Agenda E-18 (Summary)
Rules
September 2005

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) 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 . . . . . pp. 2-3

2. Approve proposed new Appellate Rule 32.1 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 4-16

3. Approve the proposed amendments to Bankruptcy Rules 1009, 5005(c), and 7004 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 . . . . . pp. 17-18

4. Approve the proposed amendments to Civil Rules 16, 26(a), 26(f), 33, 34, 45, and Form 35 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 . . . . . pp. 21-28

5. Approve the proposed amendment to Civil Rule 26(b)(5) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 29-30

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

6. Approve the proposed amendment to Civil Rule 26(b)(2) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 30-32

7. Approve the proposed amendment to Civil Rule 37(f) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 32-35

8. Approve the proposed amendment to Civil Rule 50 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... p. 35

9. Approve the proposed amendments to Supplemental Rules A, C, E, and new Rule G and conforming amendments to Civil Rules 9, 14, 26(a)(1)(E), 65.1 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 ..... pp. 35-37

10. Approve the proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 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 ..... pp. 38-40

11. Approve the proposed amendments to Evidence Rules 404, 408, 606, and 609 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 ..... pp. 43-47

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

- Federal Rules of Appellate Procedure pp.16-17
- Federal Rules of Bankruptcy Procedure ..... pp. 19-21
- Federal Rules of Civil Procedure ..... pp. 37-38
- Federal Rules of Criminal Procedure ..... pp. 40-43
- Long-Range Planning ..... p. 47
- Report to the Chief Justice ..... p. 47

Agenda E-18
Rules
September 2005

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 15-16, 2005. All members of the Committee attended as well as the Committee's reporter, Professor Daniel R. Coquillette. The Deputy Attorney General, James B. Comey, attended the meeting with John S. Davis, Associate Deputy Attorney General, and Elizabeth Shapiro, Assistant Director, Federal Programs Branch, Civil Division, Department of Justice. Professor Geoffrey C. Hazard and Joseph F. Spaniol, consultants to the Committee, and John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office also attended.

All of the chairs and reporters of the advisory rules committees were present, with the exception of the reporter to the Appellate Rules Committee, as follows: Judge Samuel A. Alito, chair of the Advisory Committee on Appellate Rules; Judge Thomas S. Zilly, 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 Susan C. Bucklew, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor

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Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Also in attendance were Professor Sara Sun Beale, consultant to the Criminal Rules Committee, James N. Ishida and Jeffrey N. Barr, attorney advisors in the Administrative Office, and Tim Reagan of the Federal Judicial Center.

ELECTRONIC CASE FILING

Rules Recommended for Approval and Transmission

The Advisory Committees on Appellate, Bankruptcy, and Civil Rules submitted proposed uniform amendments to Appellate Rule 25, Bankruptcy Rule 5005, and Civil Rule 5 with a recommendation that they be approved and transmitted to the Judicial Conference. (Federal Rule of Criminal Procedure 49(d) incorporates by reference the filing procedures in Civil Rule 5.) The proposed amendments authorize a court to require electronic case filing by local rule. The amendments were published for public comment for a three-month period beginning November 10, 2004, and expiring on February 15, 2005. Public hearings were scheduled to coincide with hearings earlier scheduled for other proposed rules amendments, and a separate hearing was set for the amendment to the Appellate Rules, which had no other proposed amendments. Only one person asked to testify. Several written comments were received on the proposals.

In August 2004, the Committee on Court Administration and Case Management (CACM) requested that the federal rules of practice be amended on an expedited basis to authorize federal courts to adopt local rules that require parties to file papers electronically. The existing rules authorize a court to adopt local rules that "permit" a party to file papers by electronic means. Although many courts have adopted local rules that require electronic filing, some courts have been reluctant to do so without a more explicit grant of authority.

CACM urged the Committee to recommend these rules amendments to promote broader use of the Case Management/Electronic Case Files system now being deployed in the courts nationwide. CACM concluded that mandatory electronic case filing would achieve significant cost savings for the federal courts.

