiday. If that happens, the extension runs to the next day that is not a Saturday, Sunday, or legal holiday. The Bankruptcy Committee also prefers that approach because it reduces the total time allowed, a matter of some importance in bankruptcy administration. Rule 6(e) was revised by deleting "— excluding intermediate Saturdays, Sundays, or legal holidays — ."

The revised version was submitted to vote of the Advisory Committee by electronic mail. The revision was approved unanimously and was presented to the Standing Committee.]

Rule 27(a)(2)

The proposal to amend Rule 27(a)(2) is designed to correct an outdated reference to service provisions of former Rule 4 that have no precise analog in present Rule 4. The few public comments supported the proposal. Three style changes were recommended and adopted. As styled, the Committee voted to recommend for adoption amended Rule 27(a)(2) as follows:

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

It was decided that the Committee Note need not be amended to offer advice on the problems that might arise if a single attorney is appointed to represent unserved persons who may have conflicting interests. The amended rule does not change the present rule in this respect.

Rule 45(a)(2)

The proposal to amend Rule 45(a)(2) was designed to ensure that a nonparty deponent have notice of the method designated for recording the testimony. The Committee voted to recommend the amended rule for adoption, with one style change to conform to the style adopted in the Style Project after Rule 45(a)(2) was published for comment:

> **(2)** A subpoena must issue as follows:
>
> > **(a)** for attendance at a trial or hearing, ~~in the name of~~ from the court for the district where the trial or hearing is to be held;
> >
> > **(b)** for attendance at a deposition ~~in the name of~~ from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and
> >
> > **(c)** for production and inspection, if separate from a subpoena commanding a person's attendance, ~~in the name of~~ from the court for the district where the production or inspection is to be made.

Supplemental Rules B, C

The proposals to amend Supplemental Rules B and C were recommended for adoption as published.

Discovery of Computer-Based Information

Judge Rosenthal introduced the report of the Discovery Subcommittee proposing rules to regulate discovery of computer-based information. She began by renewing the Committee's thanks to Professor Dan Capra and the Fordham Law School for hosting the hugely successful February conference on discovering computer-based information.

Discussions have continued "around the country" since the February conference. The Discovery Subcommittee worked hard and continuously to refine the proposals that provided the framework for the February conference. The focus of discussion has advanced from the initial phase in which the question was whether the possible differences between computer-based information and other information warrant adoption of new rules. Now it is recognized that new rules will be helpful. The question has become whether the rules should simply express the better practices that are emerging, or whether an attempt should be made to guide future developments.

The most immediate question has come to ask whether the time has come to publish proposed rules for comment. Good reasons appear to go forward now. There is a growing demand for rules, reflected in the emergence of local district rules addressed to discovery of computer-based information. A few courts have local rules in place, and several more courts are considering rules. This activity shows that judges and the bar want guidance. These initiatives also present the continuing prospect that adoption of differing local rules by many courts will freeze disuniform practices in place, impeding development of national uniformity. The publication process also is important because public comment is critical. Litigants and lawyers live with these questions in ways that outstrip their ability to educate judges. It may be important to seek comment on thoughtful proposals even though it is not yet clear that they should be adopted as proposed.

Myles Lynk, chair of the Discovery Subcommittee, provided a further introduction. The Subcommittee has worked deliberately over a period of years. It has heard from all segments of the bar and bench. Many drafts have been considered, revised, and at times rejected entirely. Alternative proposals are presented for discussion; one of the questions to be resolved is whether alternative proposals should be published with respect to some of the areas that seem to deserve adoption of some rule.

Professor Marcus introduced the specific proposals.

Rule 26(f) Conference Discussion

Perhaps the least controversial proposal, long on the table, has been to amend Rule 26(f) to address discovery of computer-based information. The first step would amend Rule 26(f)(2) to add evidence preservation to the topics to be discussed. Various formulations have been considered, looking to "preservation of evidence," or "any issues relating to preserving discoverable information."

A second step would amend Rule 26(f)(3) by adding a new subparagraph (C) to include computer-based discovery in the subjects of the discovery plan. Subparagraph (C) in its current draft form describes "any issues relating to disclosure or discovery of electronically stored information, including the form of production." (Rule 34(a) proposals would include a definition of "electronically stored information" as a term to be used throughout the discovery rules.) Parallel changes would be made in Form 35 and in Rule 16(b), including in the Report of the Planning Meeting a description of the proposals for handling discovery of electronically stored information and listing provisions for disclosure or discovery of electronically stored information as a permitted subject for a scheduling order. This version of 26(f)(3) is "softer" than earlier proposals. By

describing "any issues," it limits the need to discuss to cases in which the parties anticipate discovery of computer-based information. There would be no need to discuss such discovery if it is not expected. But the form of production should be discussed if such discovery is anticipated. Rule 34 proposals to be discussed later highlight the importance of resolving the form of production as early as possible.

These initial proposals have been noncontroversial.

Another addition to Rule 26(f)(3) would be a new subparagraph (D) addressing privilege waiver. The form in the agenda materials calls for a statement of party views "whether the court should enter an order that facilitates discovery by protecting the right to assert privilege after [inadvertent] production of privileged information." It is likely that this version should be amended at least to include an explicit reference to party agreement, making it clear that the court order should enter only if the parties agree The reference to "inadvertent" production is uncertain. The topic is deliberately limited to "discovery," excluding disclosure — since disclosure addresses only witnesses, documents, or like information that a party may use to support its position, the problem of inadvertent privilege waiver should not arise.

Discussion of these proposals began with the Subcommittee recommendation that 26(f)(3)(D) should carry forward the reference to "inadvertent" production. The concern continually expressed has addressed the production of privileged documents without realizing that they are privileged. Belated assertions of privilege after deliberate production of documents known to be privileged have not seemed to merit protection by new rule provisions.

The "inadvertent" production question includes the familiar topic of "quick peek" agreements and leads to the more general question whether party agreement should be required. These agreements call for the parties to deliberately allow access to information that may include privileged materials, so that the party who seeks discovery can determine just what information it actually wants to have produced in discovery. Designation of the desired information then leads to privilege screening and logging only with respect to the materials that are formally produced in response to the discovery requests. It is important that the rule require party agreement to these arrangements. A court cannot be authorized to order production of information without the opportunity for thorough privilege screening if a party objects. It may be that party agreement should not be required for other forms of protective orders, such as the "clawback" provisions that allow belated privilege claims after a party becomes aware that privileged materials have been produced. On the other hand, it was observed that parties will resist "clawback" provisions if they are not comfortable enough with the arrangement to agree to it in the particular case. The producing party is the one who is worried about an order to produce on terms that it has not agreed to; the receiving party is worried about surrendering once-produced materials under "clawback" terms that it has not agreed to.

The "quick peek" agreement was described as not inconsistent with a rule protecting against inadvertent production. A party providing materials for a quick peek will remove, and log, all materials that are readily identified as privileged. The problems arise with respect to materials that are privileged for reasons that do not readily appear on quick examination.

It was agreed that the (f)(3)(D) proposal should be revised to include "agreement of the parties" as an element. It was noted that cases dealing with these agreements seem to arise when parties to other litigation who did not join the protective agreement assert waiver.

It was suggested that the rule could be made broader if it did not refer to "inadvertent" production, but instead referred in general terms to party agreements enforced by court order. That would leave the parties free to devise and win court approval of innovative arrangements.

But it was asked whether a broad rule would encourage knowing, "advertent" production of privileged materials. The Subcommittee thought the rule should deal with inadvertent production.

More generally, it was suggested that the purpose of this proposal, and many like proposals, is to facilitate discovery when a producing party knows the materials may include matters covered by privilege but cannot easily identify them. Allowing preservation of the privilege by one means or another can reduce costs and expedite discovery by supporting less agonizingly thorough privilege screening. At the same time, it may seem inappropriate sermonizing to include in the rule text the words suggesting that the purpose of the agreement is to facilitate discovery.

The "inadvertence" question reappeared with the observation that the proposals are not aimed at deliberate "your eyes only" delivery of information. The difficulty of expression arises from the fact that the production is not inadvertent. The producing party knows it is producing the information. What it does not know is that some part of it is privileged. "Unintentional" does not seem to resolve the ambiguity. "Inadvertent privilege waiver" might help, but it also might seem to invoke the decisions that do permit recall of privileged information but only on condition that the producing party worked hard to avoid the production of material not known to be privileged. A simple reference to agreements that "protect against privilege waiver," on the other hand, might go too far in allowing unnecessarily expansive agreements.

It was agreed that these problems should be addressed by revising the draft to read:

> whether upon agreement of the parties the court should enter an order protecting the right to assert privilege after production of privileged information;

It was asked whether this language would include production knowing that the information is privileged. One answer was that it does — the parties may deliberately choose to agree on a protected exchange of privileged information to further settlement negotiations. Another question was whether this language would provide protection against arguments for waiver made by persons not parties to the agreement. The answer was that we do not know. Concern was expressed that a rule this broad would encourage slip-shod privilege review. But it was responded that the purpose is to enable the parties to avoid the cost and delay of thorough screening. "We want to go as far as we can."

The agreement requirement was further supported by observing that the parties will not agree to an agreement that allows clawback the day before trial. The combined requirement of party agreement and court approval will ensure that the arrangements will be sensible in the circumstances of the particular case. It was agreed that a court indeed has authority to approve such agreements.

It was observed that as proposed, the language does not directly forbid entry of an order without party consent. A producing party might request entry of an order to speed up production, despite resistance by the requesting party. The proposal does not take away any court authority that now exists. The reference to "agreement" is confined to the context of party discussion and proposals. The aim is to encourage party cooperation that keeps the case moving. In this context, "consent is the idea." It is good to have these problems addressed early, and the rule focuses party attention on these problems. They may not agree. Without agreement, a party may move for an order despite the lack of consent.

It was further observed that the draft approaches the questions of court authority and party agreement indirectly. In itself, it only provides that a discovery plan must state the parties' views and proposals on these questions. Earlier drafts directly authorized "quick peek" orders on agreement of the parties and with court approval. The (f)(3)(D) proposal does not in itself address the law of waiver.

The question returned: should a court be able to compel protection without party agreement on terms that preclude effective privilege screening? The fear is that a court might compel "quick peek" revelations over protest and without time to screen out even obviously privileged material: "produce in two weeks." The fact that the order says that privilege will be protected on later review does not adequately protect materials the party would never turn over under a party-planned "quick peek" agreement. And it must be remembered that we do not know whether these orders will protect against waiver arguments by nonparties; that is why we need party agreement.

A motion to delete from proposed Rule 26(f)(3)(D) any reference to party agreement failed, 5 yes and 8 no.

It was agreed that the Committee Note should say that this provision is modest. It does not address the court's authority to make orders absent party agreement. It simply focuses attention on mechanisms that may be adopted by agreement to speed discovery and reduce screening costs.

An observer suggested that "production" is not as useful a word for the rule as "disclosure." "Disclosure" would be used not in the sense of Rule 26(a) disclosure, but in the open sense of showing information. A quick peek would be described as disclosure, not formal discovery production.

The Committee voted to approve the proposal to add new language to Rule 26(f)(2) along the lines proposed in the agenda materials, but referring to "preservation of discoverable information."

The Committee further voted to approve the proposal to add a new Rule 26(f)(3)(C) as shown in the agenda materials

The Committee also approved the revised version of Rule 26(f)(3)(D) set out above, with the corresponding changes in Form Rule 35 and Rule 16(b).

One comment was addressed to the draft Committee Note. Line 104 on page 9 of the agenda materials refers to party discussion "whether the information is readily accessible." Accessibility is a recurring subject of debate in discussions of rules about computer-based discovery. But it may be a good word in this neutral description of topics for discussion.

Rule 34(a): "Electronically Stored Information" as Document

The agenda materials, p. 16, lines 316-320, include proposed amendments of Rule 34(a)(1)(A) that include electronically stored information in the list of materials discoverable under Rule 34's "document" production provisions.

> **(1)** any designated electronically stored information or any designated documents, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium, from which information can be obtained either directly or after the responding party translates it into a reasonably usable form, * * *

Rule 34 seems to be the place for this recognition of computer-based information. The "electronically stored information" term is used throughout this package of proposed amendments, with Committee Note reminders that it has the same meaning when discovery is sought through depositions (most obviously Rule 30(b)(6) depositions), interrogatories, and requests to admit.

"Information" is a better word than "data" when referring to electronically stored things. The object of discovery is to acquire information.

"Images" are added to the list of discoverable items to ensure that all forms of information are reached. "[I]n any medium" is added in a similar effort to achieve a comprehensive catalog.

In addition, Rule 34 is amended throughout to provide for testing and sampling of documents and other information. The Style Project considered adding these words to reflect the need to test — or perhaps to sample — "document" information. Testing the authenticity of a document is a clear illustration. The Style Subcommittees concluded that this change was beyond the reach of the Style Project, but that it seemed desirable.

As (a)(1)(A) is drafted, it is not clear whether a request for "documents" would include electronically stored information. The draft does not define electronically stored information as a document, and indeed seems to separate it from documents.

The first question was whether embedded and metadata are included in "electronically stored information." This term does not exclude such "hidden" data — information stored in the computer, but not "visible on the screen" in routine use of the application software. To the contrary, embedded and metadata are included. The Subcommittee thought about other terms such as "recorded" or "retrievable," but settled on electronically stored information. If it is stored and can be retrieved, it is discoverable. The decision to make such information discoverable does not mean that it always must be produced. Discovery is limited by all present limits, and also by any new limits that may be adopted to focus specifically on electronically stored information.

It was suggested that "in any medium" is a "bad intensifier." But these words were defended as an important part of the project. Technology changes rapidly and unpredictably. We cannot know what will emerge. The point is to ensure that discovery is not defeated by unforeseen gaps in Rule 34 language It was agreed that "in any medium" should remain in the rule.

Style changes were discussed. One would invert the order, so (a)(1)(A) would refer to "any designated documents or any electronically stored information." Or "designated" might even be moved into the preface: "to produce * * * the following designated items * * *." The important thing is to be clear that whatever form the information takes, the duty to produce is shaped by the requesting party's duty to designate.

Another style suggestion would restore em dashes to set off the examples: "any designated electronically stored information or any designated documents; — including * * * — from which information can be obtained * * *."

A broader style suggestion was that "document" should be defined to include electronically stored information. It must be clear that a request for "documents" embraces electronically stored information even when the request does not separately refer to electronically stored information. Many reported decisions now say that electronically stored information is a document; why should we not embrace those decisions? Although many judges have become familiar with computer-based discovery, many others still need to be educated in these topics. These observations were met with the concern that the rule should not stretch the definition of document "beyond any natural meaning." A data base, for example, is not much like a "document" in any conventional sense. It is simply a store of data that change continually. What emerges from it depends on what question is put to it. There are no formed "documents" in it. The conclusion was that "all we need is to be clear." The draft is clear The Committee Note can say that the response to a request for "documents" must include electronically stored information.

Rule 34(b): Form of Production

The form of producing electronically stored information seems to be a frequent source of contention and difficulty. The proposed amendments of Rule 34(b) address these questions in part.

The requesting party "may" request a form for production, and the responding party must produce or object. No standard is provided for resolving the objection. If the requesting party does not specify a form of production, the responding party may choose between defined options.

The provision for request and objection, with slight modifications from the form in the agenda materials, would read:

(b) Procedure.

(1) ***Form of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form in which electronically stored information is to be produced.

(2) ***Responses and Objections.*** * * *

(B) *Responding to Each Item* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including an objection to the requested form for producing electronically stored information, stating the reasons.

The first question was whether the requesting party should be required to state a desired form of production. That alternative was rejected by the Subcommittee because the requesting party may not know what is possible, and for that matter may be indifferent between the apparent alternatives. The Rule 26(f) proposals direct the parties to discuss the form of production; agreement often will follow.

The provision for situations in which the requesting party does not specify a form of production would be a new Rule 34(b)(2)(D):

(D) *Producing the documents or electronically stored information.* Unless the parties otherwise agree, or the court otherwise orders,

(i) A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request.

(ii) If a request for electronically stored information does not specify the form of production under Rule 34(b)(1)(B), a party must produce such information in a form in which the producing party ordinarily maintains it, or in an electronically searchable form. A party producing electronically stored information need only produce it in one form.

Discussion of these provisions began by noting that the reference to "electronically searchable form" was devised by the Subcommittee and may not be the most useful phrase. TIFF and PDF formats are not, or may not be, electronically searchable. It was pointed out that "electronically searchable form" suggests organization in a form searchable by word, concepts, or the like. TIFF

images often are accompanied by a data base that is searchable and that leads to the documents. An alternative phrase might be something like "searchable using electronic or automated methods." Or it might be "information recoverable by electronic search methods." Or "electronically searchable form" would be neat. The idea is there, but the expression is tentative. It may prove useful to publish with alternative phrases. This suggestion was approved. The Committee Note can observe that the concept requires that the form be "reasonably" searchable. An observer suggested that the Note also should say that the searchable form need not include embedded or metadata.

The reference to the form in which the information is normally maintained seems to emphasize "native format" production, a sensitive subject. Suggestions have been made for a more flexible rule that would allow the responding party to choose any form it wants. One rejected alternative would have permitted the responding party to produce the information "indexed" to correspond to the categories of the request. This alternative was rejected because it might impose great burdens. Library scientists view "indexing" as word-searchable, perhaps not a problem, but electronic discovery professionals think of indexing as a list of documents already there. The proposal advanced here was a balance among options that should be available at low cost.

It was asked whether the rule should offer a third option — production of the information printed out. That practice is often followed now. A response was that printed production works in simple cases, but "is not fair in the complex cases." There is no reason to impose the costs of non-electronic searching on the requesting party. "A paper dump can be a huge expense for no reason." The rejoinder was that the rule allows the discovering party to request an electronic form. The limit of this alternative, however, is that the requesting party may not know what forms are available to the producing party. On the other hand, the requesting party can ask for paper production, or the parties can agree on it.

The lack of any direction for resolving an objection to the form of production was pointed out. What if the requesting party demands "native format" and the producing party objects? The answer is that the court will decide.

Rule 37(f): "Safe Harbor"

Parties that store vast amounts of information in electronic systems have begged for some form of safe harbor to protect against spoliation charges. Electronically stored information is routinely lost. Loss arises because systems designed for business purposes deliberately delete information on planned terms. Loss also arises as information that has been "deleted" is overwritten in the random and unpredictable operation of the system. Once the prospect of litigation appears, moreover, it is difficult to design a litigation hold that provides assured retention of discoverable information on terms that do not freeze all use of the system.

The agenda materials include two alternative forms of a new Rule 37(f) that would provide some limited protection by way of limiting the use of discovery sanctions for failure to produce electronically stored information that was destroyed despite reasonable steps to preserve it. It may be desirable to publish alternative proposals if it is found appropriate to publish any proposal on this topic.

The problem has been addressed through discovery sanctions because it has seemed difficult to craft a Civil Rule that imposes affirmative duties to preserve information

One aspect of the drafting difficulty is that often the requested information is "not completely gone." Lengthy and expensive computer forensic efforts may be able to retrieve it — the question often is cost, not total inability to retrieve

Whatever is done, it should be clear that any discovery rule does not address the imposition of sanctions for violating preservation duties imposed by statute or regulation.

The first alternative Rule 37(f) draft focuses on reasonable steps to preserve electronically stored information. Examples of reasonable behavior are given. The draft says, among other things, that a person acts reasonably if it preserves information maintained in the usual course of its regularly conducted activities if the information appears reasonably likely to be discoverable in reasonably foreseeable litigation, and by routinely and in good faith operating its electronic information systems, unless it willfully or recklessly deletes or destroys the information. It also provides that a person who acts reasonably remains subject to sanctions if it violates a court order that requires preservation, and might provide that discovery sanctions are appropriate for violating a statute or regulation that requires preservation.

The second alternative is more streamlined, focusing directly on reasonable steps to preserve information that the person knew or should have known was reasonably likely to be discoverable in reasonably foreseeable litigation, on normal operation of the information system, and on absence of a court order — or perhaps a statute or regulation — requiring preservation. The focus is on the need to impose a "litigation hold," on ordinary operation of the system, and on court preservation orders. This alternative may not give as much protection to the producing party, in part because it does not seek to supplement the requirement of reasonable steps to preserve by looking for willful or reckless destruction.

One important drafting question arises from the extent of the sanction protection. Each alternative begins: "A court may not impose sanctions [under these rules] * * *." If "under these rules" is included, the way is left open to impose sanctions as a matter of inherent power and common-law authority. Spoliation instructions are the most obvious illustration — they commonly are explained in terms that do not draw from Rule 37. (Rule 37(c)(1), which does provide for spoliation instructions, does not reach the present problems.) If this limit remains, the safe harbor is not very comforting. On the other hand, at least the Private Securities Litigation Reform Act includes provisions directly aimed at preserving information for discovery, with "appropriate" sanctions for willful failure. See 15 U.S.C. § 78u-4(b)(3)(C). The Subcommittee does not wish to propose a rule that might supersede this statute or any other like it. Nor does it wish to propose a rule that would become a definition of what sanctions are "appropriate" within the statutory terms.

The concern that proposed Rule 37(f) intrudes on the area of spoliation rules was discussed further. The alternative drafts speak to preservation obligations before an action is even filed. Courts do impose sanctions for pre-filing destruction of evidence. But that does not of itself justify a rule that seems to create preservation duties before an action is filed. The Committee has been reminded repeatedly about the dangers of attempting to create an explicit preservation requirement. The reasons for addressing these problems, however, arise from the nature of electronic information storage systems. These systems routinely delete data. Business needs require such designs. The Subcommittee decided that we should not — perhaps cannot — attempt to create direct preservation rules. But there is a need for a safe harbor. It would be good to draft a rule, if it can be done, that offers protection to a party who behaves reasonably, recognizing that reasonable preservation obligations may arise at some point before an action is actually filed.

It was observed that if Rule 37(f) is limited to sanctions "under these rules," it may be a null set. The rules do not now provide sanctions directly for destroying discoverable information. There also is a question whether an Enabling Act rule can properly address conduct before an action is filed. Similar questions were raised during the work to develop Federal Rules of Attorney Conduct, and never fully resolved. Generally the Rules take hold with the commencement of an action and apply to events after that. The draft seems to address pre-complaint obligations. It may overlap with

obligations imposed by rules of professional responsibility. There is developing spoliation law that addresses pre-filing conduct. But proposed 37(f) addresses discovery, not evidence. And without addressing pre-filing conduct, it would not do very much. It does not impose any affirmative obligation. All it does is to make it clear that a party who undertakes reasonable preservation steps "is better off."

It was observed that Rule 37(b) sanctions are limited to circumstances in which a party has violated a court order to provide discovery. Rule 37(f) seems to go beyond that, addressing — and negating — sanctions when there is no court order. But Rule 37(b) addresses the sequence of discovery request, objection or noncompliance, order to provide discovery, and disobedience. Rule 37(f) would address failure to comply with a preservation order.

An observer suggested that the drafts go too far when they speak of "reasonably foreseeable litigation." The focus should be on the reasonable foreseeability of the action in which discovery is sought. Many enterprises engage in activity that foreseeably will give rise to litigation in broad general terms that do not focus on any specific action — a firm researching a new drug product, for example, can foresee that if the product should one day be marketed there will be later litigation about the product. Even short of that, "reasonably foreseeable" may be too open-ended.

Another observer asked what there was in the rule that would prevent an enterprise from designing an information program that automatically destroys everything every few days? The response was that businesses design information systems for their business needs, and business needs require preservation of much information for long periods. A similar question asked whether adoption of some version of Rule 37(f) would cause enterprises to change their retention practices.

The focus of the proposals is on the propositions that a party cannot produce what it does not have, but that the obligation to cooperate in discovery entails an obligation to preserve. Courts have imposed spoliation sanctions on parties who have lost electronic information. If information is destroyed before the events giving rise to litigation have occurred, on the other hand, spoliation is not likely to be found.

It was asked whether the proposals really add anything to the law. They seem simply to provide guidelines. People frequently express fear of spoliation sanctions, but the cases do not seem to impose sanctions where the proposals would defeat sanctions. On the other hand, the Second Circuit Residential Funding case says that spoliation sanctions may be imposed for negligent operation of the usual information system. Perhaps the problem is not so much imposition of sanctions for negligent spoliation — although the cases are coming up — as it is one of widespread paranoia in government and business that the only way to avoid spoliation sanctions is to "keep everything." The scope of the "litigation hold" is a real concern Several lawyers, particularly corporate staff counsel, want reassurance that it suffices to address a litigation hold to the sources that are likely to have discoverable information Rather than create a mirror image of all of the information available throughout the organization, worldwide and on all of countless different (and often incompatible) information systems, they believe they should be protected if the hold preserves information in the sources likely to relevant to the particular litigation.

It was noted that a safe harbor of any sort is likely to operate in fact as a preservation rule. "There is a strong gravitational pull." Is the rule intended to command an end to routine destruction? Or, in the version that speaks of preserving information routinely maintained, is it intended to say that once you destroy the information it is no longer maintained? Should we focus instead on information that you do not regularly maintain? Alternative 2 does not have this word trap. The focus should be on the duty to intervene reasonably in the operation of the system.

A third alternative draft was handed out at the meeting. This draft focused directly on the duty to preserve by prohibiting sanctions if the party took reasonable steps to preserve information that was destroyed in the normal operation of its electronic information system. The focus on the duty to preserve was supported. But it was suggested that there is an ambiguity in "information": do you have to preserve a back-up tape, for example, when you do not know whether it has discoverable information? Is this question answered by the limit to "reasonable" steps? A discovery request might be for the e-mail messages of an identified person. The responding party believed that they were preserved, not knowing that the person had deleted them, and recycle the back-up tape innocently. That could be reasonable behavior. Reasonable steps do not always preserve everything. Things slip through. That is the point of the safe harbor.

A preference was expressed for "alternative 2, in one form or another."

An observer suggested that the focus should be on reasonable steps to preserve, but that sanctions should be available only for willful or reckless destruction. In addition, it is too broad to speak of preserving information "reasonably likely to be discoverable in reasonably foreseeable litigation"; it should be: "when it knew or should have known that the information was reasonably likely to be discoverable in the action." It was responded that there may be situations in which information should be preserved because it is reasonably apparent that it will be discoverable. Negligent failure to preserve should not be within a safe harbor. On the other hand, sanctions may not be appropriate if trivial information is negligently lost. In further response, it was noted that "alternative 1" leaves a gap between reasonable preservation and willful or reckless destruction.

An illustration was suggested. A plaintiff claims employment discrimination. The plaintiff interacts at work with a small number of people. Once the claim is made, the employer can foresee litigation. It may be reasonable to preserve electronically stored information relevant to the people who interact with the plaintiff, without preserving all of the employer's electronically stored information. These are "reasonable steps." But what is reasonably likely to be discoverable? The full scope of Rule 26(b)(1)? The plaintiff is employed in the Chicago branch of a company with worldwide operations; focusing preservation on information in Chicago is different from focusing on information in the Shanghai branch, at least if the plaintiff has had no traffic with the Shanghai branch. As to the Chicago information, reasonable preservation may at times require that back-up tapes be preserved. And it was suggested that "house counsel can understand what is reasonably likely to be discoverable."

Discussion returned to the difficulty of focusing on when a party should have known that litigation would be brought. Perhaps this thought should be expressed by looking to a pending action or a specific action that is reasonably anticipated. But there is a complication — once information has been preserved for a foreseeable action, there may be a duty to search it to respond to discovery in a different action.

Turning to a broader view, it was said that "anything we do will disappoint a lot of people who want more guidance and more protection than we can give them. But this is a response to a discovery problem, and is within the proper province of the discovery rules. There is a lot of concern in the bar with 'gotcha,' with the disproportionate consequences of deleted information."

Support was expressed for alternative 2, but with the suggestion that there is a problem in referring to "the normal operation of the person's electronic information system." Many people do not have an electronic information "system." The response was that a "system" exists even for a person who has no document retention or destruction policy at all. The electronic system itself — the software programs that direct the hardware — routinely deletes information. "You do have a system — it is Windows, Linux, whatever." We need an expression that encompasses both the

elements of the programs that are designed to delete information according to the user's particular policies and also the elements designed into the programs by the programmers.

It could be urged that once the rule requires reasonable steps to preserve it is redundant to refer to loss through normal operation of the system. But it was responded that the emphasis on normal operation gives direction and focus. If you know how your system operates, that bears on what you need do for reasonable preservation. This provision should focus on the problem of automatic destruction that occurs without human intervention at the time of destruction.

Another question is whether the "no sanctions" rule should address a "failure to preserve" or a "failure to produce." Since the focus is on discovery sanctions, not creation of a specific preservation duty, the more natural focus is on failure to produce. (It was pointed out that it has been argued that a judge can impose sanctions for failure to produce something that did not exist at the time of the discovery request.)

A separate problem was raised in both Rule 37(f) alternatives. Should the rule include an exception so that it does not prohibit sanctions when a statute or regulation requires preservation of information that has been destroyed by automatic operation of an information system despite reasonable efforts to preserve the information? An exception of this sort may erode the value of the safe harbor. Failure to include the exception would not mean that the rule prohibits other authorities from imposing sanctions for violating the statute or regulation Only discovery sanctions would be barred by making the statutory or regulation violation irrelevant.

It was urged that there is a duty to preserve any information that a statute or regulation requires to be preserved. "The duty exists; we should be able to enforce it through discovery sanctions. This is just like failure to obey a preservation order "

An observer suggested that the violation of a statute can figure into the determination whether reasonable steps were taken. Referring only to "routine" operation of the system seems to go to the state of the art.

The mode of referring to information-preservation statutes and regulations also is a problem. An astonishing welter of statutes and regulations, state and federal, require preservation of enormous amounts of information for purposes that have nothing to do with discovery. At least one statute, however, specifically directs preservation of information for discovery purposes. The Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3)(C), directs preservation of relevant documents, data compilations, and tangible objects "as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure." The statute further states that an party aggrieved by a willful failure to comply "may apply to the court for an order awarding appropriate sanctions." Should we attempt to incorporate only the discovery-specific preservation statutes and regulations, or should all information-preservation statutes and regulations be referred to in the rule? Some of the draft language elevates all statutory duties to the same status as a specific discovery preservation order entered in the particular case.

Another question was raised by asking whether the rule should protect against loss of information by normal operation of the system, or instead should be limited to normal "good faith" operation. An observer suggested that "normal" is needed; the addition of "good faith" would be welcome. This issue returned later with the question whether "good faith" adds anything to the requirement that the destruction occur in routine operation of the system.

The Rule 37(f) discussion was brought to a point by asking whether a proposal should be published for comment. If yes, drafting decisions will remain to be made. The question was framed

by a question whether anything like this is needed. Is there something about computer-based discovery that forces us to act? If the proposal essentially reflects existing case law, is it needed? If it goes beyond existing case law, is it appropriate? The response was that the Subcommittee has worked hard on this proposal. The topic is sufficiently important to warrant publication, so that the public comments can be taken into account in deciding whether to adopt any such rule. Publication is appropriate without taking sides on the final determination whether to adopt any version of a "Rule 37(f)." In further response, it was noted that the current proposal pretty much tracks existing decisions, but there is no way to predict what future decisions will do. It also was pointed out that the problem of automatic destruction is not limited to the huge information systems of huge enterprises. It is a problem for the personal computer at home. "We want to say it's OK to put it on a CD and carry on with family use of the computer " The response in other circumstances might be quite different, including seizing the computer. The home computer is different from the box of letters or other papers at home — people do not understand how their computers routinely delete information. For that matter, surveys repeated over several years have shown that 60% of American businesses do not have routine document preservation procedures, and that staff counsel are not confident that their attempts to effect preservation will work. There is real benefit in reassuring parties that if they respond to litigation reasonably, they will be protected.

Two new alternative versions of Rule 37(f) were prepared overnight and were discussed on Friday morning. The general approach of both versions was the same. They focus on automatic operation of a "system," including a single computer as the "system," and on taking reasonable steps to preserve evidence. Neither alternative provides as much protection or direction as some people want. It would be possible to add still more explicit terms: "If a person takes such reasonable steps it may continue to operate its routine electronic information system." Many people at the Fordham conference suggested language similar to this. But it was asked whether this thought should be put in the rule. It seems a truism, and may prejudge specific situations.

It also was noted that each of the new alternatives looks to the "failure to produce," not "failure to preserve." At the same time, the first alternative also refers to a failure to preserve, and may be the better alternative for that reason.

The first question was whether either alternative really accomplishes anything. When each says that "a court may not impose sanctions if," it also says that if you act reasonably to preserve information and otherwise operate your information system in its routine manner, you are ok. The answer was that Rule 37(f) is a good place to tell people that they must have a litigation hold. This provides valuable guidance beyond anything that appears in the rules now. In addition, the reference to violating a court order "gives an alert to other parties, and supports a Committee Note that a party who wants a more specific preservation order may ask for it." The decision whether to enter a preservation order will be informed by considerations similar to those expressed in the rule, but also may be guided by other concerns.

The same concern was repeated: the rule should do more. In the proposed forms it only assures results that would occur anyway — sanctions are not imposed on people who act reasonably to preserve discoverable information. And the reply was the same — the drafts define as reasonable the routine operation of the information system For that matter, the drafts suggest that sanctions may be appropriate for failure to exercise reasonable care.

A renewed attack was launched on the language that implies that reasonable care does not defeat sanctions if the destruction of information violates a "statute or regulation." The contrast to violating "an order in this action" is marked. A specific preservation order gives clear guidance Violation of a statutory duty owed to someone not a party for purposes that have nothing to do with this litigation will lead to "gotcha" tactics. The structure emphasizes this. Safe-harbor protection

is denied if information was deleted in violation of a mining regulation in one state that requires an employer to retain all employment records for ten years, even though deletion occurred automatically after two years, before there was any reason to anticipate the present litigation or for that matter before the events that gave rise to the present litigation. Violation of the duty to the state that adopted the regulation should not control access to the safe harbor. The focus should be limited to a statute that requires preservation for purposes similar to the present action. An example would be an SEC regulation that requires preservation of information that is relevant in an action for securities fraud. Even that may be overbroad if it implies that the existence of the statute puts the world on notice that litigation is foreseeable.

So it was asked whether a party who violates an IRS regulation requiring that records be preserved should be outside the safe harbor even if the destroyed records are not those sought in discovery The answer was that only destruction of information discoverable in the action should lose the protection.

In like vein, it was suggested that the effect of a statutory violation on safe-harbor protection is similar to the question whether a statute is intended to create a private remedy. This question is particularly pointed when the statute is not aimed at preserving information for discovery in civil litigation.

A related question was whether reasonable behavior should be protected even if a statute or regulation is violated. Suppose discoverable information is destroyed in the routine operation of an information system after a party has taken reasonable steps to preserve it: should the safe harbor be available? One consequence may be an incentive to seek protective orders to provide increased protection against destruction.

It was protested that "you cannot give a safe harbor to a law breaker." The PSLRA requires preservation. A statute is as important as an order. But it may be appropriate to limit the reference to a statute or regulation that somehow is "relevant" to the particular litigation. One form would be to look to the statutory violation only if the lost information is relevant to the issues in the action. It should be remembered that denial of a safe harbor does not require that sanctions be imposed. The court still has discretion on the sanctions question, and may refuse to impose any sanction if the statutory violation does not seem important in the circumstances.

It was suggested that the reference to violation of an order in the action should be made more precise, referring to an order "to preserve information." And it was asked whether reasonable behavior may be a defense to violation of a preservation order. Suppose a preservation order is entered, the party takes reasonable steps to comply with the order, but the steps fail — the system continues routine destruction of order-protected information. The answer is that the routine destruction is not in the safe harbor. The reasonableness of the attempt to comply will figure in the decision whether to impose a sanction and the choice of sanction, but there is no safe-harbor protection

The question of willful behavior returned. If a party cannot produce destroyed information, and the destruction was not willful, do we want to leave the door open for sanctions even as a matter of discretion? Do we want to allow sanctions whenever the destruction was negligent, as a condition for carrying on routine operation of the information system? Or should we limit sanctions to willful or reckless destruction?

Another question renewed the earlier "good faith" discussion. It was suggested that a rule can address a litigation hold only by requiring that it be reasonable. The lack of reasonable care in fashioning a litigation hold is negligence, and good-harbor protection should not be afforded for a negligent attempt. It is very difficult — and probably impossible — to provide simultaneously that

a litigation hold affords safe-harbor protection only if it is framed with reasonable care, but also to provide protection if information was destroyed without willful or reckless behavior. An observer suggested that "good faith" should be addressed to the steps to preserve, as one aspect of reasonable behavior. The resolution may be that the standard for safe-harbor protection is reasonable behavior. If the lack of reasonable care — negligence — ousts safe-harbor protection, state of mind is relevant to the decision whether to impose a sanction and the choice among possible sanctions. A merely negligent failure to preserve information that likely was unimportant may escape any sanction. Willful destruction of important information may meet the most severe sanctions.

Another recurring question asked whether the Enabling Act supports a rule that addresses preservation before an action is filed. It was suggested that to some extent Rule 11 addresses pre-filing conduct, but noted that Rule 11 regulates conduct directly aimed at filing an action. Operation of an information system before filing ordinarily is not directed to unfiled litigation.

The discussion concluded by finding a consensus that some version of Rule 37(f) should be recommended for publication. The Subcommittee will frame specific language that the full Committee will review by mail in time for submission to the June Standing Committee meeting.

Privilege Waiver. Rule 26(b)(5)(B)

In addition to the discovery-conference provisions proposed as Rule 26(f)(3)(D), the agenda materials include the broad suggestion that a joint project on privilege waiver might be undertaken with the Evidence Rules Committee. Independently of any joint project, there is a proposed Rule 26(b)(5)(B) for recapture of inadvertently produced privileged information:

> **(B)** *Privileged materials produced* When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received information of its claim of privilege. After such notice, the requesting party must promptly return or destroy the specified information and any copies to the producing party, which must comply with Rule 26(b)(5)(A) with regard to the information and preserve the information pending a ruling by the court.

This proposal does not address the question whether production has waived a privilege. It merely provides a procedure to address the waiver question when a party turns over information that was not identified as privileged and later realizes that the information was privileged.

It was noted that the obligation to return or destroy is meaningless unless it implies an obligation not to use the information. Use is proper only after the requesting party obtains an order to produce, although it may be proper under the rule to rely on knowledge of the produced information in arguing that it is not privileged.

A related observation was that the rule could be read to say that the producing party does not lose a privilege until another party gets a ruling that the privilege was lost.

It was urged that the rule should go at least this far. Indeed, the rule should go farther unless the Evidence Rules Committee objects. Even if it does not go farther, the rule should say something about waiver — it should say that production is not a waiver. The Texas clawback rule has worked well for several years

It was noted that the proposed rule could operate in conjunction with a "quick peek" agreement and order. Because a quick peek is provided knowingly, the rule properly refers to production without intending to waive and the Committee Note should not refer to inadvertent production.

It was asked whether the rule should refer to "person" rather than "party," so as to protect a nonparty who produces material and also to provide recapture from a nonparty who receives privileged information from a party. This issue was taken under advisement. Rule 45 may provide adequate protection for a nonparty. And it may be difficult to justify a rule that reaches a nonparty who receives information from a party apart from requiring the party to use best efforts to recapture the information.

The proposal does not affect the burden on the requesting party to persuade the court that the information is not privileged or that the privilege has been waived. So if the applicable rule is that any production is a waiver, regardless of intent or the care taken to protect privileged information, there is a waiver. The rule only recognizes the burden on the requesting party.

The Committee approved a recommendation that a Rule 26(b)(5)(B) be published for comment, subject to further style improvements by the Subcommittee and — if feasible — review by the full Committee.

The Committee also recommended further work on privilege waiver in tandem with the Evidence Rules Committee.

The Distinctive Burdens of E-Discovery. Rule 34(a) or 26(b)(2)

Many voices have urged, with increasing vehemence, that the burdens imposed by discovery of computer-based information are so distinctive as to require separate protective rules. The agenda materials include alternative proposals allocated to Rule 34(a) or to Rule 26(b)(2). The common question is whether the need for court control should be identified in a way that resembles, but is distinct from, the "two-tier" scope of discovery established by Rule 26(b)(1). Should we require a court order for production of computer-based information that otherwise would fall within the scope of party-managed discovery in Rule 26(b)(1)?

The first two alternatives would add a new Rule 34(a)(3). One would provide for discovery of information reasonably accessible to the responding party, with additional discovery of information not reasonably accessible on court order for good cause. The second would provide for discovery of information routinely maintained in the usual course of regular activities, with additional discovery of information not routinely accessed or maintained on court order for good cause.

The argument for locating this provision in Rule 34 is that the problem lies with Rule 34 "document" production. The advantage of focusing on what is routinely maintained is that it may be more difficult to determine whether information is reasonably accessible. There is a question, however, whether the reference to information not routinely accessed includes embedded and metadata. But reasonable accessibility may be a more functional approach. Either way, the idea is to identify a line separating what is automatically discoverable from what is discoverable only on order after showing good cause.

Similar variations are provided for Rule 26(b)(2). The first two are framed as a new factor (iv) in the part framed by the Style version as 26(b)(2)(B). The second two frame the same alternatives as a new 26(b)(2)(C).

The first view expressed was that the two-tier approach should be framed as part of Rule 34, and as the version that looks to routinely maintained information. "We need some presumptions" because "there is so much available." We should require some level of good cause to get to information that is expensive to retrieve. But we should not link the question to the proportionality test of Rule 26(b)(2); that would shift the playing field too much. Nor is there any need to cross-

refer, as the drafts to, to Rule 26(b)(2). We all know it is there. At the same time, it was recognized that "reasonably accessible" is the reason for having a two-tier system.

The rejoining view was that this protection belongs in Rule 26(b)(2) in some form. The burden of retrieving electronically stored information is not unique to Rule 34 production. An organization asked to provide deponents who can testify to information known or readily obtainable by the organization will be charged with an obligation to retrieve electronically stored information and drill its designated deponents on the information. Any party asked questions by interrogatory will be obliged to search its electronically stored information in preparing answers — and if we afford less protection for Rule 33 respondents, discovery requests will shift to interrogatories.

This view was accepted, leaving the question whether the protection should become a new item (iv) supplementing the three present 26(b)(2) items, or should be stated in a separate subparagraph (C). Location as a new subparagraph (C) may make it easier to understand, and will avoid any possible confusion arising from the statement in (b)(2)(B) that the court "must" limit discovery when item (i), (ii), or (iii) appears.

It was suggested that the focus should not be on how hard it is to get the information — "reasonably accessible" — but on where a person usually goes to look for things. "Most information is there."

The two-tier approach was opposed. Recognizing that there is a lot of electronically stored information, and that retrieval can be expensive, the overriding concern is that we should not shift the basic assumption of discovery. The system operates on the assumption that a party who has information should carry the burden of showing reasons why it should not have to produce the information. The system should not work so that a producing party can avoid this burden by simply saying "second tier " If the requesting party is forced to show that the information is reasonably accessible, or to show that the information is routinely maintained and routinely accessed, the expense and delay can be prohibitive. The motion will require "discovery on discovery," and expert inquiry and testimony. This will be the only way to show that information in fact is reasonably accessible. Small plaintiffs will be driven out of court Adequate protective tools are available now through Rules 26(b)(2) and 26(c).

Support for the two-tier approach was expressed again in terms of the enormous burdens that may arise from discovery of electronically stored information. The problem is aggravated by the phenomenon that such information never — well, hardly ever — really goes away. Ordinarily it is there if sufficient expense is incurred to search it out. And the problem can be bilateral — motions are filed against plaintiffs for not producing as well as against defendants.

The opponent of two-tier discovery conceded all of these points, except for the problem of shifting the burden. The rule should require the responding party to carry the burden of showing that the information is not reasonably accessible, that further search is too costly. We know that soon all information will be stored electronically. That shift of information practices should not be used to shift the burden of justifying nonproduction.

Another advocate of the two-tier approach noted that the typical request "implicates a search that frequently entails weeks of activity and millions of dollars. There is a ground shift in what is out there." If the responding party must come forward every time there is a two-tier question, "the motion will be made all the time The leverage game will be played this way." It is better to respond with what is reasonably accessible in the ordinary course of system operation. That will be enough 95% of the time.

This debate was distilled into the observation that the rule should be more precise about the allocation of the burden. The producing party will produce. Then the parties go to court. What happens there? The proposals would require the party resisting discovery to show why it need not produce. The court can decide on the depth of search, the sources searched, the time to be used, and perhaps cost sharing. Both sides need to argue the need to produce and the need for protection. "You have engaged the court. That is the important point." But the current mechanisms to get the court involved do not seem to be working as well as should be. Adoption of a new (b)(2) provision may be desirable for reasons similar to the reasons that led to the 2000 amendment that divided the (b)(1) scope of discovery between party-managed and court-managed discovery.

The opponent of two-tier discovery agreed that basically the proposal would be appropriate if it does not shift a new burden to the requesting party. But the background is that the proponents of the rule want to shift the burden.

It was suggested that one remedy might be to add a requirement that the court find the information is not reasonably accessible. The opponent agreed that this would help.

Then a more explicit suggestion was made that the producing party should have the burden of showing that the requested information is not reasonably accessible. If that showing is made, the requesting party would have the burden of showing good cause for production. The opponent agreed that "that is what happens today." There is a motion to compel or a motion for a protective order. The initial moving burden is the key.

In allocating the burden, it is important to remember that the responding party is in the best position to know and to show the burdens of search and access. If a substantial burden is shown, the requesting party is the one who should carry the burden of showing that the need for discovery outweighs the burden.

An illustration was offered. An action is brought claiming a nationwide conspiracy since 1994 to fix widget prices. The discovery demand is for "everything about widgets." The responding party "wants to be able to rely on my regular information system without looking into the attic. What happens when the requesting party asks me to look into the attic? Do I have to show the information is not reasonably accessible?" The two-tier approach is appropriate, but the responding party should be able to respond in the first instance by relying on its normal system.