Several major bar organizations, including the American Bar Association, expressed concern during the public comment period that mandatory electronic case filing would pose hardships for litigants who do not have access to a personal computer and suggested that the national rules require that any local rule include appropriate exceptions. Such a provision was not included in the version published for public comment because a study of existing local court rules requiring parties to file papers electronically confirmed that each set of rules already excepted pro se litigants and others for good cause. Nonetheless, in light of the public comment and concerns, the advisory committees revised the proposed amendments to authorize a court to require electronic case filing by local rule only if reasonable exceptions are allowed. The Appellate Rules Committee added a provision in its proposed Committee Note to recognize that a local rule may direct a party to also file a hard copy of a paper that must be filed by electronic means. This provision responds to distinctive features of appellate practice and is not included in the other proposed rules.

The Committee concurred with the advisory committees' recommendations.

Recommendation: That the Judicial Conference approve proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) 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 are contained in the appendices of the respective sets of rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed new Rule 32.1 concerning the citation of unpublished opinions, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposal was originally published for comment in August 2003. Fifteen witnesses testified on the proposed new rule at a public hearing in Washington, D.C. More than 500 comments were submitted, a majority from lawyers and judges in the Ninth Circuit. The great majority of these comments were opposed to the proposed rule. But the proposed new rule was supported by major national bar organizations, including the American Bar Association and the American College of Trial Lawyers, by bar organizations in New York and Michigan, by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice, and by the Department of Justice.

In June 2004, the advisory committee recommended that the Committee approve new Rule 32.1 and transmit it to the Judicial Conference. In an effort to reach a greater consensus among the courts and in deference to the judges in the four circuits that opposed the proposed rule, the Committee decided to defer approving the proposed new rule and suggested that an empirical study be undertaken to assess its potential impact on the courts' workload. The advisory committee asked the Federal Judicial Center to conduct the study. It also asked Administrative Office staff to conduct a comparative statistical study of the median case disposition time and the number of summary dispositions in the nine circuits that permit citation of unpublished opinions.

The Federal Judicial Center study, *Citations to Unpublished Opinions in the Federal Courts of Appeals*, [hereinafter *FJC Report*] consisted of three components:

(1) a survey of all 257 circuit judges (active and senior); (2) a survey of attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. The Administrative Office's study examined the median case disposition time for the two years preceding and (where possible) the two years following the years in which the nine circuits liberalized or abolished their no-citation rule. Both studies failed to support the main arguments against proposed Rule 32.1 that a permissive citation policy will result in more summary opinions and impose additional work on judges and lawyers, and in some respects the studies directly contradicted those arguments and predictions. The advisory committee (7-2) and the Committee (unanimously) voted to approve the proposed new rule.

Explanation of the New Rule

Citation of unpublished opinions by attorneys in their briefs is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of unpublished opinions. In fact, about 80% of the opinions issued by the courts of appeals in recent years have been designated as unpublished. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts 2004, tbl. S-3 (2004). Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that circuit.

Proposed new Rule 32.1 is very limited. The Committee and the advisory committee expressly take no position on whether unpublished opinions should have any precedential value, leaving that issue exclusively for the circuits to decide. For this reason, a proposal that would have permitted, but disfavored, citation of unpublished opinions was not adopted. Such a rule might be interpreted as taking a formal position on the precedential value of such opinions,

compromising the proposed rule's substantive neutrality. Also, such a restriction appears unnecessary; parties would not cite to an unpublished opinion deemed non-precedential by the circuit where a published, precedential opinion is on point.

Proposed new Rule 32.1 permits the citation in briefs of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like and supersedes limitations imposed on such citation by circuit rules. The present practices governing citation of unpublished opinions vary among the circuits, with some permitting citation, others disfavoring citation but permitting it in certain circumstances, and others prohibiting citation. Nine circuits now permit citation of unpublished opinions, at least when, in the judgment of counsel, there is no precedential opinion on point.

Background of Courts' Practices Involving Citation of Unpublished Opinions

In the early 1970's, before the era of widespread computerized legal research, the Judicial Conference encouraged courts to develop plans to limit the number of opinions submitted for publication to cope with the exponentially expanding volume of litigation. Many of the court plans contained provisions governing citation of unpublished opinions. These plans were quite different from each other. Some plans prohibited the citation of unpublished opinions as a means to prevent large institutional litigators — who might have their own collections of unpublished opinions — from gaining an unfair advantage.

The Judicial Conference raised concerns about the lack of uniformity in the court plans and noted with approval the then-Committee on Court Administration's report "that further experimentation may well lead to the amendment of the diverse circuit plans and that *eventually a somewhat more or less common plan might evolve*" (JCUS-MAR 74, p. 13; emphasis added). The Committee on Court Administration recognized that some courts had adopted a policy

prohibiting citation to unpublished opinions, and it suggested that courts may eventually adopt a uniform policy permitting citation of unpublished opinions.

The issue lay dormant in the Judicial Conference until the 1990's. The *Long Range Plan for the Federal Courts* (hereafter "Long Range Plan") recommended that a *"uniform set of procedures and mechanisms* for access to court of appeals opinions, guidelines for publication or distribution, and clear standards for citation" be developed. Long Range Plan, Implementation Strategy 37d (Dec. 1995) (emphasis added). The Long Range Plan's recommendation was itself based on an earlier proposal in the *Report of the Federal Courts Study Committee*, which had recommended the creation of an ad hoc committee to review the policy on unpublished opinions. The Study Committee expressed concern with practices barring citation of unpublished opinions. It recognized that the "policy in courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity" and that technological advances in publishing opinions supported a change in that policy (*Report of the Federal Courts Study Committee*, April 1990, p. 130).

Department of Justice and Other Requests to Amend the Rules

In 2001, the Department of Justice requested the advisory committee to amend the rules to establish uniform procedures permitting citation of unpublished opinions. The Department cited examples of unpublished cases involving recurring issues decided differently by different courts of appeals (and sometimes by the same court of appeals) without knowledge of the previous dispositions. For the same and other reasons, many bar associations, attorneys, and

members of the public, and numerous law review and bar journal articles had been urging a review of the disparate citation practices.[1]

As concerns with disparate citation policies mounted, the underpinning of the original rationale for no-citation rules was quickly eroding. Institutional litigators, who at one time might have enjoyed an unfair advantage because of their ability to collect unpublished opinions, no longer were alone in their access to unpublished opinions. With the advent of computer assisted legal research, the reference to "unpublished" opinions has become a misnomer since the overwhelming majority of opinions are now readily available to the public, often at minimal or no cost because they are posted on court web sites in compliance with the E-Government Act of 2002 and are now printed in a new series of casebooks called the *Federal Appendix* that is available in most law libraries. As a result, the concern about unfair, uneven access to unpublished opinions, which was the principal reason for the promulgation of restrictive citation policies, no longer is cogent.

Mindful of the Judicial Conference's Long Range Plan, responding to the Department of Justice's and many others' requests, and considering the altered status of the availability of "unpublished" opinions caused by technological change, the advisory committee proceeded with the rulemaking process. After reviewing the citation practices of the courts of appeals and the substantial literature on the issue, and in keeping with the clear trend in the circuits toward more

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[1] A thorough discussion of the subject can be found in *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers in the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002). The American College of Trial Lawyers recommended that "the rules governing access to and use of 'unpublished' opinions in the circuit courts should be uniform. The existing circuit-by-circuit patchwork is confusing, perilous, and getting worse."

liberal citation rules, the advisory committee proposed the new rule preventing courts from barring citation of unpublished opinions.

Justification for the New Rule

Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. Moreover, in an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on which neither proposed Rule 32.1 nor the Committee Note takes any position — they cannot be justified as a matter of policy.

The advisory committee found the evidence overwhelming that unpublished opinions can be a valuable source of "insight" and "information." The opinions may be helpful in addressing recurring issues, which involve similar fact patterns. They can be particularly helpful to district judges who must exercise discretion in applying relatively settled law to an infinite variety of facts while at the same time striving for uniformity, *e.g.*, dispositions involving sentencing guideline decisions.

On the other hand, no-citation rules forbid attorneys from bringing to the court's attention information in unpublished opinions that might help their client's cause. No-citation rules prohibit attorneys from explaining how substantive legal rules have actually been applied by the court and in what actual — not hypothetical — circumstances the issue at hand has been coming

before the court. No-citation rules are especially troublesome when an unpublished opinion has been erroneously characterized as routine, even though some courts mitigate this problem by adopting procedures allowing a court to reconsider publishing a particular opinion. Lawyers, district court judges, and appellate judges regularly read unpublished opinions despite local prohibitions against citing them, providing further evidence of their value.