It was suggested that the most common sequence of events will be that the requesting party will seek information about the capacities of the responding party's information system, perhaps by a Rule 30(b)(6) deposition. Then it will move to compel. The responding party will have to respond to the motion to compel by showing that the information is not reasonably accessible. The burden would be the same if the responding party took the initiative by moving for a protective order.

A different description led to substantially the same conclusion. The responding party will routinely state that some information is not reasonably accessible. The parties will confer. If they fail to agree, there will be a motion to compel, which requires a conference. If they still fail to agree, the motion will be pressed.

The opponent of the two-tier approach stated that the approach is acceptable if the rule makes clear that the responding party has the burden of showing that requested information is not reasonably accessible. Indeed, this approach is likely to be helpful in this form. It will help sort through what really is available, and how to get it efficiently.

It was suggested that the rule should focus directly on determining whether information is reasonably accessible, without adding the qualification that it be reasonably accessible "in the usual course of its regularly conducted activities." This question was left open for later resolution; the

concern was that embedded and metadata may be reasonably accessible, and that focus only on reasonable availability might have the unintended effect of suggesting routine discovery of such data.

A motion was approved to go forward with a Rule 26(b)(2)(C), keyed to the reasonable accessibility of electronically stored information. The rule should explicitly impose on the responding party the burden of showing that information is not reasonably accessible. Once that showing is made, the requesting party still could obtain discovery for good cause. And the redundant cross-reference to Rule 26(b)(2)(B) would be deleted. The new draft will be circulated to the Committee before submission to the Standing Committee with the recommendation to publish for comment.

Interrogatory Response: Rule 33(d)

The Committee approved recommendation for publication of a Rule 33(d) amendment that would allow a party to respond to an interrogatory by making electronically stored information available to the requesting party. The Committee Note emphasizes the application to electronically stored information of the limits now in Rule 33(d). The burden of deriving or ascertaining the answer must be substantially the same for either party. The response must specify the records in a way that enables the requesting party to locate the information as readily as the responding party could locate it. And there must be a reasonable opportunity to examine the information, which may require the responding party to provide technical support, information on application software, access to its computer system, or other assistance.

Nonparty Discovery: Rule 45

The Committee approved recommendation for publication of Rule 45 amendments that make clear the availability of electronically stored information in nonparty discovery. These amendments also carry into Rule 45 the proposed Rule 34 amendment that ensures that documents may be tested and sampled as well as inspected and copied. In this dimension, Rule 45 should mirror Rule 34.

Civil Forfeiture Proceedings· New Supplemental Rule G

Judge Rosenthal introduced the proposal to adopt a new Supplemental Rule G. Rule G would govern civil forfeiture actions. It is placed in the Supplemental Rules because many forfeiture statutes adopt the Supplemental Rules. The draft serves several purposes. It draws together in one place the civil forfeiture provisions that now are scattered through the Supplemental Rules. It adds provisions that reflect enactment of the Civil Asset Forfeiture Reform Act in 2000. Other new provisions reflect developments in the decisional law, including decisions on constitutional matters.

Separation of Rule G from the remaining Supplemental Rules will enhance both forfeiture practice and general admiralty practice. Admiralty lawyers have been concerned that interpretation of common rules provisions may be shaped by responses to the needs of forfeiture proceedings, distorting the answers that should be given to meet the occasionally distinctive needs of admiralty proceedings.

Judge McKnight, chair of the Civil Forfeiture and Sealed Settlements Subcommittee, explained the proposal further. The draft presented for discussion has been hammered out over the course of a year through many hours of conference calls, a Subcommittee meeting, and multiple drafts. Indispensable assistance has been provided by the Department of Justice and the National Association of Criminal Defense Lawyers. The representatives of the Department and NACDL have participated in the discussions at the highest level of professionalism. Their efforts have helped to produce a draft that can be recommended for publication.

Discussion followed the order of the Rule G subdivisions.

Rule G(1)

Subdivision (1) states the general relationship between Rule G, Supplemental Rules C and E, and the Civil Rules. Rule G governs any issue that it addresses. There are some issues that have been left to Rule C or Rule E because those rules provide clear and sound answers And many issues are left to the Civil Rules. The Supplemental Rules do not provide a complete, self-contained system. As one example among many, amendment of pleadings is governed by Civil Rule 15.

Rule G(2)

Subdivision (2) governs the complaint. Paragraph (f) requires that the complaint "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." This standard is adopted from decisional law that has used these words to describe the particularized pleading required in a forfeiture action by Supplemental Rule E(2)(a) This pleading requirement in turn is integrated with Rule G(8)(b).

Rule G(3)

Subdivision (3) governs process directed against forfeiture property. For the first time, it requires that a court find probable cause before a warrant issues to arrest property that is not in the government's possession and is not subject to a judicial restraining order. This provision is one of several that confirm or establish advantages for potential claimants that present rules do not express.

Paragraph (c)(ii)(B) is likely to attract some controversy. Subparagraph (ii) imposes a general requirement that a warrant and any supplemental process be executed as soon as practicable. Item (B) authorizes the court to order a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause. The government in fact has been able to file forfeiture complaints under seal or to obtain an order staying execution. This course is taken when there is a need for prompt filing to satisfy time

limits, but also a need to protect ongoing criminal investigations and investigators or informers. Potential claimants do not like sealing or stay orders, however, and fear that this implicit recognition of such orders may encourage courts to enter them. The Committee Note addresses this concern by stating that the rule does not reflect any independent ground for ordering a seal or stay.

Paragraph (c)(iv) says only that a warrant for property outside the United States may be transmitted to an appropriate authority for serving process where the property is located It deliberately refrains from any attempt to dictate procedures to be followed in other countries. The United States cannot control, and may not be able to influence, these procedures.

Rule G(4)

Subdivision (4) governs notice. Paragraph (a) addresses the traditional method of giving notice by publication. Paragraph (b) is entirely new, directing that individual notice be directed to known potential claimants.

The basic requirement of (4)(a) is that the government publish notice within a reasonable time after filing the complaint. Exceptions are allowed if the property is worth less than $1,000 and individual (4)(b) notice has been sent to every person that can reasonably be identified as a potential claimant, or if the court finds that the cost of publication exceeds the property's value and other means of notice would satisfy due process. The Committee Note observes that the publication cost to be considered in this equation is the cost of the least costly method.

As a substitute for traditional newspaper publication, (4)(a) allows publication on an official internet government forfeiture site. No such site exists now, but when the rule becomes effective this means of notice is likely to be more effective than newspaper publication. Recognizing that some individuals lack access to the internet, it is far more common to find that potential claimants do not in fact read the newspaper where notice is published or do not look to the legal notices.

Paragraph (4)(a)(iv) states the standard for choosing among alternative authorized methods of publication. The government must select a means reasonably calculated to notify potential claimants. This standard was retained through several drafts. It was changed in a late draft to require choice of a means "reasonably calculated to be most effective to notify potential claimants." This change was undone soon after it was made. Due process is satisfied by selection of a traditional and customary means that is not less likely to reach potential claimants than other traditional and customary means. The government has a strong interest in choosing the most effective method so as to reduce tardy appearances by claimants who argue that a better means of publication should have been chosen, and does seek to publish by the most effective means. A rule that emphasizes the need to seek the most effective means, however, is likely to encourage litigation over such claims as that the government should have chosen one newspaper rather than another, publication in the district where the action was filed rather than the district where the property was seized, and so on.

For newspaper publication in the United States, the rule gives a choice between three districts — where the action is filed, where the property was seized, or where property that was not seized is located. Choice among these alternatives will depend on the circumstances of the specific case. The alternatives available as to property outside the United States are different, reflecting in part the concern that some countries may forbid circulation of legal notices relating to United States proceedings.

Direct notice to known potential claimants is provided by subdivision (4)(b). This practice is new to the rules, but reflects due process concerns that notice by publication should be supplemented by direct individual notice when is feasible.

The (4)(b)(ii) provisions for the content of the individual notice include a statement of the time for filing a claim and the time for filing an answer. These provisions depart in some ways from the times for claim and answer set out in CAFRA, 18 U.S.C. § 983(a)(4)(A) and (B). The Committee Note explains that the rule provisions can be reconciled with the statutory provisions, and are designed to better implement the statutory purposes.

The means of sending individual notice are described in subdivision (4)(b)(iii). The basic requirement is stated in (b)(iii)(A): notice must be sent by means reasonably calculated to reach the potential claimant. The Committee Note provides examples. The central dispute is whether the rule instead should require service of process under Civil Rule 4. The rule resolves this dispute in favor of a functional approach. This approach does not rely on the belief that notice by publication is likely to reach all potential claimants in most forfeiture proceedings. Although publication is the traditional means of notice for in rem proceedings, there is little reason to suppose that it is particularly effective. Steps taken to seize the defendant property, however, are quite likely to bring notice home to most potential claimants. There is no tradition requiring formal service, and a functional approach seems sufficient. As with choosing the means of publication, the government has an interest in choosing a means of notice that is effective.

Later subparagraphs address the means of notice in specific settings. The first, (4)(b)(iii)(B), allows notice to the attorney representing a potential claimant with respect to the seizure of the property or in related proceedings. The Committee Note observes that this means should be used only when it reasonably appears to be the most reliable means. The requirement that the attorney be representing the potential claimant in a matter related to the forfeiture seeks to limit such notice to circumstances that make it reasonable to rely on the attorney to transmit notice to the claimant.

Substantial debates surrounded the next subparagraph, (b)(iii)(C). This provision requires that notice sent to a potential claimant who is incarcerated be sent to the place of incarceration. The problems that surround such service are explored from the due process perspective in Dusenbery v. U.S., 534 U.S. 161 (2002). The government should be responsible for identifying the correct prison. But it cannot be responsible for the practices each prison adopts for internal distribution of legal mail. Potential claimants may be incarcerated in state prisons, local jails, and even lock-ups. There are 20,000 forfeitures a year. In 80% of them, at least one potential claimant is incarcerated Incarcerated claimants "have every incentive to deny receiving notice." The government can produce prisoner-signed mail log books or similar proofs for persons in federal prisons, but often cannot for those in other prisons. It cannot be held responsible for policing the mail distribution policies of state agencies, as the Seventh Circuit has recently recognized. Even drafting the rule to require mail with a return receipt would be a mistake. The receipt would be signed by a prison official, providing no information whether the notice in fact reached the potential claimant. For that matter, in some circumstances notice may be accomplished by other means — personal service occasionally is used when the claimant appears at a hearing in a related proceeding. NACDL believes that the rule should require that the notice actually get to the prisoner, by means that require the prisoner to sign for it. The Dusenbery decision only establishes the minimum due process requirements, and by a bare majority at that. "We should do better. There are a lot of cases like this."

Discussion of notice to incarcerated claimants began by asking whether sending notice to counsel bypasses these problems; the answer is that (iii)(B) is intended to provide that notice to counsel suffices. The NACDL observer urged that at a minimum, the rule should require notice both to counsel and to the potential claimant, but it was responded that this would be a burden, and a reminder was provided that for some time NACDL opposed any opportunity to rely on notice for counsel.

The discussion continued by asking whether an affidavit of service should be required. The government recognizes that an affidavit of mailing would make sense on moving for default. But it was argued that failure of any claimant to appear in an in rem forfeiture proceeding does not afford the same assurance that is provided by failure of a personally served defendant to appear in an in personam action. The lack of a claimant is a more important signal that notice may not have been effected. This observation led to the question whether the Committee Note should say something about "default." It was observed that the government does not have to move for default if no claim is made in an administrative proceeding, but recognized that Rule G applies only to judicial proceedings. It seems better not to venture beyond the observations already made in the draft Note.

The problem of notice to an incarcerated person was summarized by suggesting that the draft provides the least unsatisfactory answer to a terribly difficult problem that has no good answer. Rule G cannot fix the problem of establishing reliable means of notice to people in state prisons.

Rule G(5)

Subdivision (5) governs claim and answer. The time for filing a claim is set by the individual G(4)(b) notice if notice was sent to the claimant. If direct notice was not sent but notice was published, the draft sets the claim deadline as 30 days after final publication of notice. The draft will need further work in one respect. If notice is published on an official internet site, there may be no "final publication." The options to be considered include 30 days after the thirtieth consecutive day of internet publication, or perhaps 60 days after the first of 30 consecutive days of internet publication.

The (5)(b) provision sets the time to answer or to file a motion under Rule 12 within 20 days after filing the claim. As noted with Rule 4(b)(ii)(C), this provision modifies to some extent the provisions of 18 U.S.C. § 983(a)(4)(B). The government has urged that the time to file an answer should not be suspended by filing a Rule 12 motion, arguing that it needs information from the answer to help frame any motion to strike the claim for lack of standing. But under (5)(a)(i)(B) the claim itself must state the claimant's interest in the property, and the Rule 12 motion and litigation of the motion should reveal any additional information needed. This prospect is advanced by the special interrogatories provided in subdivision (6).

Rule G(6)

Subdivision (6) reflects, but narrows, the special interrogatory provisions of Supplemental Rule C(6)(c). The plaintiff in an admiralty action may serve interrogatories with the complaint; answers are due with the answer. Such extensive interrogatories are not needed in forfeiture proceedings; subdivision (6) is a clean illustration of the circumstances that distinguish the needs of admiralty practice from the needs of forfeiture practice. The special interrogatories authorized by (6) are limited to the claimant's identity and relationship to the property. The purpose is to facilitate early framing of the question whether the claimant has claim standing. The special interrogatories are described as "under Rule 33" to ensure that they count in applying the presumptive numerical limits of Rule 33. It has been protested that the time allowed by the draft to serve these interrogatories — up to 20 days after a claimant's motion to dismiss — is too long. So too it is protested that the government does not need the allowed 20 days after the interrogatories are answered to respond to the motion to dismiss. But these times seem reasonable in relation to the ordinary pace of litigation and the competing demands that often face United States Attorneys.

Rule G(7)

Subdivision (7) is drawn — but also departs — from provisions for preserving and disposing of property in Supplemental Rule E(9) and (10).

Subdivision (7)(a) addresses preservation of property. As presented, it spoke to property not in the government's actual possession and also to property subject to precomplaint restraint. Discussion began by observing that the examples in the Committee Note included lis pendens as an example of precomplaint restraint; it was observed that a lis pendens notice is not filed until the complaint is filed, and asked why it should be included. After agreeing that lis pendens notices should not be used as examples, discussion turned to the broader question whether there is any need to address property subject to precomplaint restraint. It was agreed that there is no need; these words will be deleted.

Paragraph (b) addresses sale of property. One of the grounds for sale listed in subparagraph (i)(A) is "diminution in value." The government is concerned that it be able to realize maximum value for property that may depreciate while the forfeiture proceeding remains pending. The rule does not require sale, but recognizes discretion — for example, the court can refuse to order sale, despite declining value, if the claimant can show an emotional attachment to a 1994 automobile. There must be good cause to order sale for diminishing value, as implied by (i)(D). A motion was made to delete "diminution in value." A claimant may have strong interests in market timing — when is the best time to sell shares of stock that fluctuate in value? — or emotional and family attachments to a home. The motion passed by vote of 8 for, 4 against. The Committee Note will be amended to state that diminution in value may establish "other good cause" for sale.

Paragraph (b)(1)(C) provides for sale of property subject to a mortgage or taxes on which the owner is in default. This provision has proved difficult; the difficulties are reflected in the draft Committee Note. It was suggested that the Note would be improved by deleting the sentence stating: "In any event it is not always fair to require a claimant to continue payment commitments made in the expectation of ongoing use of the property " This sentence seems gratuitous advice. Beyond that, it was agreed that the rule provision should remain. There are circumstances in which sale seems appropriate to protect a mortgagee or tax authorities, or to facilitate disposition of property subject to frivolous claims.

Rule G(8)

Subdivision (8) governs motions.

Paragraph (a) deals with a motion to suppress use of the property as evidence. It says that "a party with standing to contest the lawfulness of the seizure under the Fourth Amendment may move to suppress use of the property as evidence." The reference to standing is meant to avoid confusion between standing to make a claim in the forfeiture proceeding and the separate concept of standing to contest admissibility. The government also is concerned that if the rule does not refer to the Fourth Amendment, arguments will be made that the rule creates an exclusionary rule broader than the Fourth Amendment; an example might be an argument that the property must be suppressed as evidence because the warrant was not served as promptly as Rule G(3) requires. But it was asked whether the rule can and should deny standing to make a Fifth Amendment suppression argument, or an argument based on a statutory violation that requires suppression. Although the government recognizes that Fifth Amendment violations and some statutory violations have been held to require suppression, it believes that these theories have not yet been recognized in forfeiture proceedings. But it was responded that the rule should not presume to exclude these grounds for suppression. It was agreed that "under the Fourth Amendment" should be deleted, so that a motion to suppress can be made by "a party with standing to contest the lawfulness of the seizure." The Committee Note will say that the rule does not create a basis for standing that does not otherwise exist.

Paragraph (b) deals with a motion to dismiss the complaint. Subparagraph (ii) states that a complaint may not be dismissed on the ground that the government did not have adequate evidence

for forfeiture when the complaint was filed. Earlier drafts tracked the language of 18 U.S.C. § 983(a)(3)(D): "No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." The government views this subparagraph as an essential part of an interwoven compromise set of provisions There is a problem in the categories of forfeiture proceedings excluded from § 983 by § 983(i)(2) — such matters as "legacy customs cases," IRS forfeitures, the International Emergency Economic Powers Act, and a few others The Ninth Circuit, and one or two others, have adopted a rule that in these actions exempted from § 983, "pre-CAFRA law" applies. The government must have probable cause when the complaint is filed; if not, the action must be dismissed even though the government can establish probable cause at the time of dismissal. The possible collision between Rule G(8)(b)(ii) and this approach in some courts to CAFRA-exempt cases might be avoided by prefacing (ii): "In an action governed by 18 U.S.C. § 983(a)(3)(D), a complaint may not be dismissed * * *."

It was asked whether Civil Rule 11 is violated if the government initiates a civil forfeiture provision without probable cause. The answer is reflected in G(2)(f), part of this integrated package. (2)(f) requires that the complaint state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. The dispute among the circuits for pre-CAFRA cases was resolved by § 983(a)(3)(D). The statutory concept is carried forward in the rule

The NACDL observer stated that the Third and Eighth Circuits have adopted the Ninth Circuit view for non-CAFRA cases. The Third Circuit has adhered to this view in a post-2000 decision. Other courts go the other way or have identified the question without answering it. 19 U.S C. § 1615 and the Fourth Amendment require the Ninth Circuit view — there must be probable cause at the time of seizure, and so there also must be probable cause at the time of filing a forfeiture action. 18 U.S.C. § 983(c)(2) parallels § 983(a)(3)(D) — it is true that the government does not have to have sufficient evidence to establish forfeitability at the time of filing, but it must have probable cause.

The government views this as a fundamental point. CAFRA resolves the argument in the government's favor, not in favor of claimants. If the complaint pleads facts as required by Rule G(2)(f) there is no need to establish probable cause. "A complaint does not seize the res. G(3) requires that the government show probable cause for a warrant to seize the res."

It was observed that this debate raises issues not familiar in the civil procedure arena. We are speaking of the sufficiency of the complaint, and the argument seems to be based on a motion to suppress evidence packaged as a motion to dismiss. The legislative history is said to refer to summary judgment, reflecting a concern about the use of summary-judgment motions to contest probable cause at the time of filing.

It was asked what harm could flow from a rule that simply mimics the statute? But, for that matter, what use does such a rule serve? The government believes that even a rule that simply tracks the language of the statute and that applies only to proceedings independently governed by the statute will do some good.

The Committee approved a motion to revise (b)(ii) to incorporate the exact language of § 983(a)(3)(D)

A second motion was made to delete the final sentence of (b)(ii): "The adequacy of the complaint is governed by the requirements of subdivision (2)." The government opposed the motion, stating that this sentence is necessary to ensure that subdivision (2) has its intended force. A Committee member agreed: "this is a truism, but it may as well remain." The opposite view was

expressed — nothing in (8)(b)(ii) changes subdivision (2), so we do not need the final sentence. The only effect it might have is to support a government argument that subdivision (2) shows there is no need to establish probable cause at the time of filing the complaint. This argument renewed the discussion of 19 U.S.C. § 1615 and the pre-CAFRA probable cause debates. That debate can continue in cases not governed by § 983(a)(3)(D), but Rule 8(b)(ii) should not leave the door open for argument that the debate is affected by the rule. In almost all cases, a complaint that satisfies G(2)(f) can be drafted only if there is probable cause. The motion to strike the last sentence failed, 5 yes and 7 no. the Committee Note will say that the Rule takes no position on any question outside § 983(a)(3)(D).

With style changes, Rule G(8)(b)(ii) will read:

> **(ii)** In an action governed by 18 U.S.C. § 983(a)(3)(D), the complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property. The sufficiency of the complaint is governed by subdivision (2).

Paragraph (d) addresses petitions to release property pending trial. Earlier drafts sought to defeat any resort to Criminal Rule 41(g) to accomplish release outside Rule G, and to defeat any petition for release in an action exempted from CAFRA by § 983(i). Research undertaken for the Subcommittee indicated that there may be some room to rely on Rule 41(g) in special circumstances, and that in some circumstances there may be room for an argument that due process requires a post-deprivation hearing. The Subcommittee determined that it would be inappropriate to attempt to resolve by rule the issues that remain open in these areas. A later draft that sought to avoid taking any position was challenged, however, on the ground that a position was implied in the attempt to take no position. The Subcommittee concluded that these provisions, once presented as subparagraphs (iii) and (iv), should be deleted.

A motion was approved to recommend publication of Rule G and conforming changes in Supplemental Rules A, C, and E, subject to Subcommittee resolution of drafting issues identified in footnotes presented with the agenda materials.

Style Subcommittee A

Judge Russell and members of Style Subcommittee A reported on Style Rules 38 through 53, minus Rule 45. Rule 45 was styled in conjunction with the discovery rules. Discussion was framed by Style 487, including the discussion footnotes.

Rule 38. The revisions shown in text and approved in notes 1 through 3 were approved.

A possible change in subdivision (d) was discussed but not adopted. The change would have revised the style draft as follows: "A party waives a jury trial unless its demand is properly served and filed. A proper demand ~~that complies with this rule~~ may be withdrawn only if the parties consent." Although "properly demanded" is used in Style Rule 39(b), concern was expressed that in Rule 38(d) "proper" might implicate the determination whether there is a right to jury trial.

Rule 39. The Style Subcommittee accepted the suggestion that Rule 39(b) be written: "Issues on which a jury trial is not properly demanded ~~under Rule 38~~ are to be tried * * *."

Rule 40. note 1 asks whether the Style Rule should address notice requirements. It was decided to leave the Style text as it is, retaining note 1 to point out the issues for the Standing Committee. The Style-Substance Track will include a proposal to revise Rule 40 in ways that will moot this issue

Rule 41. The Committee agreed that it is appropriate to add references to Rules 23.1(c) and 23.2 to Style Rule 41(a)(1)(A) for the reasons expressed in the Committee Note.

Words were removed from 41(a)(1)(A)(i) as an unnecessary intensifier: "a notice of dismissal ~~at any time~~ before the adverse party serves * * *."

The change from "instance" to "request" identified at note 2 was approved.

The second sentence of 41(a)(2) was changed to read: "If a defendant has pleaded ~~served~~ a counterclaim before being served with the plaintiff's motion to dismiss, the action ~~must not~~ may be dismissed ~~against~~ over the defendant's objection ~~unless~~ only if the counterclaim can remain pending for independent adjudication."

The change recommended in note 4 was adopted: "may move to dismiss the ~~an~~ action or any claim against it."

A suggestion was made to divide 41(a)(2) into subparagraphs, in a fashion similar to 41(a)(1). Professor Kimble responded that one-sentence divisions generally are not favored. There has been an unfortunate tendency in recent rules to divide too far. The question is purely a matter of style, to be resolved by the Style Subcommittee.

It was asked whether the final words of 41(b) could be changed from "operates as" to "is" an adjudication on the merits. The change was rejected. The effect of the reference to an adjudication on the merits is confusing and confused in the decisions. For example, the rule says that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits. But it is well established that a dismissal for want of jurisdiction establishes issue preclusion on the jurisdiction question that was decided. "Operates as" at least has the virtue of suggesting that something may have the effect of an adjudication on the merits even when it is not.

It was agreed that the text at note 5 should remain as presented — "may stay the proceedings until the plaintiff has complied."

Rule 42 No issues arose.

Rule 43. No issues arose.

Rule 44. The change back from "authenticates" in earlier style drafts to "evidences," as explained in note 1, was approved. "Proved" in 44(a)(2)(C)(ii) will be changed to "evidenced" as suggested in note 4 "allow the record to be ~~proved~~ evidenced by * * *."

"Otherwise" will remain in 44(a)(1) and (2) as flagged by notes 2 and 3.

Brief discussion determined once again that the cross-reference at the end of 44(b) is properly to Style 44(a)(2)(C)(ii). The present rule allows admission of a written statement that there is no record or entry in a foreign record if the statement complies with the requirements for "a summary." The requirements for a summary are described in Style (a)(2)(C)(ii).

Rule 44.1. The Style draft provides for notice of an issue of foreign law "by a pleading or other written notice." It was suggested that "notice * * * by notice" is awkward. It was agreed to substitute "writing": "by a pleading or other ~~written notice~~ writing."

Rule 46. It was noted that the choice between "a party who" and "a party that" is a global issue.

Rule 47. Present Rule 47 provides that the parties or their attorneys may supplement the court's examination of prospective jurors "by such further inquiry as [the court] deems proper." Style 47(a) refers to "additional questions." This expression may imply that the court has to review and approve

specific questions. It was urged that "further inquiry" should be incorporated into the style draft. One likely resolution: "must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper."

Rule 48. No issues arose.

Rule 49. It was agreed to delete "several" from Style (a)(1)(B): "submitting written forms of the ~~several~~ special findings * * *."

Present Rule 49(a) calls for instructions necessary "to enable the jury to make its findings." Style 49(a)(2) directs the court to "instruct the jury so it can make its findings." Committee members agreed that "enable the jury" has a different sense. The Committee made a "strong recommendation" that "to enable" be restored. Whatever choice is made, the same term should be used in Style 49(b)(1): "must instruct the jury ~~as needed for it~~ to enable it to render a general verdict * * *."

Deletion of "such" from (a)(3) as recommended at note 3 was approved.

Deletion of "appropriate" from (b)(1) as recommended at note 1, p. 19, was approved.

Style 49(b)(3)(A) tracks present 49(b) in addressing the situation in which answers to interrogatories are consistent among themselves but one or more is inconsistent with the general verdict. Present 49(b) says the court may enter judgment "in accordance with" the answers. Style 49(b)(3)(A) says the court may enter judgment "according to the answers." It was asked whether this should be judgment "on the answers," the expression used in Style (b)(2) for entering judgment "on the verdict and answers" when they are consistent. "According to the answers" was defended on the ground that the interrogatories may not be complete — Rule 49(b) does not require that interrogatories address every issue necessary to decision. No change will be made.

Rule 50. It was agreed to restore "during," so Style 50(a) will begin: "If a party has been fully heard on an issue during a jury trial * * *."

The Committee approved addition to Rule 50(d) of the statement that the appellate court may direct entry of judgment on reversing denial of judgment as a matter of law. This addition fits within the limits of the Style Project because this authority has been recognized by the Supreme Court.

Rule 51. Present and Style Rule 51(b)(3) say that the court "may instruct the jury at any time after the trial begins and before the jury is discharged." Loren Kieve suggested that "after the trial begins and" be deleted. Discussion of this suggestion pointed out that trial begins when the jury is sworn, or so it may seem. It is clear in criminal prosecutions that jeopardy attaches when the jury is sworn. Perhaps it is not so clear whether for some purposes a civil trial begins before a jury is sworn. The purpose of adding this language to the completely revised Rule 51, which took effect only last December 1, was to encourage trial judges to consider initial and interim instructions in complex cases. "Pre-instructions" can be important The Committee decided that this question is a matter of style, not substance; an advisory motion to delete "after the trial begins and" failed, 5 yes and 6 no.

Style 51(a)(1) refers only to "jury instructions," rather than instructions "on the law" as in present Rule 51. Deletion of "on the law" was defended with the observation that jury instructions cover many matters other than the substantive law that governs the merits of the decision. These matters still are matters of "law," but perhaps it is better to delete "on the law" as Style Rule 51 does The Style Subcommittee concluded that this deletion would not create any confusion as to the judge's authority to comment on the evidence. Although treatises often discuss comments on the evidence in conjunction with Rule 51, that is a matter of organizational convenience reflecting the fact that neither the Civil Rules nor the Evidence Rules refer to this common-law tradition.

Style 51(c)(2)(B) says that an objection is timely if "a party, after not being informed of an instruction or action on a request * * * objects promptly * * *." It was suggested that this is awkward. It would be better to say "A party that was not informed * * * objects promptly * * *." Although this suggestion was seconded, the Committee concluded that the issue is one of style.

Style Rule 51(d)(2) says the court may consider a plain error "regardless of whether the error has been preserved as required." The Committee agreed that "regardless of whether" changes the substance of present Rule 51(d)(2). Plain-error review is reserved for cases in which the error has not been preserved as required. If the error has been preserved as required, the limits of plain-error review do not apply. Rule 51(d)(2) will be restored to the present form: "A court may consider a plain error in the instructions affecting substantial rights ~~regardless of whether the error has~~ that has not been preserved as required by (d)(1)." The Style Subcommittee may choose to revise this to "A court may consider a plain error in the instructions that has not been preserved as required by (d)(1) if the error affects substantial rights."

Rule 52. Style Rule 52(a)(4) presents a global style question. Present Rule 52(a) says that a master's findings are "considered as the findings of the court" to the extent that the court adopts them. Style 52(a)(4) says they are "considered the court's findings." The choice between "deemed" and "considered" may turn on the extent of fiction involved. "Deemed" would be used when something is a pure fiction. "Considered" would be used when there is some element of reality about treating one thing as some other thing that it is not. Under new Rule 53(g), a master's findings are reviewed de novo unless the court approves an agreement among the parties to review only for clear error or to accept the findings as final. Thus a master's findings may in fact be superseded by court findings; a master's findings adopted on de novo review are in fact the court's findings. Review for clear error adopts the findings as if the court's findings, so they may be considered the court's findings even though they are not. Adoption without any review still could be found to embrace the findings in some sense. All of this is for resolution according to the global convention ultimately adopted.

Style 52(a)(6) carries forward the provision that a judge's findings are reviewed for clear error "whether based on oral or documentary evidence." The Committee recalled that this provision was deliberately added to emphasize that the clear-error rule applies, albeit in different fashion, even when the appellate court has before it the very same paper basis for decision that the trial court relied upon. But a trial-court decision may be based on evidence that is neither oral nor documentary. There may be a view of premises, and often tangible things are considered. The Committee concluded that the clear-error rule applies now to such decisions, so that the Style Project can change Rule 52(a)(6) to read: "Findings of fact, whether based on oral or ~~documentary~~ other evidence, must not be set aside unless clearly erroneous * * *."

As a matter for future reference, not present consideration in the Style Project, it was asked whether Rule 52(a), as carried forward in 52(a)(3), creates an undesirable implication that it may be appropriate to make findings of fact in deciding a motion for summary judgment. This question may fit in with an eventual reconsideration of Rule 56 — one perennial suggestion is that Rule 56 should require a statement of the facts that are found beyond genuine issue and of the reasons why they warrant summary judgment.

The Committee Note points out several elements of the Style changes. Style 52(a)(3) expands the statement that findings are not necessary in deciding motions to reflect the fact that rules other than Rule 52(c) require findings on motions. Style 52(a)(5) makes explicit the conclusion that a party may object to findings on a decision to grant or refuse an interlocutory injunction even though the party did not request findings, or did not object to the findings or take similar measures. Finally, the former reference in Rule 52(c) to judgment "as a matter of law" has been deleted to avoid any confusion with the standards that govern judgment as a matter of law in a jury trial. A Rule 52(c)

judgment on partial findings is the de novo factfinding responsibility of the trial judge. The Committee approved these statements in the Note.

Rule 53. The changes flagged by note 2 on page 29 and note 1 on page 31 were approved. The change from "stipulate" in present 51(g)(3) to "agree" in Style 51(g)(3) involves a global issue to be resolved globally.

Style Substance. Style Subcommittee A reported on reactions to some of the Style-Substance proposals that involve rules within Subcommittee A's purview. The proposal to delete present and Style Rule 4(k)(1)(C) was approved, subject to reconsideration if Professor Rowe's research should show any reason to reconsider. The reference to a "United States" statute in the Committee Note will be changed to "federal statute."

The proposal to move beyond telephones alone in Rule 16(c)(1) was approved: "the court may require that a party or its representative be present or reasonably available by ~~telephone~~ other means to consider possible settlement."

The relationship between Rule 36(b) and Rule 16 has been uncertainly expressed in both the present rule and the Style rule. It is proper to make this change: "~~Subject to Rule 16(d) and (e), t~~The court may permit withdrawal or amendment of an admission that has not been incorporated in a pretrial order if ~~it~~ doing so would promote the presentation of the merits of the action and if * * *."

Discussion of Style Rule 40 showed the reasons why it is desirable to revise the first sentence to read: "Each court must provide by rule for scheduling trials ~~without request or on a party's request after notice to the other parties~~. * * *"

Style Subcommittee B

Judge Kelly presented the report for Style Subcommittee B for Rules 54 through 63, including parallel recommendations on the Style-Substance Track.

Rule 54. The Committee approved the change in Style Rule 54(d)(2)(D) flagged by note 1: "the court may refer issues concerning ~~relating to~~ the value of services * * *."

Professor Marcus was assigned to research the relationship between Rule 54(d)(2)(C) and new Rule 23(h). New Rule 23(h) (1) provides that a motion for an award of attorney fees in an action certified as a class action must be made by motion under Rule 54(d)(2), "subject to the provisions of this subdivision." Rule 23(h)(1) has timing provisions different from Rule 54(d)(2), reflecting the different circumstances of class actions. Professor Marcus's research concluded that there is an inconsistency between present Rule 54(d)(2)(C) and present Rule 23(h)(1) that was overlooked when Rule 23 was revised. The new provisions of Rule 23(h)(1) prevail, making it proper to fix the dissonance in the Style Project by deleting the reference to class members from Rule 54(d)(2)(C).

Professor Marcus also pointed up another conflict between present Rule 54(d)(2)(C) and Rule 23(h). Rule 54(d)(2)(C) allows "a party" to make adversary submissions on an attorney-fee motion. Rule 23(h)(2) allows only a class member or a party from whom payment is sought to object to the motion. This provision was deliberately adopted to bar objections by other parties — a nonsettling defendant, for example, would not be allowed to object to an award of attorney fees against a settling defendant. Here too, the newer Rule 23(h)(2) governs This consequence of adopting Rule 23(h)(2) should be reflected in the Style Project. Both changes can be reflected in Style 54(d)(2)(C): "Subject to Rule 23(h), ~~O~~on request of a party ~~or class member~~, the court must give an opportunity for adversary submissions on the motion * * *." The Committee Note will state that "The adoption

in 2003 of Rule 23(h) limits the application of Rule 54(d)(2)(C) to class actions. This effect is reflected by adding the reference to Rule 23(h)."

The Committee approved the Committee Note explanation of the Rule 54(b) change that deletes the requirement that there be "an express direction for the entry of judgment." The continuing requirement that there be an express determination that there is no just reason for delay, coupled with actual entry of judgment, satisfies the rule's purposes.

Rule 55. Present Rule 55(a) provides that the clerk shall enter a default when a party "has failed to plead or otherwise defend as provided by these rules." Style Rule 55(a) deletes "as these rules provide." The Committee approved the deletion as proper within the Style Project. The cases show that the clerk may not enter default when a party has done something that counts as defending, even though it is not in a manner provided by the rules.

Rule 56. Discussion of Style Rule 56(c) overlapped a suggestion made for the Style-Substance Track. Present Rule 56(c) directs that a summary-judgment motion "be served at least 10 days before the time fixed for the hearing." Style Rule 56(c) changes this to "at least 10 days before the hearing day." The Style-Substance Track suggestion would change this to "at least 10 days before it is submitted for decision."

Support was expressed for referring to the time the motion is submitted for decision. That addresses the functional need. Summary-judgment motions often are decided without a formal "hearing." It was pointed out that the Fifth Circuit, responding to Texas state practice that required an actual hearing, has ruled that the motion can be heard at any time after 10 days.

A different approach was suggested, looking to the functional problem by allowing 10 days to respond to the motion.

Support also was expressed for "at least 10 days before the hearing."

But it was pointed out that most districts have local rules establishing time limits for summary-judgment proceedings. The Style Project should not do anything that would interfere with those local rules. If anything is changed, the rule also should be changed to expressly authorize the local rules that now exist.

It was further suggested that the time provisions in present Rule 56 "are a mess. They need fixing far beyond anything that can be accomplished in the Style Project." The subject will prove controversial.

The present rule found support — why not continue to say "the time fixed for the hearing"? It was protested that ordinarily no time is fixed for the hearing. Another Committee member observed, however, that this corresponds to the "return date," a common aspect of practice in some courts. And an observer responded that this language is good because it supports the practice of providing an actual hearing, not a mere submission for decision "'Heard' means something Why change to submission?"

Concern was expressed about leaving the rule as it is. The rule is "unconnected to the real world." Submission for decision seems proper, or else a direct focus on the time to submit opposing affidavits. That might be expressed by adding "during which time the opposing party may serve opposing affidavits."

It was asked whether the court can shorten the 10-day period. The answer appears to be that although interim relief can be granted to meet emergent circumstances, the time for considering summary judgment cannot be accelerated absent agreement or waiver.

It was concluded that Style Rule 56(c) should carry forward the present rule, with a small change of expression: "at least 10 days before the day ~~fixed~~ set for the hearing." This topic will be removed from the Style-Substance Track.

In Style Rule 56(d)(2), it was agreed that the expression should be "interlocutory summary judgment may be entered on ~~the issue of~~ liability alone * * *."

In Style Rule 56(e)(1), the Style Subcommittee had decided to retain "affirmatively" — affidavits must "affirmatively show that the affiant is competent to testify * * *." But after discussion it was concluded with the Style Subcommittee's concurrence that "affirmatively" can be deleted as unnecessary. It suffices to say that the affidavit must show that the affiant is competent to testify.

Another change at the end of Style Rule 56(e)(1) was accepted: an affidavit may be supplemented or opposed by "~~further~~ additional affidavits."

"[P]romptly" was deleted from Style Rule 56(g). the court must ~~promptly~~ order the submitting party to pay * * *."

The Committee approved the Committee Note explanation of the Style decision to change "shall" in present Rules 56(c), (d), and (e) to "should" in the places that say the court "shall" grant summary judgment. "Must" would be inaccurate in light of the well-established doctrine that there is discretion to deny summary judgment even though the summary-judgment papers show there is no genuine issue of material fact. The Committee also approved the Note observations that courts should seldom exercise this discretion.

Rule 57: The Committee approved this change in the Style draft. "A party may demand a jury trial ~~may be demanded~~ under Rules 38 and 39."

Rule 58: Present Rule 58(b) separates paragraphs (1) and (2) with "and." The Committee agreed with the Style Subcommittee that this should be changed to "or." These two paragraphs set out alternatives.

Rule 59: No issues arose.

Rule 60: A global issue was noted for this change in Style Rule 60(b)(1): the court may relieve a party or ~~a party's~~ its legal representative * * *." This is part of the choice whether to refer to a party as "who" or "it, that."

Present Rule 60(b) states that all Rule 60(b) motions "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment * * *." It is clearly settled that the "reasonable time" requirement may require that a motion be made in less than one year. The one-year limit is a maximum that closes off any opportunity to argue that it is reasonable to move after more than one year, but does not ensure that any time up to one year is reasonable. Style Rule 60(c)(1) says "A motion under (b) must be made within a reasonable time — and, for reasons (1), (2), and (3) within a year — after entry of the judgment * * *." Doubt was expressed whether this version clearly communicates the present meaning. No change was made, but room was left for the Style Subcommittee to change to "for reasons (1), (2), and (3) ~~within~~ no more than a year * * *."

The final sentence of present Rule 60(b) begins: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished * * *." Style Rule 60(d) deletes all of this sentence. The draft Committee Note refers to the phenomenon that although Rule 60(b) purports to abolish these writs, they have not disappeared completely. Occasionally a federal court relies on federal practice principles to address particularly distressing

circumstances through one of these writs. See Ejelonu v. INS, 355 F.3d 539, 544-548 (6th Cir. 2004). And lawyers familiar with state-court uses of these writs may attempt to carry the state practice over to federal court. Pro se litigants, moreover, frequently pick up on references to these writs and apply for them. The suggestion that the abolition should be restored was met by the protest that it would be a shame to continue forever with this backward-looking fixation on practices long buried. But it was responded that it is in fact forward-looking to anticipate continued resort to these writs and to provide a clear abolition in the rule rather than rely on a Committee Note that will be overlooked or deliberately ignored. A motion to restore the abolition was adopted, 10 yes and 1 no. The Style Subcommittee will decide whether the abolition should be placed in Style Rule 60(d) or should become an independent subdivision (e).

Rule 61. No issues arose.

Rule 62. Present Rule 62(c) says that the court may suspend, modify, restore, or grant an injunction during the pendency of an appeal "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Style Rule 62(c) renders this as "on terms for bond or other terms that ~~the court considers proper to~~ secure the adverse party's rights." This rendition was questioned on the ground that it implies that the terms must in fact secure the adverse party's rights. It is clearly settled that injunction bonds need not provide adequate security. Indeed, it is settled that a court may conclude that no bond should be required although there is a significant risk of substantial injury. The seeming style change may in fact change present meaning. It was responded that although present practice is in fact as described, present practice is a misreading of the present rule's language. The rejoinder was that the Style Project then should carry forward with language that supports the present misreading. The discussion concluded without making any recommendation.

Style Rule 62(c)(2) has been progressively brought closer and closer to the language of the present rule. The current proposal is: "(2) by the assent of all its judges, as evidenced by their signatures." The difficulty has been that the present rule seems to say that all three members of a three-judge court must agree before the court can act on issues relating to an injunction pending appeal There are real questions whether that is a wise rule, and whether in any event an Enabling Act rule can purport to circumscribe the authority of a two-judge majority of a three-judge court. The Committee agreed to accept the proposed language.

Rule 63. After substantial discussion, Subcommittee B agreed to the Style Subcommittee's proposal to change the description of a judge's unavailability to proceed with a case. Present Rule 63 addresses a judge who "is unable to proceed." Style Rule 63 refers to a judge who "cannot" proceed. But the caption of Style Rule 63 continues to refer to a judge's "inability" to proceed. The dissonance between the change in the rule text and the failure to change the caption was challenged. But the Style draft was defended on the ground that continued use of "inability" in the caption shows that "inability to proceed" means the same thing as "cannot proceed." The question why the language of the rule had been changed was raised. The Committee recommended to the Style Subcommittee that the language of the rule be changed back to conform to the present rule: "If the judge who commenced a hearing ~~cannot~~ is unable to proceed, * * *."

Style-Substance. In addition to Rule 56(c), Style Subcommittee B addressed the proposal to amend Rule 24(a)(2) on the Style-Substance track. This proposal reflects a widespread belief that the threshold for intervening under Rule 24(a)(2) should be the same as the criterion for joining a party under Rule 19(a)(1)(B). Rule 19 describes a nonparty who claims an interest relating to the subject of the action Rule 24(a)(2) describes a nonparty who claims an interest relating to "the property or transaction that is" the subject of the action. Deleting these words from Rule 24(a)(2) would make it conform to Rule 19 But the cases do in fact rely on this language in present Rule 24(a)(2).

Deleting it seems a subject too serious to be added to the list of "clearly right" changes suitable for the Style-Substance track. The Committee agreed to remove this proposal from the Style-Substance Track.

Style Subcommittee B had no concerns about any of the other Style-Substance Track proposals for rules that have been its responsibility in the Style Process.

Rule 50(b) · Foundation for Post-Verdict Motion

From the beginning in 1938, Rule 50 has permitted a post-verdict motion for judgment notwithstanding the verdict only if the moving party had moved for a directed verdict at the close of all the evidence. This requirement was carried forward when the terminology was changed to "judgment as a matter of law." The cases continue to agree that a post-verdict motion generally cannot be supported by a motion made during trial but before the close of all the evidence. At the same time, the substantial number of reported appellate opinions that continue to wrestle with this requirement show that lawyers all too often forget to renew earlier trial motions at the close of all the evidence. Some of the opinions permit modest relaxations of the requirement, inviting still further appeals attempting to resurrect failures to comply punctiliously with the requirement.

The Rules 15 and 50 Subcommittee proposed to amend Rule 50(b) to allow a post-verdict motion for judgment as a matter of law to be supported by any motion for judgment as a matter of law made during trial under Rule 50(a). This proposal rests on the conclusion that a motion made during trial serves the functional needs that have been urged to support the close-of-all-the-evidence requirement, and at the same time avoids unnecessary procedural forfeitures. A motion made during trial alerts the opposing party to the claimed inadequacy of the evidence and affords a clear opportunity to supplement the evidence. The trial motion also alerts the court to the opportunity to simplify the proceedings by granting judgment as a matter of law on all or part of the case before submission to the jury. Because these important functional needs are satisfied, the Seventh Amendment also is satisfied

As a matter of style, it was explained that it seems better to refer expressly to a motion for judgment as a matter of law made "under subdivision (a)." Both present Rule 56 and Style Rule 56 refer to granting summary judgment when the moving party is entitled to "judgment as a matter of law." The Subcommittee considered and rejected the possibility that a post-verdict motion might be supported by arguments made to support a pretrial motion for summary judgment. A post-verdict motion under Rule 50(b) should be clearly limited to grounds urged at trial.