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize unpublished opinions would have an unfair advantage. As this justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, however, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). *See, e.g.*, *Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1

n.2 (S.D.N.Y. Aug. 14, 2002). An exhaustive study conducted by the Federal Judicial Center at the request of the advisory committee found that over a third of the attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not. *See FJC Report* at 15, 45 (2005). Unpublished opinions are often read and cited by both judges and attorneys precisely because they do contain valuable information or insights. Many unpublished opinions include lengthy discussions of legal issues and may include a dissenting opinion. The Supreme Court has granted review of unpublished decisions. *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit); and *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004) (reversing unpublished decision of Sixth Circuit). The FJC findings were consistent with the advisory committee's conclusions, showing that a large minority of surveyed judges (55) found citations to unpublished opinions to be "occasionally," "often," or "very often" helpful. Only a small minority (14) agreed with the contention that unpublished opinions are "never" helpful. *FJC Report* at 10-11.

When attorneys can and do read unpublished opinions — and when judges can be and are influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about the unpublished opinions that both are reading.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal

and factual issues imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions because they know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished opinions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. To the contrary, a study of the federal appellate courts conducted by the Administrative Office at the request of the advisory committee found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" — that is, the time it takes appellate courts to dispose of cases — and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005).

The Federal Judicial Center, as part of its study, asked the judges of the First and D.C. Circuits — both of which have recently liberalized their citation rules — what impact, if any, the rule change had on the time needed to draft unpublished opinions and on their overall workload.

All of the judges who responded — save one — reported that the time they devoted to preparing unpublished opinions had "remained unchanged" and that liberalizing their citation rule had caused "no appreciable change" in the difficulty of their work. *See FJC Report* at 12-13, 42-43. In addition, when the Federal Judicial Center asked the judges of the nine circuits that permit citation of unpublished opinions for their persuasive value in at least some circumstances how much additional work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. *Id.* at 10, 38. The responses from the judges in the four restrictive circuits were more mixed. In the Seventh Circuit, a majority of judges (8 of 13) predicted that the time devoted to unpublished opinions would either stay the same or decrease. The Second Circuit was divided almost in thirds: seven judges predicted no impact or decrease, six judges predicted a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Half the judges in the Federal Circuit (7 of 14) predicted that the time devoted to unpublished opinions would not increase, four other judges predicted only a "moderate" increase, and only three judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, whose judges have expressed so much opposition to the new rule, 17 of 43 judges predicted no impact or a decrease — a few more (20) predicted a "great" or "very great" increase. *Id.* at 36.

It is true that every court is different. But the federal courts of appeals are enough alike that there should be *some* evidence that permitting citation of unpublished opinions causes the harms predicted by defenders of no-citation rules. No such evidence exists. The advisory committee found telling the lack of evidence that any court that had abolished or liberalized its no-citation rules had experienced any of these adverse consequences. Significantly, the

Committee received no comment that the citation policy has had bad consequences from any judge from a circuit that permitted citation of unpublished opinions.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand; because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.

The short answer to this argument is the same as the short answer to the argument about judicial workloads. Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that attorneys and litigants have experienced these consequences. Attorneys surveyed as part of the FJC study reported that proposed Rule 32.1 would not have an "appreciable impact" on their workloads. *FJC Report* at 17, 49. Moreover, the attorneys who expressed positive views about proposed Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits. *See id.* at 17-19, 50.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions, attorneys already apply and will continue to apply the same

common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, and law review articles — or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles — or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which requires that all opinions, including unpublished opinions, be made widely available at little or no cost.

Conclusions

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable in today's changed circumstances. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a

mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, proposed Rule 32.1 abolishes those rules and requires courts to permit unpublished opinions to be cited.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve proposed new Appellate Rule 32.1 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed new Federal Rule of Appellate Procedure is in Appendix A with an excerpt from the advisory committee report.

Rule Approved for Publication and Comment

The advisory committee proposed an amendment to Rule 25(a)(5) with a recommendation that it be published for comment.