The Committee recommended this amendment for publication. There was not time to discuss the Committee Note, which may be shortened before the rule is presented for publication.

The Subcommittee also presented without recommendation another proposal to amend Rule 50(b). Original Rule 50(b) set the time limit for seeking a judgment n.o v. as 10 days after the jury was discharged if a verdict was not returned, but was later amended to set the time to renew a motion for directed verdict as 10 days after the entry of judgment. This change conformed Rule 50(b) time limits to the time limits set in Rules 52 and 59. But it seems to allow an extraordinarily long time to move if the jury fails to return a verdict. It would be foolish to permit a motion after a second trial to rely on the inadequacy of the record at the first trial. After a second trial the sufficiency of the evidence should be measured by the record at the second trial. For that matter, it would be disruptive to permit renewal of a motion made during the first trial on the eve of the second trial. When the jury has failed to agree, it seems sensible to restore the time limit to 10 days after the jury is discharged. Any motion after that would be a motion for summary judgment before the second trial necessitated by the first jury's failure to agree. The moving party could rely on the first trial record to support the Rule 56 moving burden; if the trial record shows that the opposing party does not have

sufficient evidence, summary judgment will be granted unless the moving party is able to supplement the trial record with sufficient evidence to create a jury issue.

This proposal has lingered for several years on the Committee agenda. The Subcommittee could not make time to consider it, but presented it without recommendation in the thought that it is better to consider at one time any likely Rule 50(b) amendments.

One consequence of the lack of Subcommittee deliberation immediately appeared. The draft prepared for Subcommittee consideration expressed the separate time limit as follows: "or if a complete verdict was not returned by filing a motion no later than 10 days after the jury was discharged." Rereading this language, however, suggested a possible problem: when a jury returns a partial verdict, the time limit should apply only to those issues on which the jury has failed to agree. Matters resolved by the verdict should be governed by the general provision geared to entry of judgment. One suggestion was that the rule should read: "or — if the motion addresses a jury issue not decided by the [a?] verdict — no later than 10 days after the jury was discharged." The Subcommittee will consider this language further.

The Committee approved a recommendation to publish this second Rule 50(b) amendment for comment in a form to be resolved by the Subcommittee.

As a matter of style, it was suggested that the final sentence of Rule 50(b) be revised: "Alternatively, the movant may ~~alternatively~~ request a new trial or join a motion for a new trial under Rule 59 * * *." This suggestion was resisted. It seems to describe the new trial motion as an alternative to the renewed motion for judgment as a matter of law. The emphasis instead should be on the new trial as alternative relief — the movant's first request is for judgment as a matter of law, with a new trial as a less desirable alternative.

Rule 15

The Rules 15 and 50 Subcommittee has concluded that the Committee agenda is too fully occupied by more pressing matters to support present consideration of proposals to amend Rule 15. Although some of the proposals seem simple, they raise may difficult issues that cannot be resolved without extensive deliberation. The Committee agreed that the Rule 15 proposals should be carried on the agenda for consideration in the future.

E-Government Act

Judge Fitzwater chairs the Standing Committee E-Government Act Subcommittee. He introduced the questions raised by the E-Government Act of 2002, Pub L 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note. Section 205 requires any document that is filed electronically to be made available online. Paper documents may be converted to electronic form; if converted, they too must be made available online Section 205(c)(2), however, provides that a document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal." Section 205(c)(3) requires the Supreme Court to prescribe Enabling Act Rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability * * * of documents filed electronically." Section 205(c)(3)(A)(iv), finally, provides that any Enabling Act rule that provides for redaction of information shall provide that a party who wishes to file an otherwise proper document containing such information may file an unredacted document under seal. The unredacted and sealed document "at the discretion of the court and subject to any applicable rules issued [under the Enabling Act] shall be either in lieu of, or in addition[,sic] to, a redacted copy in the public file."

The Judicial Conference Court Administration and Case Management Committee has worked hard to develop initial responses to the E-Government Act Their recommendations have been made

the basis for the initial recommendations of the E-Government Act Subcommittee. Professor Capra, Reporter for the Evidence Rules Committee, has been designated lead reporter for this project. He has prepared a template rule to be considered by each of the advisory committees. The Standing Committee hopes that the advisory committees will consider the template both to determine whether the template might be improved in ways that apply to all the sets of rules and also to determine whether special needs dictate departures from the template for a specific set of rules. Professor Schiltz has prepared a refined version of the template, and the materials submitted to the Civil Rules Committee reflect still further variations. The advisory committee reporters will confer with the E-Government Act Subcommittee in conjunction with the June Standing Committee meeting.

One illustration of the ways in which specific concerns may arise under a particular rules set arose in conjunction with this meeting. When Department of Justice lawyers reviewed the agenda materials, they suggested that the template rule makes no sense for civil forfeiture proceedings. Civil forfeiture procedure requires public notice of many things that the government would be required to redact from court filings. It seems clear that significant work will need to be done to study and resolve this concern.

The advisory committees also will have a second responsibility. Each set of rules must be reviewed to determine whether revisions should be made in addition to adoption of a general E-Government Act rule. The materials submitted for this meeting include not only a proposed "Rule 5.2" based on modifications of the general template but also a long list of Civil Rules that might be considered for possible revision.

Discussion began with an observation that the problems considered at a recent meeting of Chief District Judges show that it will be important to move as rapidly as possible toward a new rule.

It also was noted that the rather ambiguous statutory provision for routine filing under seal is a real problem. An amendment has been proposed to Congress, and there are hopes that it will be approved at this session. The prospect that the statute establishes a general right to file under seal is troubling on at least two scores. The practical burden on court clerks will be staggering. And the tradition of public access, sought to be carried forward into an era of electronic filing, could be substantially reduced.

The burdens of complying with even simple redaction requirements may be far greater than appears on casual contemplation. Discovery materials, for example, are to be filed only when used in the proceeding or ordered by the court. But does that mean that at that time they must be redacted to expunge home addresses, the names of minors, all but the last four digits of financial account numbers, and so on? Lawyers already are reacting to these concerns by reframing the questions put at deposition and so on. But care must be taken to ensure that nothing has slipped in execution.

It had been hoped that the several advisory committees would be able to take action on E-Government Act Rules proposals during the fall 2004 meetings. As continued study continues to suggest new problems, however, it appears that it may be necessary to consider these rules both in the fall and again during the spring 2005 meetings. Proposals advanced for publication at the June 2005 Standing Committee meeting will be timely for publication in August 2005, the likely publication date even if proposals were advanced for the January 2005 Standing Committee meeting Work will continue.

Federal Judicial Center Study: Sealed Settlement Agreements

Tim Reagan presented the final Federal Judicial Center Report on sealed settlement agreements filed in federal courts. The study surveyed 288,846 civil cases in 52 districts. It found 1,272 filed and sealed settlement agreements. In 97% of those cases, the complaint was not sealed,

leaving open public access to information about the subject of the action. Study of the few actions in which both complaint and settlement were sealed suggested that only a very few cases involved matters likely to be of general public interest.

The summary report in the agenda materials is backed up by a lengthy report and study of the individual sealed settlement cases. A survey of local district rules and state statutes also is provided.

The Committee received the Report with thanks and praise. The Subcommittee on Filed, Sealed Settlement Agreements will study the report further and recommend whether rules changes should be made to reflect the information in the report.

Next Meeting

The next Committee Meeting was set for October 28 and 29 in Charleston, South Carolina.

Respectfully submitted,

Edward H. Cooper
Reporter

Rule 5(e): Mandatory E-Filing

The Committee on Court Administration and Case Management (CACM) has recommended that the Bankruptcy and Civil Rules be amended to authorize local rules that require electronic filing. Apparently some districts already have adopted mandatory e-filing rules. The amendment itself is simple. Partly because it is simple, and partly because it seems better to address all the sets of rules at once, an informal consensus has emerged that the Appellate and Criminal Rules should be included in the same course of action.

The Court Management/Electronic Case Filing system (CM/ECF) has been implemented in a majority of the district courts. All courts are scheduled to be operating the system within a year. CM/ECF provides courts with the capability to accept electronic case filings. Because it may have significant cost savings for the federal judiciary, CACM has recommended that the rulemaking process be expedited to authorize courts to adopt local rules that require electronic filing. A copy of Judge Lungstrum's letter is attached If each of the advisory committees finds the amendment noncontroversial as well as simple, it has been proposed that it be published for comment on an accelerated and abbreviated schedule. If the proposal meets with no substantial opposition, the plan would be to have the Standing Committee recommend adoption at its June 2005 meeting. This would require publication of the proposed amendments in November 2004 with a shortened public comment period that expires on February 15, 2005. The Advisory Committee on Bankruptcy Rules met on September 9-10 and agreed to publish the proposed amendments on this expedited schedule. The Advisory Committee on Criminal Rules meets on October 30 and will consider an identical amendment

Discussion follows the proposed amendment. The proposal is shown in text as it would affect present Rule 5(e); the Style Rule version is shown in the margin. The draft Committee Note first set out is the Note prepared by the Bankruptcy Rules Committee for Bankruptcy Rule 5005(a)(2). As will be seen, the Committee Note presents greater challenges than the proposed rule.

Rule 5. Service and Filing of Pleadings and Other Papers.

* * * *

(e) Filing with the Court Defined. * * * A court may by local rule permit <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. * * *[1]

[Bankruptcy] Committee Note

This amendment acknowledges that many courts have local rules that make electronic filing of documents mandatory. The amendment recognizes that advances in technology have led the courts to adopt those local rules. Electronic filing is used in many courts, and the amendment will encourage courts by local rule to

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[1] In the Style version, Rule 5(d)(3): "(3) *Electronic Filing, Signing, or Verification* A court may, by local rule, allow <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A paper filed by electronic means in compliance with a local rule is a written paper for purposes of these rules."

proceed at their own pace towards a total electronic filing environment.

In adopting local rules, courts can include provisions to protect access to the courts for those who may not have access to or the resources for electronic filing. Given the variety of circumstances presented to the courts, it is appropriate to allow each court to make these decisions, at least initially, on a local level.

[Alternative Draft] Committee Note

Rule 5(e) is amended to authorize local rules that require filing by electronic means. Mandatory electronic-filing rules have already been adopted by some courts. These rules and the model rule will generate experience that will facilitate gradual convergence on uniform exceptions to account for circumstances that warrant paper filing.

Discussion

The attached materials show that many initial uncertainties about electronic filing have been resolved by demonstrating that electronic filing works well. Concerns that small law offices might find electronic filing a burden have been dissolved by the experience that they reap comparatively greater advantages than do large law offices. The level of enthusiasm among those who have converted to electronic filing is so uniform and so high that the hold-outs deserve an incentive stronger than "try it, you'll like it." Courts, counsel, and clients alike will benefit from mandatory electronic filing in most circumstances.

Electronic filing also results in substantial cost savings for the courts These savings generally are accompanied by advantages for the filers as well. A move to mandatory electronic filing is not a case of transferring costs from courts to litigants.

The inevitable caution is that the advantages are general, not universal. If the smallest of law offices can be expected to enter the world of electronic filing, pro se litigants cannot. Extending electronic filing to all "papers" may create problems when the time comes to file the results of massive paper document discovery. Similar problems can arise — and are likely to be more frequent — when a party is required to file official administrative records or the transcripts of prior court or administrative proceedings. One approach would be to draft exceptions into Rule 5(e) itself — the rule could forbid application of mandatory rules to pro se cases, or it could require that mandatory rules provide a procedure to show cause to permit paper filing. (Most local rules that require electronic filing provide an exception for pro se filers.) Yet other qualifications might be adopted. Defining and drafting the qualifications does not seem a task that can be completed in one meeting and accomplished in a form that would justify expedited consideration and adoption. Even on the regular time schedule, the task would be challenging. If anything is to be done about recognizing the need for exceptions, it is likely to be done by comment in the Committee Note. The Bankruptcy Rule Committee Note is an illustration.

Moving beyond the direct terms of electronic filing, further complications may arise from the next step — electronic service of electronically filed papers. Rule 5(b)(2)(D) permits electronic service only if "consented to in writing by the person served." The consent requirement was added out of concern that not all litigants or law offices should be required to assume the burden of acquiring equipment and — commonly the more difficult step — monitoring it constantly Many local electronic filing rules provide that the option to participate in electronic filing includes consent

to receive service by electronic means.[2] Those provisions constrain the choice to the extent that a party or law office wants to participate in electronic filing, but they leave the option to withhold consent to electronic service by forgoing participation in electronic filing. The option may be held open on a case-by-case basis. Some local rules, however, require electronic filing and also provide that participation in electronic filing includes electronic service. That approach raises two questions. Does the consent requirement in Rule 5(b)(2)(D) invalidate a local rule that establishes mandatory electronic service as part of mandatory electronic filing? And — if we do not propose to amend Rule 5(b)(2)(D) or to complicate the amendment of Rule 5(e) on an expedited track — should we attempt to address this problem in the Committee Note? Is there a risk that if we do not provide guidance in the Committee Note some local rules will fail to provide an option to withdraw from electronic-service provisions, creating an opportunity to challenge the effect of electronic service because there was no Rule 5(b)(2)(D) consent?

It would be possible to add to the Committee Note a paragraph like this:

> Adoption of a local rule that requires electronic filing does not authorize provisions that extend beyond filing to require service by electronic means. Rule 5(b)(2)(D) authorizes service by electronic means only if "consented to in writing by the person served." Consent counts only if it is voluntary. A court that wishes to couple electronic filing with electronic service must adopt some provision that enables a party to opt out of electronic service, whether by withdrawing from electronic filing as well or by expressly withholding consent to electronic service. [The choice may be made available as a general matter, or as a matter to be decided on a case-by-case basis.]

The attached materials include: (1) a brief report on the status of local electronic filing systems in the courts; (2) a study on cost savings realized by CM/ECF/ and (3) the model local rule governing electronic service.

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[2] Model Local Rule 9, attached below, provides that apart from sealed filings, "The 'Notice of Electronic Filing' that is automatically generated by the court's Electronic Filing System * * * constitutes service of the filed document on Filing Users Parties who are not Filing users must be served with a copy of any pleading or other document filed electronically in accordance with the Federal Rules of Civil Procedure and the local rules. * * * A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User."

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

August 2, 2004

Honorable David F. Levi
Chief Judge
United States District Court
2504 U.S. Courthouse
501 I Street
Sacramento, CA 95814-7300

Dear Judge Levi:

At our recent Summer meeting, and as part of the Executive Committee's budget initiative, our Committee considered a myriad of cost containment ideas, one of which was that all cases filed in federal court be done exclusively through the CM/ECF system. After discussing this proposal, it was the consensus of the Committee that significant savings can and will be achieved through electronic filing, and therefore mandatory electronic filing should be encouraged to the fullest extent possible. Because this proposal has obvious implications for the federal rules of procedure and therefore your Committee, I wanted to alert you to our Committee's recommendations.

As you are aware, our Committee – at the request of and in coordination with your Committee – has developed model local electronic filing rules (which were subsequently endorsed by the Judicial Conference) that strongly encourage electronic filing. One of the fundamental reasons for developing these model rules was to assist the Rules Committee in its consideration of the development of national rules for electronic filing. These rules have been provided to the courts for over two years, and have been of great assistance in implementing CM/ECF.

At our Summer meeting, the Committee considered a series of proposed amendments to those rules that would create a presumption that all documents would be electronically filed, unless otherwise ordered by the court upon a showing of good cause. The Committee decided, however, that these proposals would probably conflict with the current Fed. R. Civ. P. 5(e) and Fed. R. Bankr. P. 5005, which state that a court may "permit" electronic filing, and therefore declined to endorse them. Instead, our Committee decided to tackle the issue head on, by

recommending that the Rules Committee consider expedited amendments to the civil and bankruptcy rules that would authorize the courts to "require" the use of electronic filing but that would also incorporate appropriate exceptions. Fundamentally, the Committee believes this to be the most appropriate way to formally implement electronic case filing into the culture of the federal courts. And, while the Committee was cognizant of the fact that the Appellate courts will not start implementing CM/ECF until January of 2005, and will not go live until January 2006 at the earliest, we believe now is an appropriate time to begin the rules process to effect these changes, in order that they be implemented as quickly as possible.

In the meantime, the Committee also plans to consider amendments – to the extent they are possible – to the current model local rules that would more strongly encourage the use of electronic filing without violating the current federal rules. The Committee is also requesting the Executive Committee, as part of its cost containment initiative, to strongly urge courts to work with their local bars to ensure that CM/ECF is implemented to the greatest extent possible. The Committee believes this will help eliminate paper filing practices, as well as dual paper and electronic filing practices, in favor of the full incorporation of electronic case filing, thereby achieving cost savings through this technology.

Therefore, based on the Committee's recommendations, I would like to formally request that the Rules Committee propose, on an expedited basis, amendments to Rule 5(e) of the Federal Rules of Procedure and Rule 5005(a)(2) of the Federal Rules of Bankruptcy Procedure that would authorize the courts to "require" the use of electronic filing, but would also incorporate appropriate exceptions. I would also welcome any suggestions your Committee may have regarding our initiative to review the current model local rules with an eye towards amending them to more strongly encourage electronic filing.

Thank you for your consideration of these proposals, and please do not hesitate to contact me if you would like to discuss them further. Our two committees have devoted an enormous amount of time and energy to these issues, and it looks like those efforts will continue for some time. I sincerely believe, however, that our efforts have been a great contribution to the federal judiciary.

Sincerely,

John W. Lungstrum

John W. Lungstrum

cc: Peter McCabe
John Rabiej

Rule 9– Service of Documents by Electronic Means

The "Notice of Electronic Filing" that is automatically generated by the court's Electronic Filing System, except as provided below, constitutes service of the filed document on Filing Users. Parties who are not Filing Users must be served with a copy of any pleading or other document filed electronically in accordance with the Federal Rules of Civil Procedure and the local rules.

Most sealed filings do not produce a Notice of Electronic Filing, and therefore, service by the filer of any sealed document by an alternate method is required.

A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User.

Derivation

The first sentence of Model Rule 9 is derived from the rules of the District of Kansas. The second paragraph is derived from the Northern District of Ohio's procedures.

Commentary

1. The amendments to the Federal Rules (Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 4 service). The Model Rule covers only service of documents after the initial service of the summons and complaint.

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a non-sealed document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under the amendments to the Federal Rules (Civil Rule 5(b)(2)(D)), do so through a local rule. The amendments require a local rule if a court wants to authorize parties to use its "transmission facilities" to make electronic service. The Model Rule includes such a provision by providing that the court's automatically generated notice of electronic filing constitutes service. See note 6, below, for information on when a Notice of Electronic Filing is generated for an electronic filing pertaining to a sealed case or sealed document.

3. Parties who are not Filing Users are not deemed under the Model Rules to have consented to electronic service of the Notice of Electronic Filing. They must be served in some other way authorized by the Federal Rules of Civil Procedure (Fed.R.Civ.P. 5(b)). Under the rules, they can be served in the traditional way with a paper copy of the electronically filed document, or they can consent in writing to service by any other method, including other forms of electronic service such as fax or direct e-mail.

4. An amendment to Fed.R.Civ.P. 6(e) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note states:

> Electronic transmission is not always instantaneous, and may fail for any number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that make electronic service ever more attractive.

5. While some courts accept the Notice of Electronic Filing as a certificate of service, other courts require a separate certificate of service to be included with the filed document indicating that the document was electronically filed using the CM/ECF system and the manner, electronically through the Notice of Electronic Filing or otherwise, in which parties were served.

6. Note that Version 2.0 of District CM/ECF introduces the capability, if a court so chooses, to allow attorneys to electronically file into sealed cases or to electronically file sealed documents into otherwise unsealed cases. For most sealed filings, no Notice of Electronic Filing will be produced. Production of a Notice of Electronic Filing will depend on whether the docket entry and case are sealed from public view. Generally, under the default settings, CM/ECF will issue a Notice of Electronic Filing only when the filed document itself is sealed, but the docket entry for the document and the rest of the case file remain publicly available. Electronic filings in sealed cases do not generate a Notice of Electronic Filing, nor do electronic filings in otherwise unsealed cases in which both the docket entry and the attached document are sealed. Each court will need to decide how to use this functionality to best suit its needs. The model rules picks a uniform approach - requiring service by means other than through the Notice of Electronic Filing in all situations involving a sealed filing. However, if a court wants to allow service though the Notice of Electronic Filing in those instances in which a Notice of Electronic Filing will be generated (i.e., in an otherwise unsealed case where the document is sealed but the docket entry is unsealed), it can choose to do so.

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief

Rules Committee Support Office

September 29, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT. *Status of CM/ECF Project and Study of Cost-Savings Associated With It*

I have attached a report on the status of the Court Management/Electronic Case Filing project (CM/ECF) and a study containing information on cost-savings associated with the project.

The three-page report describes the status of the CM/ECF implementation in the federal courts as of June 2004. It is operational in 123 courts, including 75 bankruptcy courts and 48 district courts. "Another 16 bankruptcy courts and 29 district courts are in the process of rolling out the system." Attorney participation is impressive with 88,000 using it to make over 3 million docket entries. In general, the report gives the project a glowing stamp of approval.

In 2003 the Judicial Conference's Committee on Information Technology requested a study "to determine whether electronic public access fees impact specifically attorney's acceptance of the CM/ECF system." The study was conducted by a consulting firm, PEC Solutions, Inc. In determining whether assessing fees reduced attorney participation, the study examined the offsetting cost savings realized by attorneys using the system. A discussion of the attorneys' cost savings can be found on pages 8-9, 12, and 18-24.

The study provides some indirect information on the cost savings for courts It documents the specific ways attorneys save money using the system, several of which likely will apply to the courts, while others likely will result in less work for the courts. A discussion of revenue enhancements derived from CM/ECF for the courts is also given on pages 36-40.

John K Rabiej

Attachments

Status Report: Electronic Filing in the Federal Courts: 2004

by Sharon D. Nelson, Esq. and John W. Simek

Sharon D. Nelson, Esq. and John W. Simek are the President and Vice President of Sensei Enterprises, Inc., (www.senseient.com) a computer forensics and legal technology firm based in Fairfax, VA. They can be reached by email at sensei@senseient.com or phone at 703-359-0700.

A well deserved drum roll please! Without any fanfare, the Administrative Office of the U S Courts is quietly changing the way federal courts do business, court by court. When the AO first announced that it would have its case management/electronic case filing system (CM/ECF) operational in all federal courts by 2005, the pronouncement was greeted skeptically. After all, state e-filing projects were bogged down, the economy wasn't cooperating, and the whole project seemed extraordinarily massive. This is now the third report the authors have compiled on the status of electronic filing in the federal courts, and it looks as though next year's report will announce the completion of the AO's mission, on time and on budget

Here are the very impressive statistics: As of June 2004, CM/ECF was fully operational in 123 courts, including 75 bankruptcy courts and 48 district courts. Another 16 bankruptcy courts and 29 district courts are in the process of rolling out the system CM/ECF is rolled out in waves, with nine courts being rolled out every two months. Remarkably, the timeline adopted at the initiation of this project in 1995 has remained largely in place Also, remarkably, the cost of instituting the system has dropped, to about $50,000 per court, while the speed of the system has more than doubled This is partly due to reduced equipment cost and the conversion to a Linux operating system

Gary Bockweg, the AO's Project Director for CM/ECF, reports that the AO has encountered only one significant delay, with respect to electronic filing in the appellate courts. Because the appellate court functionality differs greatly from district court functionality, the appellate courts defined substantially different requirements for their case management system. Rather than merely modifying existing district court software, as had been planned, the developers had to create a wholly new system for the appellate courts It is also true that the appellate courts have not shown the depth of interest in electronic filing manifested by the bankruptcy and district courts. This may have to do with the fact that appellate courts tend to be more traditional or that due to the differences in their processes, appellate courts may not expect the same benefits that the district and bankruptcy courts are seeing.

The e-filing statistics for May 2004 are really striking. Some fourteen million cases were being handled by the CM/ECF system A total of 88,000 attorneys were using the system, and 127,000 new cases were opened. Some 3,300,000 docket entries were made in May. On a humorous note, in this increasingly complex world, the AO found itself tagged by blacklists as a spammer when it sent out thousands of copies of the same e-mail notification in the Enron case The AO spent some time trying to unravel the mess But as is clearly evident from the stats, this is a well-oiled machine in constant use.

As the economy floundered, the federal courts continued to have funding available for their CM/ECF implementation through revenue generated by the judiciary's "PACER" (Public Access to Court Electronic Records) program, which generated approximately $27,000,000 in revenue last year. Where does all the money come from? Many people are surprised to find that court data is invaluable to many industries, including credit card companies, banks, realtors, marketing companies–the list goes on and on While there are no added fees for those filing electronically or receiving their one free access to any new filing in their own case, the court information is also made available electronically to the public for a fee of

seven cents per page. Understandably, the AO is pro-PACER and its revenue generation This may well stir a privacy concern for those whose data is being sold, but at the moment, the public seems largely unaware that court data has become electronic gold. As Bockweg noted cheerfully, "We are pleased to have access to this money Congress has authorized the judiciary to assess reasonable user fees for its electronic public access program, and this has enabled us to keep the service going " In fact, much of this data gathering is automated, and has become so intense that it has occasionally threatened to bog the system down In response, the AO has asked some of the most active data gatherers to adjust their procedures so that the activity is done at night, when normal system access is low. It remains to be seen whether privacy advocates will cry "foul" at this source of revenue.

Some elements of the federal e-filing system remain unchanged The AO's philosophy has been to make e-filing permissive rather than mandatory While that once seemed worrisome, and skeptics fretted that participation would lag, this train is now moving so fast that everyone seems eager to jump on board.

Just as reported in previous installments, the AO is struggling mightily to stay current with the latest web browsers and doing a credible job, lagging only slightly behind the most up-to-date versions

As also reported previously, the AO is playing a waiting game with XML and continuing to monitor its progress elsewhere One element of the CM/ECF system that surprises some observers is that it still uses a user ID and password rather than digital signatures. As Bockweb notes, this simple system has been working just fine and has not thus far presented any security issues Though he expects digital signatures to be adopted at some point in the future, there are no immediate plans for their adoption

One major change is that electronic commerce has now been melded with the system, and more and more courts are permitting fees to be paid online

The universality of the system seems to appeal to all the courts using it, so fairly minimal use has been made of their ability to modify the code. More frequently, courts have supplemented the core code with their own set of local instructions, news, and procedures. If the core code is touched, the court modifying it is also responsible for handling the replication and maintenance of the code in the event of a disaster recovery event.

The "Public Access v Privacy Rights" debate continues and Bockweb notes wryly that the AO is prepared to "shift with the winds" as dictated by the changing methodologies of balancing both rights In 2001, the Judicial Conference issued its rules in civil cases, requiring that "personal data identifiers" such as Social Security numbers, dates of birth, financial account numbers, and names of minor children be modified or partially redacted Social Security cases were excluded from the system entirely At that time, criminal cases were also generally excluded, but that has now changed.

Public Access to Electronic Criminal Case Files

In March, 2002, the Judicial Conference approved the establishment of a pilot project that would allow 11 courts, ten district courts, and one court of appeals, to provide remote electronic access to criminal case files. A study of these courts conducted by the Federal Judicial Center did not find any instances of harm due to remote access to criminal documents

After further study and deliberation, the Judicial Conference adopted new policies with respect to remote access to criminal case files in September of 2003. In general, the policy states that documents that can be accessed at the courthouse should be accessible remotely There are some restrictions The policy states in part

Upon the effective date of any change in policy regarding remote public access to electronic criminal case file documents, it is required that personal data identifiers be redacted by the filer of the document, whether document is filed electronically or in paper, as follows:

1 Social Security numbers to the last four digits,
2 Financial account numbers to the last four digits,
3 Names of minor children to the initials,
4 Dates of birth to the year, and
5 Home addresses to city and state

The following documents are not to be included in the public case file and are not made available at the courthouse or via remote electronic access

1 Unexecuted summonses or warrants of any kind,

2. Pretrial bail or presentence investigation reports,

3 Statements of reasons in the judgment of conviction,

4 Juvenile records;

5 Documents containing identifying information about jurors or potential jurors,

6 Financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

7 Ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act, and

8 Sealed documents.

Courts maintain the discretion to seal any document or case file *sua sponte*

Security remains a constant concern, exacerbated by the injection of terrorist activities as part of the daily culture The AO works with the Department of Homeland Security and the National Security Agency to secure court records, and thus far, has been very successful The federal system utilizes a "dirty" server accessible to the public with the court's data residing on a "clean" server protected by a firewall Thus far, the system has foiled hundreds of thousands of "rattlings at the doorknob" though the AO is anything but complacent. As part of the national infrastructure, court records are potentially a valuable target for terrorists and the AO remains alert to the ever-morphing potential security vulnerabilities. Currently, court databases are replicated in Virginia and Missouri, and further replications are anticipated It may actually be safer to have data for the Eastern part of the U S. replicated in the West, and vice versa, a concept that is presently being studied With current software, only a single replication is possible, but that software will shortly be replaced and multiple replications will then be possible, thereby further reducing security risks

At one point, the Western District of Kentucky helped test the system by losing their outside server, and then activating the replicated data server Their system failure resulted in a test of the AO's "failback" procedures, which raised concerns about the methodology used to return to a normal production environment following a failover The AO continues to work to make such transitions as smooth as possible The AO has also allowed controlled "white hacking," in which security specialists attempted to hack into the CM/ECF system While the results mandated some minor fixes, the AO breathed a happy sigh of relief when the experts were unable to effect any major intrusions

Asked to sum up the general reaction, Bockweb notes happily, "It is rare to hear anything negative Most courts seem to really enjoy the benefits and those who have already implemented are looking forward to getting more and more 'nice to have' features." Some states, stymied in their own e filing efforts, have asked the AO for its CM/ECF system, but Bockweb notes that the AO can't afford to devote staff resources to working with the states Also, because the system hasn't been packaged as an "off the shelf" system, it would be very hard for anyone else to bring it up state by state, or court by court, in accordance with local needs. Still, the AO is looking at the issues to see if it can ultimately assist the states In the meantime, the "little engine that could" keeps chugging along, and it looks very much as though it will make it to the station on time ●

Executive Summary

Background

In 2001, the Administrative Office (AO) conducted a study of the electronic public access fee and its impact on the use of CM/ECF. Although data from the Electronic Public Access (EPA) Fee Study performed in 2001 suggested that fees do not impact the use of CM/ECF, these findings were made early in the CM/ECF implementation process, and the survey set was comprised of PACER users (commercial entities, attorneys, and the general public). In 2003, the Committee on Information Technology asked the Electronic Public Access (EPA) Program Office to conduct a follow-up study to determine whether electronic public access fees impact specifically attorney's acceptance of the CM/ECF system.

The EPA Program Office contracted with PEC Solutions, Inc. (PEC), which conducted the 2001 fee study, to also conduct the research for this study, which consisted of a telephone survey, focus group meetings, and an analysis of electronic public access account utilization

The objectives of the 2003 Fee Study were to assess the impact of fees on users' adoption and use of CM/ECF, and to determine the need to develop an alternate pricing method for electronic public access.

Methodology

In the telephone survey, PEC randomly selected 135 attorneys who use CM/ECF in either bankruptcy or federal district courts from 13 judicial districts divided into two pools. metropolitan statistical areas, which are populations over 50,000; and micropolitan statistical areas, which are populations under 50,000. The survey consisted of twenty-five questions concerning size and style of law practices, CM/ECF usage patterns, and opinions regarding the current fees and corresponding value of CM/ECF.

PEC personnel, along with AO staff, visited six different courts in four court locations: District of Columbia- District Court; Eastern District of Virginia- Bankruptcy Court; Western District of Missouri- District and Bankruptcy Courts; and Nebraska- District and Bankruptcy Courts. Each participating court contacted a cross-section of attorneys and firms who represented the most experienced users of CM/ECF. The number of participants varied from eight to fifteen persons per group meeting Participants included attorneys and support staff from sole practitioners' offices, small and large law firms, local and remotely located attorneys, U S. Attorneys and bankruptcy trustees

The focus groups proceeded via open discussions, rather than the method of specified questions and answers used in the telephone survey. A facilitator guided the discussion through four topical areas, including: what impact the system has had on attorneys' practices; how fees and other

costs impact attorneys' use of CM/ECF, what benefits attorneys are deriving from the system; and what changes, if any, attorneys would prefer.

Participants discussed any topic or aspect of CM/ECF or PACER that they believed to be important. The openness of the forum allowed potentially contentious issues to surface without derailing the discussion. The unrestrained conversation resulted in less inhibited, more meaningful discussions than the telephone survey permitted. Nonetheless, the focus groups predominantly confirmed the telephone survey results and provided qualitative explanations corresponding to each topic of discussion.

At each focus group meeting, participants completed a time analysis worksheet to identify where and how CM/ECF changed their work processes, filing procedures, storage of data, case management, and other aspects of the work day. The worksheet divided an 8-hour day into time segments into which attorneys attributed their work procedures, both clerical and substantive, before and after the implementation of CM/ECF.

Results

The study results show that the current fee structure does not deter attorneys from adopting or using CM/ECF. Accordingly, the survey participants preferred the current fee plan more than a proposed per-document plan or a flat fee.

1. Fee Structure: Participants compared the current fee structure to both a per-document fee plan and a flat fee, and overwhelmingly preferring the current fee system Most attorneys do not bother to bill clients for the fees, for two reasons: 1) the comparatively minuscule fees do not justify spending the time to track and recover them; and 2) under the current system, attorneys said it is difficult to efficiently attribute a particular fee to a particular client.

An overwhelming majority of attorneys surveyed, 86%, said the fee does not inhibit their use of CM/ECF A few users, however, complained of paying fees to view case files for their own cases, even after the initial free copy is obtained Some also complained of the billing mechanism, i.e., they found the billing transaction receipts annoying, but they challenge neither the need for the fee nor the amount of the fee. Other users suggested building the access fee into the filing fee or some other one-time fee associated with each case.

2. Advantages. Survey participants listed several benefits of CM/ECF, including cost savings, productivity and efficiency improvements, and enhancements to products and services. Users realized cost savings in postage, copying, paper usage, courier services, and travel to and from courts for filing and document retrieval Time advantages include service and delivery efficiencies, document filing, and access to case information, which facilitates improved communications with clients, other case participants, and the courts.

Users also advise that because of the time savings, attorneys and staff alike are able to spend more time on substantive projects. Use of CM/ECF also results in increased workloads, more billable hours, and even product improvement. The attorneys cite the 24 x 7 access as an element of CM/ECF that benefits their professional work as well as their personal lives by providing greater flexibility of when and where attorneys could perform their work.

3. Disadvantages: Attorneys' most vocal complaint was the increase in email volume, especially bankruptcy notices. Some attorneys reportedly diverted resources to manage the barrage of emails One predominant issue is the inability, under the current system, of the user to identify the source and subject of the emails, which necessitates the time-consuming tasks of opening and reading each individual email.

Attorneys also complained that filing and case management with CM/ECF required more highly skilled support staff Although filing and noticing have been streamlined, skilled staff are required to operate the system and troubleshoot anomalies. Obtaining skilled staff required new recruitment and hiring efforts and training, and might require laying off other staff with inadequate computer skills.

Those who practiced criminal law disliked the restricted access in criminal cases. However, the Judicial Conference recently changed the policy regarding remote access to criminal cases.

4 Start-Up Costs· Attorneys acknowledged that they incurred considerable initial costs, which they recouped directly, through billing and less money expended on mailing and courier services, and indirectly, through increased operational efficiencies, allowing more time to be spent on substantive issues rather than clerical issues involved in filing of cases. Users also note that by requiring updated computer and word processing equipment, CM/ECF has forced firms to update computer equipment to the overall benefit of the firm Therefore, users have recouped the start-up costs of CM/ECF while improving client services.

5. Case Management Tool: Almost all attorneys indicate that they have printed documents from CM/ECF, rather than saving them to disc. Users printed hard copies because of habit, practice peculiarities, security concerns, and court rules. Ultimately, both attorneys and support staff reported that they simply were more comfortable with a paper file than with an electronic file. Consequently, because users kept hard copies of CM/ECF documents, they were less likely to refer repeatedly to the system to review case documents. The attorneys have asserted, however, that the EPA fee is not the motivating factor that influences whether they use CM/ECF as their primary file system.

6 Revenue Projections: The number of CM/ECF courts increases dramatically each year, with a corresponding increase in EPA fee revenue. Nearly 50 CM/ECF courts are currently billing for EPA, and by the end of fiscal year 2004 this number should increase to nearly 90 courts, with 60 bankruptcy courts and 27 district courts implementing the system. The bankruptcy implementation is significantly closer to completion than is the district implementation. Consequently, the growth

rate for bankruptcy revenues is relatively flat, whereas the growth rate for district courts projects continued growth through 2005. Additionally, because bankruptcy revenue has historically accounted for most of the EPA revenue, and the bankruptcy statistical model is based on experience, the bankruptcy model supplies the principal dynamic in the projected growth of EPA. Nevertheless, analysis indicates that the current fee structure will provide increased revenues over time, continuing to provide for development, implementation, and operation of CM/ECF

Due to the differences between bankruptcy and district courts, the researchers created separate forecasting models for each. For fiscal year 2004, expected total revenue is $35 0 million*; for fiscal year 2005, the expected revenue is $43.7 million**; and for fiscal year 2006, the expected revenue is $47.7*** million.

7. Cost-Benefit Analysis· Attorneys report that CM/ECF's benefits substantially outweigh the costs of start-up and operation Attorneys using CM/ECF take advantage of saved time to improve services and increase billable hours, gaining competitive and thus economic advantage over those who do not use CM/ECF. Firms commonly write-off non-billable hours because they exceed reasonable costs for the period. Upon implementing CM/ECF, however, firms have reduced non-billable hours write-offs and have recovered the revenue corresponding with the regained hours. Users were able to pass savings on to clients, promoting client good will and further enhancing competitive advantage

Summary

The 2003 Fee Study results show that the current fee structure does not deter attorneys or support staff from using CM/ECF. Although users do not typically use CM/ECF as their primary internal case management system, this is not related to the access fee. Instead, users choose to print documents for a variety of reasons related to historical practice, court requirements and security Users have noted that start-up costs were moderate to substantial, but that they have recouped the costs through increased billable hours, expanded competitive advantage and enhanced client goodwill. Ultimately, the users overwhelmingly report that the value of CM/ECF substantially outweighs the burden of the access fee.

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* Between $29.1 million and $38 6 million

** Between $34.2 million and $48 2 million

*** Between $35.8 million and $59 0 million

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Section 1 – Introduction

1.1 Background

The Administrative Office of the U.S. Courts (AO) is at the approximate mid-point of implementing a new case management system for the federal judiciary. The new application is a Government-developed product called Case Management/Electronic Case Files (CM/ECF). The CM/ECF project replaces existing case management systems in the federal courts (e.g., the Integrated Case Management System (ICMS), NIBS) with a new case management system based on current technology, new software, and increased functionality requested by the courts In addition to providing the courts with updated tools for managing their cases, this new system enables the courts to create electronic case files and implement electronic filing over the Internet.

Current Judicial Conference policy is that public access fees should be commensurate with the costs of providing existing services and for developing enhanced services. The fee for public access to electronic information was initially set at $1.00 per-minute. It was reduced twice, first to $.75, then to $.60 per-minute. As access began to be made available via the Internet, the Judicial Conference, at its September 1998 session, prescribed a $.07 per-page charge for Internet access to court documents. This charge, which was aimed at maintaining current public access revenues, while also introducing new technology to expand public access court information, was calculated to produce comparable charges for Internet and dial-up access for large users (charges are reduced for light users), and applies to all court types.

As a result of the Fee Study conducted by PEC Solutions in 2001, the Judicial Conference approved a per-document cap of $2.10 on case file documents accessed through the Public Access to Court Electronic Records (PACER) system. This cap was set based on user preference combined with the need to preserve revenue at a level sufficient to fund the EPA program, which relies exclusively on revenues derived from PACER. The PACER Service Center, located in San Antonio, TX, manages administration and billing for all electronic public access in the courts. While physical access to public records within the courthouse during regular operating hours is currently available to the general public free of charge, anything beyond this basic level has an associated charge, e.g · $.50 per-page for copies of court documents, $20 for a search of the court records by the clerk; $4 for a sheet of microfiche; $20 for an audio recording of court proceedings; $7 for certification of a document; and $.10 per-page if printed from a public access terminal.

EPA revenues are used to fund not only the PACER program, but also the Appellate Bulletin Board System (ABBS), the Voice Case Information System (VCIS) and the Appellate Voice Information System (AVIS); the latter two of which are provided to the public without charge In addition to VCIS, which has been an extremely popular service, the U S Party/Case Index, which allows users to perform nationwide searches, logged approximately 3,000,000 transactions last year These revenues also provide courts with telephone lines and toll-free lines, as well as all of the hardware and software necessary for public access, including PACER-Net and infrastructure costs, and public

scanning stations, including a personal computer for free public access at the court in all offices with ten or more staff.

EPA revenues also fund the development and implementation costs of CM/ECF, whose operation has been integrated with, and indeed expanded the scope of PACER. PACER has been expanded to administer electronic access to documents filed in CM/ECF, in addition to docket sheets CM/ECF is currently "live" in 60 bankruptcy courts and 27 district courts and is currently being implemented in 52 additional district and bankruptcy courts Implementation of all federal courts is anticipated to be completed by the end of 2005

1.2 Objectives

The objectives of the EPA Follow-up Fee Study are to assess the impact of fees on the adoption and use of CM/ECF by attorneys and to evaluate alternate pricing models for electronic public access and electronic filing for attorneys. The study reviews the benefits and disadvantages system users have experienced to determine the value that the system provides to attorneys.

1.3 Analytical Methods and Document Organization

The focus of this study is on the attorneys practicing in the U.S. Courts A telephone survey of current, randomly selected, CM/ECF users, coupled with focus groups of attorneys in CM/ECF courts gathered users' opinions regarding the advantages and disadvantages of CM/ECF, and how the system has impacted practice. The survey and focus groups were performed in parallel; however, initial answers from the survey were used to direct questions and discussion during the later focus group sessions to help the PEC facilitators fully understand the issues arising from the implementation and use of CM/ECF by attorneys EPA revenue forecasts extrapolated revenue trends using statistical regression models. The specific methodology is described in detail in Section 6, "Revenue Projection." These sources also contributed to estimates for Section 4, "Electronic Public Access Benefits and Costs."

The remainder of this document is organized into the following sections:
Section 2 - Data Collection Methodology
Section 3 - CM/ECF Impact on Attorney Practice
Section 4 - Electronic Public Access Benefits and Costs
Section 5 - Attorney Adoption of the CM/ECF System
Section 6 - Revenue Projection
Section 7 - Findings

Section 2 – Data Collection Methodology

This section describes the three primary data collection methodologies used to develop the information contained in this report. PEC performed a telephone survey of randomly selected attorneys, facilitated focus group meetings with current users of CM/ECF, and analyzed account and revenue data from the previous two years.

2.1 Overview

The timing of this study, at the mid-point of CM/ECF implementation, allows analysts to draw on actual experience using the system. The following data collection tools provided complementary insights into the experience of CM/ECF users:

- Telephone Survey - collect data regarding user demographics, usage patterns, and fee-related issues, as well as general information regarding the perceived value and costs of EPA.
- Focus Group Meetings - provide specific information regarding the effects of CM/ECF on attorney practice, the advantages and disadvantages of EPA, including quantifiable and non-quantifiable benefits experienced with the implementation of the system. In addition, issues raised from the telephone survey will be discussed to develop a complete understanding of reasons behind some of the answers.
- CM/ECF and PACER Account and Revenue Data - analyze usage data to develop models to forecast future usage and revenues, as well as development of possible alternative pricing models

The following paragraphs describe these methodologies in detail.

2.2 Telephone Survey

2.2.1 Overview

The telephone survey was developed with input from the AO The survey consists of twenty-five (25) questions developed to elicit responses which identify the user's law practice, CM/ECF usage patterns, and opinions regarding the current fees and value of EPA. Survey participants were randomly selected from lists of CM/ECF users from thirteen (13) judicial districts totaling approximately 15,800 attorneys A total of 135 attorneys were surveyed, which provides an eight (8) percent error rate with a confidence interval of 90 percent

2.2.2 Methodology

PEC chose a telephone-based survey because of the higher response rate and more in-depth issue exploration anticipated via telephone, as compared to e-mailed or printed questionnaires. To gain the maximum insight into the use of electronic documents from CM/ECF, the population was defined as the courts that have used the system for the longest time. Select additional courts with significant CM/ECF experience were added to provide a balance of "prototype" and later "wave" courts.

The courts represented CM/ECF courts of varying sizes covering different demographic areas in different regions of the country to enable participation and representation in the survey of areas with as many characteristics and court environments as possible. A particular interest in the survey was to ensure adequate representation of the views of attorneys who practice outside of large cities and metropolitan areas. To achieve a balance between metropolitan and non-metropolitan attorneys, the lists provided by the selected courts were divided according to their location into two groups representing larger and smaller population areas. The survey groups were defined as follows:

I. Those attorneys located in Metropolitan Statistical Areas (population >50,000) defined by the U.S. Census Bureau, and
II. Those located in Micropolitan Statistical Areas (population <50,000) and other small towns and sparsely populated areas.

Separation into two groups was necessary because the attorneys in micropolitan areas would represent a statistically insignificant group in a non-differentiated survey.

For each group, the attorneys were sequenced and selected to participate in the survey by matching the sequence number with a list of numbers provided by random number generator This method supports the guiding principles that all participants have an equal chance of selection. The only records eliminated were those that contained erroneous and incomplete address and telephone contact information that prevented survey contact, or were duplicates.

2.2.3 CM/ECF User Pool for Survey

Thirteen (13) courts provided lists of their current CM/ECF attorney users for inclusion in the initial pool from which survey participants would be randomly selected (see Attachment D). The total pool of users provided by the participating courts totaled over 15,800 attorneys. As stated above, the users were then separated into metropolitan and micropolitan sub-groups to ensure representation of both user types.

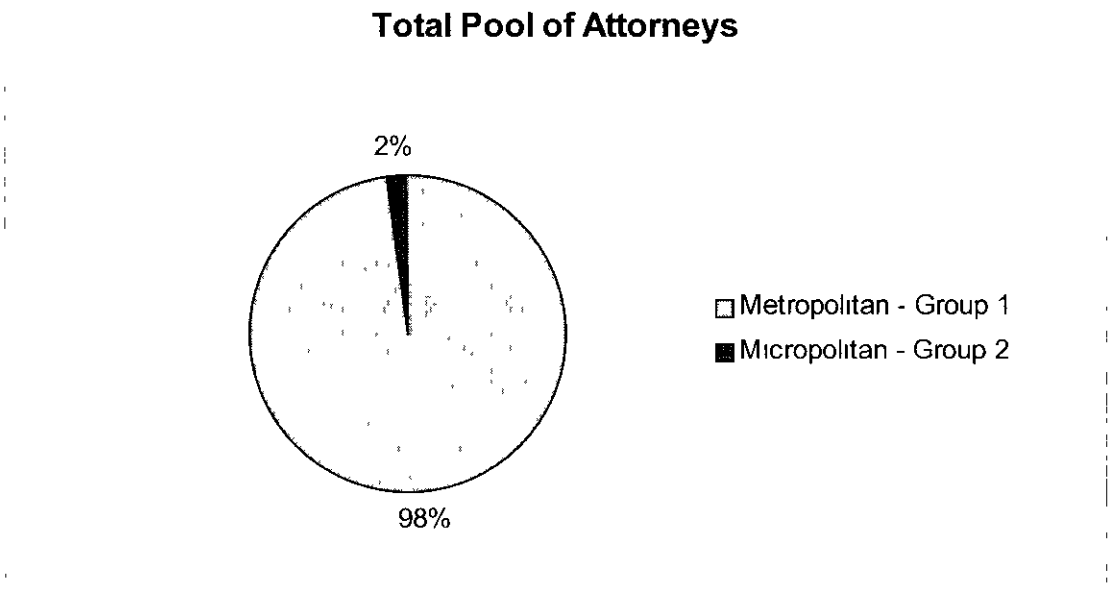


Exhibit 2.1: Pool of Attorneys by Location

Exhibit 2.1 shows the enormous disparity between the number of metropolitan and micropolitan users and illustrates the need to create two randomly selected groups If all users were combined into one pool the odds of randomly selecting a sufficient number of micropolitan users to gather meaningful data would be extremely low.

2.3 Focus Group Meetings

2.3.1 Overview

The objective of the focus group meetings is to understand how the CM/ECF system is used by attorneys. Several areas are discussed with each focus group.

- What impacts has the system had on their practice?
- How do fees and other costs impact their use of CM/ECF?
- What benefits are attorneys receiving from the system? and
- What would they like to see happen with the system in the future?

The focus groups also allow the PEC team to delve deeper into certain issues that may have been identified during the telephone survey. For the most part, the focus groups confirmed and enhanced the survey results and provided the qualitative explanations underlying the quantitative results of the survey.

2.3.2 Methodology

The AO arranged for the PEC team to visit four court locations and a total of six courts which have been using the CM/ECF system for a significant period of time. The focus group courts included:

- District of Columbia - District Court
- Eastern District of Virginia - Bankruptcy Court
- Western District of Missouri - District and Bankruptcy Courts
- Nebraska - District and Bankruptcy Courts

Facilitation of the focus groups insured that:

- All participants had an opportunity to express their thoughts on EPA;
- Potentially contentious issues were surfaced without derailing the main items of discussion; and
- Conduct of the focus groups occurred in an efficient, decorous, and professional manner that reflected on the judiciary's concern for the user community and scrupulously respects the time constraints of busy attorneys.

Each focus group court arranged for the participation of a representative group of attorneys and support staff The total number of participants in each session varied from eight to fifteen individuals. Sessions were attended by a cross-section of the CM/ECF attorney user community, which included sole practitioners, attorneys from small, medium (10 - 30 attorneys) and large firms (> 30 attorneys), remotely located attorneys, U.S. Attorneys, and bankruptcy trustees. Participants included attorney support staff (paralegal/legal secretary), who identified how the office environment has changed since the implementation of CM/ECF. Many attorneys do not use the system frequently, relying on their support staff to electronically file and receive documents. In addition, many of the anticipated benefits of the system are more clerical in nature and, therefore, the support staff may be significantly affected by the implementation of CM/ECF

Lastly, a time analysis worksheet (Attachment C) was provided to each of the focus group participants to help identify where and how their work day has changed since the implementation of CM/ECF. Participants were asked to assume an eight hour work day and allocate those hours among the categories provided, both before CM/ECF and after its implementation. The time analysis was not a scientific study; rather, it provided indications of where and how CM/ECF is affecting practicing attorneys

Section 3 - CM/ECF Impact on Attorney Practice

3.1 Overview

This section explores the impact CM/ECF has had on attorney practice. The impacts CM/ECF has had on the day-to-day practice of attorneys and what advantages/disadvantages attorneys have experienced are reviewed.

3.2 CM/ECF Impact on Attorney Practice

CM/ECF impacts practice in many different ways, such as staff requirements, costs, time allotment, productivity, client servicing, and access to information. The telephone survey results and focus group input both identify advantages and disadvantages experienced by attorneys and professional staff using the system. Overall, the input received about the system during the data collection activities is very positive.

The telephone survey asked several questions about how the CM/ECF system affects attorneys' practice. Question #22 asked users if they viewed the system positively or negatively in the following areas: Cost Control, Access, Reliability, Timeliness, Single Source of Data, and Change. For all areas approximately 90% of the survey respondents replied that they view the impacts from CM/ECF in a positive light. All of these aspects of the system were also identified as advantages by the focus groups and are discussed in greater detail in paragraph 3 3 1

Similarly, Question 20 queried whether there was a positive or negative impact on "Research and/or Document Preparation", Filing/transmittal, Case tracking, and Post Case Follow-up. For the work areas of Research and Post-case follow-up there was an almost even split between those who believed that CM/ECF has had no impact and those who answered that the system has had a positive impact on practice For the more clerical work areas of Filing/transmittal and Case tracking, close to 90% of the respondents believe there has been a positive impact.

A third question was asked regarding the perceived value that CM/ECF provides or will provide Question #21 asked:

"In general, do you expect the overall long term impact of electronic documents to be:

a. Labor-saving
b. Burdensome
c. No impact
d. Other

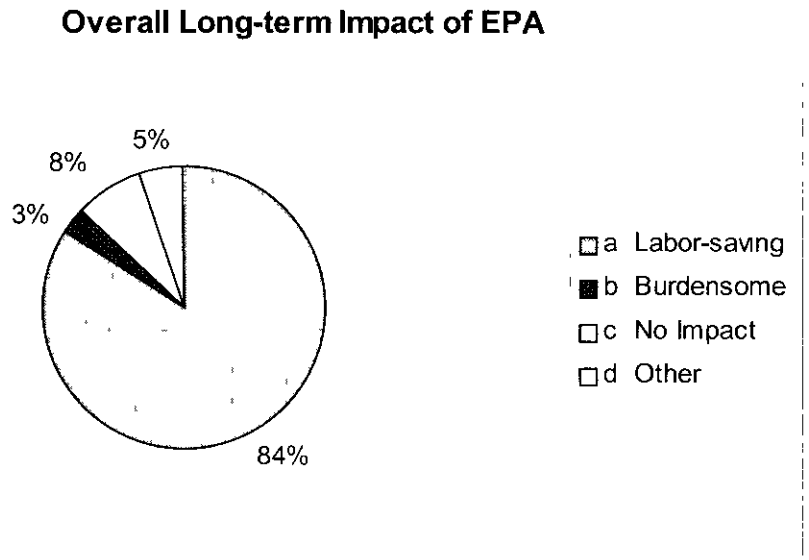


Exhibit 3.1: Long-term Impact of EPA

The results are consistent with overall views on the efficiency of using the system Exhibit 3.1 shows that the overwhelming majority of system users believe that CM/ECF will provide labor-savings over the long term. Both metropolitan and micropolitan attorneys had the exact same percentage of users answer that the system will be labor saving.

3.2.1 Advantages

There were numerous advantages cited by the focus group participants, however, several were mentioned consistently throughout the meetings and telephone survey The benefits can generally be divided into four categories: cost savings, efficiency/time savings, productivity gains, and quality of access improvements.

3.2.1.1 Cost Advantages

Cost advantages provided by the CM/ECF system are usually the first benefits mentioned by system users because they are readily apparent and can be significant. The cost advantages will be discussed in general terms in this section and quantified in greater detail in Section 4, Cost-Benefit Analysis.

Cost savings were identified primarily for clerical and delivery areas having to do with document production and delivery.

- **Postage** - CM/ECF shifts the burden for document service delivery from the submitting attorney to the Court because the system automatically forwards the documents to parties in the case via e-mail. For large bankruptcy and multiple

defendant civil/criminal cases the number of mailings could run into the hundreds or even thousands of documents over the life of a case Attorneys are no longer required to send hard copies of court documents (in most cases) and, therefore, save a considerable amount of money.

- **Copying/Paper** - Similar to the postage savings, with electronic delivery of court documents the submitting attorney has shifted the cost of making multiple hard copies of documents, which can be hundreds of pages in length, to send to the parties in a case. Considering that the normal cost attributed to paper and copier usage is estimated at approximately $ 05 per-page, for every 100 pages not copied an attorney's office saves $5 00. Although a relatively small amount initially, during the course of litigation thousands of pages per-case can be saved, resulting in significant savings. One focus group member commented that, "Copying costs alone are down 60%."

- **Courier** - Before CM/ECF submission of documents in a timely manner to the court required either a mailing or a courier delivery to the courthouse. Since documents can be filed electronically at any time, day or night, the need for courier delivery and the urgency to meet a 5 o'clock deadline have been eliminated.

- **Travel** - Like courier expenses, travel expenses necessary to deliver or retrieve documents from the court have been significantly reduced or eliminated. Attorneys remotely located from the court particularly benefit from reduced travel costs. The current government reimbursement rate for auto travel is $0.36 a mile. If an office is required to send someone to deliver a document or travel to retrieve a document and they are located 100 miles away, the office can save $72 in auto costs, plus the hourly labor costs for the person making the trip.

- **Storage Space** - Offices have the potential of saving money on storage space for areas currently used for physical files because the files can be stored electronically. However, since attorneys are still printing documents, they are not taking full advantage of this potential benefit

3.2.1.2 Efficiency/Time Advantages

Efficiency and time advantages consist of changes in how particular tasks are performed, reducing the amount of time required or providing more flexibility for the user.

- **Service/Delivery** - CM/ECF has drastically reduced the amount of time it takes to prepare and deliver documents to case parties for support personnel. Time copying, binding, and mailing documents has been eliminated because the documents are sent to all necessary recipients with immediate delivery. Conversely, notification and

acceptance of delivery on the receiving end is almost immediate. Parties no longer have to wait several days to receive a document via mail.

- **Internal Document Filing/Retrieval** - Time associated with filing or retrieving hard copy documents from file rooms has been reduced or, in some cases, eliminated. Although hard copies are normally made, in many instances copies of documents are also saved electronically on the user's computer system. Users have instant access to the document via CM/ECF or through their own computer files. This is especially important when a client calls and the attorney does not have to waste time finding the file and then calling the client back with the information, he or she can respond almost instantly Some attorneys noted that the organization of their files is better when they save them electronically.

- **Immediate Access to Information** - CM/ECF provides users with almost immediate access to their own case files, as well as information regarding current cases in the federal judicial system Attorneys can check the docket at any time to ensure their case files are complete. With immediate delivery and receipt of court documents, it was noted that many simple court actions are completed much quicker. Case history is more readily available, especially for closed/permanent records, along with easier access to exhibits In addition, client background checks regarding their litigation history can now be done quickly and discretely by attorneys.

- **Improved Communication** - All parties are more aware of what is going on in the case because the access to the docket and case files. This improves efficiency of the entire process and allows practitioners to potentially handle more cases.

3.2.1.3 Productivity Gains

Productivity gains include advantages such as increased case load and reduced "busy" work.

- **More Substantive Work** - CM/ECF has reduced the need for clerical support and has freed up support staff and attorneys to work on more substantive projects. This is especially important for sole practitioners or small offices where clerical support is at a premium. A focus group member commented that it, "liberates support staff of menial and time consuming tasks." By eliminating much of the clerical "busy" work (copying, delivery preparation, etc.), an office can be more productive

- **Increased case load/billable hours** - Because of the reduced clerical work and increased efficiency, several attorneys commented that CM/ECF allows them to increase their billable hours and/or handle a larger case load

3.2.1.4 Quality Improvements

Quality improvements include both attorney product quality, but also work/life quality.

- **Product Improvements** - The time savings and efficiency improvements mentioned above allow attorneys to spend more time doing substantive work, such as legal research and quality assurance. One type of research that is now available is the access to pleadings in other cases. Attorneys can now use ideas and arguments from other cases which they may not have had easy access to previously. This results in a better work product and better client support and servicing. The ability to file documents up until midnight the day they are due allows attorneys to do last minute quality checks on documents before they are filed (see also disadvantages).

- **Remote and 24 x 7 Access** - The CM/ECF system allows access via the internet, twenty-four hours a day, seven days a week The ability to access the system and file documents at any time, from any location with internet access provides considerable flexibility to attorneys. Attorneys can now access case files while they are away from the office.

  Remotely located attorneys, such as those in the micropolitan areas are particularly advantaged by the access CM/ECF provides. Remote attorneys now have the same access to documents as attorneys that are located next to the courthouse. One sole practitioner stated, "The system is a boon for me - it allows me to be more efficient and independent."

  Some quality of life issues are also improved by the 24 x 7 access allowed by CM/ECF. An attorney noted that the ability to file documents at his leisure (up to midnight) allows him flexibility to attend family functions, such as a child's softball game, and still file timely afterwards, often from home

3.2.2 Disadvantages

Participants in the focus groups and the telephone survey were asked to identify disadvantages of using CM/ECF Respondents named as disadvantages particular facets of using the system that were actually needed system improvements, which are listed as "Attachment A." Several disadvantages were repeatedly identified, such as e-mail volume and naming of docket entries, time increases, and start-up costs, among others. Below are the most common disadvantages cited by the focus groups and survey participants.

- **Volume of e-mails** - The volume of e-mails that some users receive, especially in bankruptcy, can be overwhelming. In contrast to paper copies of documents delivered via U.S. mail, documents served electronically prove more difficult to quickly review for relevance, especially in light of the naming convention issue. Moreover, attorneys are now receiving e-mail notification for every action taken in a particular case, whether or not it is relevant to their client This is true for

bankruptcy cases where there are multiple creditors and civil cases with multiple defendants. Some attorneys indicated that they spend more time trying to review their e-mails than they used to spend going through their regular mail.

- **Naming convention for docket entries** - The naming convention for e-filing in CM/ECF does not always identify the exact type of document being submitted. CM/ECF users are having difficulty identifying important e-mails because of this, causing them to waste time going through every e-mail received.

- **Higher skilled staff** - Due to the complexities of attorney practice and the growing number of e-mails, staff that is more highly skilled is required to identify important documents, rather than using purely clerical staff As a result the individual cost per support person has increased. Most indicated, however, that they require less personnel overall, so the costs appear to balance out.

- **Start-up costs** - Start-up costs are an issue for a few of the smaller offices and sole practitioners. The costs of upgrading computers, purchasing scanners and software, and installing a high speed connection could be relatively high

- **Lack of consistency** - The way CM/ECF is implemented varies from jurisdiction to jurisdiction. Similar rules for using the system would simplify training for multi-jurisdictional practices.

- **Information Access** - A few criminal attorneys commented that they could not access some documents on-line that they were able to access by going to the court. The restrictions reflect current Judicial Conference policy

- **Staff time has increased in some areas** - Scanning of documents, especially exhibits[1], has increased considerably, along with the formatting of documents to be filed electronically. Getting documents prepared for PDF conversion and delivery has balanced out time savings in other areas for some staff.

- **Accounting** - The credit card bills that the law offices receive for their filing fee via CM/ECF are not detailed which causes increased time for the attorney and/or accounting personnel to figure out the bills for each client.[2]

- **24 x 7 Availability** - Although constant access to the system is advantageous in many respects, it has also extended the day for some attorneys and staff. In many

[1]Not all courts require exhibits to filed electronically.

[2]This is a function of the credit card company billing practices, not CM/ECF or PACER

instances, the staff person is the only person who knows how to use CM/ECF, so they must stay with the attorney to file the document.

- **Technical Difficulties** - Participants noted sporatic difficulties with electronic service delivery and other aspects of the CM/ECF system and their own internal systems

- **Less opportunity to catch errors** - A few attorneys found the electronic filing processes provided fewer or briefer reviews before filing the documents As a result, they were concerned that they occasionally submit the incorrect version of an electronic file.

- **Shift in costs to trustees** - Printing/paper costs have shifted from the debtor to the bankruptcy trustees. This was mentioned in two focus groups, but not specifically identified as a disadvantage to the system.

3.2.3 Time Shift Analysis

During the focus group meetings participants were provided a sheet which listed broad work categories likely to be affected by the implementation of CM/ECF. Each broad category had several more specific categories beneath it Participants were asked to assume an eight-hour day and allocate those eight hours among the categories of work before CM/ECF was implemented and after. The individuals filling out the sheet could fill it out from their own perspective (attorney/paralegal/secretary) or from the perspective of the firm. If attorneys believed that the work areas were more appropriate for support staff, they were asked to fill it out from that perspective. The Time Analysis Template is included as Attachment C.

While the analysis does provide a general indication of how CM/ECF is affecting certain practice areas, the analysis certainly could not be considered a scientific study of how work performance has changed. The four broad work categories are: Delivery, Case Management, Clerical, and Legal Research.

Many attorneys commented that the categories were more applicable to support staff and filled out the sheet from that perspective. A large number of participants also noted that the overall time during their workday has not changed, but what they are doing has shifted somewhat. After tabulating the results from the worksheets, there was a clear indication that time had been reduced in more areas than increased in others since the implementation of CM/ECF. Consistent with advantages cited earlier, the additional time was used to improve work product through additional quality assurance and research, as well as additional client services.

Below are the results of the time shift analysis, broken down by attorney time and staff time.

- **Delivery** - this category included travel/driving, service delivery to multiple recipients, follow-up/service confirmation, and wait time at the courthouse.
    - Across the board, the reduction in time required since the implementation of CM/ECF was by far the greatest.
        - Average attorney time decreased by 1.0 hours
        - Average staff time decreased by 1.49 hours
- **Case Management** - this category included logistics/coordination, internal document retrieval, internal document filing, preparation for submission, and docket checking.
    - The results in this category were mixed Submission preparation and docket checking increased for many, while document retrieval and filing fell significantly.
        - Average attorney time decreased by 0.78 hours
        - Average staff time increased by 0.5 hours
- **Clerical** - this category included copying, delivery preparation, mail sorting/document processing, and billing.
    - The total time in this category decreased for both attorneys and staff, though scanning was written in by several participants as an increase in time Copying was significantly reduced. Time spent sorting mail stayed the same or increased for many because of the volume of e-mails and time spent on billing increased for those who bill their clients for CM/ECF charges.
        - Average attorney time decreased by 0.76 hours
        - Average staff time decreased by 0 27 hours
- **Legal Research** - this category includes specific judge rulings, searches of similar cases, key word searches, and travel to courthouse.
    - The total time for each labor category decreased.
        - Average attorney time decreased by 0 37
        - Average staff time decreased by 0.19
- **Other** - this category was filled in if the above list did not include a category which experienced change for a particular participant.

- A few attorneys spent more time with their clients.
  - Average attorney time increased 0.05 hours
  - Average staff time increased 0.29 hours

- **Total Time Change**:
  - Attorney: -3 08 hours
  - Staff: -0.98 hours

Section 4 – Electronic Public Access Benefits and Costs

The telephone survey and the focus group meetings described above served as the basis for assessing benefits and costs. Attorney users having a wide variety of practices conveyed their perceptions of the system's impacts, which included many benefits, such as decreased costs, increased effectiveness, and improved work product. The general benefits of the system were discussed in Section 3. This section presents a comparison of quantifiable benefits with the estimated costs users incur to use CM/ECF.

4.1 Overview

CM/ECF has been implemented in approximately half of the courts in the federal Judiciary and has been in use for several years in some court jurisdictions The costs and benefits in the jurisdictions that have experience using CM/ECF have been recognized by the users and are beginning to take full effect

4.2 Methodology

The format for collecting information included the focus group meetings and telephone surveys with CM/ECF attorney users. Wherever possible, specific quantifiable costs and benefits were identified and calculated using assumptions regarding use and time periods. Although not a scientific study, the time shift data gathered during the focus groups identified specific changes in time spent on activities by the attorney and staff users, as detailed in the preceding section. Since CM/ECF has been in use in some jurisdictions for several years, this experiential data yields an approximate idea of the savings to be realized from using CM/ECF.

4.3 Quantifiable vs. Non-quantifiable Benefits

Quantifiable benefits are those where a direct association can be established between some particular component of CM/ECF and a cost reduction. Other activities that are linked to improvements made by the system, are considered to be non-quantifiable. For example, alleviating the necessity to retrieve a document physically from the courthouse corresponds to a quantifiable cost savings of salary or courier fees. In contrast ensuring that a document has been received timely is a non-quantifiable, though important, benefit. Another example of an important non-quantifiable benefit is the ability to produce better work products due to the efficiencies gained in other areas.

4.4 List of Benefits

The benefits/advantages identified by system users are generally explained in Section 3.3. Below is a table listing all EPA benefits identified by the system users during the focus groups and telephone survey The quantifiable and non-quantifiable benefits are specified.

Table 4.1: Quantifiable and Non-Quantifiable Benefits

Functionality/ Factors	Benefits	
	Quantifiable	Non-Quantifiable
1. Time Savings		
1. Travel time (to Courthouse)	✓	
2. Wait time (in line in Courthouse)	✓	
3. Wait time (for mail or courier)	✓	
4. Document processing time (opening mail, sorting, etc.)	✓	
5. Copy time (to generate copies)	✓	
6. Filing time (internal manual file handling)	✓	
7. Filing time (court document submission)	✓	
8. Legal research time (searching court files)	✓	
9. Legal research time (judges' rulings)	✓	
10. Legal research time (marketing, competitive analysis, client checks)	✓	
11. Search time (document retrieval)	✓	
12. Search time (to find information for clients)	✓	
13. Document production time (reduced data "rekeying")	✓	
2. Increased Availability		
1. Case files available 24X7 (not only during Courthouse hours)		✓
2. Information available immediately (without getting up from computer)		✓
3. Information is available from anywhere (remote users have same access)		✓
4. Greater flexibility (adjust schedule)		✓

Functionality/ Factors	Benefits	
	Quantifiable	Non-Quantifiable
3. Increased Effectiveness		
1. Better work product (more time for quality assurance)		✓
2. Increased billable hours	✓	
3. Increased case load	✓	
4. Better case filings (electronic access to successful filings)		✓
5. Better communication between parties		✓
6. Fewer misfiled documents		✓
7. More effective use of time (time shift)	✓	
4. Increased Efficiency		
1. Lower internal copy costs (fewer hard copies)	✓	
2. Lower postage costs (fewer mailings)	✓	
3. Lower court copy costs (fewer hard copies)	✓	
4. Lower travel costs (mileage and time)	✓	
5. Lower storage costs (less hard copy storage)	✓	
6. Lower courier costs (fewer trips to court to file)	✓	
7. Reduced case management time (for manual or automated case management)	✓	
8. Better market analysis (of competition)	✓	

4.5 Estimation of Benefits and Costs

This section quantifies the benefits and costs associated with the CM/ECF system Benefits derive primarily from the time-saving features and reduced resource usage described previously in this report. The costs are primarily associated with fees for electronic public access The necessary hardware, software, training, and other costs of becoming proficient in the CM/ECF application delay some users' achievement of the benefits ultimately available from document access in CM/ECF. Many users noted the initial investment required to achieve proficiency, terming it a

"learning curve" or "adjustment period." The vast majority of CM/ECF users expected that the return on the investment from using the system will far outweigh the initial implementation costs.

Projection of the estimated benefits for particular classes of CM/ECF users is produced from the information gained from the telephone survey and focus group meetings. Using the survey breakdown of metropolitan and micropolitan attorneys, a definition of "small" and "large" law offices could be produced. The average number of attorneys in each group was calculated and used to compute associated time benefits. The Time Shift Analysis was used to estimate time savings for various categories of work and provides a break down for staff and attorney time.

Table 4.2: Time Shift Analysis

Work Category		Attorney	Staff
Delivery			
	Travel/driving	(0 58)	(0 86)
	Multiple recipients	(0 11)	(0 23)
	Follow-up/service confirmation	(0 14)	(0 12)
	Wait time at courthouse	(0 21)	(0 29)
	Other -	(0 06)	
	Other -	0 07	
	Other -	0 04	
	Total	**(0.99)**	**(1.49)**
Case Management			
	Streamlined logistics/coordination	(0 26)	0 04
	Internal document retrieval	(0 43)	(0 11)
	Internal document filing	(0 11)	0 01
	Preparation for submission	0 04	0 10
	Docket Checking	(0 04)	0 21
	Other -	0 02	0 25
	Other -		
	Other -		
	Total	**(0 78)**	**0.50**
Clerical			
	Copying	(0 57)	(0 48)
	Delivery prep	(0 37)	(0 27)
	Mail sorting, document processing	(0 28)	0 51
	Billing	0 25	(0 13)
	Other -	0 18	0 03

	Other -		0 07
	Other -		
	Total	**(0.79)**	**(0.27)**
Legal Research			
	Specific Judge rulings	(0 03)	0 02
	Similar cases currently in the system	0 09	(0 10)
	Key-word search	(0 11)	0 01
	Travel to courthouse	(0 52)	(0 11)
	Other		(0 04)
	Total	**(0 57)**	**(0.23)**
Other			
		0.05	**0.29**
Total Time Increase (Reduction)		**(3.08)**	**(0.98)**

Benefit/Cost Computation for Small Law Office (Micropolitan)

Assumptions for small law office (3 attorneys and 5 support):

Billing: $150/hour for attorney; $40/hour for support (clerical and paralegal)
Workdays: 250 days/year
Courthouse: 1 visit/week

The following tables detail the Benefits to a Small Law Office using CM/ECF.

Annual Savings by Attorneys	
Delivery	**.99 hours/day**
Case Management	**.78 hours/day**
Clerical	**.79 hours/day**
Legal Research	**.57 hours/day**
Other (cost)	**-.05 hours/day**
Total saved per-day (average office)	**3.08 hours/day**
Adjustment for small office (25% of average office)	**.77 hours/day**
Total Attorney Dollars Saved/year (.77 x 250 x $150)	**$28,875.00**

Annual Savings by Support Personnel	
Delivery	**1.49 hours/day**
Case Management (cost)	**-.5 hours/day**
Clerical	**.27 hours/day**
Legal Research	**.23 hours/day**
Other (cost)	**-.29 hours/day**
Total saved per-day (average office)	**.98 hours/day**
Adjustment for small office (25% of average office)	**.25 hours/day**
Total Support Dollars Saved/year (.25 x 250 x $40)	**$2,500.00**

Other annual estimated costs avoided by reliance on CM/ECF information	
Reproduction costs for 5 documents per-day (assuming 5 pages/document) (25 pages/day x 250 days/year x $ 05 /page)	**$312.50**
Postage costs for 1 document per-day and 4 recipients (1 docs/day x 4 recipients x 250 days x $.37 stamp)	**$370.00**
Vehicle/transportation costs from avoided trips to courthouse (assuming 10 miles/trip) (10 miles x 52 trips/year x $ 36/mile)	**$187.20**
Courier costs for 1 trip per-week (1 trip x 52 weeks x $15 per trip)	**$780.00**
Reproduction charge for each courthouse visit (assuming 50 copies @ $ 25 per copy 50 copies x 52 weeks x $ 25 per copy)	**$650.00**
Annual Total Other Costs	**$2,299.20**

Summary Table

Total Annual Benefits to Small Law Offices	
Total Attorney Time	**$28,875.00**
Total Staff Time	**$2,500.00**
Total Other	**$2,299.20**
Total Annual Benefits	**$33,674.20**

Costs of CM/ECF to Small Law Offices

Cost of CM/ECF access is estimated based on accessing 10 documents/per day. This basis is larger

than the total hard-copy documents estimated in the savings calculation above due to the fact that additional CM/ECF documents are accessed for reasons of research, quality assurance, and simple convenience. However, as the survey indicated, attorneys only go back to a document once or twice after their first free electronic copy The propensity expressed by attorneys for using hard-copy documents requires the additional assumption that the electronic documents will be printed for review and filing Many attorneys indicated that multiple copies are made in some instances for several attorneys.

Annual Costs of CM/ECF to Small Law Offices	
CM/ECF Fee (10 documents x 5 pages/doc x 250 days x .07)	**$875.00**
Printing Costs [15 documents x 5 pages/document x 250 days x .05 (paper/printer ink)]	**$937.50**
Total Annual Cost To Small Law Office	**$1,812.50**

Benefit/Cost Computation for a Large Law Office

The following calculation projects the annual benefits derived from access to CM/ECF information for a large law office (78 attorneys and 75 staff personnel):

- Estimated parameters are the same as for the preceding small law office example Application to large law office case is made on the basis of savings per office with a 25% increase over the medium firm.

Annual Benefits to Large Law Firm (detail omitted)	
Total Attorney Time [(3.08 hours x 1.25) x 250 x $150]	**$144,375.00**
Total Staff Time [(.98 hours x 1.25) x 250 x $40]	**$12,250.00**
Total Other	**$5,748.00**
Total Benefits	**$162,373.00**

Annual Costs of CM/ECF to Large Law Offices	
CM/ECF Fee (50 documents x 5 pages/doc x 250 days x .07)	**$4,375.00**

Printing Costs [75 documents x 5 pages/document x 250 days x .05 (paper/printer ink)]	**$4,687.50**
Total Annual Cost To Large Law Office	**$9,062.50**
Net Annual Benefit(Cost) to Large Law Office	**$153,310.50**

4.6 Constraints on Achieving Benefits

A number of reasonable, implicit assumptions formed the basis of the preceding estimates, as is typical with "bottom-up" parametric estimates. However, these estimates may overlook factors that can limit the actual benefits received. The time savings were calculated from the Time Analysis Worksheet handed out during the focus group meetings and filled out by attorneys and staff personnel. Participants estimated based upon their actual experience or their opinion of what is being saved or what areas increased. The way the worksheets were filled out was not always consistent and assumptions had to be made in some instances. In many cases, attorneys were estimating changes in time of their support personnel because the work categories were more likely to be in the support area.

4.7 Cost-Benefit Estimate

Table 4.2 identifies the Benefit-Cost Ratio for the two example law firms (small and large law offices) . It is important to recognize the issue of how much of presumed benefits actually save attorneys money, since they usually pass these costs on to their clients. The primary consideration is that attorneys risk losing business to more efficient firms if they fail to take advantage of saved time Hence, savings are real even if they are realized by clients because attorneys who do not use more efficient methods will be negatively impacted. This is most clearly true when attorneys charge fixed fees This is extremely relevant for federal courts because most of the PACER business is bankruptcy, for which debtors are charged on a fixed fee basis (and very competitively) Whether or not the savings are passed along to the clients in the form of lower fees, the firms who adopt electronic documents have an economic advantage, so CM/ECF provides a benefit. Moreover, it is a common situation to have written-off hours that the firms do not bill because they exceed reasonable costs for that product. Savings that result in fewer hours written off because lawyers work more efficiently are real benefits (in reclaimed revenue). As in the other cases, some benefit may be shared with clients but firms still benefit either from reclaimed revenue, client goodwill, or competitive advantage.

User Group	Estimated Benefit (saved labor and other cost)	Estimated Cost	Benefit Cost Ratio
Large Law Office	**$162,373**	**$9,062.50**	**17.9**
Small Law Office	**$33,674.20**	**$1,812.50**	**18.6**

Exhibit 4.3: Benefit Estimates for CM/ECF

The benefits listed in Table 4.3 apply specifically to electronic access. Because CM/ECF had been in use for some time in the majority of the courts in the focus groups and the survey pool, the estimates of time savings are thought to be relatively reliable. Almost all respondents indicated that actual work hours had not changed and, in fact, had increased in some instances because of the increased availability The responses on the Time Shift Worksheet were consistent with the comments made during the focus group meetings. Many attorneys, especially in small offices or sole practitioners indicated that the attorney savings were significant because they no longer had to do clerical work or non-billable "busy" work. The larger offices also commented that attorney benefits were significant and in many instances the support staff day was increased due to the volume of e-mails, file preparation, and extra hours worked to file later at night Some respondents noted that the start-up (sunk) costs were relatively steep; however, the vast majority believed the benefits of the system far out weighed the initial costs. While the courts may not take into account the short-term costs to attorneys and other users for their changing business processes associated with electronic filing, the long-term benefits and savings greatly outweigh the short-term costs. The access to electronic documents afforded by CM/ECF offers a savings in time and cost to those who embrace the new technology.

Section 5 - Attorney Adoption of CM/ECF

5.1 Overview

This section analyzes possible impediments to fully adopting the CM/ECF system experienced by attorneys practicing in the federal courts. Issues such as the impact of the current electronic public access fee structure, attorney demographics, and the initial costs of implementing the system within the firm are factors which are explored. A primary issue of this study is to identify whether the current EPA fees are affecting whether attorneys are using the system and, more importantly, whether some attorney groups are disadvantaged by the access fees. The telephone survey was essential in gathering data for this section regarding attorney demographics and specific usage, which was enhanced with input from the focus groups. Issues regarding how the system is used and how practice is impacted are addressed in Section 3

5.2 Fee Impact on CM/ECF Adoption

5.2.1 Current Environment

The current electronic public access (EPA) fee schedule provides for a $.07 per-page fee with a per-document cap of $2 10 on case file documents accessed through the electronic public access systems. The per-page fee structure was preferred by CM/ECF user groups, including attorneys, and is designed to preserve system revenue at a level sufficient to fund the EPA program, including implementation and development costs of CM/ECF, which relies exclusively on revenues derived from EPA.

Attorneys of record are provided one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. As part of this initial access, users have the opportunity to print or save the document to their own computer system for future use. Attorneys are charged the public access fees for all subsequent access. In addition, users are provided $10 worth of free usage per calendar year.

Many of the judicial districts which have implemented CM/ECF require or strongly encourage use of the system to electronically file to the court docket. Therefore, most attorneys that practice in federal courts which have implemented CM/ECF file electronically, regardless of their location, size of firm, or level of federal practice.

5.2.2 Fee Impact on Attorneys

The telephone survey asked participants several questions regarding how the current fee structure impacts their use of the CM/ECF system, as well as how other fee structures might impact their usage or satisfaction with the system. In addition, during the focus group meetings, the question of whether the current fees deterred individuals or organizations from using the system was specifically asked of the participants ***Approximately 88% of attorneys answered that the current public access fees do not influence their use of CM/ECF.***

A prime example of the responses received from the study groups were the answers to the following question from the telephone survey:

- #11. If you download CM/ECF documents to your computer, why do you do so?
  a. To avoid fees
  b. To maintain your own record
  c. Other, specify

Overwhelmingly, the answer to question #11 was "To maintain your own record." Exhibit 5.1 identifies the breakdown of responses. It should be noted that for the majority of respondents, when referring to "downloading" documents, they are actually printing the documents for hard copies, rather than saving it to their computer. The reasons behind this issue are discussed in greater detail in Section 3.

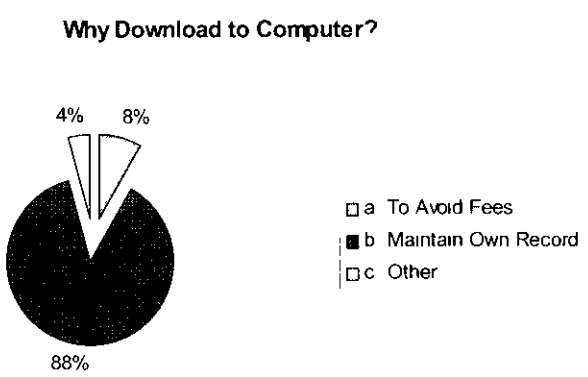


Exhibit 5.1: Survey Question #11

The results of question #11 did not vary between micropolitan and metropolitan attorneys. However, when asked if they capture the incurred CM/ECF fees to bill their clients, 77% of micropolitan attorneys answered that they do not bill their clients for CM/ECF charges (see Survey Question #15), while a smaller percentage of metropolitan attorneys, approximately 53% of the offices, do not bill their clients

The focus groups included attorneys located in remote locations relative to the federal courthouse and they were specifically asked if the fees are an impediment to their use of CM/ECF. Almost unanimously, they answered that the benefits provided by the system far outweigh the minimal fees they incur The remotely located members of the focus groups and the micropolitan attorneys surveyed by phone stated that CM/ECF has increased their ability to provide services to local clients and has put them on equal footing with attorneys located near the courthouse. The information accessibility, and travel, postage, and time savings for the remote attorneys far exceed the fees that are incurred while using CM/ECF Further discussion of the impact on attorney practice is contained in Section 4.

5.2.2.1 CM/ECF as the Primary Case File

The majority of CM/ECF users do not use CM/ECF as their primary or official case file; however, the fees appear to have almost no influence on this issue. During the telephone survey, PEC asked several questions regarding system usage and what users do with documents after accessing their free copy. The following questions were asked of survey participants:

- Question #10 - We are interested in learning if the system is used to access documents more than once, or if users are using their "one free look" and saving documents to their internal computer system for future access. When you use the system, do you.

    a. Access the document for your one free look and save it to your system for future use?

    b. Go back to the CM/ECF system to look at documents when they are needed again?

    c. A combination of the above? Specify when you save vs. re-retrieve.

Exhibit 5.2 shows that all attorney groups are inclined to use their initial access without charge to save or print the document.[3] A minority of attorneys, however, indicated that they also go back to the CM/ECF system for subsequent retrieval. Most of the attorneys who subsequently retrieve documents gave the reason that they believed the document was not important and they could save space by not "saving". This issue was also raised during the focus group meetings and many attorneys indicated that they subsequently retrieved documents from CM/ECF when clients called and requested information. The convenience of having the document immediately available is highly valued because it provides better client service and saves time not having to search through their files Almost all attorneys in the focus groups printed the document to hard copy during their initial access, rather than downloading it to their computer system.. The internal hard copy file still appears to be considered the users' primary case file.

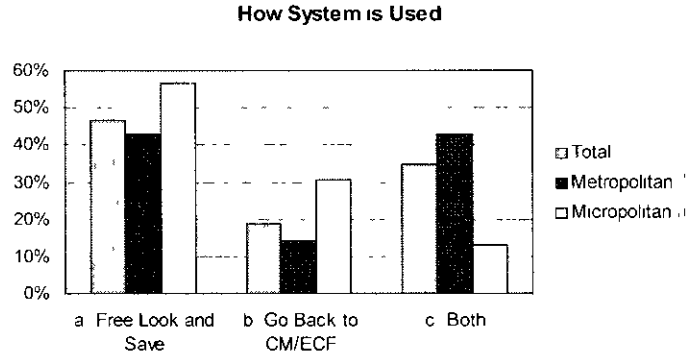


Exhibit 5.2: Document Retrieval Preference

- Question #14 - On average, how often do you retrieve documents from your cases on the CM/ECF system after your first free look?

    a. 1 time or less
    b. 1 - 2 times
    c. More than 2 times, but less than 5 times
    d. 5 times or more

[3]Almost all attorneys when asked if they save the document, indicated that they print the document rather than save it to their own computer system for future use. The reasoning behind printing the document is discussed in paragraph 5.2.2.3.

In response, 65% of the respondents answered 1 time or less and an additional 25% indicated that they retrieved documents from CM/ECF only 1 or 2 times. Therefore, 90% of CM/ECF users retrieve documents subsequently 2 times or less from EPA. The next question inquired if the fee influenced this decision.

- Question #13 - Does the current fee structure discourage your use of CM/ECF as your primary file system?
  A. Yes
  B. No

Exhibit 5.3 illustrates that 80% of CM/ECF users stated that the current fee structure does not influence their decision whether or not to use the CM/ECF system as their primary file system. As illustrated in Exhibit 5.1, 88% of the CM/ECF users printed or saved the document to maintain their own record, rather than to avoid fees (8%)

5.2.2.2 Focus Group Responses

Focus group answers were entirely consistent with the survey results on this matter and the meeting participants provided several explanations for their hesitancy to rely solely on CM/ECF as their primary file system. These include:

- **Custom/habit**. The most common reason attorneys do not use CM/ECF as their primary filing system is custom or habit. Almost all firms/attorneys are used to working with hard

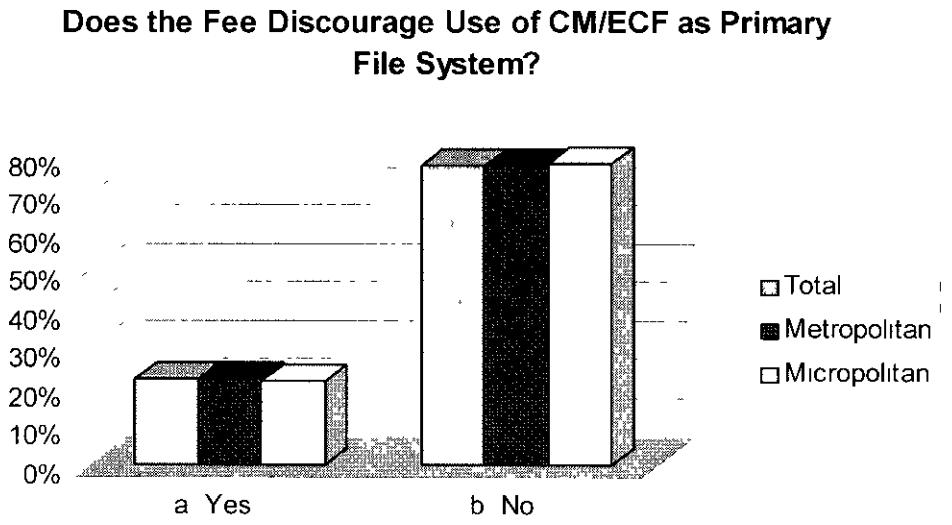


Exhibit 5.3: Fee Impact on File System

copy files and have proven filing systems. Some attorneys indicated that they look forward

to having just electronic files; however, until a large portion of senior staff turns over, the current processes are likely to stay in place.

- **General Practice.** Since most attorneys have a portion of their practice outside of the federal courts, the majority of which are not using electronic filing systems, they have to keep hard copy files anyway. So, for consistency they keep all files under the same type of filing system.

- **Security Concerns.** The primary issue with security is in regard to the stability of CM/ECF and their own internal computer systems. If either of the systems were to crash, become infected with a virus, etc., the hard copy file is still available for use. Another consideration is the actual security of the on-line system and the possibility of someone gaining access to information and tainting it in some manner. Malpractice insurance concerns are also an issue because some insurers require attorneys to keep complete files in their office.

- **Court Rules.** Some court documents still require original signatures or initials, especially in bankruptcy practice, and must be kept in hard copy. In addition, some documents are required to be submitted in hard copy, such as evidentiary exhibits. Some bankruptcy creditors do not have internet access and are not required to get access, and must have documents delivered in hard copy. Lastly, most courts are not currently allowing electronic devices in the courtroom during trial, so the attorneys must print hard copies anyway.

- **Court Consistency.** Not all federal jurisdictions have implemented CM/ECF. Attorneys with multi-jurisdictional practices must conform to the rules in each jurisdiction and, therefore, keep all files in hard copy for consistency purposes.

5.2.2.3 Fee Impact on "Paperless" Office

As illustrated above in paragraph 5.2.2.1, attorneys and law offices primarily print court documents for hard copy use, rather than use electronic documents. The survey and focus group results cited above in reference to the use of CM/ECF as a primary file system, also apply to why a "paperless" office has not been realized, except in very few cases. Habit, practice peculiarities, security concerns, and court rules all influence why attorneys print court documents. The EPA fee, however, does not have a significant influence over whether or not users print documents Although some CM/ECF users may consider the fee and dislike the fee, their decision to download or print a document is independent of the fee because they view the cost as relatively insignificant.

Attorneys and staff personnel in the focus groups provided several additional comments on the reasons for printing documents rather than using the electronic files.

- Hard copies are easier to use, especially when comparing large documents. Users can put notes and tabs on hard copy documents and easily line up documents side-by-side for comparison

- Support personnel receive the electronic copy and print it out for several attorneys within the office.

- Some attorneys noted that they can check their mail much more quickly in hard copy than trying to click through e-mails to see the documents.

Although there are significant roadblocks to realizing a paperless office, the CM/ECF system has had a positive influence on how some attorneys view other processes around their offices. A comment was made by a focus group member that they have become more selective on what they print and are conscious of other ways to reduce paper around the office environment.

5.2.2.4 Fee Level

EPA fees are considered de minimus. The focus groups provided insight into why some attorneys were not capturing EPA expenses to bill to their clients. The principal reaction was that the costs were so minor, it would take more time and expense to develop a bill for each client for the EPA charges than they would be recouped. As one focus group member commented, "The cost of billing clients would be more than the bills themselves " Focus group participants estimated that average total quarterly fees incurred range between $15 and $150, with one attorney noting that they have incurred $350 in fees in one month. Considering that the average attorney rates are between $100 - $300 per-hour, the EPA user fees are relatively insignificant In addition, clerical hourly costs generally range between $25 - $60 per-hour, which in many instances would cause the cost of bill preparation to be higher than the amount billed.