The proposed amendment is part of a package of proposals to the Appellate, Bankruptcy, Civil, and Criminal Rules that address the privacy and security concerns arising from electronic case filings in compliance with the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281). The package is derived from and implements the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The proposed amendment to Rule 25 adopts by reference the privacy provisions proposed in the other sets of rules.

The Committee approved the recommendation of the advisory committee to circulate the proposed rule amendment to the bench and bar for comment.

Informational Item

Appellate practitioners and bar organizations, including the Council of Appellate Judges and the Department of Justice, have expressed concern that local rules regarding briefs are numerous, vague, and confusing, and that these rules are often in tension, if not in conflict, with the national rules. They also assert that these local requirements are difficult to find. At the advisory committee's request, the Federal Judicial Center completed a comprehensive report entitled *Analysis of Briefing Requirements in the United States Courts of Appeals* (2004). The Center found that every one of the courts of appeals imposes briefing requirements that are not found in the Appellate Rules, and that over half of the courts of appeals impose seven or more such requirements. On behalf of the advisory committee, the chair will mail a copy of the Center's report to chief judges, circuit executives, clerks, and circuit advisory rules committees, along with a letter encouraging each circuit to examine the local rules identified in the report and, where possible, to consider repealing them.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1009, 5005(c), and 7004 with a recommendation that they be approved and transmitted to the Judicial Conference. The scheduled public hearings on the amendments were canceled because the only person submitting a timely request to appear agreed instead to submit written comments.

The proposed amendment to Rule 1009 requires a debtor to submit a corrected social security number when the debtor learns that a previously submitted social security number is inaccurate and to provide notice of the corrected number to all others who have received the inaccurate number.

Under the proposed amendment to Rule 5005(c), the clerk of the bankruptcy appellate panel and district judges are added to the list of officers who can transmit erroneously delivered papers to the clerk of the bankruptcy court.

The proposed amendment to Rule 7004 makes clear that the debtor's attorney must be served with a copy of any summons and complaint filed against the debtor without regard to the manner in which the summons and complaint was served on the debtor, including personal service. Under the current rule, the debtor's attorney must be served only if the summons and complaint was served on the debtor by mail. Service on the debtor's attorney may be made by any method permitted under Civil Rule 5(b).

The advisory committee withdrew a proposed amendment to Rule 4002 implementing § 521 of the Bankruptcy Code, which requires the debtor to "surrender to the trustee" information and documentation of income and financial assets at the § 341 creditors' meeting. It withdrew the amendment because the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8) includes several provisions that require amendments to Rule 4002, which will be considered at a later date.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1009, 5005(c), and 7004 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 Bankruptcy Procedure are in Appendix B with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 3001, 3007, 4001, and 6006, and proposed new Rules 6003, 9005.1, and 9037 with a recommendation that they be published for comment.

The proposed amendment to Rule 3001 limits the length of supporting documents attached to a proof of claim. If the supporting documents exceed the page limits, the claimant may only file summaries and copies of relevant excerpts.

Under the proposed amendment to Rule 3007, a party in interest may not include a demand for relief requiring an adversary proceeding with an objection to the allowance of a claim. In addition, objections to more than one claim (omnibus objection) may be joined in a single pleading only if all the claims are filed by the same entity, or if the objections are based solely on non-substantive matters, such as filing untimely or duplicate claims, which often can be resolved quickly without substantial factual or legal dispute.

The proposed amendment to Rule 4001 requires a party seeking authority to use cash collateral, obtain debtor-in-possession financing, or approve related agreements to submit a brief motion summarizing the transactions and a proposed order granting the requested relief. The amendment also requires a party to provide more extensive notice to interested parties of specified provisions contained in credit agreements accompanying the motion.

Proposed new Rule 6003 limits the types of motions and the relief that can be granted during the first 20 days of a case. It is intended to alleviate some of the time pressures present at the start of a case, so that full consideration can be given to matters that may fundamentally affect the case and allow all parties to be involved.

The proposed amendment to Rule 6006 authorizes the use of an omnibus motion to assume, assign, or reject multiple executory contracts and unexpired leases. The amendment permits the consolidation of up to 100 such contracts and leases in a single motion to initiate the contested matter. Specific notice provisions are also included to alert nondebtor parties.