Larger firms are more likely to capture EPA fees because they have pre-existing internal infrastructure (e g. dedicated accounting department) to more effectively identify client charges. In addition, the total incurred fees per billing period in larger firms are greater due to the volume of people using the system and the number of cases handled

5.2.2.5 Fee Structure

The current fee structure is considered fair, affordable and provides a high level of satisfaction. Attorneys were asked during the telephone survey (Question #23) about the current fee structure and two possible alternatives: a per-document plan and flat fee per-user plan. The per-document plan would consist of a specified charge per document, similar to or less than the current $2.10 ceiling, regardless of the page count. The flat fee per-user plan would establish a document or page threshold for a period of time, a month, quarter or year, and the user would pay a set fee, somewhat like current cell phone plans.

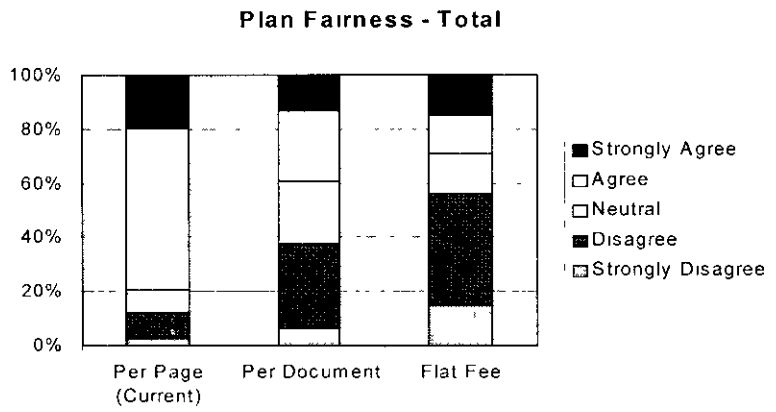


Exhibit 5.4: Fee Structure Fairness

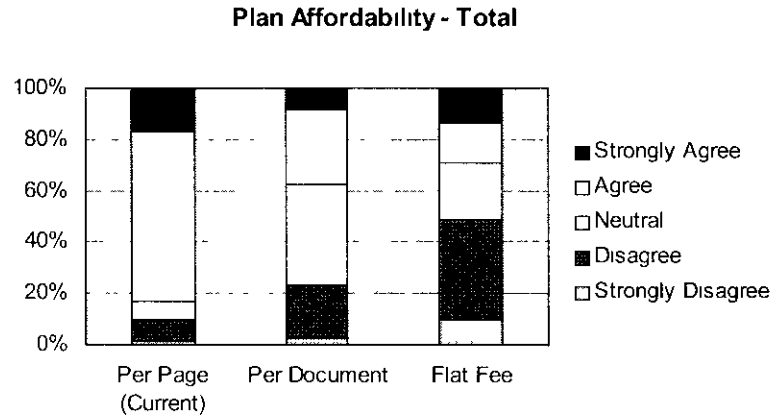


Exhibit 5.5: Fee Structure Affordability

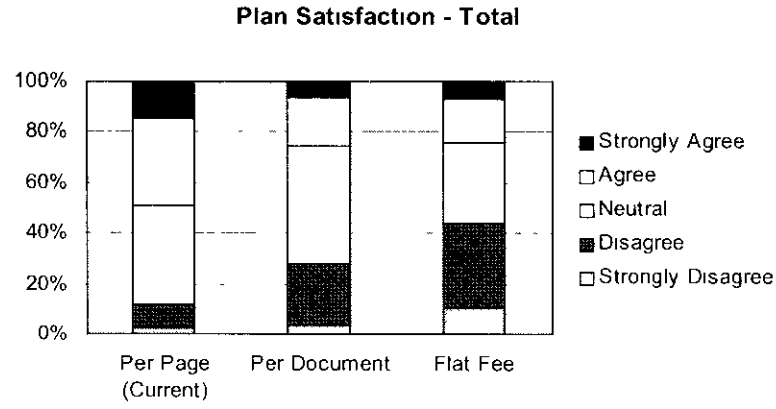


Exhibit 5.6: Fee Structure Satisfaction

The responses clearly identified the current fee system as the most desirable. Exhibits 5.4, 5.5, and 5.6 show the responses regarding attorney opinions on the fairness, affordability, and perceived satisfaction Over 80% of the survey participants agree that the current fee structure is fair and affordable. In regard to plan satisfaction, approximately 50% agree that the current plan increases their satisfaction with CM/ECF, but only 15% disagreed. In contrast, the per-document and flat fee plans had significantly higher ratios of negative responses. It should be noted, however, that the two alternative fee plans received a higher percentage of "neutral" responses. This could be because the participants do not have the experience working with those plans, as they do with the per-page plan.

The results were relatively consistent between the metropolitan and micropolitan survey groups. The micropolitan group found the current fee structure to be slightly more desirable than the metropolitan participants. Although most micropolitan attorneys do not bill for CM/ECF charges, they are conscious of the fees they incur Therefore, the per-page plan allows them to pay for only what they need The metropolitan, while preferring the current plan, also liked the concept of the flat fee because it

would allow for greater use, but would make it even more complicated to attribute specific client charges for billing purposes.

5.3 Minority Opinion on the Electronic Public Access Fees

As described above, the majority of CM/ECF attorney users believe the current fee level and structure is fair and reasonable, and does not impede their adoption or use of the system. However, some responses from the survey and participants in the focus groups expressed concerns, dislikes, and issues with the PACER fees. Although the total number of negative responses was small, they were fairly consistent within each of the focus groups and the telephone survey In most instances, the participant making the negative comment also stated that the value provided by the system outweighs the costs or negative aspects.

Below are the issues which were identified during the data collection phase of the study.

- A complaint raised by a few of the participants regarding the PACER fees was in regard to charges parties incur to view documents in their own case. Some questioned why they had to pay for something they could go to the courthouse to look at for free.

- Some attorneys do not like the psychological aspect of seeing the fee each time a document is accessed. They stated that they understood that their overall costs have declined, but it is an issue of finding the transaction receipt "annoying" and "irksome," rather than a deterrent to system use. One suggested alternative fee structure is to include PACER fees as an up front cost, which would remove the psychological affect of the per-page fee and it would be easier to attribute costs to specific clients.

- A few attorneys did state that the fees inhibit their use of CM/ECF. They indicated that their looking at documents was slightly curtailed and in one case a firm had instructed its attorneys not to go back and look unless it was absolutely necessary. The attorneys who made these comments did not come from one specific group (micropolitan vs. metropolitan) or a particular practice area

- The final comment regarding the fees is a technical issue. There were several comments from survey and focus group participants that they would like the ability to only view a portion of a document, thereby saving money in fees. Attorneys commented that there are some documents that contain a significant number of pages that are not relevant to their client, yet they have to pay to download all of the pages. The current fee cap of $2.10 per-document helps to reduce the total fees incurred, however, attorneys, especially from the micropolitan group, would just like to pay for the pages relevant to their client.

As a confirmation that the fees do not play a significant role in deterring acceptance of the electronic public access is a quote from a participant of one of the focus groups·

"I don't like the fee, but I'd pay double to use the system "

5.4 User Demographic Impact on CM/ECF Adoption

This section investigates whether demographic issues, such as location, size of firm or area of practice, influence individual attorneys' adoption and use of CM/ECF.

5.4.1 Current Environment

As described in Section 2.2 3, the vast majority (98%) of CM/ECF users are located within metropolitan areas, based upon Census Bureau definitions. Although there are practices with a wide range of sizes within both survey groups, data from respondents in both groups show that the size of the firm is highly dependent on location and population centers. The majority of large firms are located in metropolitan areas, whereas firms in the micropolitan group tend to be smaller. This difference in size between the user groups is highlighted in the average number of attorneys (partners and associates) in the firms surveyed. Survey data shows that the average number of attorneys for firms in the metropolitan group is 78 attorneys per firm, while the average number of attorneys for firms in the micropolitan group is slightly less than 3 attorneys per firm.

Attorney location has a minor impact on the proportion of federal work attorneys practice (see Exhibit 5.7). Forty-five (45%) percent of metropolitan firms responding to the survey said that over half of their practice is performed in the federal courts, whereas, only thirty (30%) percent of the micropolitan firms have more than 50% of their practice in the federal arena.

Lastly, the areas of practice vary considerably within both survey groups, but also between the metropolitan and micropolitan survey participants. The most common area of practice for both survey pools is bankruptcy; however, for the micropolitan attorneys bankruptcy is the primary practice area for 58% of the respondents compared to 27% of the metropolitan group. The next most common practice areas identified by the metropolitan attorneys were Contract, Labor/Employment, and Personal Injury, each with 14%. The micropolitan respondents identified Civil Rights (including Habeas cases) as the second most common primary practice area (13%), with no other practice area making up more than 4%

5.4.2 Impact of Firm Size on Individual Usage of CM/ECF

Firm size has a significant impact on who within the firm actually uses CM/ECF. Exhibits 5 8 and 5.9 show that attorneys in the micropolitan group (i e smaller firms on average) are much more likely to use CM/ECF themselves. Attorneys with smaller firms and especially sole practitioners, are more likely to perform required clerical functions on a day-to-day basis around the office due to the reduced availability of support resources A natural progression with the implementation of CM/ECF is for the sole proprietor or small firm attorney to take on the responsibility of using

CM/ECF. Metropolitan attorneys are more inclined to have support personnel, secretaries and/or paralegals, file and retrieve documents using CM/ECF.

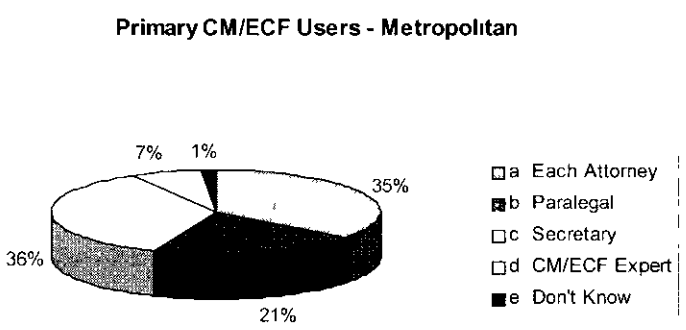


Exhibit 5.8: Metropolitan Users

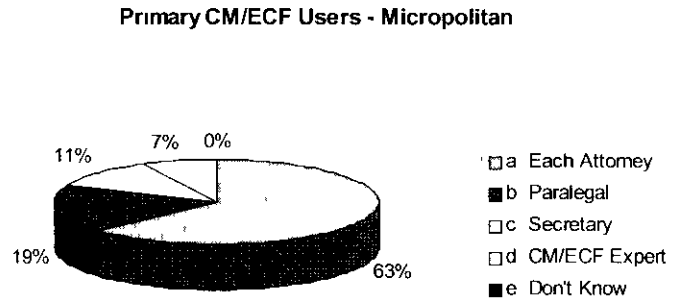


Exhibit 5.9: Micropolitan Users

Data gathered from the focus group meetings indicates that sole practitioners are a group that experienced a significant benefit in time savings since the implementation of CM/ECF. EPA has reduced the copying, mailing, and delivery time required for document submission, as well as travel time required to pick up documents from the courthouse. Sole practitioners do much of this work themselves and CM/ECF has provided additional time to do more substantive work (see Section 3).

Results indicate that attorneys in large firms, particularly senior attorneys, are less likely to actively participate in the use of CM/ECF. There are two primary reasons why these attorneys take a less active role in the adoption of the system:

1. Skilled support personnel are more readily available; and

2. Senior attorneys are less likely to be technically proficient and can rely on more junior attorneys in the firm to ensure proper filing and document review.

5.5 Impact of Initial Start-up Costs on Adoption of CM/ECF

Costs to implement CM/ECF in the office environment generally do not hinder adoption of the system. Responses during the focus group meetings to questions regarding the initial costs to get started with CM/ECF varied considerably. The primary costs to equip an office for effective use of CM/ECF generally include a relatively recent generation of computer, Adobe Acrobat software, scanning equipment, a high speed internet connection, and system training. How individual offices meet these requirements ranged from the purchase/upgrade of their current equipment costing several thousand dollars to using current equipment in an innovative manner and thereby not spending a significant amount of money to implement the system. For instance, one sole practitioner was able

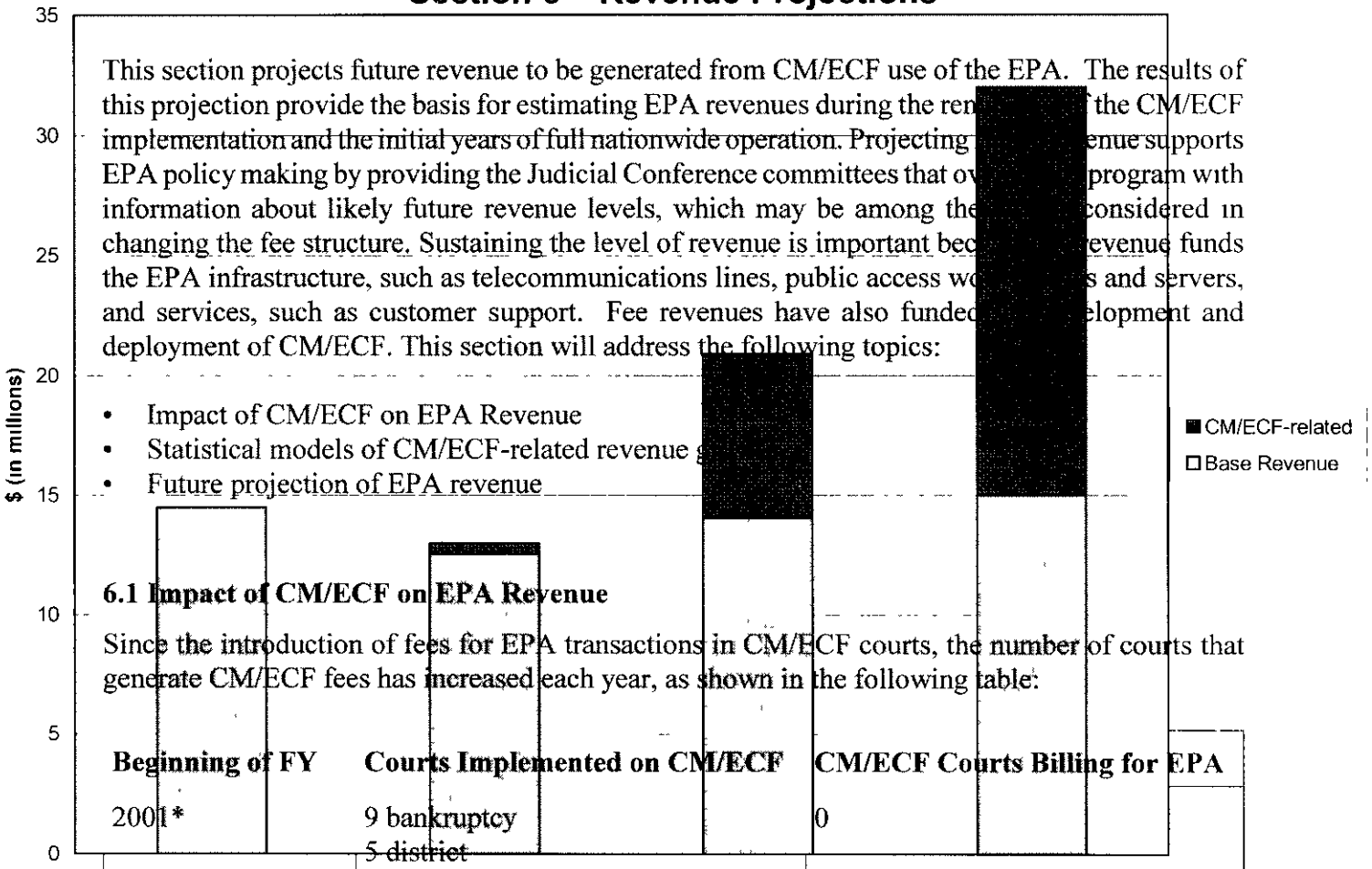
to use his fax machine to fax documents to his computer to create scanned versions of court documents rather than purchasing a separate scanner.
Larger firms tended to have less of a problem with costs associated with CM/ECF implementation because they were already equipped with sufficient resources to handle the new requirements. Sole practitioners and small offices, on the other hand, have incurred relatively greater expenses up front to upgrade their offices. However, virtually all of the attorneys present at the focus groups believed that the return on investment from the system will be positive in a relatively short period of time because of the savings being realized in other areas of their practice. See Section 4, Cost-Benefit Analysis for further discussion of this topic.

One practice area that may be disadvantaged partly by the implementation costs of CM/ECF is the casual bankruptcy practitioner. It was mentioned in two separate focus group meetings that there is a considerable chance that the implementation of CM/ECF would cause the elimination of the casual (i.e a few cases a year) bankruptcy attorney. The focus group attorneys cited the initial implementation costs as a significant reason, as well as the on-going requirements of electronic filing, because they would not have the volume of cases to receive a positive return on investment.

Section 6 – Revenue Projections

This section projects future revenue to be generated from CM/ECF use of the EPA. The results of this projection provide the basis for estimating EPA revenues during the ren the CM/ECF implementation and the initial years of full nationwide operation. Projecting enue supports EPA policy making by providing the Judicial Conference committees that ov program with information about likely future revenue levels, which may be among the considered in changing the fee structure. Sustaining the level of revenue is important bec evenue funds the EPA infrastructure, such as telecommunications lines, public access wo s and servers, and services, such as customer support. Fee revenues have also funded elopment and deployment of CM/ECF. This section will address the following topics:

- Impact of CM/ECF on EPA Revenue
- Statistical models of CM/ECF-related revenue g
- Future projection of EPA revenue



6.1 Impact of CM/ECF on EPA Revenue

Since the introduction of fees for EPA transactions in CM/ECF courts, the number of courts that generate CM/ECF fees has increased each year, as shown in the following table:

Beginning of FY	Courts Implemented on CM/ECF	CM/ECF Courts Billing for EPA
2001*	9 bankruptcy 5 district	0
2002**	11 bankruptcy 6 district	11
2003	39 bankruptcy 10 district	49
2004 (estimated)	60 bankruptcy 27 district	87

* CM/ECF bankruptcy courts did not bill for EPA transactions until 7/1/2001
** CM/ECF district courts did not bill for EPA transactions until 7/1/2002

Exhibit 6.1: Increase in CM/ECF Courts Generating EPA Fees

The increased number of CM/ECF courts has resulted in a corresponding increase in EPA revenue, as demonstrated by the graphic depicting the growth of overall revenues and the increasing proportion due to CM/ECF courts.

Exhibit 6.2: Recent Trend of Base and CM/ECF-Related EPA Billings

The CM/ECF-related growth in EPA revenue has been driven primarily by bankruptcy courts. In the first ten months of FY2003, for example, district courts accounted for approximately six percent of CM/ECF-related EPA revenue While this disparity is due in part to the faster implementation of CM/ECF in the bankruptcy courts, fee revenue historically has come disproportionately from the bankruptcy courts.

6.2 Statistical Models of CM/ECF-Related Revenue Growth

The model for CM/ECF-related revenue associates the level of EPA fees (excluding dial-up access) in CM/ECF courts to the factors that drive that growth. Separate models for bankruptcy and district courts are required because of the difference in underlying business practices and the different implementation patterns. These distinct patterns are evident in Exhibit 6.1, which shows far more bankruptcy courts receiving CM/ECF during the initial years of the project. Bankruptcy courts also began charging fees earlier, yielding more historic billing information. As a result, bankruptcy courts offer many more data points from which to develop a revenue model Moreover, as noted above, bankruptcy courts account for a much greater proportion of CM/ECF-related revenue than district courts. For all of these reasons, a specialized model tailored to the particular usage patterns of each case type provides greater capacity to predict future CM/ECF-related revenue than a general model combining all case types

The statistical models developed in this section are based on regression analysis, which calculates coefficients (multipliers) for explanatory factors–called independent variables By multiplying the coefficients times the values of the independent variables and adding a constant, an estimate is calculated for the value of the result in question–called the dependent variable. A regression model is presented in the following format:

$$\mathbf{Y = A + B_1X_1 + B_2X_2 + \ldots + B_nX_n + error}$$

In the preceding formula, "Y" is the dependent variable, "A" is the constant, "X_1, X_2, . . X_n" are the independent (explanatory) variables, and "B_1, B_2, . B_n" are the coefficients multiplied times the corresponding independent variables. "Error" is not a calculated component of the formula, but represents the difference between the estimated and actual value of the result (dependent variable) for each occurrence of the data

The regression algorithm computes coefficients that minimize the error of the estimates, as measured by the "least squares" of the differences between actual and estimated value. The success of the model–its "goodness of fit"–is measured by the correlation coefficient, symbolized by R^2 This measurement is the variation in the dependent variable successfully estimated by the model as a the proportion of the total variation, so the closer R^2 is to 1, the better the model

6.2.1 Statistical Model for Bankruptcy Courts

The most successful model for explaining the revenue growth resulting from bankruptcy courts' adoption of CM/ECF uses caseload and experience with CM/ECF as the explanatory factors that are

most closely associated with the level of revenue. Caseload was modeled both as a combined variable (filings) and as separate measures for business and non-business filings. A model using separate measures performed much better. The formula for this model is presented below.

revenue = -73170 + 64812 * experience + 1494 * business filings – 24 * non-business filings

In the preceding formula, *revenue* is defined as the annual revenue (excluding dial-up) for a court adopting CM/ECF, *experience* is defined as the quarters since billing began for CM/ECF transactions in the court, and *business filings* and *non-business filings* are the annual reported filings on the "F-2 Table" in the Annual Report of the Director on the Judicial Business of the U.S. Courts

The correlation coefficient, or R^2, for the model described above has a very high value: **.71**. This result indicates significant predictive power by the model, considering that nearly three-quarters of the variation in court-by-court revenue over time is explained by experience and caseload The positive association between revenue, experience, and business filings follow intuitive reasoning. It is to be expected that revenue should increase as the EPA user community gains more experience with the information that is available through CM/ECF and greater facility in using the system over time. High volumes of business filings indicate that caseload is composed of highly complex cases with many parties, which should correlate with greater access of EPA information.

The negative association between non-business filings and revenue is counterintuitive, however, it is important to realize that factors do not operate "in a vacuum." A possible explanation for the opposite effects of business and non-business filings is that revenue growth is faster than average for courts with a higher proportion of business filings (examples of such courts are Delaware and the Southern District of New York) and correspondingly slower than average for courts where non-business filings predominate The quantity of parties and complexity that characterize business filings would explain why this type of caseload accelerates CM/ECF-related revenue, while consumer-intensive caseload retards it. The actual reasons underlying the relationships between the variables cannot be discovered by the regression methodology. Experimentation at a court-by-court level, using control observances, is required to determine cause and effect.

Regardless of the explanation for the discrepancy between business and non-business filings, the impact of experience is the crucial result. Whatever the level of revenue predicted by the particular caseload characteristics of an individual court, the positive effect of experience predicts that revenue will continue to rise over time. Conservatism dictates that this predicted effect not be extended perpetually. Because charging for EPA transactions through CM/ECF is a relatively recent occurrence, the period of time that supports same-quarter (annual) comparisons varies from six months to one year and a half, depending on the court. Projecting the impact of the experience factor into the future based on such abbreviated usage history is problematic The resulting risk of under- and over-estimation necessitates that the revenue model use different thresholds for the maximum experience period that courts will realize fee increases. The results of these different thresholds are incorporated into the estimates presented in Paragraph 6 3 In no case should projected increases extend further into the future than the duration of the historical trends on which the increases are based, which indicates that the effects of increased CM/ECF experience should be fully realized in

all courts by FY 2006. Accordingly, the revenue projections contained in Paragraph 6.3 extend only through FY 2006 because subsequent revenue increases will be attributable only to caseload changes

6.2.2 Statistical Model for District Courts

The most successful model for explaining EPA revenue in the district courts uses caseload as the explanatory factor most closely associated with the level of revenue. Caseload was modeled using filings, terminations, and pending cases as the candidate measures for caseload. Terminations performed slightly better than filings and much better than pending cases. Only civil case statistics were used because much of the data came from courts that operated only the civil component of CM/ECF during the period of analysis. The formula for this model is presented below

revenue = 23785 + 13 * civil terminations

In the preceding formula, *revenue* is defined as the annual revenue (excluding dial-up) for a court adopting CM/ECF and *terminations* are the annual reported filings on the "C Table" in the Annual Report of the Director on the Judicial Business of the U.S. Courts.

The correlation coefficient, or R^2, for the model described above has a significant value: **.56** This result indicates that the model accounts for slightly more than half of the variation in district court revenue. The short period since the beginning of billing eliminates experience as a factor to be included in the district model There may be such an effect, as is evident in the bankruptcy courts, but a longer period of time will be required before it appears. In lieu of a statistically generated projection, the best estimate of EPA program managers for the revenue increases due to district court cases–approximately $1 million per year–will be used to represent the estimated growth of revenue attributable to the district courts.

6.3 Future Projection of EPA Revenue

The bankruptcy-related revenue supplies the principal dynamic in the projected growth of EPA revenue. The reasons for this are twofold: the revenue from bankruptcy cases has historically accounted for most of the EPA revenue; and the bankruptcy model developed above includes an experience-based multiplier that increases projected revenue as the bankruptcy court user community gains more experience with CM/ECF. There has not been a statistically significant basis for demonstrating the impact of experience in the district court user community, although such a factor may appear in the future

The projection of revenue is based on two components: the bankruptcy case projection and the base EPA revenue that comprises current district, appellate, and case-party index transactions. The district portion of the EPA revenue is projected to increase by $1 million per year based on program manager estimates rather than using the model based on terminations (described above), which projects flat revenues. The bankruptcy-related revenue projections are based on the experience-based and caseload-based model, and therefore reflect significant increases over the three years that are estimated. The revenue projections are provided in the following table:

Range of Estimates	FY 2004	FY 2005	FY 2006
[1]Expected revenue	$35.0 million	$43.7 million	$47.7 million
[2]Lower bound	$29.1 million	$34.2 million	$35.8 million
[3]Upper bound	$38.6 million	$48.2 million	$59.0 million

[1]Based on 4 quarters' growth in revenue due to CM/ECF experience
[2]Based on 2 quarters' growth in revenue due to CM/ECF experience
[3]Based on 6 quarters' growth in revenue due to CM/ECF experience

Exhibit 6-3: Projection of EPA Revenue for FY 2004 through FY 2006

The impact of the experience multiplier is substantial, accounting for a nearly 50 percent increase in revenue over the current level in three years While dramatic, the magnitude of these increases is plausible given that the previous two years have seen approximately 50 percent increases per year. Given the trend of steadily increasing revenues, the lower bound representing an approximately 10 percent decrease in next year's revenue may seem unrealistic Given the important role that "mega-cases," such as the WorldCom, Enron, and airline bankruptcies, played in generating large revenue increases during the period of the historical trend analysis, a revenue decrease coinciding with the conclusion of several mega-cases is plausible, although not expected.

A number of assumptions are factored into the projections provided above, of which three are crucial for determining their reliability. The major assumption is that the experience of the courts that have been implemented in the last year and those implemented in the future will be comparable to those implemented within the first 2 years of the project, which served as the basis for the model. This assumption, which is the basis for experienced-based revenue growth, is essential for the revenue levels projected in Exhibit 6-3 to be realized While significant, this assumption is reasonable based on the common practices–founded in law, rules of procedures, and professional standards–across jurisdictions The second major assumption is the stability of caseload. As described above, the bankruptcy model is sensitive to significant changes in caseload. The final major assumption is that the revenue increase due to experience will subside within four quarters after implementation. If the experience impact is sustained, then actual results may exceed the expectation. Another possible effect with the ability to increase the actual result beyond the projection is the positive impact of experience, should it materialize in the district courts. The projections above reflect only nominal increases in the revenue from the district courts The combined effect of these assumptions is to estimate conservatively wherever possible.

Section 7 - Summary of Findings

The objective of the Electronic Public Access Follow-up Fee Study was to answer three primary questions regarding attorney use of the system

1. Does the current fee structure deter CM/ECF users from adopting and using the system?

No, the current fee structure does not deter adoption of CM/ECF. The current fee structure consists of a $.07 per-page fee with a cap of $2.10 per-document. Although some attorneys do not like the fees, they are considered de minimus. It was estimated by the focus group members that average quarterly costs for CM/ECF use per attorney range between $15 and $150. One participant estimated a high of $350 for one month; however, considering that attorney hourly rates are between $100 and $300 and the support staff costs are between $25 and $60, the CM/ECF costs are minor. In fact, it was identified that a large portion of the attorney users do not bill their clients for the incurred EPA fees because the cost of producing a bill would be higher than the amount of the bill.

The current fee structure was compared to two other alternatives and found to be considered the most fair, affordable, and it provides the greatest level of satisfaction. The two alternatives presented to the telephone survey participants were a Per-Document plan and a Flat Fee for a period time. The survey participants were asked several questions regarding the three plans and in all instances the current fee structure was preferred.

2. Does the current fee structure inhibit attorney users from using the system as their primary case file system?

Consistent with the first question, CM/ECF users are not influenced by the fees when deciding how to use the system. Most users do not use CM/ECF as their primary file system; however, the reasons behind their decision have to do with habit, rather than cost Almost every attorney surveyed or asked during the focus groups indicated that they print a hard-copy of the document during their first free look and keep hard-copy files. The most common explanation is that they are used to working with hard-copy documents and they are easier to use for comparison and note taking. In addition, users noted that court rules do not allow them to go completely paperless, even if they wanted to Some bankruptcy documents still require an original signature or initials, many exhibits have to be filed in hard copy, some malpractice insurance requires it, and there is no consistency between federal jurisdictions or federal and state courts regarding electronic filing As a result, most offices have to have hard copy files.

3. Does CM/ECF provide value to the attorney users?

Yes The impacts that CM/ECF has had on attorney practice were discussed during the focus group meetings and the majority of users have found the system to be beneficial in many different ways. Eighty-three percent (83%) of the survey participants stated that the system will provide a long term reduction in labor. In addition, cost reductions for copying, travel, postage and courier expenses have been experienced, as well as time/labor savings for copying of pleadings for submission,

document preparation, and internal file retrieval The efficiencies cited have provided more time for attorneys to concentrate on their client services and the quality of their work product. Other benefits of the system include the instant access to information and the ability to access the cases remotely.

CM/ECF users noted disadvantages to the system as well. The volume of e-mails that come over the system are overwhelming some offices, especially in the bankruptcy practice. Attorneys are having to hire more skilled staff to work with the system, but they are able to reduce the total number of staff required, so it balances out. The scanning that is required and the formatting of documents for submission have increased staff support time in many instances. Attorneys also have problems identifying documents when they come through the e-mail system because the document categories are too broad or there is no standard naming convention. Lastly, although the 24 x 7 anywhere access to information is an advantage, it is also a disadvantage because it can become intrusive on an attorneys' off hours.

The following is a partial list of positive and negative quotes from the focus groups:

Positive Quotes	Negative Quotes
"The system has allowed me to be more billable."	*The fee transaction receipt is "annoying" and "irksome."*
"It liberates my support staff of menial and time consuming tasks "	*"I now have support personnel rotate checking the e-mails that are coming in all day."*
"I don't like the fee, but I'd pay double to use the system "	*"Should be able to get documents on-line that we can view at the courthouse (criminal docs) "*
"Copying costs alone are down 60%."	*"Each court is different on how they want filing, especially exhibits - they need continuity "*
"24 x 7 access provides flexibility to attend family functions and file something later "	*"Nights and weekends are no longer off limits "*
"The system is a boon for me - it allows me to be more efficient and independent "	*"The casual bankruptcy attorney is likely to disappear "*
"The cost of billing clients would be more than the bills themselves."	*"I'm relying on technology that I don't fully understand."*

Exhibit 7.1: Focus Group Quotes

4, 4-A, 4-B, 4-C

Sections
4, 4A, 4B, and 4C
are located in Volume II.

RULE 5.1 PUBLISHED FOR COMMENT: AUGUST 2003

A proposal to adopt a new Civil Rule 5.1 was published in August 2003. The new rule would revise and relocate provisions in present Rule 24(c) that implement 28 U S.C. § 2403. Section 2403 provides for notice to the Attorney General of the United States or of a state when the constitutionality of an Act of Congress or a state statute is drawn into question. The published version of the proposal and accompanying Committee Note are set out after this introduction, along with the summary of public comments provided with the agenda materials for the April 2004 Advisory Committee meeting.

The April discussion provided substantial debate. The Committee closely divided on whether a party who draws in question the constitutionality of an Act of Congress or a state statute should be required both to file a Notice of Constitutional Question with the court and also to mail a copy of the Notice to the appropriate Attorney General. Questions also were raised as to the wisdom of the provision that the court must set a time for intervention by the Attorney General "not less than 60 days from" the court's certification of the question to the Attorney General. The debate is set out at length in the draft April Minutes. The initial discussion concluded that the party's duty to notify the Attorney General should be deleted. It was proposed that a draft set out below should be republished for comment. A motion to reconsider was later adopted, and the topic was tabled for want of time to complete consideration.

With the continuing strong support of the Department of Justice, the Rule 5 1 proposal is now back for further consideration Some new materials are available to support the discussion. A letter from Assistant Attorney General Peter D. Keisler is attached, setting out the reasons the Department continues to believe that the proposed rule change is valuable. Further drafting options also are provided.

It seems most helpful to proceed in this order: First, a draft proposed for consideration. Second, the draft Rule and Committee Note that were published for comment in August 2003, with the few comments received during the public comment period. Third, the Style Subcommittee proposed revision of the rule published for comment. Fourth, the incomplete draft proposed during the April discussion as a model for republication.

(1) Proposed Discussion Draft

Rule 5.1 Constitutional Challenge to a Statute — Notice and Certification

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal statute or a state statute must promptly:

(1) file a Notice of Constitutional Question stating the question and identifying the paper that raises it if.

(i) a federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or

(ii) a state statute is questioned and neither the state nor any of its agencies, officers,

or employees is a party in an official capacity;[3] and

(2) serve the Notice and paper by certified [or registered] mail on the Attorney General of the United States or of the state[4].

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the Attorney General of the United States or of the state that there is a constitutional challenge to a statute

(c) Intervention; Final Decision on Merits. The court must set a [reasonable] time no less than 60 days after the certification for the Attorney General to intervene The court may reject the constitutional challenge before the time to intervene expires. The court may not enter a final judgment holding the statute invalid before the time to intervene expires.

(d) No Forfeiture. A party's failure to file and serve the required notice, or the court's failure to certify, does not forfeit a constitutional right that is otherwise timely asserted.

This version retains the provision set out in the published rule requiring a party to notify the Attorney General as well as the court of a constitutional challenge. It also incorporates substantive changes from the published draft that were adopted at the April meeting

Finally, it tracks the Style Subcommittee draft set out as the third draft below, but with two differences.

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[3] It would be possible to consolidate (i) and (ii) by reverting to a position part-way between the published proposal and the Style Subcommittee version, something like:

(1) file a Notice of Constitutional Question stating the question and identifying the paper that raises it if no party is the United States, the State, a United States or state agency, or a United States or state officer or employee in an official capacity;

Alternatively, this limit could be stated at the beginning of the rule:

(a) Notice by a Party. If no party is the United States, a state, a United States or state agency, or a United States or state officer or employee in an official capacity, a party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal statute or state statute must promptly:

(1) file a notice of Constitutional Question stating the question and identifying the paper that raises it, and

(2) serve the Notice and paper by certified mail on the Attorney General of the United States or of the state

[4] This is the language of the Style Subcommittee draft. An alternative would be: "serve * * * the United States Attorney General or the State Attorney General " If (a)(2) is changed, (b) also should be changed.

The attached letter from Peter Keisler summarizes and expands the reasons for retaining the requirement of party notice both to court and also to the federal and state attorneys general that was in the published rule. The letter explains the Department's basis for believing that the dual notification requirement is warranted because notification by the court alone fails frequently to provide state and federal officials timely notice of a constitutional challenge; it is not a substantial additional burden, experience in federal courts with local rules and in state courts under state rules imposing a dual notification requirement has been successful and workable.

The discussion draft includes changes from the published proposal and the Style Subcommittee version. As published, subdivision (c) read: "(c) Intervention The court must set a time not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General." The final paragraph of the Committee Note embellished this provision:

> The 60-day period for intervention mirrors the time to answer set by Rule 12(a)(3)(A). Pretrial activities may continue without interruption during this period, and the court retains authority to grant any appropriate interlocutory relief. But to make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded or the period has expired without response. The court may, on the other hand, reject a challenge at any time. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

In the April discussion and in some of the public comments, two substantive criticisms were directed to Subdivision (c) and the Note One criticism addressed the 60-day period for intervention directly. It was feared that a defined period would unnecessarily freeze pretrial activities, perhaps thwarting timely relief. The other criticism was that subdivision (c) did not support the advice offered in the Committee Note.

The discussion draft carries forward the minimum 60-day intervention period, and adds a statement that the court may reject the challenge before the 60-day period expires. This protects the opportunity of the Department of Justice to deliberate the intervention decision in orderly fashion. Section 2403 is designed to ensure the opportunity to intervene, and time for full deliberation seems important. It also states that the court may not enter final judgment invalidating a statute before the 60-day period expires, and would support a revised version of the Committee Note that says that. This version remains vulnerable to the criticism that delay will be the practical consequence of a 60-day intervention period. In addition, it does not fully respond to the government's interest in participating in the process that upholds a statute. The government may be able to build a record that supports final disposition on appeal, where without government intervention the result of a premature decision upholding the statute may be a remand to build a better record or — worse — a final appellate decision invalidating the statute. Specification of a 60-day intervention period, finally, has generated some anxiety over the need to ensure that the government remains able to intervene even after the period expires, and indeed after judgment.

An alternative approach would not directly address intervention, saying only that final judgment invalidating a statute may not be entered before 60 days after the district court has certified the challenge Intervention would be addressed only by § 2403 itself. This approach would provide

> **(c)** *{Version 2}* **Final Judgment of Invalidity.** The court may not enter a final judgment holding the statute invalid before 60 days after certifying the challenge.

The certification under (b) alerts the government to the opportunity to intervene. The 60-day period ensures that the government has at least that long to intervene and defend the statute, but does

not imply any reason to defer prompt attention to development of the case It also clearly supports Committee Note advice that although a final invalidating judgment may not be entered, interlocutory relief can be granted on the theory that the statute is invalid, while on the other hand it is proper to enter a final judgment upholding the statute. (Here too, the government remains at risk of a premature decision without having participated to build the record.)

Although it would support either version, the Department of Justice prefers the discussion draft version of subdivision (c) This version has two advantages. It carries forward the published proposal that required the court to set a minimum 60-day period for the government to intervene And it establishes that a final judgment invalidating a statute should not be entered before the Department has been given an opportunity to participate.

Apart from these major questions, two changes from the published proposal were approved at the April meeting The published draft required notice where no party was a government official "sued" in an official capacity. "Sued" was dropped because there is no reason to require notice and certification when a government official sues in an official capacity. And service by certified or registered mail was substituted for the cross-reference to service under Rule 4(i)(1)(B); what counts is that the Department of Justice has special procedures for tracking mail that arrives in certified or registered form.

The discussion draft also has changes from the Style Subcommittee draft. One is noted above in discussing subdivision (c). Additionally, the Style Subcommittee draft would require that a party file a Notice of Constitutional Question even in an action in which the United States or a state is a party. Section 2403 does not require certification in those circumstances, and little purpose would be served by it. Apparently this feature was an unintended consequence of last-minute drafting. It seems sensible to bring the rule back into line with the purpose to implement § 2403, at least to the extent that notice is not required if the parties include the United States, the state, a United States or state agency, or an officer or employee in an official capacity.

If some version of the discussion draft is approved, it must be decided whether to recommend it for adoption or whether to recommend republication The Committee Note published in August 2003 noted all of the points that would be covered by a revised subdivision (c), affording an opportunity to comment. Only minor revisions need be made in the Note to adjust for the proposed revisions.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D C 20530

The Honorable Lee H. Rosenthal
Chair
Advisory Committee on Civil Rules
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, Texas 77002-2698

Dear Judge Rosenthal:

I wanted to take this opportunity to provide to the Civil Rules Advisory Committee some supplemental information and analysis relevant to the Committee's consideration of proposed Federal Rule of Civil Procedure ("FRCP") 5.1. In light of the discussion at the April 2004 meeting, I believe this is an appropriate time to summarize why the Department of Justice has supported adoption of this Rule, and how such a Rule will assist both the Department in its effort to defend the constitutionality of federal statutes and the Courts in obtaining timely and comprehensive briefing when such matters arise. I also address concerns and criticisms of the proposed Rule that have been expressed during the Committee's prior meetings. I hope that this letter will be useful as we resume discussion on proposed FRCP 5.1 at the October 2004 meeting.

Background - Need for the Rule

Proposed FRCP 5.1 would require a party challenging the constitutionality of a statute in a non-government case to file a notice of constitutional challenge and serve a copy of the notice on the Attorney General.[1] The proposal supports the provisions of 28 U.S.C. § 2403, which provide that courts shall certify constitutional challenges to Acts of Congress to the Attorney General and permit the United States to intervene in the actions.

As the Committee is aware, the Department of Justice has been involved in the drafting of this proposed Rule from the outset. The Department's primary purpose in supporting this proposed Rule has been to increase the likelihood that the Attorney General and state attorneys general will receive notice in a timely manner. As the Department noted in its February 13, 2003 letter to the Committee, we have determined that there have been many instances in which the

[1] Proposed FRCP 5.1 also requires parties to provide notice to the relevant state attorney general when the constitutionality of state statutes are drawn into question.

Attorney General has not been provided with notice of constitutional challenges or has received only informal notice at a late stage of a proceeding.

Before presenting our proposal a few years ago, the Department selected litigation under the federal Telecommunications Act of 1996 as a test case to determine whether the Attorney General was receiving certifications of constitutional challenges pursuant to 28 U.S.C. § 2403(a) We determined that, of the 180 cases in which the Act was challenged, we had received only 13 certifications. In one instance, the Attorney General was unaware of a case in which a federal district court ultimately determined that the Act was unconstitutional.[2] Although this litigation may represent an unusual example of an almost total failure of implementation, it illustrates a serious problem.

More recently, in response to questions raised at the Committee's April meeting regarding the frequency of such instances, we have reviewed § 2403(a) compliance related to constitutional challenges to another frequently contested federal statute, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Our experience with challenges to this statute has been somewhat more positive, but still significantly problematic. RLUIPA has been challenged in approximately 71 district court cases and, to date, courts have issued certifications in approximately 50 of them. We are aware of 6 cases, however, in which courts have ruled on RLUIPA's constitutionality, albeit favorably, without having notified the Attorney General of the challenge.

We have also asked Department attorneys in the Civil and Environment and Natural Resources Divisions about their experiences with § 2403 certifications and have learned of numerous other examples where federal district courts failed to certify constitutional challenges to the Attorney General For example, the Attorney General did not receive certifications from courts in approximately 10 cases involving constitutional challenges to the Digital Millennium Copyright Act, approximately 16 cases involving constitutional challenges to the Violence Against Women Act, at least one case involving a constitutional challenge to the federal Telephone Consumer Protection Act, and at least one case involving a constitutional challenge to the Coal Industry Retiree Health Benefit Act. The Attorney General also was not made aware of a constitutional challenge to provisions of the Rhode Island Indian Claims Settlement Act until shortly before argument before the First Circuit, in another case, the Attorney General became aware of a challenge to the constitutionality of certain provisions of the Indian Civil Rights Act only after the case had been argued in the Ninth Circuit.

In short, while we cannot quantify comprehensively the total number of instances in which the notification process failed, it is clear at a minimum that the process fails frequently – and in a way that can deprive, and in some instances has deprived, the Department of a meaningful opportunity to present its position to the district court, and thereby deprives the

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[2] See AT&T Comms v. BellSouth Telecomms., Inc., 43 F. Supp. 2d 593 (M.D. La. 1999), rev'd, 238 F.3d 636 (5th Cir 2001).

district court of an opportunity to consider that position on matters of significance

Although we support a federal rule applicable in all federal district courts, it is notable that several federal courts already have local rules that require the attorneys for the challenging party to notify the Attorney General directly that the constitutionality of an Act of Congress has been drawn into question.[3] We have contacted the Civil Chiefs at the respective United States Attorney's offices to learn about the background for, and practice under, these rules. We learned, for example, that the Northern District of Indiana rule was amended to require party notification of constitutional challenges because the State of Indiana Attorney General's office had not been receiving § 2403(a) certifications. Although we do not have similar information from the other offices, the Civil Chiefs in these districts report generally that their rules work well and that they receive notices of challenges to federal statutes

In light of this continuing problem, we believe that the dual notification requirement of proposed FRCP 5.1 is warranted and will best ensure that the Attorney General has the opportunity to intervene and protect the public interest in district court cases in which there are constitutional challenges to federal statutes.

Implementation of the Proposed Rule

The Department recognizes that proposed FRCP 5.1 will impose a new requirement on litigants to notify the Attorney General that the constitutionality of a federal statute has been challenged. The proposed Rule, however, will not present a substantial burden on practitioners Current FRCP 24(c) already imposes a duty on the challenging party to "call the attention to the court to its consequential duty" to certify the constitutional challenge. As noted above, some district courts have imposed similar duties on challenging parties through local court rules. To the extent that the proposal imposes the actual notice requirement directly on the party raising the challenge, it thereby makes it easier for the courts and the clerks to identify cases in which certification under § 2403 is appropriate. The marginal cost on practitioners to notify the Attorney General of a challenge to a federal statute is more than offset by the resulting ability of the Department to respond to that challenge.

While some Committee members have expressed the view that, instead of a national rule, there should perhaps be more education or training of the district judges of their responsibilities under 28 U.S.C. § 2403, we conclude that such efforts, while salutary, will not be as effective as the visibility and uniformity of a national rule. Conducting training or educational sessions for hundreds of incumbent district judges and magistrate judges, with the necessity of providing training to new appointees after they are confirmed, will be an ongoing burden on the judiciary. More important, given the pace of civil litigation and motions practice, and the crowded nature of many dockets, a district judge or magistrate judge may not become aware that the

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[3] E.D Cal. L. R. 24-133; N D. Cal. L. R 3-8; Colo. L R. 24.1, N D. Ind. L. R 24.1; S.D. Ind. L R 24.1, D. Kan. L. R. 24.1; M.D N.C. L. R. 83 7.

constitutionality of a federal statute has been challenged until after full briefing, when time for review of the parties' arguments is available to that judge -- perhaps months after the challenge has been asserted. This could slow the disposition of the case, including threshold or dispositive motions.

Similarly, we do not believe that proposed Rule 5.1 would cause a hardship on pro se litigants. First, such litigants are under the same duty as counsel for represented parties to serve process and other papers, and to comply with the Federal and local rules and standing orders of a presiding judge. If a pro se litigant is challenging the constitutionality of a federal (or state) statute, there is no reason to exempt him or her from that specific requirement Second, just as district courts already "screen" pro se submissions as a matter of current practice, a judge will be able to evaluate whether a constitutional challenge is other than a frivolous one. The draft advisory committee note explicitly refers to this practice. We would expect FRCP 5.1 to be implicated only in non-frivolous cases.

Finally, we conclude that proposed Rule 5.1 will prove workable, and will not impose an undue burden, based upon the widespread existence of comparable state law We recently reviewed state statutes and state court rules involving notification to state attorneys general when parties challenge the constitutionality of state statutes. We first came across a uniform declaratory judgment act that requires that state attorneys general be served and given an opportunity to be heard when state statutes are challenged as unconstitutional in declaratory judgment actions [4] The uniform act provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.[5]

Thirty-six (36) states have adopted this uniform act in some form.[6] State courts have relied on

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[4] See Unif. Decl Judg Act § 11 (1922).

[5] Id.

[6] Ala. Code § 6-6-227, Ariz. Rev Stat. § 12-1841, Ark. Code Ann. § 16-111-106, Colo. Rev. Stat. § 13-51-115, Del. Code Ann., tit. 10 § 6511, Fla. Stat. § 86.091, Ga. Code Ann. § 9-4-7(c), Idaho Code § 10-1211, Ind. Code § 34-14-1-11, Kan. Civ. Proc. Code § 60-1712, Ky. Rev. Stat. Ann. § 418.075, La. Code Civ. Proc Ann., art. 1880, Me. Rev. Stat. Ann , tit. 14 § 5963, Md. Code Ann Cts. & Jud Proc. § 3-405(c), Mass. Gen. Laws, ch. 231A § 8, Minn. Stat.

the party raising a constitutional challenge to notify the appropriate executive branch official responsible for defending the statute or provision in a manner similar to that described in proposed FRCP 5.1.[7]

We have also identified 18 states with procedural rules that require a party raising a constitutional challenge in any type of case to notify the state attorney general,[8] and 11 states that have party notification rules at the appellate level.[9] The State of New York recently amended its laws to shift the duty to notify the State Attorney General of constitutional challenges from the court to the party raising the challenge.[10]

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§ 555 11, Mo. Ann. Stat. § 527.110, Neb. Rev Stat. § 25-21, 159, Nev. Rev. Stat. § 30 130, N.M. Stat. Ann. § 44-6-12, N.C. Gen. Stat. § 1-260, N.D. Cent. Code § 32-23-11, Ohio Rev. Code Ann. § 2721.12(A), Okla. Stat., tit. 12 § 1653(c), Or. Rev. Stat. § 28.110, R.I. Gen. Laws § 9-30-11, S.C. Code Ann. § 15-53-80, S.D. Codified Laws § 21-24-8, Tenn. Code Ann. § 29-14-107(b), Tex. Civ. Prac. & Rem. Code § 37.006(b), Utah Code Ann. § 78-33-11, Vt Stat. Ann , tit. 12 § 4721, Wash. Rev. Code § 7.24.110, W. Va. Code § 55-13-11, Wis. Stat. § 806.04(11), and Wyo. Stat. Ann. § 1-37-113.

[7] Although the state statutes do not explicitly state that the party is responsible for serving the state attorney general, that is the most logical reading of them. Cases applying the statutes explicitly refer to the failure of a party to comply with its service provisions. E.g., Reagan v City of Piggott, 305 Ark. 77, 81; 805 S.W.2d 636, 638 (Ark. 1991); Scott v. Matlack, Inc., 1 P 3d 185, 191 (Colo Ct. App. 2000), rev'd on other grounds, 39 P.3d 1160 (Colo. 2002); Sendak v Debro, 264 Ind 323, 324-26; 343 N.E. 2d 779, 780-81 (Ind. 1976); Stewart v. Estate of Cooper, 102 S W. 2d 913, 915 (Ky. 2003); Bailey v. Parish of Caddo, 716 So.2d 523, 530 (La Ct. App. 1998); Gardner v Board of County Comm'rs of St. Mary's Cty., Md., 320 Md. 63, 69-72; 576 A.2d 208, 211-12 (Md. Ct. App. 1990); Lazo v. Board of County Comm'rs of Bernalillo County, 102 N.M. 35, 37-38; 690 P.2d 1029, 1031-32 (N M. 1984), Marks v. City of Roseburg, 59 Or App. 558; 651 P.2d 748, 749 (Or. App. 1982).

[8] Ala. R. Civ. P. 5, 24 cmts., Ill. S. Ct. R. 19, Ky. R. Civ. P 24.03, Me. R. Civ. P 24(d), Mass. R. Civ P. 24(d), Minn. R. Civ. P. 24.04, Miss. R. Civ. P. 24(d), Mont. R. Civ. P. 24(d), N.J. R. Civ. P. 4:28-4(a), N.Y. Exec. § 71 (eff 1/2005), N.Y. C.P.L.R. § 1012 (eff. 1/2005), N.D. R. Civ. P. 24(c), Pa. R. Civ. P. 235, R.I R. Civ. P. 24(d), S.C. R. Civ. P. 24(c), S.D. Codified Laws § 15-6-24(c), Tenn. R Civ. P. 24.04, Utah R. Civ. P. 24(d), and Wyo. R Civ. P 24(d).

[9] Cal Civ. Proc. Code §§ 664.5(e), 826, Cal. R. App P. 29.8, Haw R. App. P 44, Ill. S. Ct. R. 19, Ind. R. App P. 9(A)(1), Minn. R. App. P. 144, Mont. R. App. P. 38, Neb. S. Ct. & App. Ct. Prac. R. 9(E), N.H. S. Ct R. 31, N Y. R. App. Ct. 500 2(d), Or. R. App. P. 5.12, and Pa. R. App. P. 521.

[10] See N Y. Exec. § 71 (eff. 1/2005), N.Y. C.P.L.R. § 1012 (eff. 1/2005).

This pattern of state practice is a strong indication that compliance with the proposed Rule would be both effective and practical and will not constitute an undue burden on practitioners.

Time for Intervention by the Attorney General

Proposed FRCP 5.1 currently requires that a court set a time to intervene for the Attorney General of not less than 60 days from the date of certification. The Department had proposed that the Attorney General have at least a 60-day window to intervene in recognition of the Department's internal administrative procedures that must be followed upon receipt of a notice. These procedures include securing the Solicitor General's approval for intervention under 28 C.F.R. § 0.21. The current draft advisory committee note, however, states that a court need not stay a case pending a response from the Attorney General. It also suggests that the court not make a final (as opposed to preliminary) determination sustaining a constitutional challenge before the 60 days (or whatever longer period is set by the court) for intervention has elapsed The Note reminds courts that a stay of proceedings might avoid a second round of briefing or a second hearing on the constitutional challenge should the Attorney General decide to intervene. Finally, the proposed Rule does not restrict a court's ability to reject a constitutional challenge at any time, even before notice and certification to the Attorney General.

At the April 2004 meeting, some concerns were expressed that the proposed Rule not prescribe a 60-day window for the Attorney General to intervene, either because that time period was longer than necessary or because the exigencies of a particular case might require more expedited consideration of pending motions or other issues. Although the Department would prefer to have a uniform, defined period in which to make a decision on intervention (as it does for responding to a complaint or to notice an appeal), the Department is sensitive to the concerns that the needs of specific litigation may make a uniform time period impracticable and introduce unnecessary delay in the resolution of some cases. Accordingly, the Department has prepared a modified proposal to address the amount of time the Attorney General and state attorneys general are given to intervene after service of the notice. Our original proposal provided at least 60 days to intervene; our redraft substitutes "a reasonable time" for 60 days and makes a corresponding change to the proposed advisory committee's note.

Proposed Rule 5.1 Constitutional Challenge to Statute – Notice and Certification

(a) [unchanged]
(b) [unchanged]

(c) Intervention. The court must allow a reasonable time ~~set a time not less than 60 days from the Rule 5.1(b) certification~~ for intervention by the Attorney General or State Attorney General.

(d) [unchanged]

Committee Note

[paragraphs 1-3 remain unchanged]

Subsection (c) mandates that the court allow a reasonable time for intervention by the Attorney General or State Attorney General, leaving the determination of what constitutes a reasonable time to the discretion of the court. Other federal civil rules provide guidance on what constitutes a reasonable time for the Attorney General to take action in a new matter. For example, the Attorney General is given 60 days to ~~The 60-day period for intervention mirrors the time to~~ answer a complaint under ~~set by~~ Rule 12(a)(3)(A) and to file an appeal under Federal Rule of Appellate Procedure 4(a)(1)(B).

Pretrial activities may continue without interruption during the time set by the court for intervention by the Attorney General or State Attorney General ~~this period~~, and the court retains authority to grant any appropriate interlocutory relief. But to make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded or the period has expired without response. The court may, on the other hand, reject a challenge at any time. The rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action--including a constitutional challenge--at any time, even before service of process.

We hope that the foregoing information and analysis will advance the Committee's consideration of proposed Rule 5.1 at the October meeting. We welcome your further thoughts and comments on this important proposal that serves to assist the federal and state executive branches to fulfill their duty to defend the constitutionality of statutes.

Sincerely,

PETER D. KEISLER
Assistant Attorney General
Civil Division

§ 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(June 25, 1948, c. 646, 62 Stat. 971; Aug. 12, 1976, Pub.L. 94–381, § 5, 90 Stat. 1120.)

To: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

From: **David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **May 21, 2003, as revised July 31, 2003**

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

Introduction

The Civil Rules Advisory Committee met on May 1 and 2 at the Administrative Office of the United States Courts in Washington, D.C.

* * * * *

Part I of this report describes recommendations to publish for comment in two parts. Part IA recommends four proposals for immediate publication along with the amendments to Admiralty Rules B and C approved for publication at the January meeting.

* * * * *

***I ACTION ITEMS: NEW RULE 5.1 AND AMENDED RULES 6(e), 24 (c), 27(a), AND 45(a) FOR PUBLICATION; * * ***

Part IA recommends immediate publication for comment of a new Rule 5.1 and amended Rules 6(e), 24(c), 27(a), and 45(a). * * *

A Rules For Immediate Publication

The Advisory Committee recommends publication for comment of new Civil Rule 5.1 and amendments to Rules 6(e), 24(c), 27(a), and 45(a).

Rule 5.1

The project that led to development of proposed Rule 5.1 arose from a suggestion stimulated by the publication of Appellate Rule 44(b) for comment. Rule 44(b) expanded Rule 44 to address the procedure for notifying a court of appeals that a party questions the constitutionality of a state statute Judge Barbara B. Crabb responded to publication of the proposed amendment by suggesting that the Civil Rules should emulate Appellate Rule 44, implying that the provisions in present Civil Rule 24(c) are inadequate. The Department of Justice has taken up the proposal.

Appellate Rule 44 and present Civil Rule 24(c) implement the provisions of 28 U.S.C.A. § 2403·

> (a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *
>
> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee

> thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *

Appellate Rule 44, including a new subdivision (b) that took effect on December 1, 2002, provides.

> **(a) Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.
>
> **(b) Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State

Civil Rule 24(c), describing the procedure for intervention, includes these three sentences, the final two of which were added in 1991:

> **(c) Procedure.** * * * When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28,

> U.S.C , § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403 A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

It seems likely that these provisions were attached to Rule 24 because the purpose of notice is to support the right to intervene. This location, however, is not calculated to catch the attention of any but the most devoted students of procedure. Rule 24 is likely to be consulted by a party who knows of a lawsuit and wants to join it, but may not be consulted by a party who has joined an action and may not remember the duty to call the court's attention to a constitutional question and § 2403. Relocation as a new Rule 5 1, sandwiched between rules that deal with service and notice, may make the rule more effective.

Apart from the question of location, the Department of Justice reports that too often it fails to receive notice that the constitutionality of an Act of Congress has been drawn in question in a district-court action. It believes that it is particularly important to have notice while the action is in the district court, because that is where the record is made, and to have notice as soon as the constitutional question is drawn. For this reason, it believes that just as Appellate Rule 44 was drafted in terms quite different from Civil Rule 24(c), a new Civil Rule 5.1 should do more than Appellate Rule 44 to assure notice to the Attorney General.

The relationship between proposed Rule 5.1 and Appellate Rule 44 is important Cognate provisions in the Civil and Appellate Rules should differ only when the differences are justified by the need to respond to the distinctive needs of trial-court procedure and appellate procedure. The relationship between the rules and the statute they implement, § 2403, also is important. The description of proposed Rule 5 1 thus begins by describing the ways in which it

departs from § 2403 and then carries on to describe the ways in which it departs from Appellate Rule 44.

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

First, each imposes an obligation on a party, while § 2403 imposes an obligation only on the court.

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

Third, § 2403 does not require notice to the Attorney General if a United States officer or employee is a party. Both Appellate Rule 44 and draft Rule 5 1 require notice when an officer or employee is a party, but is not sued in an official capacity. With respect to an Act of Congress, the United States Attorney General often will have notice under Civil Rule 4(i) of an action against a United States officer or employee in an individual capacity, but not always.

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

First, Appellate Rule 44 addresses a party who "questions" the constitutionality of an Act of Congress or a state statute Draft Rule 5 1, drawing directly from § 2403, applies to a party who "draws in question" the constitutionality of an Act of Congress or state statute This direct incorporation of statutory language avoids any dispute whether an argument that a challenged interpretation should be rejected to avoid a constitutional question, "questions" the constitutionality of the statute.

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

Third, draft Rule 5.1 goes beyond the Rule 44 requirement that the notice be filed with the court. It also requires that the notice be served promptly on the Attorney General. Service would be accomplished in the manner provided by Civil Rule 4(i)(1)(B), which calls for certified or registered mail. The draft does not substitute this requirement for the court's § 2403 duty to certify the fact of the challenge to the Attorney General, but adds to it. The Attorney General thus may get notice twice, once from the party who raises the question and once from the court This dual-notice requirement was drafted because the Department of Justice wishes to make quite sure that notice comes to its attention in timely fashion. The dual notice is less burdensome than might appear on first blush. The party must file a notice with the court, it is little additional burden to serve the notice by mail on the Attorney General. Similarly, the court must set a time for intervention by the Attorney General; it is little additional effort to include a certification The major benefit of the dual notice may be that the party notice will be served early in the litigation, often well before any activity by the court concerning the action

Fourth, adhering to the statute, draft Rule 5.1 provides that the court certifies the question to the Attorney General. Appellate Rule 44 transfers the certification duty to the clerk. (It may be that on appeal it is easier to substitute the clerk for the court because Rule 44, in common with draft Rule 5.1, dispenses with the need to determine whether the challenged statute affects the public interest. Substitution of the clerk may be complicated, however, by the need under Rule 44 to determine whether a United States officer or employee who is a party has been made a party in an official capacity.)

Fifth, draft Rule 5.1 includes a specific provision for setting a time to intervene. Appellate Rule 44 has no similar provision. This difference reflects the great variability of time to disposition in a trial court as compared to the more predictable schedule on appeal.

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

Rule 6(e)

Moved by comments on the Appellate Rules amendments that conformed appellate time-counting conventions to the Civil Rules conventions, the Appellate Rules Committee referred to the Civil Rules Committee a nice question arising from the relationship between Civil Rules 6(a) and 6(e). Rule 6(e), set out below, adds 3 days to some prescribed time periods. Unfortunately, it does not do so in a way that is as clear as time-counting rules should be The proposed amendment aims to increase clarity in a way that will support, not disrupt, the general present understanding.

As recently amended, Rule 6(e) says:

> 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.

(Rule 5(b)(2)(B) governs service by mail. (C) governs service by leaving a copy with the court clerk (D) governs service by "any other means, including electronic means, consented to in writing.")

Rule 6(a) says that intervening Saturdays, Sundays, and legal holidays are excluded when computing a prescribed or allowed "period of time" that is "less than 11 days."

Four possible methods of integrating Rules 6(a) and 6(e) have been recognized. Two can be rejected without regret One would "add" the 3 days "to the prescribed period" directly — a 10-day period becomes a 13-day period, Rule 6(a) is ousted because the

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5.1. Constitutional Challenge to Statute — Notice and Certification

(a) Notice. A party that files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute must promptly.

(1) if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B);

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

(2) if the question addresses a state statute and no party is the state or a state officer, agency, or employee sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the State Attorney General.

(b) Certification. When the constitutionality of an Act of Congress or a state statute is drawn in question the court must certify that fact to the Attorney General of the United States or to the State Attorney General under 28 U.S.C. § 2403.

(c) Intervention. The court must set a time not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General

(d) No Forfeiture. A party's failure to file and serve a Rule 5.1(a) notice, or a court's failure to make a Rule 5.1(b) certification, does not forfeit a constitutional right otherwise timely asserted.

Committee Note

Rule 5 1 implements 28 U.S C § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party who files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute to file a Notice of Constitutional Challenge and serve it on the United States Attorney General or State Attorney General The notice must be promptly filed and served. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or the State Attorney General. The notice will ensure that the Attorney General is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's § 2403 certification obligation remains, and is the only notice when the constitutionality of an Act of Congress or state statute is drawn in question by means other than a party's pleading, written motion, or other paper

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading

Rule 5 1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any Act of Congress or state statute, not only those "affecting the public interest" It is better to assure, through notice, that the Attorney General is able to determine whether to seek intervention on the ground that the Act or statute affects a public interest

The 60-day period for intervention mirrors the time to answer set by Rule 12(a)(3)(A). Pretrial activities may continue without interruption during this period, and the court retains authority to grant any appropriate interlocutory relief. But to make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded or the period has expired without response The court may, on the other hand, reject a challenge at any time. This rule does not displace any of the statutory

or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of Service ~~Under Rule 5(b)(2)(B), (C), or (D)~~. Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may act 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~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the ~~prescribed~~ period.

Committee Note

Rule 6(e) is amended 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. Three days are added after the prescribed period expires All the other time-counting rules apply unchanged.

One example illustrates the operation of Rule 6(e) A paper is mailed on Wednesday. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a legal holiday, ordinarily Monday.

Discussion Topics. The comments suggest two revisions.

The first revision seems a good idea. Rule 5.1(a)(1) and (a)(2) would be revised by deleting "sued" in each place:

> **(1)** if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States ~~sued~~ in an official capacity * * *.
>
> **(2)** if the question addresses a state statute and no party is the state or a state officer, agency, or employee ~~sued~~ in an official capacity * * *.

The theory is direct. There is no need to give Rule 5 1 notice if an officer or employee is a plaintiff in an official capacity. The statute that requires court certification, 28 U.S.C. § 2403, does not employ the "sued" restriction: "to which the United States or any agency, officer or employee thereof is not a party * * *." The parallel Appellate Rule 44, is similar: "in which the United States or its agency, officer, or employee is not a party in an official capacity * * *." (The expressions as to state statutes and state officers are similar.)

The second possible revision would specify a method to serve the State Attorney General in subdivision (a)(2)(B):

> **(B)** serve the Notice and the pleading, written motion, or other paper that raises the question on the State Attorney General by certified or registered mail.

The argument for adding these words is that without them, service can be made by ordinary mail under Rule 5(b)(2)(B). State Attorneys General may experience the same problem that the Department of Justice has described: notice by ordinary mail may not be treated with an appropriate degree of reverence by mailroom workers, delaying delivery of notice to a person situated to respond.

The opposing argument is one encountered in deliberating on proposed Supplemental Rule G. Specifying the details of service, rule-by-rule, can become outdated.

The competing considerations are clear. The balance can be weighed by those with a good sense of practical realities.

Finally, it may be useful to remark on comment 03-CV-10, Bill Lockyer, Attorney General of California. Expressing strong support for Rule 5.1, the comment notes: "It is this office's experience that the clerk's-notice requirements of current Rule 24(c) often go unsatisfied " The requirement of party notice "increases the likelihood that an Attorney General will be notified of such litigation * * *."

Summary of Comments: August 2003 Rule 5.1

03-CV-005, Hon. Geraldine Mund: As to style, it is better to say "A party who" rather than "A party that." This rule should be incorporated in the Bankruptcy Rules "as we receive constitutional challenges to both state and federal statutes and there is no requirement here that notice be given in a bankruptcy case."

03-CV-008, State Bar of California Committee on Federal Courts: (1) Creating a new Rule 5.1 "seems likely to highlight the notice requirement in a way the current rules fail to do." The Committee supports this. (2) Rather than set a minimum 60-day period for intervention, the period should be set in the district court's discretion. Action is likely to be frozen for the 60 days, and that can thwart timely relief. Rule 24 requires timely intervention; that suffices. There is no indication that state or federal governments have suffered for lack of an explicit time period for intervention. The analogy to the 60-day answer period in Rule 12(b)(3)(A) is not persuasive; the statutory challenge may arise later in the litigation, and for that matter some statutes require the government to answer in less than 60 days. (3) Literally, Rule 5.1 may require multiple notices; a party should be required to file only one notice in a single case.

03-CV-005, State Bar of Michigan Committee on Federal Courts: (1) Delete "sued" from both (a)(1) and (a)(2): "and no party is the United States, a United States agency, or an officer or employee of the United States ~~sued~~ in an official capacity." Notice should not be required if an officer or employee of the United States is a plaintiff in an official capacity. Appellate Rule 44 reads. "in which the United States or its agency, officer, or employee is not a party in an official capacity." (2) There is no reason to require the party to give notice; notice from the court clerk, required by statute, suffices. (3) But if the rule does provide that the party give notice, (a)(2)(B) should specify the method of serving notice on the State Attorney General: "serve * * * the State Attorney General by sending copies by registered or certified mail."

03-CV-010, Bill Lockyer, Attorney General of California: Supports the proposal "It is this office's experience that the clerk's-notice requirements of current Rule 24(c) often go unsatisfied. As a result, we are frequently ignorant of pending litigation in district court that involves the constitutionality of a state statute Proposed Rule 5.1 increases the likelihood that an Attorney General will be notified of such litigation * * *." And it is good to reach all statutes, not only those that affect the public interest.

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U. S. Department of Justice: Expresses the Department of Justice's "strong support of the final proposal." (1) Despite § 2403 and Civil Rule 24(c), "there have been many instances in which the Attorney General has not been provided with notice of constitutional challenges or has received informal notice at a late stage of a proceeding." Requiring notice by a party in addition to the court certification "will ensure that the Attorney General is made aware of constitutional challenges in a timely manner." The incremental burden on the parties is slight — Rule 24(c) now requires the party to call the court's attention to the duty to certify. (2) The 60-day intervention period recognizes "the Department's internal administrative procedures that must be followed upon receipt of a notice." But the Committee Note should state that Rule 5.1 does not itself restrict the Attorney General's opportunity to intervene more than 60 days after the Rule 5.1(b) certification, and that the rule does not limit the opportunity to intervene after final judgment if a party or the court fails to comply with the duty to give notice or certify. (3) After considering other possible methods of serving the party's notice, the Department has concluded that service in the manner provided by Civil Rule 4(i)(1)(B) "will best ensure timely and proper processing of notices." (4) The differences between Civil Rule 5.1 and Appellate Rule 44 are justified. It is important that the government have an opportunity to be present "as a party in district court, where the factual record is made and constitutional arguments are developed " In addition, notice "under Appellate Rule 44 functions more smoothly given the nature

of the appeals process and the centralized circuit court structure." (This comment also expresses approval of several other features of proposed Rule 5.1 that have not drawn adverse comment by other participants.)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports Rule 5.1, and specifically mentions (1) moving this out from Rule 24(c); (2) placing the burden of notification on the party that brings constitutionality into question; (3) addressing the "interface with" the § 2403 certification requirement; and (4) establishing a 60-day intervention period.

[Rule 5.1 as it was published for public comment]:

Rule 5.1. Constitutional Challenge to Statute — Notice and Certification

(a) **Notice.** A party that files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute must promptly

(1) if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States sued in an official capacity

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B).

(2) if the question addresses a state statute and no party is the state or a state officer, agency, or employee sued in an official capacity

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the State Attorney General

(b) Certification. When the constitutionality of an Act of Congress or a state statute is drawn in question the court must certify that fact to the Attorney General of the United States or to the State Attorney General under 28 U S C § 2403

(c) Intervention. The court must set a time not less than 60 days from the Rule 5 1(b) certification for intervention by the Attorney General or State Attorney General

(d) No Forfeiture. A party's failure to file and serve a Rule 5 1(a) notice, or a court's failure to make a Rule 5 1(b) certification, does not forfeit a constitutional right otherwise timely asserted

[Rule 5.1
Style Subcommittee draft; April 9, 2004] [with Cooper annotations and Kimble responses]

Rule 5.1 Constitutional Challenge to a Statute – Notice and Certification

(a) **Notice by a Party.** A party that files a pleading, written notice, or other paper drawing into question the constitutionality of a federal statute[1] or a state statute must promptly

(1) file a Notice of Constitutional Question stating the question and identifying the paper that raises it, and

(2) serve the Notice and paper on

(A) the Attorney General of the United States as provided in Rule 4(i)(1)(B),[2] if a federal statute[1] is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or

(B) the state Attorney General by registered or certified mail, if a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity

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1 **Cooper:** This is a long-running controversy Section 2403 says "Act of Congress " In several discussions the Department of Justice representatives have refused to assert that every Act of Congress is a "statute " To the contrary, they offer several illustrations of enactments that are Acts of Congress but may not be statutes Joint Resolutions Approval of an interstate compact Private bills Possibly ratification of a treaty Rule 5 1 is designed in large part to implement section 2403 Rather than adhere rigidly to the style convention that says "federal statute," we should stick with the statute [I assume without research that section 2403 does not extend to administrative rules or regulations]

Kimble: In the restyled rules, we have changed "statute of the United States" to "federal statute " Now, do we mean something different in this one instance? And how likely is it that there will be a constitutional challenge to a joint resolution or a private bill? I made a quick run through an annotation in 147 A L R Fed 613 and found no such cases--only cases involving statutes (Interestingly, the first sentence of the annotation says that "the original version of the intervention statute applied only to federal statutes ") Section 2403 was passed in 1937, and the possibility that we are concerned about has apparently never come up It's also possible, of course, that the drafters meant nothing more than "federal statute "

2 **Cooper:** This is another global question The difficulty is that Rule 4(i)(1)(B) does not provide anything at all about serving a notice and paper It provides only for serving a summons and complaint It is accurate to say "in the manner provided by," and the expenditure of two extra words is worthwhile Compare Style 503, in which "in the manner provided in Rule 4" has escaped censure [the censor] up to this point

Kimble: I have wrestled with our multiple ways of making these cross-references "as provided in", "in the manner provided in", "as prescribed in", "as stated in", "in accordance with", "pursuant to," "under", and others We should at least be able to cut down on the number of variations Perhaps we will sometimes need "in the manner provided in " But one meaning of "as" is "in the same manner or way " Will anyone be confused because 4(i)(1)(B) is about serving a different kind of paper on the Attorney General?

(b) **Certification by the Court; Intervention.** The court must, under 28 U S C § 2403, certify to the Attorney General of the United States or of a state that there is a constitutional challenge[3] to a statute The court must set a time no less than[4] 60 days after the certification for the Attorney General to intervene

(c) **No Forfeiture.** A party's failure to file and serve the required notice, or the court's failure to certify the challenge,[5] does not forfeit a constitutional right that is otherwise timely asserted

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3 **Cooper:** The Advisory Committee debated at length the best way of expressing the nature of the constitutional issue It decided to adopt the language of section 2403 One reason was that this is the language of the statute But a second reason was that this better captures the circumstances that require notice or certification Often the argument is not a challenge to the constitutionality of the statute Instead it is an argument that the statute must be interpreted in the way that I argue because the contrary interpretation would be unconstitutional, there is nothing unconstitutional about the statute because it means what constitutionally it must mean "Challenge" does not capture that We should be consistent with "drawing into question," the words that open 5 1(a) This should say "that the constitutionality of an Act of Congress or statute has been drawn into question "

Kimble: Federal statutes are not the model for good drafting But even apart from that, I see no problem here First, the title to 5 1, as published, is "Constitutional Challenge to a Statute--Notice and Certification " Second, if you look over the case summaries in 28 U S C A sec 2403, you'll see that the cases repeatedly use the words "constitutional challenge", I counted at least 12 cases And 7C Wright-Miller-Kane sec 1915 (pocket parts) refers to the duty to notify the government when a "constitutional challenge is raised " Third, this convenient shortening saves us a bunch of words not only in (b) but also in (c) Notice how much clumsier (c) would be with the other formulation We also avoid the "Act of Congress" issue Finally, I think we can trust readers to readily see that "constitutional challenge" is indeed a convenient shortening of the longer statutory formulation that appears earlier

4 **Cooper:** It may be better to retain this provision as a separate subdivision The duty to certify and the time to intervene are distinct Apart from that, many other style edits have suggested that it would be better to say "set a time at least 60 days after * * * "

Kimble: There is a tendency in the rules to overdivide and then cross-refer to something that appeared just a sentence or two earlier The time for intervention is tied to the certification, I think they fit together nicely We avoid the cross-reference, and we avoid having to refer to both of the attorneys general]

(4) Partial April 2004 Redraft

Rule 5.1 Constitutional Challenge to a Statute — Notice and Certification

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal statute or a state statute must promptly file a Notice of Constitutional Question stating the question and identifying the paper that raises it.

(b) Certification by the Court; Intervention. The court must, under 28 U.S.C. § 2403, certify to the Attorney General of the United States or of a state that there is a constitutional challenge to a statute. The court must set a time no less than 60 days after the certification for the Attorney General to intervene.

(c) No Forfeiture. A party's failure to file the required notice, or the court's failure to certify, does not forfeit a constitutional right that is otherwise timely asserted.

This draft deleted the requirement that the party raising the question serve notice on the Attorney General. It also omitted the provision that limits Rule 5.1 to actions in which no party is the United States, the state, or a federal or state employee.

FILED AND SEALED SETTLEMENT AGREEMENTS

Concerns have been raised in Congress that filed but sealed settlement agreements may deprive the public of information needed to protect the public health and safety. Responding to these concerns, the Committee asked the Federal Judicial Center to undertake a study of these practices. The study surveyed state law and local rules of federal districts. It also undertook a study of all cases terminated during a two-year period in 52 federal district courts. The study found that sealed settlement agreements are filed in only a tiny fraction of federal cases. An examination of the cases in which sealed settlement agreements were filed further showed that unsealed information in the case file almost always revealed everything relevant to the public health or safety that might be deduced from the settlement agreement Progress in developing the report was considered by a Advisory Committee Subcommittee chaired by Judge McKnight and regularly reported to the Committee. The final report was delivered and considered at the Committee meeting last April.

This lengthy deliberation has shown that there is no present need to undertake development of a new Civil Rule to regulate the practice of filing sealed settlement agreements. The underlying concerns are important, and suggest that the topic should remain alive on the Committee agenda to support a prompt response if the situation should change. It will remain on the agenda.

This conclusion should be reported to Congress through Senator Kohl, who has sponsored legislation on sealed settlement agreements. The following draft is proposed as the framework for a letter to Senator Kohl:

DRAFT

Honorable Herb Kohl
United States Senate
380 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

On December 16, 2003, I wrote to you about the work of the Advisory Committee on Civil Rules on the proposal to regulate confidentiality provisions in settlement agreements set out in the "Sunshine in Litigation Act of 2003" (S. 817, 108th Cong., 1st Sess.).

To address the concerns raised in the bill, the Advisory Committee asked the Federal Judicial Center to collect and analyze data on the practice and frequency of sealing orders limiting disclosure of settlement agreements in the federal courts. In my December 2003 letter, I advised you of the Center's preliminary findings based on data from 29 federal district courts. In April 2004, the Center completed its study after surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. I am pleased to enclose a copy of the Center's final report.

In those 52 districts, the Federal Judicial Center found a total of 1,272 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, approximately one in 227 cases (0 44%). The findings in the Center's final report do not materially vary from the preliminary findings provided in my December 2003 letter. After reviewing all the information from the 52 districts, the Center concluded that most settlement agreements are neither filed with a court nor require court approval. Instead, most settlement agreements are private contractual obligations. Such agreements would not be affected by provisions like those in the proposed Sunshine in Litigation Act prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

The Advisory Committee was concerned that even though the number of cases in which courts seal settlement agreements is small, those cases could involve significant public hazards concealed through sealed agreements. A follow-up study was undertaken to determine whether in these cases, there is publically available information about potential hazards contained in other

records, which are not sealed. The follow-up study revealed that in the few cases involving a potential public hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the allegedly defective nature of a harmful product, dangerous characteristics of a person, or the lasting effects of a particular harmful event.[1] These findings from the follow-up study were consistent with the general conclusions of the Federal Judicial Center study, that complaints provided the public with "access to information about the alleged wrongdoers and wrongdoings."

The Advisory Committee also considered the effectiveness of a federal rule regulating the small number of settlement agreements filed and sealed in federal courts. As noted, most settlement agreements are not filed with the court at all and remain private contracts between the parties. On occasion, parties file a settlement agreement with the court. In most of these cases, the parties do so only to make the settlement agreement part of the court's judgment and ensure continuing federal jurisdiction, not to secure court approval of the settlement. Ordinarily a federal court has no jurisdiction to enforce an agreement that settles a federal-court action unless the agreement is made part of the court's judgment.[2] Otherwise, later interpretation and enforcement of the agreement would take place in state court under state law. A federal court would be involved only if there is diversity jurisdiction and would apply state law to the agreement, including to any provisions requiring confidentiality. The Federal Judicial Center study shows that parties file only a small fraction of the agreements that settle federal-court actions. A federal rule of procedure governing the few settlement agreements that are filed in federal court would not apply to, and could not effectively regulate, the private nature of the vast majority of settlements.

The Advisory Committee reviewed the thorough and detailed Federal Judicial Center study at its meeting on October 28-29, 2004. Based on the relatively small number of cases involving a sealed settlement agreement, the availability of other sources, including the complaint, to inform the public of potential hazards in cases involving a sealed settlement agreement, and the questionable authority and ability of the Committee to regulate confidentiality provisions enforced by state substantive law, the Committee concluded that no amendment to the Federal Rules of Civil Procedure is appropriate.

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[1]Of the 109 public interest cases studied, only one involved a sealed complaint. In general, the Federal Judicial Center study found that the complaints were available to the public in 97% of the cases with sealed settlement agreements – 1,234 of the 1,272 cases.

[2]*See Kokkonen v Guardian Life Ins Co* , 511 U S. 375, 381-382 (1994). *See also Union Oil Co of California v Leavell*, 220 F. 3d 562, 567-568 (7th Cir. 2000) (sealed case-file records are presumptively open to public in later litigation seeking to enforce settlement terms, unless court agrees to continue confidentiality).

Scope of Study

The docket sheets of 52 district courts, which record all actions in proceedings in every civil case filed, were electronically searched to locate and identify by name each case that included a sealed settlement agreement. The docket sheets of civil cases terminated during a two-year period in these districts were reviewed and cases were identified involving a sealed settlement agreement. A summary of the claim in each of the cases was prepared. The cases in which the claim might possibly implicate public health or safety, broadly defined, were tagged In a follow-up study of these tagged cases, the plaintiffs' complaints, which were available to the public, were manually reviewed and analyzed to determine whether they contained information sufficient to alert the public of a possible health or safety hazard.[3]

The Federal Judicial Center's report also included a survey of state laws and rules governing settlement agreements, which I reported to you in the December letter State laws, state court rules, and federal district court rules were surveyed to determine the extent to which existing statutes and rules regulate sealed settlement agreements filed with the courts.

Highlights of Findings

The Federal Judicial Center found that 1,272 cases involved a sealed settlement agreement, which represented a minute fraction of the total number of cases filed in the federal courts. That number would be smaller still if the 177 cases that were part of two MDL (multi-district litigation) cases were excluded. Importantly, the rate of sealed settlements in 11 districts whose local rules require good cause to seal a document (0.37%) was not statistically significantly different from the sealed settlement rate in other courts (0.45%). In fact, the settlement rate was virtually identical if the 177 cases, which were part of two MDL cases but counted separately for purposes of the report, are excluded (0.38% versus 0.37%). Three district courts had sealed-settlement rates more than twice the national rate, including Pennsylvania Eastern, Hawaii, and Puerto Rico. But the Pennsylvania Eastern number included 144 cases disposed of in a single MDL action.

The Federal Judicial Center study analyzed the 1,272 sealed settlement cases to determine how many of them involved matters of public interest. The Center coded the cases for the following characteristics, which might implicate public health or safety interests: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant, (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) bore one or more of the public-interest features, including 177 cases that were part of two MDL cases

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[3] The follow-up study examined the data available in the preliminary Federal Judicial Center report. At that time, the study had completed a review of the docket sheets of over 128,000 civil cases in 29 district courts.

An earlier study of the partial data compiled by the Federal Judicial Center supported the conclusions that sealed settlement agreements do not substantially affect public awareness of possible health and safety hazards.[4] Plaintiffs' complaints in the sealed settlement cases that involved a "public interest" provided significant notice to the public. Although the complaints varied in level of detail, all of them identified the three most critical pieces of information regarding the possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product liability suits, for example, specifically identified the product at issue, described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, e.g., civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the incident alleged to have caused harm.

The Advisory Committee on Civil Rules will continue to monitor courts' practices in this important area. Please feel free to contact Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure at (202) 502-1810, if you have any questions about this letter.

Sincerely,

Leonidas Ralph Mecham
Secretary

Enclosures

cc: Honorable Orrin G Hatch
Honorable Patrick Leahy
Honorable Jeff Sessions
Honorable Charles E. Schumer

[4]The study was performed by Steven Gensler, a professor at the University of Oklahoma Law School who was serving as a judicial fellow to the Administrative Office of the United States. Professor Gensler reviewed and analyzed the complaints filed in the 109 sealed settlement cases involving a "public interest."

108TH CONGRESS
1ST SESSION

S. 817

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

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IN THE SENATE OF THE UNITED STATES

APRIL 8, 2003

Mr. KOHL introduced the following bill, which was read twice and referred to the Committee on the Judiciary

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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 2003".

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

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

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

"(a)(1) A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that—

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

"(2) No order entered in accordance with paragraph (1), other than an order approving a settlement agreement, shall continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) have been met.

"(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

"(4) This section shall apply even if an order under paragraph (1) is requested—

"(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

"(B) by application pursuant to the stipulation of the parties.

"(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

"(B) No party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

"(b)(1) A court shall not approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to sub-

section (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement between or among parties that prohibits 1 or more parties from—

"(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or

"(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.

"(2) Paragraph (1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United

States Code, is amended by adding after the item relating to section 1659 the following:

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

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

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

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

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DATE: October 8, 2004

TO· Advisory Committee on Civil Rules

SUBJECT: Summary of *Sealed Settlement Agreements in Federal District Court* (Federal Judicial Center 2004)

In response to your research request, we examined 288,846 civil cases that were filed in a sample of 52 districts. We found 1,270 cases with sealed settlement agreements (0.44%). That is one in approximately 227 cases. In 97% of the cases with sealed settlement agreements, the complaint is not sealed. Generally the only thing kept secret by the sealing of the settlement agreement is the amount of settlement.

Among cases with sealed settlement agreements, almost one-quarter (22%) were actions typically requiring court approval of settlement agreements This includes cases involving minors or other persons requiring special protection (13%), actions under the Fair Labor Standards Act (7%), and class actions (6%)

Sometimes the settlement agreement is not filed until one party believes it has been breached, and then it is filed as a sealed exhibit in a motion to enforce it. In approximately 11% of the cases with sealed settlement agreements, this was how the agreement came to be filed. In a few additional cases, there was a motion to enforce after the agreement was filed.

Occasionally the settlement agreement is not a sealed document filed with the court, but a part of a sealed or partially sealed proceeding or transcript. This was true for 13% of the cases we found with sealed settlement agreements.

We did not evaluate whether the sealing of documents complied with circuit law and local rules, but we did observe that the public record almost never included specific findings justifying sealing

Our report is available from our Information Services Office (202-502-4153) and on-line at www.fjc.gov under "Recent Publications."

Sealed Settlement Agreements in Federal District Court

Tim Reagan, Shannon Wheatman, Marie Leary, Natacha Blain, Steve Gensler, George Cort, Dean Miletich[1]
Federal Judicial Center

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to conduct research on sealed settlement agreements filed in federal district court. Although the practice of *confidential* settlement agreements is common, the question is how often and under what circumstances are such agreements *filed* under seal?

Many civil cases settle before trial and defendants commonly seek confidentiality agreements concerning the terms of settlement. Usually such agreements are not filed. A high proportion of civil cases settle,[2] but a sealed settlement agreement is filed in less than one half of one percent of civil cases. In 97% of these cases, the complaint is not sealed.

The Law of Sealing

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978) (footnote omitted). "It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598.

Accountability is a principal reason for public access. *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be sub-

[1] We are grateful to our colleagues Pat Lombard, Angelia Levy, David Guth, Donna Pitts-Taylor, Vashty Gobinpersad, and Estelita Huidobro for their assistance with this project. We are grateful to Russell Wheeler, Jim Eaglin, Syl Sobel, Tom Willging, Molly Treadway Johnson, and Ken Withers for advice on this report. We are especially grateful to the clerks of court, other court staff, and archive personnel who provided us with information and helped us acquire access to court files.

[2] An analysis of disposition codes for civil terminations from 1997 through 2001 showed 22% were dismissed as settled and 2% were terminated on consent judgment. Another 10% were voluntary dismissals, and some of these probably were settled. An additional 20% are coded as "other" dismissals.

ject to public scrutiny."); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) ("the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret"); *id.* at 929 ("The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."); *Union Oil Co. of California v. Leavell*, 220 F.3d 562 (7th Cir. 2000) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

Courts of appeals have determined that the common law presumption of access applies to documents filed with the court, although it does not apply to documents exchanged in discovery, *Federal Trade Commission v. Standard Financial Management Corp.*, 830 F.2d 404, 408 (1st Cir. 1987); *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995), or to settlement agreements not filed, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781-83 (3d Cir. 1994). Also, the presumption of public access is stronger for documents filed in conjunction with substantive action by the court than for documents filed as part of discovery disputes. *Anderson v. Cyrovac Inc.*, 805 F.2d 1, 11 (1st Cir. 1986); *Leucadia Inc. v. Applied Extrusion Technologies Inc.*, 998 F.2d 157, 165 (3d Cir. 1993); *Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003); *Chicago Tribute Co. v. Bridgestone/firestone Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

Some cases have stated explicitly that if a settlement agreement is filed with the court for the court's approval or interpretation, then denying the public access to the agreement requires special circumstances. *Bank of America National Trust & Savings Association*, 800 F.2d 339, 345 (3d Cir. 1986) ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records."); *Herrnreiter v. Chicago Housing Authority*, 281 F.3d 634 (7th Cir. 2002) ("[Defendant's] desire to keep the amount of its payment quiet (perhaps to avoid looking like an easy mark, and thus drawing more suits) is not nearly on a par with national security and trade secret information. Now that the agreement itself has become a subject of litigation, it must be opened to the public just like other information (such as wages paid to an employee, or the price for an architect's services) that becomes the subject of litigation."); *Brown v. Advantage Engineering Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought

before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances . . . , the court file must remain accessible to the public.").

Many appellate opinions have stressed the importance of the court's stating specific reasons for sealing a filed document. *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) ("Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient."); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 182 (4th Cir. 1988) ("the district court must provide a clear statement, supported by specific findings, of its reasons for sealing any records or documents, as well as its reasons for rejecting measures less drastic than sealing them"); *Hagestad v. Tragesser*, 49 F.3d 1430, 1435 (9th Cir. 1995) ("because the district court failed to articulate any reason in support of its sealing order, meaningful appellate review is impossible").

Only two federal district courts have local rules pertaining specifically to sealed settlement agreements. The District of South Carolina proscribes them, D.S.C. L.R. 5.03(C), and the Eastern District of Michigan limits how long they may remain sealed, E.D. Mich. L.R. 5.4. Forty-nine districts (52%) have local rules pertaining to sealed documents generally. Fourteen districts (15%) have rules covering only administrative mechanics (e.g., how sealed documents are marked),[3] 32 districts (34%) have rules covering how long a document may remain sealed (after which it is returned to the parties, destroyed, or unsealed),[4] and 12 districts (13%) have good cause rules.[5] These rules are compiled in Appendix B.

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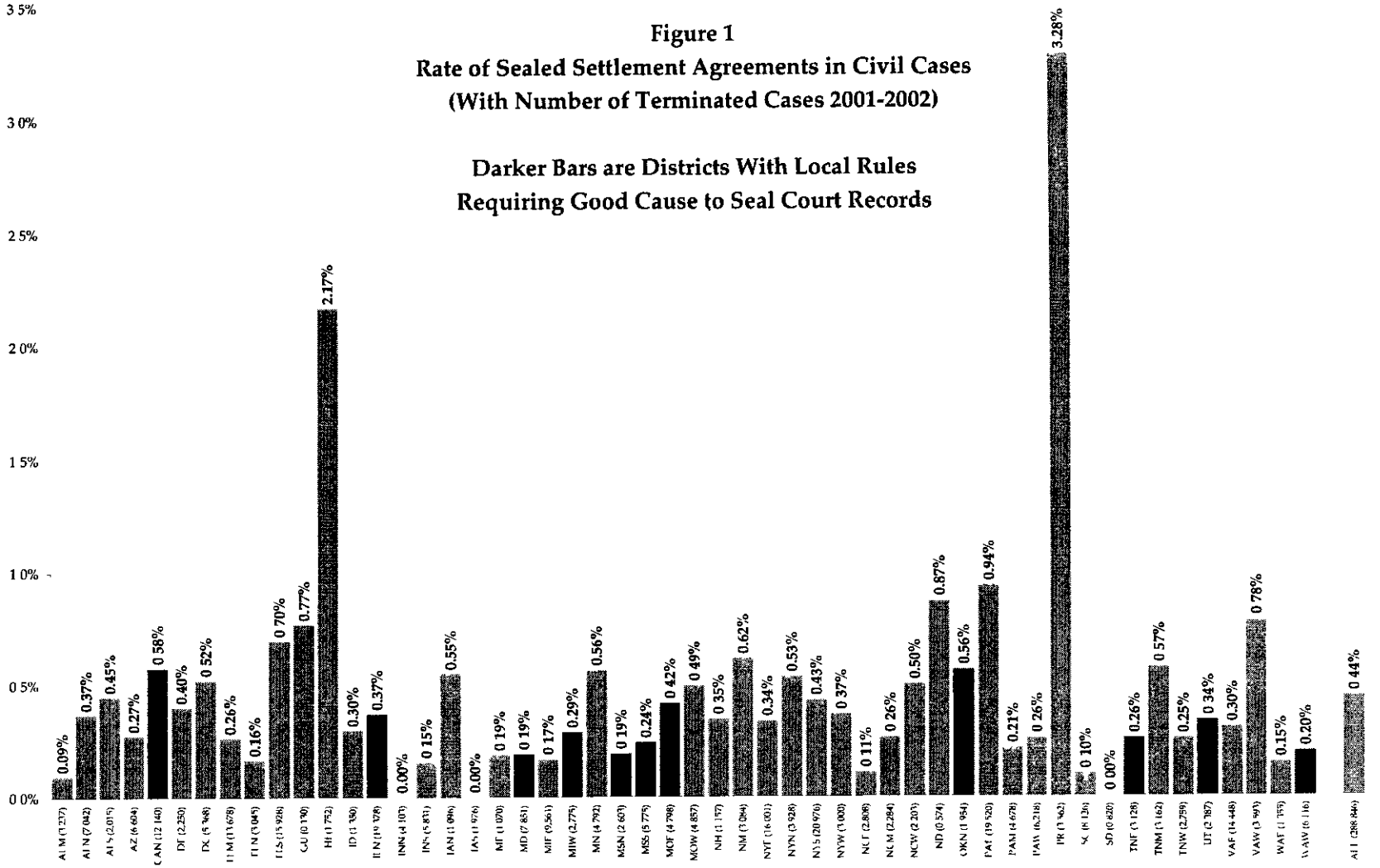
[3] California Central, California Eastern, Colorado, Delaware, District of Columbia, Georgia Southern, Indiana Southern, Montana, New Hampshire, New York Northern, Oklahoma Western, Rhode Island, Vermont, Wisconsin Eastern.

[4] Arizona, California Northern, California Southern, Connecticut, Florida Southern, Idaho, Illinois Northern, Iowa Northern and Southern, Kansas, Maryland, Michigan Eastern, Michigan Western, Minnesota, Mississippi Northern and Southern, Missouri Eastern, New York Eastern, North Carolina Eastern, North Carolina Middle, North Carolina Western, North Dakota, Ohio Northern, Ohio Southern, Oregon, Pennsylvania Middle, Tennessee Eastern, Texas Eastern, Texas Northern, Utah, Virginia Western, Washington Western.

[5] California Northern, Illinois Northern, Maryland, Michigan Western, Mississippi Northern and Southern, Missouri Eastern, New York Western, Oklahoma Northern, Tennessee Eastern, Utah, Washington Western. Note that the good cause rule for the Western District of New York is new (May 1, 2003).

Figure 1
Rate of Sealed Settlement Agreements in Civil Cases
(With Number of Terminated Cases 2001-2002)

Darker Bars are Districts With Local Rules
Requiring Good Cause to Seal Court Records



Findings

We examined 288,846 civil cases that were filed in a sample of 52 districts. We found 1,272 cases with sealed settlement agreements (0.44%). That is one in approximately 227 cases.

The sealed settlement rate for individual districts ranges from considerably less than the national rate to considerably more than that rate. Figure 1 shows sealed settlement rates for individual districts. Three of the districts we studied (6%) had no sealed settlement agreements among cases terminated in 2001 and 2002 – Indiana Northern, Iowa Southern, and South Dakota. Three districts (6%) had sealed settlement rates more than twice the national rate – Pennsylvania Eastern (0.94%), Hawaii (2.2%), and Puerto Rico (3.3%).[6]

We studied all 11 districts whose local rules require good cause to seal a document. The rate of sealed settlement agreements in those districts was 0.37%. The rate of sealed settlement agreements in the other districts was somewhat higher – 0.45% – but the difference was not statistically significant.[7]

Sealed settlement agreements appear in cases of many different types. Table 1 shows nature of suit frequencies. More than half of the cases with sealed settlement agreements are either personal injury cases (30%) or employment cases (26%). Another fifth are either civil rights cases (10%) or contract cases (11%). Intellectual property cases account for 11% of civil cases with sealed settlement agreements, but the rate of sealed settlement agreements in such cases is relatively high (1.54%). Cases identified as Fair Labor Standards Act cases have an even higher rate of sealed settlement agreements (2.58%), almost six times the overall average. Because the court must approve settlement agreements in such cases, they are frequently filed. They often are filed under seal to preserve confidentiality.

Sealed settlement agreements appear to be filed typically to facilitate their enforcement. If they are filed with the court, the same judge who

[6] The high rate for Pennsylvania Eastern is due largely to a single multidistrict litigation case in that district; 79% of the cases with sealed settlement agreements that we found in that district were in this multidistrict litigation. The sealed settlement agreement rate in Hawaii is relatively frequent in part because the sealing of the record of successful settlement conferences is relatively high there, approximately two-thirds of the cases we identified as containing sealed settlement agreements in that district were so identified for this reason. The high rate of sealed settlement agreements in Puerto Rico appears to reflect a relatively more common practice of filing and sealing such agreements in that district.

[7] $p = 0.63$.

heard the case can enforce the agreement without a new action being filed, and the court can enforce the agreement with contempt powers. Often the agreement is filed so that the court can approve it. Among cases with sealed settlement agreements, approximately one-quarter (22%) were actions typically requiring court approval of settlement agreements – 13% were cases involving minors or other persons requiring special protection, 7% were actions under the Fair Labor Standards Act, and 6% were class actions.[8]

Table 1. Types of Cases With Sealed Settlement Agreements

Nature of Suit	Number of Cases	Proportion Among Cases With Sealed Settlement Agreements	Sealed Settlement Rate
Personal Injury	378	30%	0.82%
Personal Property	28	2%	0.64%
Real Property	7	1%	0.07%
ERISA	26	2%	0.20%
Fair Labor Standards Act	88	7%	2.58%
Other Employment/Labor	223	18%	0.75%
Other Civil Rights	125	10%	0.55%
RICO	9	1%	1.06%
Securities	11	1%	0.76%
Antitrust	10	1%	0.59%
Trademark	48	4%	1.19%
Patent	62	5%	2.17%
Copyright	29	2%	1.25%
Contract	145	11%	0.33%
Other	83	7%	0.08%
Total	**1,272**	**100%**	**0.44%**

Sometimes the settlement agreement is not filed until one party believes it has been breached, and then it is filed as a sealed exhibit to a mo-

[8] The three individual percentages add up to more than the overall percentage, because some cases had more than one reason for court approval of settlements. A few cases with Fair Labor Standards Act claims had other nature of suit codes.

tion to enforce it. In approximately 11% of the cases with sealed settlement agreements, this was how the agreement came to be filed. In a few additional cases, there was a motion to enforce after the agreement was filed.

Occasionally the settlement agreement is not a sealed document filed with the court but a part of a sealed or partially sealed proceeding or transcript. This is true for 13% of the cases we found with sealed settlement agreements.

In 97% of the cases with sealed settlement agreements the *complaint* is *not sealed.* Almost the only time we encountered a sealed complaint was in cases where the entire record was sealed. (Sometimes the docket sheet was sealed;[9] sometimes although the case file was sealed, the docket sheet was

[9] We encountered 23 cases with sealed docket sheets: *Cahaba Pressure-Treated Forest Products v OM Group* (AL-N 7:97-cv-01917 filed 07/25/1997) (fraud action dismissed as settled), *Thomasson Lumber Co. v. Cahaba Pressure-Treated Forest Products* (AL-N 7.98-cv-00043 filed 01/08/1998) (contract action dismissed as settled), *Pennsylvania National Mutual Casualty Insurance Co. v. Cahaba Pressure-Treated Forest Products* (AL-N 2:98-cv-01261 filed 05/19/1998) (insurance action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (CA-N 4:00-cv-02945 filed 08/14/2000) (Statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (CA-N 3:01-cv-01156 filed 03/21/2001) (statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (CA-N 3:01-cv-02928 filed 07/27/2001) (contract action dismissed as settled), *Nick Chorak Mowing v. United States* (DC 1:99-cv-00587 filed 03/08/1999) (contract action dismissed as settled), *Engel v. Equifax Inc.* (DC 1:01-cv-00882 filed 04/17/2001) (statutory action dismissed as settled), *United States v. Board of Regents* (FL-N 4:93-cv-40226 filed 06/25/1993) (statutory action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (FL-S 0:01-cv-01845 filed 05/04/2001) (commerce action resolved by consent judgment), *Casimiro v. Allstate* (HI 1:99-cv-00527 filed 07/22/1999) (insurance action dismissed as settled), *Kessler v. American Postal* (MD 8:98-cv-03547 filed 10/21/1998) (statutory action dismissed as settled), *United States v. Frederick Memorial* (MD 1:01-cv-02923 filed 10/02/2001) (statutory action dismissed as settled), *Compaq Computer Corp. v. SGII Inc.* (MI-W 1:02-cv-00028 filed 01/16/2002) (trademark action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:98-cv-02428 filed 11/10/1998) (fraud action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:99-cv-00292 filed 02/18/1999) (fraud action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:02-cv-00369 filed 02/12/2002) (fraud action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MN 0:02-cv-04270 filed 11/07/2002) (contract action dismissed as settled), *Sealed Plaintiff v. Sealed Defendant* (MS-S 1.95-cv-00161 filed 03/23/1995) (statutory action dismissed as settled), *Compass Marine v. Lambert Fenchurch* (MS-S 1:99-cv-00252 filed 04/05/1999) (fraud action dismissed as settled), *Arviso v. Mission Manor Health* (NM 6:02-cv-01072 filed 08/27/2002) (statutory action dismissed as settled), *United States v. Genesee Valley Card* (NY-W 6:97-cv-06502 filed 11/12/1997) (statutory action dismissed as settled), *United States v. 2986 Tallman Road* (NY-W 6:01-cv-06155 filed 03/23/2001) (drug-related seizure of property case resolved by consent judgment).

not.[10]) In one additional case, all documents in the case file were sealed, including the complaint and the settlement conference report, *except* for the agreed judgment, which specified the terms of settlement.[11]

We did not evaluate whether the sealing of documents complied with circuit law and local rules, but we did observe that the public record almost never included specific findings justifying sealing.

Some of the cases with sealed settlement agreements are likely to be of greater public interest than others. Table 2 lists some types of cases that might be of special public interest and states what proportion of sealed settlements in our study are in cases of each type. Approximately two-fifths of the cases have at least one of the features in Table 2 that might make them of special public interest.

Appendix C contains case descriptions showing what the public record reveals about each case. Because the complaints are almost never sealed, the public record almost always identifies the defendants and reveals what the defendants are alleged to have done.

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[10] We encountered 15 cases with sealed case files but unsealed docket sheets: a product liability action brought by a minor, *Farr v. Newell Rubbermaid Inc.* (AL-N 5:00-cv-00997 filed 04/18/2000), an employment action against the University of Michigan where private medical information was an issue, *Baker v Bollinger* (MI-E 4:00-cv-40239 filed 06/26/2000); a civil rights action by a minor against a county, *M.K v. Pinnacle Programs Inc.* (MN 0:98-cv-02440 filed 11/13/1998); a wrongful death action against a city and a railroad, *Schlicht v. Dakota Minnesota & Eastern R.R. Corp.* (MN 0:98-cv-02059 filed 12/28/1999); a job discrimination action brought on behalf of children, *Rowe v Boys and Girls Club of America* (MN 0:01-cv-202269 filed 12/10/2001); two consolidated foreclosure actions pertaining to gambling boat mortgages, *Credit Suisse First Boston Mortgage Capital LLC v. Doris* (MS-N 4.99-cv-00283 filed 11/22/1999), consolidated with *Credit Suisse First Boston Mortgage Capital Inc. v. Bayou Caddy's Jubilee Casino* (MS-N 4:99-cv-00284 filed 11/22/1999), a qui tam action under the False Claims Act against a hospital, *United States ex rel. Padda v. Jefferson Memorial Hospital* (MO-E 4:00-cv-00177 filed 02/03/2000); a RICO case by one unnamed plaintiff against three unnamed defendants, *Sealed Plaintiff v. Sealed Defendant* (NY-E 9:00-cv-04693 filed 08/11/2000); another product liability case with a minor plaintiff, *Keyes v. Deere & Co.* (PA-E 2:98-cv-00602 filed 02/06/1998); an insurance case involving a workers' compensation claim, *Slater v. Liberty Mutual Insurance Co.* (PA-E 2:98-cv-01711 filed 03/31/1998); a copyright case, *Valitek Inc. v. Hewlett-Packard Co.* (PA-E 2:99-cv-03024 filed 06/15/1999); an insurance case against a church, *Jesus Christ of the Apostolic Faith* (PA-E 2:00-cv-03320 filed 06/29/2000); a patent case, *Graham Packaging Co v Mooney* (PA-M 1 00-cv-02027 filed 11/20/2000); and a third product liability case with a minor plaintiff, *Angelo v General Motors Corp.* (PA-W 2:00-cv-00871 filed 05/04/2000).

[11] This was a civil rights action for failure to prevent disclosure of plaintiff's medical condition, *Doe v. City of Tulsa* (OK-N 4:00-cv-00896 filed 10/18/2000). We counted this as a case with a sealed settlement agreement, because although the agreed judgment was not sealed, other documents containing terms of settlement were sealed.

Table 2. Types of Cases That Might Be Of Special Public Interest

Type of Case	Cases	
Environmental	10	(1%)
Product Liability (includes cases with other Nature of Suit codes)[12]	258	(20%)
Professional Malpractice	40	(3%)
Public Party Defendant	153	(12%)
Very Serious Injury (death or serious permanent disability)	334	(26%)
Sexual Abuse	31	(2%)
Any Reason	**504**	**(40%)**

We had access to important terms of settlement in 18% of the cases with sealed settlement agreements. Occasionally this was because we had access to sealed documents. Sometimes sealed documents became unsealed. Sometimes documents that are not sealed disclose some or all terms of the settlement agreement. Analysis of information available in this way confirms that settlement agreements, sealed or otherwise, generally contain four essential elements: (1) a denial of liability, (2) a release of liability, (3) the amount of settlement, and (4) a requirement of confidentiality. In unfair competition cases, especially cases involving patents, the terms of settlement typically bind the parties to certain actions in addition to or instead of the payment of a settlement amount. In general, however, the only thing kept secret by the sealing of a settlement agreement is the amount of settlement.

Conclusion

Sealed settlement agreements are rare in federal court. They occur in less than one-half of one percent of civil cases. In 97% of these cases, the complaint is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings. Although the public record seldom contains specific findings justifying the sealing of settlement agreements,

[12] More than half of these cases arise from a 1998 airplane crash near Peggy's Cove, Nova Scotia (144 cases in the Eastern District of Pennsylvania); the 1996 crash of TWA flight 800 taking off from Kennedy airport also accounted for a substantial fraction of these cases (31 cases in the Southern District of New York).

generally the only thing kept secret by the sealing is the amount of settlement.

Appendix A
Method

Districts

We looked for sealed settlement agreements in the 11 districts with local rules requiring good cause to seal a document and a 50% random sample of the other districts.[13]

We originally designed our method so that we might include all districts in the study, but we have studied the districts in a modified random order, so that if we concluded the research without studying all districts, we would have studied a random sample. Because state court practices influence federal practice, we decided to study districts in the same state together, and we decided the same researcher should study them. So we listed the states (plus the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) in random order and began studying the districts in that order.[14]

We modified random selection in the following ways. We began our research with districts in North Carolina, which is home to the subcommittee's chair (the Honorable Brent McKnight, formerly magistrate judge for the Western District of North Carolina and now district judge there), so that his additional knowledge about cases in his district would serve as a check on our work. We also put at the top of the list states with districts having local rules specifically concerning sealed settlement agreements. The Eastern District of Michigan has a rule calling for the unsealing of settlement agreements after two years. E.D. Mich. L.R. 6.4. The District of South Carolina has a new rule proscribing the sealing of settlement agreements. D.S.C. L.R. 5.03(C). We also put Florida at the top of the list, because of the state's groundbreaking Sunshine in Litigation law, Fla. Stat. § 69.081.

We decided the first 47 districts in the list would provide a sample of sufficient size, taking into account an estimate that it would take approximately a year and a half to study that many districts. We determined that our time frame would permit us to supplement the random sample with the five otherwise unselected districts with local rules requiring good cause to seal a document. That way our study would include all 11 dis-

[13] The Western District of New York adopted a good cause rule after the cases in this study were terminated.

[14] The Northern Mariana Islands is not included, because its docket sheets are not available electronically.

tricts with good cause rules,[15] permitting a rough comparison between those districts and a sample of other districts, especially with respect to sealed settlement rates.[16]

To test whether results from our modified random sample are likely to be different from an unmodified random sample, we computed the overall rate of sealed settlement agreements using a procedure somewhat different from just comparing the number of sealed settlements we found to the number of cases we examined. There are nine districts that were selected first, before we starting selecting districts at random – districts in Florida, Michigan, North Carolina, and South Carolina. We computed an average by weighting each of these districts as 1. There are 85 other districts. Not considering the five districts that were selected only because they have good cause rules (California Northern, Illinois Northern, Maryland, Oklahoma Northern, and Utah), we selected 38 at random. So we weighted these districts 85/38 = 2.24 in computing an average. Using this weighting scheme, we computed a sealed settlement rate of 0.46%, which is almost identical to the unweighted rate of 0.44%. For this reason, we decided to analyze our data as if our sample were truly random.

Termination Cohort

We decided to look at cases terminated over a two-year period – calendar years 2001 and 2002. Because we include all calendar months, there are unlikely to be any hidden seasonal biases. Looking at two years of terminations ensures that our data will not be based only on an idiosyncratic year.

Finding Sealed Settlement Agreements

Our search for sealed settlement agreements was a process of step-by-step elimination – upon closer and closer review – of cases that do not have sealed settlement agreements.

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[15] California Northern, N.D. Cal. Civ. L.R. 79-5, Illinois Northern, N.D. Ill. L.R. 26.2, Maryland, D. Md. L.R. 105.11; Michigan Western, W.D. Mich. L. Civ. R. 10.6; Mississippi Northern and Southern, N. & S. D. Miss. L.R. 83.6; Missouri Eastern, E.D. Mo. L.R. 83-13.05(A); Oklahoma Northern, N.D. Okla. L.R. 79.1(D); Tennessee Eastern, E.D. Tenn. L.R. 26.2; Utah, D. Utah L. Civ. R. 5-2; and Washington Western, W D. Wash. L. Civ. R 5. The Western District of New York adopted a good cause rule after the cases in this study were terminated, *see* W.D.N.Y. L.R 5.4(a) (adopted May 1, 2003).

[16] Three of these additional districts – California Northern, Illinois Northern, and Oklahoma Northern – are in multidistrict states. We did not study the other districts in those states

We rejected the idea of looking only at cases with disposition codes of "settled" or "consent judgment" in data reported to the Administrative Office – that would have eliminated 37% of the cases we ultimately found.[17] Even if we also looked at cases with disposition codes of "voluntary dismissal" and "other dismissal," we would have eliminated 20% of the cases we ultimately found.[18]

We attempted to download all 288,846 docket sheets for cases terminated in 2001 or 2002 in the study districts. We found 138 of the docket sheets (0.05%) to be sealed. We searched each unsealed docket sheet for the word "seal."[19] This search found "seal," "sealed," "unseal," etc., including "Seal," "Seale," etc. in a party name. Docket *entries* (and headers) with the word "seal" in them were extracted and assembled into a text file. If a docket *sheet* had the word "seal" in it, then we also searched for the word "settle" (which found "settle," "settled," "settlement," etc.), extracted docket *entries* with the word "settle" in them, and assembled them into the same text file as the docket entries with the word "seal" in them. Naturally, some docket entries had both the word "seal" and the word "settle" in them. In this way we examined docket entries from 15,026 cases.

We considered, but rejected, looking only at cases where a docket entry with the word "seal" had a date within two weeks, for example, of either the termination date or a docket entry with the word "settle." Had we done this, we would have missed 8% of the cases we ultimately found.[20]

If "seal" and "settle" docket entries from the same case suggested that the case might or did have a sealed settlement agreement, then we read the entire docket sheet for that case. Sometimes, for example, a docket entry merely says "sealed document," and review of other docket entries is necessary to determine what the sealed document might be.[21]

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[17] 60% of the cases we found were coded 13 = "dismissed: settled" and 4% were coded 5 = "judgment on consent."

[18] 8% of the cases we found were coded 12 = "dismissed: voluntarily" and 9% were coded 14 = "dismissed: other."

[19] Because the Northern District of Illinois has a procedure for restricting public access to documents without actually sealing them – although they may also be sealed – for that district we also searched for the word "restrict."

[20] In one case the word "seal" is 627 days from both termination and the word "settle" (*Franco v Saks & Co.*, NY-S 1:00-cv-05522 filed 07/26/2000).

[21] For this project, researchers who examine docket sheets and court documents all have law degrees – either a J.D. or an M.L.S. (master of legal studies, which typically requires approximately one year of law school). Tim Reagan reviewed documents from districts in California, Guam, Iowa, Michigan, Missouri, New Hampshire, North Caro-

This review of 2,262 docket sheets eliminated cases with sealed documents filed only at the beginning of qui tam actions or attached only to discovery motions, motions for summary judgment, and motions in limine.

When we reviewed a complete docket sheet, we determined two things. First, we determined whether the case might or did include a sealed settlement agreement. If so, then we identified which documents in the case file to review to learn what the case is about and to learn as much as possible about the sealed settlement agreement. We reviewed actual documents filed in 1,415 cases.[22] Generally we reviewed complaints, cross- and counterclaims, court opinions, and documents pertaining, or possibly pertaining, to the settlement.

We were not able to determine with very good precision whether cases with sealed docket sheets contained sealed settlement agreements, so we regarded cases with sealed docket sheets that were terminated by consent judgment or settlement as containing sealed settlement agreements and cases terminated otherwise as not containing sealed settlement agreements.[23]

In this way we identified 1,272 cases among cases terminated over a two-year period in 52 districts that appear to have sealed settlement agreements.[24] Table A summarizes the number of cases reviewed in each district. Descriptions of these cases are in Appendix C.

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lina, Puerto Rico, South Carolina, and Virginia; Shannon Wheatman reviewed documents from districts in Florida, Hawaii, Indiana, Maine, Maryland, North Dakota, Pennsylvania, Puerto Rico, Virginia, and Washington; Marie Leary reviewed documents from districts in Alabama, Arizona, Delaware, Idaho, New York, and South Dakota; Natacha Blain reviewed documents from districts in Illinois, Minnesota, Mississippi, New Mexico, Oklahoma, Tennessee, and Utah; Steve Gensler reviewed documents from the District of Columbia.

[22] For one case in the Northern District of Illinois, most of the case file is lost, so our decision as to the presence of a sealed settlement agreement was based on review of the docket sheet and a one-page stipulated dismissal. An additional two case files in the Southern District of New York are lost, so our decisions as to the presence of sealed settlement agreements were based on review of the docket sheets alone.

[23] We were given access to 17 of these sealed docket sheets and our decision as to the presence of a sealed settlement agreement was based on a review of the docket sheets rather than the less precise rule of thumb.

[24] This includes 23 cases (2%) with sealed docket sheets terminated either by consent judgment or settlement, according to data reported to the Administrative Office

Table A Case Counts.

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Alabama Middle	3,237	0	80	4	3	3
Alabama Northern	7,042	3	745	26	24	26
Alabama Southern	2,015	1	78	22	9	9
Arizona	6,604	18	347	32	21	18
California Northern**	12,140	11	635	146	82	70
Delaware	2,250	0	213	13	9	9
District of Columbia	5,368	5	469	39	35	28
Florida Middle	13,678	17	529	103	43	36
Florida Northern	3,045	2	160	11	5	5
Florida Southern	15,928	16	669	260	128	111
Guam	130	0	7	3	1	1
Hawaii	1,752	2	458	42	40	38
Idaho	1,350	6	440	10	5	4
Illinois Northern**	19,378	0	649	99	80	72
Indiana Northern	4,103	1	216	11	7	0
Indiana Southern	5,831	0	200	60	13	9
Iowa Northern	1,096	0	42	15	6	6
Iowa Southern	1,976	0	69	9	0	0
Maine	1,070	0	141	10	2	2
Maryland**	7,851	8	232	20	15	15
Michigan Eastern	9,561	0	351	52	19	16
Michigan Western*	2,775	2	181	13	7	8
Minnesota	4,792	13	300	31	27	27
Mississippi Northern*	2,603	0	54	22	5	5
Mississippi Southern*	5,775	11	211	38	18	14
Missouri Eastern*	4,798	0	342	53	22	20
Missouri Western	4,857	0	167	35	27	24
New Hampshire	1,157	2	83	10	4	4
New Mexico	3,084	3	86	23	19	19
New York Eastern	16,001	0	495	88	59	54
New York Northern	3,928	0	192	27	22	21
New York Southern	20,976	0	948	130	93	90
New York Western	3,000	12	106	20	12	11
North Carolina Eastern	2,808	0	143	12	4	3
North Carolina Middle	2,284	0	63	10	7	6
North Carolina Western	2,203	2	101	27	14	11
North Dakota	574	0	126	8	6	5

Table A. Case Counts.

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Oklahoma Northern**	1,954	0	176	35	15	11
Pennsylvania Eastern	19,520	0	655	208	192	183
Pennsylvania Middle	4,678	0	520	25	12	10
Pennsylvania Western	6,218	0	306	44	20	16
Puerto Rico	3,562	0	223	159	120	117
South Carolina	8,126	0	311	25	8	8
South Dakota	820	0	40	6	0	0
Tennessee Eastern*	3,128	0	249	15	11	8
Tennessee Middle	3,162	0	581	39	24	18
Tennessee Western	2,759	0	222	37	16	7
Utah*	2,387	3	179	11	8	8
Virginia Eastern	14,448	0	330	57	47	44
Virginia Western	3,593	0	112	41	31	28
Washington Eastern	1,355	0	70	3	2	2
Washington Western*	6,116	0	741	23	16	12
Total Number of Cases	**288,846**	**138**	**15,043**	**2,262**	**1,415**	**1,272**

* District with a local rule requiring good cause for sealing and part of the 50% random sample
** District with a local rule requiring good cause for sealing and *not* part of the 50% random sample

E-GOVERNMENT ACT RULE

The Direction to Prescribe A Civil Rule

Section 205 (a) of the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note, requires each district court to establish a website. Section 205(c)(1) provides that the court "shall make any document that is filed electronically publicly available online." The court "may convert any document that is filed in paper form to electronic form"; if converted to electronic form, the document must be made available online. Section 205(c)(2) provides an exception -- a document "shall not be made available online" if it is "not otherwise available to the public, such as documents filed under seal."

Section 205(c)(3) directs adoption of implementing rules:

> (A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28 * * * to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically
>
> (ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.
>
> (iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.
>
> (iv) Except as provided in clause (v), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.
>
> (v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in Clause (iv) in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response—
>
> (I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that—
>
> (aa) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case; and
>
> (bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed, and
>
> (II) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

Standing Committee E-Government Subcommittee

The Standing Committee has appointed an E-Government Act Subcommittee, chaired by Judge Sidney A. Fitzwater, to coordinate study of E-Government Act rules by the several advisory committees. Professor Daniel J. Capra, Reporter of the Evidence Rules Committee, has been designated Lead Reporter for the Subcommittee. Professor Capra prepared a "template" rule and Committee Note for consideration by the advisory committees. The template rule was extensively revised after a Subcommittee meeting last June; minutes of the June meeting are attached.

Each advisory committee has been asked to study the revised template rule at its Autumn 2004 meeting and to suggest any desirable changes or variations. The Subcommittee, in consultation with the advisory committee reporters, will consider the advisory committee reactions in January. The effort is designed to generate a uniform rule that may be adopted in uniform — or nearly uniform — terms for each of the Appellate, Bankruptcy, Civil, and Criminal Rules. Some variations may prove suitable for the different circumstances faced by the different procedure systems.

Revised Privacy Template

Date: June 16, 2004.

Rule [ ] Privacy in Court Filings

(a) Limits on Disclosing Identifiers. If an electronic or paper filing made with the court includes any of the following identifiers,[1] only these elements may be disclosed, unless the court orders otherwise,[2]

(1) the last four digits of a person's social security number and tax identification number[3];

(2) the initials of a minor's name[4],

(3) the year of a person's date of birth; and

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[1] The subcommittee rejected an option that would apply the redaction requirement only to filings made by parties: "If a party includes any of the following identifiers in an electronic or paper filing with the court, the party is limited to disclosing:"]

[2] The subcommittee determined that flexibility should be added to the rule by allowing the court to excuse the redaction requirements in a particular case

[3] The subcommittee determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.

[4] The subcommittee rejected an exception to the redaction requirement for actions in which the minor is a party; it also resolved to inquire of CACM as to how it determined that a child's name should be a protected identifier.

(4) the last four digits of a financial account[5] number.[6]

(b) Unredacted Filing Under Seal. A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal The unredacted copy must be retained by the court as part of the record.[7]

(c) Reference List. A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information.[8]

(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the

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[5] The subcommittee rejected language that would limit the protection of financial accounts to those accounts that were personal; to active accounts; and to asset accounts. The subcommittee concluded that the risk of identity theft was significant with respect to *any* financial account number available over the internet

[6] The subcommittee deleted home address as a protected identifier. It determined that a full home address was often necessary, especially in bankruptcy cases. The subcommittee requests the Criminal Rules Committee to consider whether home address should be a protected identifier in criminal cases. CACM supports the protection of home addresses in criminal cases. The subcommittee also requests the Criminal Rules Committee to consider whether it is necessary to protect home addresses in habeas cases.

[7] The subcommittee rejected the following language that was proposed by the Justice Department:

> Where a document is filed under seal solely to comply with this rule, the seal does not prohibit the disclosure of the document to the parties, their counsel, their agents, law enforcement officers, and triers of fact, nor the disclosure by those persons when appropriate to the performance of their official duties.

[8] This language is intended to track proposed legislation that would amend the E-Government Act to permit the filing of a registry list as an alternative to an unredacted document under seal. The subcommittee directed the Lead Reporter to monitor the legislation and to make any changes to the revised template to accord with the legislation as adopted.

following: [9]

(1) in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture,

(2) records of an administrative agency proceeding;

(3) official records of a state court proceeding in an action removed to federal court; and [10]

(4) the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed [11]

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[9] The subcommittee requests the Criminal Rules Committee to consider the following possible exemptions to the redaction requirement, as proposed by the Justice Department for criminal cases.

(1) filings in any court in relation to a criminal matter or investigation that are prepared before the filing of a criminal charge or that are not filed as part of any docketed criminal case;

(2) arrest warrants;

(3) charging documents—including indictments, informations, and criminal complaints—and affidavits filed in support of those documents;

(4) criminal case cover sheets.

The subcommittee also requests the Criminal Rules Committee to consider whether similar exemptions are necessary for civil cases.

[10] The subcommittee rejected an exception for "a certified copy of a document filed with the court." The subcommittee determined that a redaction could be indicated on a certified copy where necessary to protect an identifier.

[11] Some subcommittee members suggested that the exemption apply to "the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally ***created.***"

(e) Social Security Appeals; Access to Electronic Files. In an action for benefits under the Social Security Act,[12] access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have electronic access to any part of the case file, including the administrative record,

(2) all other persons may have remote[13] electronic access only to:

(A) the docket maintained under Rule [relevant civil or appellate rule]; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.[14]

(f) Court Orders. In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a).[15]

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[12] The subcommittee considered whether limited public access, as provided for Social Security cases, should be extended to other sets of cases, such as immigration, Black Lung, ADA cases, etc. The subcommittee deferred to the determination of CACM, made after extensive study, that Social Security cases are sui generis because of the sensitive information presented and the voluminous filings made. The Subcommittee concluded that in light of CACM's considered determination, the burden would be on those seeking exclusion of other sets of cases to show that public access must be limited in order to protect privacy interests. It is possible that such a showing will be made before or during the comment period.

[13] The revised template contemplates that members of the public may obtain electronic access at the courthouse.

[14] The subcommittee rejected a sentence at the end of the subdivision that would have provided: "The parties are not required to redact personal identifiers from a transcript filed in an action for benefits under the Social Security Act." The subcommittee found this language to be unnecessary.

[15] This subdivision is referred to the Advisory Committees to determine whether it is useful to clarify that the court may by order provide protection for information not covered by the redaction requirement, on the ground that it is sensitive information that should not be accessible to non-parties over the internet CACM's position is that courts already have this power, and to

(g) Waiver of Protection of Identifiers. A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction.

Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. [Subdivision (c) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(iv) of the E-Government Act, as amended in 2004.]

In accordance with the E-Government Act, the rule refers to "redacted identifiers". The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties

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include it in this rule would provide an open invitation to parties to seek court orders.

Subdivision (f) provides for limited public access in Social Security cases. Under Judicial Conference policy, Social Security cases are *sui generis* in the pervasiveness of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the Social Security case file at the courthouse

Subdivision (g) allows a party to waive the protections of the rule as to its own personal identifier by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.[16]

[16] The subcommittee rejected language in the Committee Note that would have provided. "This rule does not apply to trial exhibits as they are not filed within the meaning of the rule." It was determined that exhibits are indeed filed in some courts, and that if exhibits are filed, they should be treated the same as any other court filing.

ALTERNATIVE SUBDIVISION (a)

(a) Limits on Information Disclosed~~ing Identifiers~~. ~~If~~ Unless the court orders otherwise, an electronic or paper filing ~~made with the court~~ that refers to a social security or tax identification number, a minor's name, a person's birth date, or a financial account may include~~s any of the following identifiers~~ only ~~these elements may be disclosed, unless the court orders otherwise~~:

(1) the last four digits of ~~a person's~~ the social security, ~~number and~~ tax identification, or financial account number;

(2) the minor's initials ~~of a minor's name~~, and

(3) the year of ~~a person's date of~~ birth~~; and~~

~~**(4)** the last four digits of a financial account number~~.

Rule 11(b)(1) states that an attorney or party presenting a paper to the court certifies that it is not presented for any improper purpose. If it is desirable to use Rule 11 or any other rule of procedure to reach liability for such acts as purposefully filing a defamatory pleading, the present language seems adequate. The determination whether to bend Rule 11 to this purpose at all will be difficult — it at least approaches substantive questions of defamation liability, the right to petition courts, and privilege. It would not be wise to take on these issues by amending Rule 11, unless it be to disclaim any attempt to answer them.

Rule 12(f). The agenda includes a pending question addressed to the effect of a Rule 12(f) order to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Is the stricken material physically or electronically expunged? Or is it preserved to maintain a complete record, for purposes of appeal or otherwise, but sealed? Electronic access to court files may make this question more urgent, but there is no apparent change in the principles that will guide the answer.

Rule 12(f) could be amended to refer directly to an order to strike information that violates Rule "5.2." Authority to strike seems sufficiently supported, however, both by present Rule 12(f) and by the implications of Rule "5.2."

Rule 16. Rule 16(b) or (c) might be amended to include scheduling-order directions or pretrial-conference discussion of electronic-filing issues. The most apparent subjects would be limiting filing requirements or permitting filing under seal. Care would need to be taken to avoid interference with the purposes of the E-Government Act. But there may be an advantage, particularly in early years, from assuring that parties and court think of the privacy and security issues that may arise from electronic access.

Rule 26 or Other Discovery. Rule 5(d) limits on filing discovery materials are noted above. It is conceivable that a reminder of E-Government Act access — and the need to redact filed documents to comply with Rule "5.2" — should be added somewhere in the discovery rules as well.

The protective-order provisions of Rule 26(c) do not seem to need amendment. They provide ample authority to respond on a case-specific basis "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *."

Rule 56. Summary-judgment affidavits are among the papers covered by Rule "5.2." It would be possible to add a cross-reference to Rule 56.

Rule 80(c). Rule 80(c) — inevitably part of the future project to reconcile the Civil Rules with the Evidence Rules — states that whenever stenographically reported testimony is admissible in evidence at a later trial, it may be proved by the transcript. Although the proof might include filing, and a corresponding need to redact under Rule "5.2," there is no apparent need to amend Rule 80(c) to refer back to Rule "5.2."

E-Government Subcommittee

Minutes of the meeting of June 16, 2004
Washington D.C.

The E-Government Subcommittee (the "Subcommittee") met on June 16, 2004, at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Subcommittee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Robert L. Hinkle, Liaison from the Evidence Rules Committee
Hon. Laura Taylor Swain, Liaison from the Bankruptcy Rules Committee
Deborah Rhodes for Hon. Reta M. Strubhar, Liaison from the Criminal Rules Committee
Hon. David F. Levi, Chair, Standing Committee *(ex officio)*
Professor Daniel R. Coquillette, Reporter to the Standing Committee *(ex officio)*
Professor Daniel J. Capra, Lead Reporter and Reporter to the Evidence Rules Committee *(consultant)*
Professor Edward H. Cooper, Reporter to the Civil Rules Committee *(consultant)*
Professor Jeffrey W. Morris, Reporter to Bankruptcy Rules Committee *(consultant)*
Professor Patrick J. Schiltz, Reporter to the Appellate Rules Committee *(consultant)*

The following individuals participated via teleconference:

Hon. Shira A. Scheindlin, Liaison from the Civil Rules Committee
Hon. Donetta W. Ambrose, Liaison from the Committee on Court Administration and Case Management

Also present were:

Hon. Francis M. Allegra, U.S. Court of Federal Claims
Hon. Lee H. Rosenthal, Chair of the Civil Rules Committee
Hon. A. Thomas Small, Chair of the Bankruptcy Rules Committee
Bruce Curtis, Committee on Court Administration and Case Management
Robert Deyling, Esq., Attorney Advisor, Administrative Office of the Courts
Daniel Hawtof, Esq., Attorney Advisor, Administrative Office of the Courts
James Ishida, Esq., Attorney Advisor, Administrative Office of the Courts
Patricia Ketchum, Administrative Office of the Courts
Barbara Kimble, Committee on Court Administration and Case Management
Peter G McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
Paul Miller, Administrative Office of the Courts
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Elizabeth Shapiro, Esq , Attorney, Department of Justice
James Wannamaker, Esq , Administrative Office of the Courts
Brooke D Coleman, Esq

Welcome and Introduction

Judge Fitzwater extended a welcome to the Subcommittee and thanked all in attendance for coming. Those attending the meeting introduced themselves.

Business of the Subcommittee Meeting

Judge Fitzwater briefly reviewed the activities of the Subcommittee since its previous meeting in January 2004. Judge Fitzwater explained that Professor Capra provided a draft template rule to each of the appropriate Advisory Committees. The Advisory Committees raised questions and comments regarding the template rule, as have outside groups such as the Department of Justice ("DOJ"). Judge Fitzwater explained that the goal of the meeting is to revise the template rule in light of these questions and comments and to distribute the revised template rule to the Advisory Committees. He further noted that members of the Committee on Court Administration and Case Management ("CACM") were unable to attend today's meeting. However, CACM supplied a letter with comments and concerns regarding the revised template that would be referred to and addressed during the meeting. In addition, the Subcommittee intends for CACM to review the revised template adopted at this meeting in order to identify any additional concerns.

Professor Capra explained that some changes had been made to the template by common consent. However, he planned to review these changes to confirm the Subcommittee's approval. The changes include: (i) deletion of the Judicial Conference standards from the Committee Note; (ii) deletion of home address from the template list of identifiers (the Criminal Committee should still consider this identifier for its E-Government Rule); (iii) addition of social security cases as a category of cases exempt from electronic filing; and (iv) general shortening of the Committee Note.

Professor Cooper asked how home addresses in habeas cases should be treated. The Subcommittee discussed this issue and decided to refer the question to the Criminal Rules Committee for further review. Finally, the members of the Subcommittee unanimously approved the changes proposed by Professor Capra.

Review of Drafting Options

Limits on Disclosing Identifiers Professor Capra discussed whether the proposed rule should be limited in application to parties or expanded to cover all electronic filings. CACM prefers the latter approach. The Subcommittee unanimously agreed that the rule should cover electronic filings by both parties and non-parties.

The Subcommittee further discussed this section of the template rule. Judge Swain explained that in bankruptcy cases, certain statutes require the inclusion of some of the information listed for redaction in the template rule. She requested that the proposed rule be "subject to existing statute(s), as directed by the court." The Subcommittee discussed whether the E-Government Act of 2002 ("E-Government Act") preempts those

statutes. Judge Hinkle suggested that adding language such as "unless the court orders otherwise" to section (a) may be appropriate since Judge Swain's comment is not necessarily solely a bankruptcy issue. He explained that the rule is currently written in a definitive way, and the Subcommittee may want to provide the court with discretion to suspend redaction in certain cases. The Subcommittee discussed and debated the merits of this proposal. The following language was proposed and unanimously approved:

> "(a) Limits on Disclosing Identifiers. If an electronic or paper filing made with the court includes any of the following identifiers, only these elements may be disclosed, unless the court orders otherwise"

Delineated Identifiers. Professor Capra explained that some of the Advisory Committees have questioned whether to redact the name of a minor in every case, using only the minor's initials as an identifier. Professor Cooper questioned how parties will know who is suing them when an action is brought on behalf of a child, creating a practical notice problem. Judge Small explained that the abbreviations might create a problem in the bankruptcy setting as well. Professor Capra pointed out that as the revised rule stands, the court would have discretion to permit the filing of the full minor's name if appropriate. Judge Fitzwater asked why CACM takes the position that minor's names should be abbreviated in every case. CACM's reasoning was not clear on this issue from its correspondence Judge Fitzwater suggested leaving the identifier in the rule, subject to CACM's response regarding their reasoning for including it. Further, Judge Fitzwater suggested that the Subcommittee could make clear that it neither supported nor opposed the inclusion of this particular identifier such that the Advisory Committees could make their own determination on the issue. Judge Fitzwater's proposal was unanimously approved.

Professor Capra reviewed the question of whether financial account numbers should be listed in section (a) of the rule. Specifically, since there is a requirement to truncate social security numbers, should tax identification numbers be subject to the same requirement. Ms. Shapiro explained that she believed the rule was aimed at protecting personal privacy, and not necessarily at the privacy of corporations or other entities. The DOJ requested that this point be clarified since it is concerned about how the rule will affect its ability to prosecute fraud (and other) cases involving corporate entities. The Subcommittee requested specific examples of how truncating tax identification numbers would negatively affect the DOJ's ability to prosecute cases. Ms. Shapiro agreed to follow up on that question. Professor Capra proposed approving the addition of tax identification numbers to the list of identifiers. The proposal was unanimously approved.

Unredacted Filing Under Seal. Professor Capra explained that the E-Government Act allows for unredacted documents to be filed under seal. Further, under the E-Government Act, courts can still require that a redacted copy be filed publicly. Professor Cooper opined that the tone of the rule as currently drafted suggests that filing a sealed copy can be done as a matter of course, and does not clearly communicate that a redacted filing may also be required. He suggested drafting the rule to state that a party that does file a redacted copy may also file an unredacted copy under seal. The Subcommittee

discussed this proposal, including a discussion of how to practically seal the documents (e.g., by court order). The Subcommittee also discussed the current legislative proposal under consideration by Congress that allows for a redacted document to be filed publicly along with a sealed list of the redacted personal identifies. Professor Capra explained that he believed this legislation would create a third option under the proposed rule. Following this discussion, Professor Capra proposed the following language for section (b):

> "(b) Unredacted Filing Under Seal. A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record."

The proposal was unanimously approved. The Subcommittee asked for the DOJ to provide further information regarding its proposal that the rule specifically allow for copies of the sealed documents to be served on parties and their lawyers without violating this provision. Also, the Subcommittee agreed to advise the Advisory Committees to consider addressing sealing mechanics in their respective rules.

Reference List for Redacted Filings. Professor Capra explained that the proposed language for this provision reflects the amendment that is currently being considered by Congress. The provision basically provides that a reference list of the redacted information in a filing can be filed under seal Ms. Shapiro questioned whether the reference list would cause authenticity problems at later stages of a case. Professor Capra pointed out that the Subcommittee has to follow the statutory language, which does not address Ms. Shapiro's concerns as of now. Judge Levi inquired about the language providing for amendment of the reference list "as of right" and questioned whether the opposing party could challenge that amendment Judge Sheindlin thought the language was intended to cover the filing of additional information as a matter of course, and not as a way to add additional claims. Judge Fitzwater suggested that the Civil Rules Committee consider clarifying that point in the Committee Note to its rule. After discussion, the following language was proposed, subject to any additional changes in the legislation:

> "(c) Reference List. A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information "

The Subcommittee approved this language unanimously and requested that Professor Capra make any changes necessary once the final legislation passes. Any revision will be circulated to the Subcommittee for a vote via e-mail or conference call.

Exemption Options. Professor Capra explained that there might be certain categories or types of documents that should be exempted from the redaction requirements of the rule. For example, some have argued that arrest warrants should not be redacted since they may be created before the case file even exists and redacting them later could prove burdensome. The Subcommittee discussed the proposed options.

The first proposal included four related documents that arise in a criminal context (criminal documents prepared before filing a criminal charge, arrest warrants, charging documents, and criminal case cover sheets). The Subcommittee discussed this category of documents at length and decided to eliminate them from the template rule. However, the Subcommittee advised the Criminal Rules Committee that it should consider including these documents in the list of exemptions for its specific E-Government Rule. The Subcommittee also agreed to ask CACM for its opinion on this category of documents. Finally, Professor Cooper requested that the Criminal Rules Committee also consider whether the Civil Rules Committee should worry about this category of documents in the civil context. The Subcommittee unanimously agreed to refer these issues to the Criminal Rules Committee for its consideration.

Next, the Subcommittee considered whether to exempt financial account numbers from redaction when those numbers are the subject of a civil or criminal forfeiture. The Subcommittee agreed that this category should be exempted from redaction and the following language was proposed and unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (1) in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture."

The next proposal would exempt administrative records. CACM asked that this exemption not be expanded beyond social security cases, which it had specifically recommended for exemption. CACM did not wish the exemption to apply to other administrative records because they were concerned such an exemption would invite abuse. However, the Subcommittee expressed concern regarding the size of these types of records and the cost associated with redacting information for filing. The Subcommittee further discussed how to define administrative records in a way that would capture all areas of concern (for example, ERISA cases will often include a record from an administrative agency, but no direct appeal of an administrative agency decision) Judge Fitzwater proposed that the Subcommittee start with a narrow definition and let CACM and the DOJ comment as appropriate He proposed the following language, which was unanimously approved

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following. (2) records of an administrative agency proceeding."

Next, Professor Capra discussed exempting state court records in an action removed to federal court. Judge Hinkle asked what would happen if a minor's name was included in state court documents filed in a removed abuse case. Judge Fitzwater explained that a party could still move to seal those records in that situation The Subcommittee discussed this option. Judge Fitzwater proposed the following language, which was approved by all members of the Subcommittee with the exception of Judge Hinkle:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (3) official records of a state court proceeding in an action removed to federal court."

Professor Capra then asked the Subcommittee whether certified copies of documents should also be exempt. Judge Rosenthal suggested that this could be problematic since, for example, one may file a certified copy of his or her social security card. Judge Swain stated that she thought this category was too broad. Ms. Shapiro expressed concern that if a certified document, which by its nature has a certain legal status, is redacted, the legal status of that document once filed would be questioned. Judge Hinkle explained that the document could still be filed under seal without redaction. A proposal was made to delete any exemption for certified copies of documents filed with the court. This proposal was unanimously approved.

Next, Professor Capra discussed exemption of pre-existing court records from the redaction requirement. He explained that CACM's position was that this exception should only apply to bankruptcy. Judge Swain asked what the term pre-existing was meant to encompass -- documents filed before the E-Government Rule is effective or any document where the party did not comply with the E-Government Rule. Judge Fitzwater asked why this category had been proposed. Ms. Shapiro provided an example of records on appeal that the parties would not want to go back and redact (such as INS cases). The Subcommittee discussed whether this would be a category triggered by the timing or by the type of case and case history. The Subcommittee further discussed whether the other categories listed already covered the examples being discussed. After extensive discussion, Judge Fitzwater suggested that this category be included conceptually so that the Advisory Committees can flush it out with the assistance of CACM and the DOJ. The Subcommittee agreed and the following proposal was unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (4) the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed [created]."

Social Security Appeals; Access to Electronic Files. This section limits remote electronic access to social security cases to the parties only. Professor Capra inquired as to whether the limitation for access to social security cases should be expanded to other categories of cases (such as medical malpractice cases). The limitation of access to social security files had been developed by CACM and approved by the Judicial Conference

Ms. Shapiro explained that immigration or black lung cases present many of the same privacy concerns as social security cases. However, the point was made that any number of specific cases are analogous to social security cases such that the exception itself could become much too broad. Mr. Deyling explained that his understanding of CACM's position what that it understood that other categories similar to social security cases exist, but that it drew the line at social security cases because of the volume of the cases and amount of personal information contained in those cases The Subcommittee members questioned what sensitive documents typically filed in social security cases would also be found in other types of cases. In other words, the members of the Subcommittee wondered what primarily motivated the inclusion of social security cases in this section. Judge Fitzwater asked whether the DOJ could conduct a study to determine empirically what other categories of cases might be included with social security cases. The DOJ agreed to submit its views and results of its research by mid-September. In the meantime, Judge Fitzwater suggested that only social security cases be included in this section The Subcommittee unanimously agreed to this approach.

Professor Capra explained that this section also provided that remote electronic access to social security cases would be limited to the parties, but that at the actual courthouse, any member of the public could access the physical or electronic file. The motivation for this proposal is that the E-Government Act should not limit access at the courthouse Judge Scheindlin expressed concern that electronic access, even if at the courthouse, would give database companies even more access and that items may still get posted on the internet because of this access. Professor Morris explained that these companies were actually less likely use electronic access at the courthouse because they could not transfer the electronic files easily. In other words, they would still have to print out the documents (at $0.50/page) and scan them. However, Judge Fitzwater pointed out that PACER and the associated fees may not always be in place, making all of the files much more accessible than they are today. Following discussion, Professor Capra proposed the following language, which was approved by all members of the Subcommittee with the exception of Judge Scheindlin·

> "(2) all other persons may have remote electronic access only to: (A) the docket maintained under Rule [relevant civil or appellate rule]; and (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record."

Professor Schiltz also requested that Professor Capra draft Committee Note language to clarify the distinction between remote electronic access and courthouse electronic access.

Waiver of Identifier Protection. Professor Capra explained that CACM was opposed to allowing parties to forfeit the protection of their identifiers as provided by the proposed rule. Professor Capra inquired whether the Subcommittee believed that such a waiver should still be included. Professor Schiltz stated that if a party does not want to pay its attorneys to redact, that party should not be forced to do so. Further, if a party makes that choice, other parties should not be required to redact those same identifiers. The Subcommittee agreed with Professor Schiltz and discussed how the waiver should be

drafted. Proposals included serving a notice of waiver on other parties to the action or providing for a de facto waiver if identifiers are disclosed in a filing. Ms. Shapiro expressed concern about the latter proposal because pro se parties could mistakenly file personal identifiers without intending to forfeit the protection. Judge Hinkle stated that he understood Ms. Shapiro's concern, but the reality is that once the identifier is filed, it is public so other parties should not be forced to redact the information in their filings. The Subcommittee agreed that this was a policy decision. After additional discussion, Professor Capra suggested the following language, which was unanimously approved:

> "(g) Waiver of Protection of Identifiers. A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction."

Judge Rosenthal requested that the Committee Note clarify that a party may seek relief for improvident disclosure.

Committee Note. Professor Capra explained that the DOJ requested that a sentence warning parties against filing "other sensitive information" be deleted because it was too vague. The Subcommittee unanimously agreed to delete this sentence.

Miscellaneous Issues. The Subcommittee next discussed whether trial exhibits should be explicitly excluded from the proposed rule. Some argue that trial exhibits are not "filed" with the court and, therefore, not subject to the rule The members of the Subcommittee discussed whether exhibits were considered part of a case file or not. Professor Capra proposed that the rule not reference trial exhibits at all -- if the exhibits are filed with the court, then they should be redacted and if they are not filed, then they are not public and not subject to the rule. The Subcommittee agreed. Judge Levi suggested that the Civil Rules Committee may still want to revisit this issue

Professor Capra asked whether employer identification numbers ("EIN") should be included as identifiers to be redacted. The Subcommittee discussed whether an EIN raised the same privacy risks as social security or tax identification numbers Professor Morris explained that the EIN was solely used to file taxes and did not present the same privacy concerns. The Subcommittee agreed and decided not to include EIN's in the list of redacted identifiers.

Next, Professor Capra asked whether a section clarifying the application of judge discretion outside of the new rule should be included. He explained that CACM opposed including any such language. CACM believed that judges maintain the discretion articulated, but to state it in the rule would only invite abuse by parties seeking court order under that section. The Subcommittee discussed the proposed language A proposal was made to keep the current language in the rule and invite the Advisory Committees to consider the proposal without any Subcommittee recommendation on whether the language should be included. The Subcommittee unanimously agreed and the following language was retained in the rule for Advisory Committee consideration·

"(f) Court Orders. In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a)."

Conclusion of Meeting

Judge Fitzwater thanked the members of the Subcommittee for their input and thought on these matters. He gave special thanks to the members of CACM, attorneys in attendance from the DOJ, and other attendees for their input. He reviewed the plan of action for the Subcommittee and adjourned the meeting at 6:15 p.m

Respectfully submitted,

Brooke D Coleman, Esq.

Public Law 107–347
107th Congress

An Act

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

Dec 17, 2002
[H R 2458]

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

E-Government Act of 2002

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

44 USC 101 note

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

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

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

SEC. 204. FEDERAL INTERNET PORTAL.

44 USC 3501 note

(a) IN GENERAL.—

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

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

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

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

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

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

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

SEC. 205. FEDERAL COURTS.

44 USC 3501 note

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

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

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

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

(4) Access to docket information for each case

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

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

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

(b) MAINTENANCE OF DATA ONLINE.—

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

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

(c) ELECTRONIC FILINGS.—

Public information

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

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

Regulations

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

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

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

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

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

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

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

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

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

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

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

(g) DEFERRAL.—

(1) IN GENERAL.—

(A) ELECTION.—

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

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

(I) the reasons for the deferral; and

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

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

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

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

(B) summarizes and evaluates all notifications.

SEC. 206. REGULATORY AGENCIES. 44 USC 3501 note

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

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

108TH CONGRESS
1ST SESSION

H. R. 1303

AN ACT

To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.

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

SECTION 1. RULEMAKING AUTHORITY OF JUDICIAL CONFERENCE.

Section 205(c) of the E-Government Act of 2002 (Public Law 107–347, 44 U S.C. 3501 note) is amended by striking paragraph (3) and inserting the following.

"(3) PRIVACY AND SECURITY CONCERNS.—

"(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form

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

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

"(iv) Except as provided in clause (v), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wish-

es to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.

"(v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in clause (iv) in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response—

"(I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that—

"(aa) identifies each item of unredacted protected information that the attorney or, if there is no attor-

ney, the party, certifies is relevant to the case, and

"(bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and

"(II) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

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

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

electronic conversion shall comply with, and be construed in conformity with, subparagraph (A)(iv)

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

Passed the House of Representatives October 7, 2003.

Attest

Clerk

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Members of and Liaisons to the Standing Committee Subcommittee on the E-Government Act
From: Dan Capra, Lead Reporter
Re: Timeline for Enactment of Rules Protecting Privacy of Court Filings
Date: January 20, 2004

The following is the projected timeline for enactment of National Rules protecting privacy of court filings, as directed by section 205 of the E-Government Act. This timeline was reached by the Subcommittee at its meeting in Scottsdale on January 14, 2004.

Spring 2004– Advisory Committees on Civil, Criminal, Bankruptcy and Appellate Rules will each consider a rough draft of a privacy rule. These drafts will be derived from a template prepared by Professor Capra. That template will be adapted by the respective Reporters to accommodate issues particular to civil, criminal, bankruptcy or appellate practice. While the privacy rules will proceed from a template, it is recognized that the privacy rules will not be identical. For example, it may be appropriate for the Bankruptcy Rule simply to refer to the Civil Rule; and the Appellate Rule may simply provide that whatever was protected below must be protected on appeal

Summer 2004– Reporters will confer on the results of the consideration of the rough drafts by the respective Advisory Committees. Reporter will work out any issues that may be necessary for an integrated approach to privacy

Fall, 2004– Advisory Committees will each consider a final draft of a privacy rule as amended, if necessary, by the Reporters If possible, the Committees each will vote out a rule with the recommendation that the Standing Committee release it for public comment. If more issues or concerns arise in any of the Advisory Committees, then a vote for public comment can be deferred to the Spring 2005 meeting of that Committee.

January, 2005– If all Advisory Committees have recommended a privacy rule for public comment, then each of those proposals will be submitted to the Standing Committee with the recommendation that they be released for public comment in August, 2005.

Spring, 2005– Final date for each Advisory Committee to prepare a privacy rule for submission for public comment.

June, 2005– Final date for submitting proposed privacy rules to the Standing Committee with the recommendation that they be released for public comment.

August 2005– Proposed privacy rules released for public comment.

January/Early February 2005– Public hearings, if necessary. [It would seem most efficient for the privacy rules to be released as a package Public hearings, if necessary, then could be held on the entirety of the privacy package, rather than as individual committee proposals. In other words, it would seem wasteful to have a separate public hearing for each Committee's privacy rule, when the goal is to provide an integrated approach to privacy.]

February 15, 2006– Public comment period ends.

Spring 2006– Advisory Committees consider public comments. Each Advisory Committee votes out a privacy rule with the recommendation that it be forwarded to the Judicial Conference

June 2006– Standing Committee approves each of the privacy rules and forwards the rules to the Judicial Conference with the recommendation that they be approved and sent to the Supreme Court

Summer, 2006– Judicial Conference approval of privacy rules

September 2006– Privacy rules referred to the Supreme Court.

May 2007– Supreme Court sends privacy rules to Congress

December 1, 2007– Effective date of national rules on privacy of court filings

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **PRIVACY RULE TEMPLATE**

DATE: **AUGUST 16, 2004**

The E-Government Act of 2002 requires the promulgation of rules to protect the privacy of persons identified in court filings and to govern the availability of those documents when they are filed electronically. The Act applies to all government agencies, but the rules promulgation requirement obviously applies only to the courts. The E-Government Committee, chaired by the Hon. Sidney Fitzwater (N.D. Tex.) met on two occasions to consider drafts of a template of a privacy rule that could be adopted by the Advisory Committees. Prof. Dan Capra, the Reporter to the Advisory Committee on the Rules of Evidence, served as the Reporter for the E-Government Committee.

The E-Government Committee met most recently in June 2004, and the result of that meeting is the Revised Privacy Template attached to this memorandum as Exhibit A (the "template Rule"). Subdivision (a) of the Template Rule sets out the limitations on the disclosure of certain information in the materials filed with the court. Disclosure of a person's social security number and date of birth are limited as are references to a minor's name and any financial account numbers that might be included in the filings. The rule permits a party to file an unredacted copy of the document under seal at the same time that they file a copy of the document properly redacted as required by the rule. Consistent with recently-enacted legislation to amend the E-Government Act, the rule provides in subdivision (c) that a party may file a

reference list for use in identifying the otherwise redacted items in a particular document. Attached to this memo is a report on the amendment. The proposed rule also includes actions that are exempt from the redaction requirements (see subdivision (d)) and includes a significant restriction on electronic access to files in actions for benefits under the Social Security Act. The Template Rule also provides that a party can waive the privacy protection of subdivision (a) of the Rule by using his or her own personal identifier without redacting the relevant information.

The Template Rule also includes a provision in subdivision (f) that authorizes the court to order a greater limit or restriction on "remote electronic access" by non-parties to the electronically filed documents. The rule states that the court must be satisfied that the protection of the information provided by subdivision (a) of the rule is insufficient before it orders additional protection of the information under subdivision (f). The E-Government Committee is especially interested in receiving the comments of the Advisory Committees as to the propriety of this subdivision of the rule. The subdivision arguably may be unnecessary because the courts already have the power to seal records, and including this in the rule would simply create a cottage industry in applications for such orders.

The Advisory Committee on Civil Rules is considering the Template Rule (as are the Criminal and Appellate Rules Committees), and the expectation is that the rule as adopted by the Advisory Committees will be as uniform as possible. In fact, the E-Government Act of 2002 includes such a directive, with the proviso that the uniformity be as great as is reasonably practicable. To that end, Judges Small and Swain and I have been active participants in the work of the E-Government Committee and have considered how to best incorporate the rule into the Bankruptcy Rules. In keeping with the spirit of the E-Government Act and the directives of

Judge Fitzwater's Committee, we suggest that the Bankruptcy Rules incorporate the Civil Rule version of the Privacy Template Rule into the rules governing adversary proceedings and that the rule be added to the list of rules that apply in contested matters under Rule 9014. There is a need for one distinction between the Civil Rule and the Bankruptcy Rule. That is, the Civil Rule (we assume) will include a limitation that only the initials of a minor's name be included in the document. This will create a problem if the minor is the debtor in the case. Since the rule would apply only in adversary proceedings and contested matters, the limitation would not apply either to a voluntary or involuntary petition. (Our recent amendment to Rule 1005, for example, calls for the partial redaction of a debtor's social security number but does not require the use of only a minor's initials on the petition. Official Forms 1 and 4, the voluntary and involuntary petitions, likewise include the limit on the publication of the full social security number.) After consideration, we believe that a minor debtor's full name should be required on the petitions to ensure that creditors are receiving appropriate notice in the case. Since the full name will be on the petition, that name will appear again in the caption of the adversary proceedings and contested matters in the case. We are therefore proposing a modification of that provision of the Template Rule, to exempt the name of a minor who is the debtor from the redaction requirement in adversary proceedings and contested matters.

RULE 70XX[1] Privacy in Court Filings.

Except as provided in this rule, Rule XX F. R. Civ. P. applies in adversary proceedings. Subdivision (a)(2) of Rule XX F. R.

[1] The number will correspond to the number of the Civil Rule in the same manner as other rules in Part VII of the Bankruptcy Rules.

Civ. P. does not apply if the minor being identified is the debtor in the case.

COMMITTEE NOTE

This rule makes Civil Rule XX applicable in adversary proceedings with the exception of the limitation in that rule on the publication of a minor's name. Under the Civil Rule, only a minor's initials may be included in the filed document, and this rule carries that limitation forward if the minor is not the debtor in the case. If the debtor is a minor, the debtor's full name will be included on the petition (whether it be a voluntary or involuntary petition) as well as on all of the filings in adversary proceedings and contested matters. See Bankruptcy Rules 7010 and 9004(b).

RULE 9014 Contested Matters.

* * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, 70XX and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same

manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

COMMITTEE NOTE

The rule is amended to include Rule 70XX in the list of Part VII rules that automatically apply in contested matters. That rule largely incorporates Rule XX F. R. Civ. P. with the exception that Rule XX's limitation on the use of a minor's full name is made inapplicable where the minor is the debtor in the case.

INDICATIVE RULINGS: NEW RULE "62.1"

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules. The amendment would address a common procedure that at times is characterized as an "indicative ruling." The problem arises when a notice of appeal has transferred jurisdiction of a case to the court of appeals. A party may seek to raise a question that is properly addressed to the district court — a common example is a motion to vacate the judgment under Civil Rule 60(b). As a rough statement, the most workable present approach is that the district court has jurisdiction to deny the motion but lacks jurisdiction to grant the motion. If persuaded that relief is appropriate, the district court can indicate that it is inclined to grant relief if the court of appeals should remand the action for that purpose. The court of appeals can then decide whether to return the case to the district court. This procedure, however, is not securely entrenched; different approaches are taken. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2873 Additional detail is provided in Solicitor General Waxman's letter.

The proposal to adopt a court rule was made for several reasons. First, differences remain among the circuits. A uniform national procedure seems desirable. Second, experience shows "that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals." Third, the Supreme Court's ruling that a court of appeals need not vacate a district court judgment when an appeal is mooted by settlement creates a new need for advice from the district court. The parties to an appeal may be able to settle only if they can persuade the district court to vacate the judgment; providing a procedure for an indication by the district court will lead to settlement of more "cases on the docket of the appellate courts."

The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

The Appellate Rules Committee considered this proposal in April 2000 and April 2001. Judge Garwood reported that although committee members "seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule," "the committee concluded unanimously" that any rule should be included in the Civil Rules, not the Appellate Rules. Reliance on the Civil Rules makes sense because the court of appeals plays only a minor role in the process. The first line of action is in the district court. The court of appeals becomes involved only if the district court indicates a desire to grant relief, and then "a routine motion to remand is made in the appellate court."

If a civil rule is to be adopted, it should be tailored to the transfer of jurisdiction effected by an appeal. There is no apparent reason to limit existing district-court freedoms to act pending appeal. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. Section 1292(b) and Civil Rule 23(f) expressly address stays of district-court proceedings. Collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the burdens of trial and even pretrial proceedings, while a security appeal may have quite different consequences. It does not seem desirable, however, to limit any new rule to appeals from "final" judgments

The following draft is simply a sketch to illustrate the form a rule might take. It is described as Rule 62.1, bringing it within Civil Rules Part VII (Judgments) An alternative might be to resurrect the appeals numbers beginning with Rule 74.

RULE 62.1 INDICATIVE RULINGS

(a) A district court may entertain an otherwise timely motion to alter, amend, or vacate a judgment that is pending on appeal [and that cannot be altered, amended, or vacated without permission of the appellate court] and

(1) deny the motion, or

(2) indicate that it would grant the motion if the appellate court should remand for that purpose.

(b) A party who makes a motion under (a) must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.

(c) If the district court indicates that it would grant a motion under (a)(2), a party may move the appellate court to remand the action to the district court. The appellate court has discretion whether to remand.

(d) This rule does not apply to relief sought under Federal Rule of Appellate Procedure 8, nor to proceedings under 28 U.S.C. §§ 2241, 2254, and 2255.

Committee Note

[The Committee Note should make clear that subdivision (a) does not address a judgment that the district court can change or supersede without appellate permission. It seems likely that the rule text should include some version of the concept included in brackets.

[Subdivision (c) calls for remand of the action. It might be better to retain jurisdiction of the appeal, with a limited remand for the purpose of ruling on the motion in the district court. Much would depend on the nature of the relief indicated by the district court. If there is to be a new trial, outright remand makes sense. If the judgment is to be amended and re-entered, retained jurisdiction may make better sense.]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Chambers of
WILL GARWOOD
Circuit Judge

903 San Jacinto Boulevard
Austin, Texas 78701
512/916-5113

May 14, 2001

The Honorable David F. Levi
United States District Court for
the Eastern District of California
501 I Street — 14th Floor
Sacramento, CA 95814

Dear Judge Levi:

Last year, the Department of Justice asked the Advisory Committee on Appellate Rules to amend the Federal Rules of Appellate Procedure ("FRAP") to explicitly authorize the use of a procedure known as an "indicative ruling." A copy of Solicitor General Waxman's March 14, 2000 letter to me is enclosed. The letter describes the indicative ruling procedure at some length.

The Appellate Rules Committee discussed this proposal at both its April 2000 and April 2001 meetings. The members of the Committee seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule and Committee Note submitted by the Department of Justice. However, the Committee concluded unanimously that if the rules of practice and procedure are to be amended to include provisions authorizing and regulating indicative rulings, those provisions should be located in the Federal Rules of Civil Procedure ("FRCP"), and not in FRAP.

The proposed rule would authorize parties to file post-judgment motions found in the FRCP (not in FRAP) in the district court (not in the appellate court) and would authorize the district court (not the appellate court) to issue a particular type of ruling. The appellate court has almost no involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. At bottom, the proposed rule on indicative rulings is a rule that would govern a district court's consideration of post-judgment motions listed in the FRCP; as such, the proposed rule belongs in the FRCP. This point is reinforced by the fact that Rule 33 of the Federal Rules of Criminal Procedure, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

For these reasons, our Committee has decided to leave this proposal in the good hands of your Committee. Please don't hesitate to contact me if you have any questions. I look forward to seeing you in Philadelphia in June.

Sincerely,

Will Garwood

Enclosure

cc: Dean Patrick J. Schiltz (w/o enc.)
Prof. Edward H. Cooper (w/ enc.)
Mr. Douglas Letter (w/o enc.)
Mr. John K. Rabiej (w/o enc.)

00-04

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 14, 2000

The Honorable William L. Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendment to FRAP to Establish a New Rule Governing "Indicative Rulings" by District Courts

Dear Judge Garwood:

The Department of Justice proposes creation of a new provision in the Federal Rules of Appellate Procedure (FRAP) to cover the use of a procedure commonly referred to in civil cases by the courts of appeals as seeking an "indicative ruling." An indicative ruling procedure allows a district court that has lost jurisdiction over a matter due to the filing of a notice of appeal to notify the court of appeals how it would rule on a motion if it still had jurisdiction. If the district court would grant the motion, the court of appeals can then remand the matter for entry of a new order. The indicative ruling is commonly used in the context of a motion that would be filed under Federal Rule of Civil Procedure 60(b), but it can also be used in an interlocutory appeal when the district court's ruling is needed on the specific issue appealed.

We are suggesting a new provision in the FRAP to cover this indicative ruling procedure for civil cases because it is widely employed by the Circuits on the basis of case law, but is nowhere mentioned in the federal civil or appellate rules. There is no relevant rule in the FRAP. FRCP 60(a) provides that a district court may grant relief from a "clerical mistake" while an appeal is pending "with leave of the appellate court." But the civil rules mention no other situations and do not explain the procedure to be used.

A federal rule is warranted because our experience in dealing with many counsel in appellate civil cases over the years has revealed that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals. In addition, the Circuits use somewhat differing procedures, although there appears to be no good reason for local variation.

The indicative ruling procedure is discussed in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), and is currently used by nearly every Circuit.[1] Under this procedure, "when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial." The Circuits that follow this procedure appear to accept that a district court has some form of jurisdiction to allow it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. The Ninth Circuit, however, maintains that the district court has no jurisdiction to entertain a Rule 60(b) motion, and therefore requires a remand from the court of appeals before a district court can even deny such a motion.

By contrast, the Second Circuit has on some occasions used a different procedure. For example, in Haitian Centers Council, Inc. v. Sale, Acting Commissioner, INS, No. 93-6216 (Oct. 26, 1993), the court declined to use the indicative ruling procedure and instead dismissed the appeal without prejudice for 60 days. The Second Circuit then reinstated the case in the court of appeals after the district court had ruled on the relevant motion. We have found this procedure to be commonly used in the Second Circuit.

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[1] See Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F. 2d 39 (1st Cir. 1979); Toliver v. Sullivan, 957 F. 2d 47 (2nd Cir. 1992); United States v. Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974 (3d Cir. 1992); Fobian v. Storage Tech. Corp., 164 F.3d 887 (4th Cir. 1999); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, (5th Cir. 1994); Detson v. Schweiker, 788 F. 2d 372 (6th Cir. 1986); Brown v. United States, 976 F. 2d 1104 (7th Cir. 1992); Pioneer Insurance v. Gelt, 558 F.2d 1303 (8th Cir. 1977); Aldrich Enterprises, Inc. v. United States, 938 F. 2d 1134 (10th Cir. 1991).

Originally, the Circuits used the indicative ruling procedure solely or principally for parties who wished to move for a new trial based on newly-discovered evidence. In other circumstances, however, this procedure has been deemed applicable -- for example, when new methodologies or procedures change the impact of evidence used below; when the law has changed subsequent to judgment; when settlement negotiations are contingent on the district court's judgment being vacated; or when there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issues on appeal.

Indicative rulings are procedurally superior to other possible methods of handling these situations. The district court, being familiar with the case, is often in the best position to evaluate a motion's merits quickly. If a motion should clearly not be granted, the district court will usually recognize that fact faster than the appellate court. If the motion has possible merit, there is no need for the appellate court to have discovered that first. Most importantly, an early indication of the district court's view can avoid a pointless remand in those cases where the trial court would deny the motion.

In addition, indicative rulings have become critical in modern settlement negotiations, following the Supreme Court's ruling in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), for cases that are on appeal. In that opinion, the Supreme Court ruled that, in most circumstances, a court of appeals need not vacate the decision of a district court if an appeal becomes moot through a settlement. The Court made clear, however, that the district court remains free to vacate its own judgment pursuant to Fed. R. Civ. P. 60(b). See 513 U.S. at 29. Vacatur of a district court ruling is often a key element in a negotiated settlement. The indicative ruling procedure can be used effectively to determine if a district court would be willing to vacate its judgment as part of an overall settlement of a case. If the district court indicates a willingness to issue such an order, more cases on the docket of the appellate courts can be settled and dismissed without taking up scarce appellate judicial resources.

A formal amendment to the FRAP is warranted for several reasons. While the indicative ruling procedure is commonly used, its inclusion in the federal rules would ensure that all practitioners are aware of it. In addition, while nearly every Circuit currently employs this procedure, courts have used other mechanisms to achieve the same end. By making our recommended change to the FRAP, the courts would have

one standardized procedure to rely on under these circumstances, which would promote efficiency, consistency, and predictability in judicial proceedings.

Therefore, we propose a new rule, and suggest that it be located after current FRAP 4. At this point, it appears appropriate to provide for this procedure only in civil cases; our understanding is that post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters. In addition, Federal Rule of Criminal Procedure 33 already states that, if an appeal is pending, a district court may grant a new trial in a criminal case "based on the ground of newly discovered evidence," "only on remand of the case." Because our proposal does not apply to criminal cases, we also make clear that it does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, FRAP 4 does not apply to appeals from the Tax Court (see FRAP 14), but we make clear in the explanatory note that the courts of appeals are free to use this same procedure in Tax Court cases.

We suggest a new FRAP 4.1, to read as follows:

> "**Rule 4.1. Indicative Rulings.** When a party to an appeal in a civil case seeks post-judgment relief in district court that is precluded by the pendency of an appeal, the party may seek an indicative ruling from the district court that heard the case. A party may seek an indicative ruling by filing a motion in district court setting forth the basis for the relief requested, and stating that an indicative ruling appears to be necessary because an appeal is pending and the district court lacks jurisdiction to grant the relief absent a remand. The movant must notify the clerk of the court of appeals that a motion requesting an indicative ruling has been filed in the district court, and must notify the clerk of any disposition of that motion. If the district court indicates in an order that it would grant the relief requested in the event of a remand, the movant may seek a remand to the district court for that purpose. Nothing in this rule governs relief sought under FRAP 8, and it does not apply to matters under 28 U.S.C. §§ 2241, 2254, and 2255."

We also propose the following as an Advisory Committee Note:

> "This rule is designed to make known, and to make uniform, a procedure commonly used by the courts of appeals in civil cases for obtaining 'indicative

rulings' by the district courts when an appeal is pending. (The problem arises because a district court loses jurisdiction over a judgment when an appeal is filed.) The D.C. Circuit described this procedure in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), as follows:

> When an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial."

Nearly all of the Circuits have adopted this procedure in their case law; they appear to accept that a district court has some form of jurisdiction that allows it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. Accordingly, a uniform procedure is needed so that a district court may notify the parties and the court of appeals that it would grant or seriously entertain a post-judgment motion, and that a remand from the appellate court is thus warranted for that purpose. This procedure is currently used by the courts of appeals in a variety of situations other than simply seeking a new trial based on recently discovered evidence: new methodologies or other procedures change the impact of evidence used below; there has been a post-judgment change in the law; settlement negotiations are contingent on a decision that the district court's judgment be vacated, see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994); or there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issue on appeal. Thus, the indicative ruling procedure should be used in appropriate circumstances for filing post-judgment motions in civil cases, such as under FRCP 60(b), and may also be used when an interlocutory appeal is pending. The procedure provided by this Rule 4.1 will not be necessary or appropriate, of course, where the movant seeks relief pending appeal under Rule 8 FRAP (i.e., a stay or injunction pending appeal) or seeks other relief in aid of the appeal, since such relief is available in the district court without a remand even after the notice of appeal is filed. Moreover, nothing in this rule would foreclose a district court from exercising any authority it retains during the pendency of an interlocutory appeal. There does not appear to be a need for this procedure in

criminal cases, and FRCrP 33 already provides that a district court may grant a new trial in a criminal case 'based on the ground of newly discovered evidence,' 'only on remand of the case.' Because this new rule does not apply to criminal cases, it also does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, although Rule 4 does not apply to appeals from the Tax Court, the courts of appeals are free to use this same procedure in Tax Court cases."

Thus, I am submitting this matter to you for consideration by the full FRAP Advisory Committee.

Sincerely,

Seth P. Waxman

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

Minutes of Spring 2001 Meeting of
Advisory Committee on Appellate Rules
April 11, 2001
New Orleans, Louisiana

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 11, 2001, at 8:35 a.m. at the Hotel Inter-Continental in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Samuel A. Alito, Jr., Chief Justice Richard C. Howe, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Also present were Judge Anthony J. Scirica, Chair of the Standing Committee; Judge J. Garvan Murtha, the liaison from the Standing Committee; Prof. Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and former Advisory Committee members Chief Justice Pascal F. Calogero, Jr., and Mr. John Charles Thomas.

Judge Garwood introduced Chief Justice Howe and Mr. Roberts, who replaced Chief Justice Calogero and Mr. Thomas, respectively, as members of this Committee. Judge Garwood thanked Chief Justice Calogero and Mr. Thomas for their devoted service to this Committee and presented both with certificates of appreciation. Judge Garwood also introduced Judge Murtha, who replaced Judge Phyllis A. Kravitch as the liaison from the Standing Committee. Finally, Judge Garwood welcomed Judge Scirica from the Standing Committee and Prof. Cooper from the Civil Rules Committee.

II. Approval of Minutes of April 2000 Meeting

The minutes of the April 2000 meeting were approved.

III. Report on June 2000 and January 2001 Meetings of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2000 meeting, the Standing Committee approved for publication all of the rules forwarded by this Committee — including the proposed amendments to Rules 4(a)(7), 5(c), 21(d), and 26.1, as well as the electronic service package — with one

D. Item No. 00-04 (FRAP 4.1 — indicative rulings)

The Department of Justice has proposed that FRAP be amended to authorize a procedure — commonly referred to as an "indicative ruling" — that is permitted under the common law of most of the courts of appeals. The need for an indicative ruling most often arises in the following situation: A district court enters judgment. A party files a notice of appeal. Sometime later, that party — or another party — files a motion under FRCP 60(b) for relief from the judgment. At that point, the district court cannot grant the FRCP 60(b) motion, as it no longer has jurisdiction over the case. The party can ask the court of appeals to remand the case to the district court, but that would be a waste of everyone's time if the district court will not grant the FRCP 60(b) motion.

Under the indicative ruling procedure, the party files its FRCP 60(b) motion in the district court. The district court then issues an "indicative ruling" — that is, a memorandum in which the district court indicates how it would rule on the FRCP 60(b) motion if it had jurisdiction. If the district court indicates that it would grant the motion, the court of appeals remands the case.

The Justice Department's proposal was discussed at some length at this Committee's April 2000 meeting. At that time, members raised several concerns. Some members objected to the exclusion of proceedings under 28 U.S.C. §§ 2241, 2254, and 2255 from the rule. Other members expressed confusion over how the rule would operate in the case of interlocutory appeals. Still other members questioned the need for rulemaking on this subject or expressed concern about particular language in the Committee Note. The Justice Department agreed to give the matter further study.

Mr. Letter reported that the Justice Department continued to believe that habeas proceedings should be excluded from the rule, but did not feel strongly about it. Likewise, the Department was willing to drop any reference to interlocutory proceedings from the rule or Committee Note.

After further Committee discussion, the Reporter suggested that any rule on indicative rulings should be placed in the FRCP, not in FRAP. Placement in the FRCP would be more logical; after all, the rule authorizes parties to file the post-judgment motions authorized by *the FRCP* in the *district* court and authorizes the *district* court to issue a particular type of ruling. The appellate court has no real involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. The rule on indicative rulings is a rule governing a district court's consideration of post-judgment motions listed in the FRCP; as such, it belongs in the FRCP. This point is reinforced by the fact that FRCrP 33, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

Several members agreed with the Reporter. A member moved that the proposal of the Justice Department on indicative rulings be referred to the Civil Rules Committee and removed from the study agenda of this Committee. The motion was seconded. The motion carried (unanimously).

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which a notice of appeal is filed on behalf of a corporation, but, rather than being signed by an attorney, the notice is signed by one of the corporation's officers. To date, there is only one decision on this issue. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999). However, the issue is pending before the Fourth Circuit, so the possibility of a future conflict exists.

Judge Motz asked that further discussion of this matter be postponed. She stated that the Fourth Circuit had not yet issued its decision on this issue. The Reporter said that it is likely that the panel is holding the case in anticipation of the Supreme Court's decision in *Becker v. Montgomery*, which is scheduled for argument on April 16. In *Becker*, the Sixth Circuit held that it was required to dismiss an appeal because the pro se appellant failed to sign the notice of appeal.

By consensus, the Committee agreed to postpone further discussion of this matter until its fall 2001 meeting.

F. Items Awaiting Initial Discussion

1. Item No. 00-06 (FRAP 4(b)(4) — failure of clerk to file notice of appeal)

Judge Easterbrook forwarded to this Committee a copy of his opinion for the Seventh Circuit in *United States v. Hirsch*, 207 F.3d 928 (7th Cir. 2000), and asked this Committee to consider amending Rule 4(b)(4) to address the failure of a district clerk to file a notice of appeal in a criminal case when requested by a defendant under FRCrP 32(c)(5).

The Reporter suggested that this matter be removed from this Committee's study agenda. Judge Easterbrook himself said in *Hirsch* that the situation that he wishes Rule 4(b)(4) to address "is rare and may be unique," given that he was "unable to find any other case in which judges have had to ponder how to proceed when the clerk does not carry out that mechanical step " Moreover, *Hirsch* itself was not such a case. The transcript made clear that the defendant in *Hirsch* had not, in fact, asked the clerk to file a notice of appeal on his behalf. Until this situation actually arises, this would not be a fruitful subject of rulemaking.

RULE 48: POLLING THE JURY

The question of jury polling practices was raised at the June Standing Committee meeting. The suggestion was that the Civil Rules might consider addition of a polling provision similar to Criminal Rule 31(d). Drawing from Style Rule 48, the rule might look like this:

Rule 48. Number of Jurors; Verdict; Polling.

(a) Number of Jurors. A jury must have no fewer than 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

On informal inquiry, the Council of the ABA Litigation Section indicated that this approach seems desirable. They seem to prefer this version of new subdivision (c), taken verbatim from Criminal Rule 31(d), which requires a poll only on a party's request. There was some brief but inconclusive discussion of the possibility that a provision might be added to allow the trial judge to conduct the polling "in private."

The question whether to add a polling provision seems direct enough. If the question is pursued further, there is likely to be some pressure to adopt the language of Criminal Rule 31(d), as set out above. But there may be some reason to distinguish between the civil and criminal rules. Civil Rule 49(b) addresses verdicts that include answers to questions that are inconsistent among themselves or inconsistent with the general verdict. When that happens, the court is to "direct the jury to further consider its answers and verdict, or order a new trial." "Deliberate further" seems a good substitute for "further consider its verdict" because the problem is likely to be lack of unanimity But "order a new trial" may be better than "declare a mistrial and discharge the jury" for purposes of a civil rule.

The question is whether to add this matter to the agenda for further work.

RULE 30(B)(6): DEPOSITIONS AS INTERROGATORIES

The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association has provided a report on practice under Civil Rule 30(b)(6), 04-CV-B. The report offers many suggestions to correct what are seen as growing misuses of Rule 30(b)(6) depositions, but only one specific amendment

The proposed amendment grows from concerns that a Rule 30(b)(6) deposition may be used in various ways to extend beyond fact discovery. A first concern arises from a broad perception that once an organization has been designated as deponent on a described subject and has provided a witness to testify on its behalf, the witness may be asked to take litigation positions that will bind the organization. One example among many: The witness is shown conflicting deposition testimony of three other witnesses, and asked to state which version the corporation adopts A second concern is that the organization's duty to prepare the witness to testify to "matters known or reasonably available to the organization" will invade work product. Counsel may be forced to investigate to find matter reasonably available to the organization, and then prepare the witness. The preparation may include protectible work product, creating practical difficulties in protecting the work product "on the wing" when the witness is deposed.

The amendment would address these problems by foreclosing use of a Rule 30(b)(6) deposition to inquire into legal issues. One word would be added: The witness "shall testify as to factual matters known or reasonably available to the organization."

The many practice suggestions involve at least some matters that could be addressed in rule language. Perhaps the clearest illustration is the suggestion that Rule 30 should be interpreted to apply the presumptive 7-hour limit on a deposition cumulatively to all witnesses designated to testify on behalf of an organization, treating all witnesses together as a single deposition.

Other issues are discussed but without recommendation. One set of issues that may prove particularly knotty on closer examination involves the use of the deposition as an "admission" when the organization is a party.

The overall feel of the report suggests a familiar set of dilemmas. In part, there is a feeling that Rule 30(b)(6) depositions may be coming to be used as a substitute for Rule 33 interrogatories, perhaps in the hope that it will prove easier to provoke unguarded statements at deposition. In part, there are illustrations of specific decisions that seem ill-advised. The challenge for rulemaking is to determine several things: How frequent and severe are the arguable misuses? Is this set of issues something more than an illustration of the proposition that we should not attempt to amend the rules whenever some courts seem to be getting it wrong? Can a way be found to draft amendments that will do more good than harm?

The report is lengthy and will be included in a future agenda when the questions seem more ready for deliberation. The topic is raised now only to provoke reactions — at the meeting or over the next several weeks — on the place these issues should command on the agenda. If the problems seem worthy of advancing to the near-term agenda, they may benefit from preliminary study by a Discovery Subcommittee.

ALL-RULES: TIME DEADLINES

The rules for counting time are almost constantly before the committee. Practicing lawyers want and deserve rules that are clear beyond any possible ambiguity. (Unless, perhaps, a particular situation spurs a desire for creative ambiguity.) Every time an effort is made to substitute precise expression for a less clear expression, comments suggest a deeper problem The methods for counting time remain complex, particularly for periods less than eleven days. More generally, the actual time periods allowed by various rules need to be rethought.

Facing these concerns, an informal understanding has been reached that the several advisory committees, coordinating through the Standing Committee, should attempt to devise uniform methods for counting time. Rather than measure time as Rule 6 does, it may prove desirable to express time periods in terms of "calendar days," or perhaps "court days," or even "business days." Substituting periods measured in weeks rather than days also is possible. Adoption of the same method for Appellate, Bankruptcy, Civil, and Criminal Rules would improve the lives of lawyers enormously and also simplify the business of the courts.

Along with adopting a common method, thought must be given to the proper periods to allow. Some present provisions seem nearly ludicrous A motion for summary judgment need be served only 10 days before the time fixed for the hearing; opposing affidavits may be served (mailed) "prior to the day of the hearing." Whether as part of a general time project or as part of a particular Rule 56 project, those provisions need to be fixed Many provisions may be more nearly sensible.

The task of reconsidering the actual periods allowed could become complicated. The competing needs for expedition and adequate opportunity to prepare may be balanced in the abstract, but abstract calculation may be removed from reality. And reality may shift — as we move into an era of electronic filing and service, workable time periods may be affected. Modern methods of generating trial transcripts might affect the time for post-trial motions. Electronic discovery might affect the presumptive times to respond to Rule 33 interrogatories, Rule 34 document requests, or Rule 36 requests to admit. Getting a firm grasp on the best practical time periods will require imaginative work.

It also may be appropriate to reconsider the "jurisdictional" character of some time periods. A trial judge lacks authority to extend the Rule 59 time to move for a new trial. Is it possible to create some escape, or is the likely price too high? (This example illustrates the need for substantive integration of the various rules sets; Rule 59 time limits are integrated with Appellate Rule 4.)

There may never be an ideal occasion for all advisory committees to take on these questions. But in considering the long-range agenda, planning should begin now, recognizing that this project will consume large amounts of committee time once launched.

EVIDENCE-CIVIL RULES JOINT PROJECT TO END DUPLICATION

The Style Project has renewed long-simmering questions about the integration of the Civil Rules with the Evidence Rules. The Civil Rules continue to include evidence provisions that predate the Evidence Rules. Rule 32 is the central example, along with Rules 43, 44, and 44.1. Rule 80(c) is a more obscure example.

The Civil Rules evidence provisions may duplicate, contradict, or supplement the Evidence Rules. Whatever the outcome, it is desirable to consider all of these relationships. The eventual answer might be that all evidence provisions should be set out in the Evidence Rules, amending the Evidence Rules to pick up the better answer if a Civil Rule that contradicts or supplements an Evidence Rule is indeed better. Or it may be that there is room to keep a few evidence-like provisions in the Civil Rules. The Rule 43(a) provision for taking testimony in open court, for example, may be valuable as a continuing rejection of abandoned modes of trial.

The integration project thus will not be as simple as stripping all vestiges of evidence provisions from the Civil Rules. The project, moreover, seems to come to mind in the course of such internal undertakings as the Style Project. There is no evidence of great distress in the bench or bar. But the project is a worthy one that deserves a place on the agenda. The question, as with the time-counting project, is one of committee capacity and priorities.

Agenda Report

Subjects continually accumulate on the agenda There is not time to address all of them in depth At irregular intervals it proves useful to nominate subjects that might be removed from the agenda for lack of interest sufficient to predict eventual consideration. Next winter, well before the spring meeting, an agenda report will be circulated to identify subjects that will be removed from the agenda unless a committee member requests consideration by the full committee.