Proposed new Rule 9005.1 applies pending Civil Rule 5.1 — dealing with notification requirements involving constitutional challenges to a statute — to all contested matters and other proceedings in a bankruptcy case.

Proposed new Rule 9037 addresses the privacy and security concerns arising from electronic case filings in compliance with the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281). The rule is derived from and implements the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The Conference policy requires that documents in case files generally should be made available electronically to the same extent that they are available at the courthouse, provided that certain "personal data identifiers" are redacted and not included in the public file. The proposed rule exempts records of certain proceedings from the redaction requirements. It also authorizes a court to limit or prohibit remote electronic access by a non-party to a document filed with the court if necessary to protect private or sensitive information. The proposal is similar to proposed new Civil Rule 5.2 and Criminal Rule 49.1.

The Committee approved for publication proposed amendments to Rules 3001, 3007, 4001, and 6006, and proposed new Rules 6003, 9005.1, and 9037, which will now go to the bench and bar for comment.

Informational Item

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8), which generally takes effect on October 17, 2005. Several provisions in the 500-page Act require new or amended rules and forms. To meet the statutory effective date and to accommodate legal publishing firms who mass produce the Official Forms, the advisory committee intends to submit to the Committee in early August interim rules and amended or new Official Forms that are necessary to conform with the Act. The interim rules will not be binding on the courts, although it is expected that the courts will adopt them, as they have in the past when the enactment of legislation required prompt action. The revised and new Official Forms, however, will be binding on the courts in accordance with Bankruptcy Rule 9009, if they are approved by the Committee and the Judicial Conference.

The Committee expects to immediately review the advisory committee's recommendations and transmit the proposals to the Judicial Conference, with a request that, given the need for preparation in advance of the October 17 effective date, they be promptly approved by the Executive Committee on the Conference's behalf and circulated to the courts. The advisory committee will monitor the experiences of the courts with the interim rules and forms and proceed with the regular rulemaking process, leading to the promulgation of permanent national rules. Under this timetable, proposed rule amendments and any appropriate changes to the Official Forms will be published for public comment in August 2006.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G (with

conforming amendments to Rules 9(h), 14, 26(a), and 65.1), and revisions to Form 35 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 2004. Three public hearings were held at which 74 witnesses testified; many of these witnesses also submitted written comments. An additional 180 written comments were submitted.

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 first heard about problems with computer-based discovery at a discovery conference in 1996. In 1999, the then-chair laid out the advisory committee's daunting mission to devise "mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation." The advisory committee began intensive work on this subject in 2000. Since then, bar organizations, attorneys, computer specialists, and members of the public have devoted much time and energy in helping the rules committees understand and address the serious problems arising from discovery of electronically stored information. The advisory committee's study included several mini-conferences and one major conference, bringing together lawyers, academics, judges, and litigants with a variety of experiences and viewpoints. The advisory committee also heard from experts in information technology who provide technical electronic discovery services to lawyers and litigants.

The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents. Commonly cited current examples of

such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly. Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, unlike words on paper, may be incomprehensible when separated from the system that created it. These and other differences are causing problems in discovery that rule amendments can helpfully address.

The advisory committee monitored the experiences of the bar and bench with these issues for several years. It found that the discovery of electronically stored information is becoming more time-consuming, burdensome, and costly. The current discovery rules, last amended in 1970 to take into account changes in information technology, provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases. Developing case law on discovery into electronically stored information under the current rules is not consistent and is necessarily limited by the specific facts involved. Disparate local rules have emerged to fill this gap between the existing discovery rules and practice, and more courts are considering local rules. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop. While such inconsistencies are particularly confusing and debilitating to large public and private organizations, the uncertainty, expense, delays, and burdens of such discovery also affect small organizations and even individual litigants.

The costs of complying with unclear and at times vague discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, are becoming increasingly problematic. Unless timely action is taken to make the federal discovery rules better able to accommodate the distinctive features of electronic discovery, those rules will become increasingly removed from practice, and similarly situated litigants will continue to be treated differently depending on the federal forum.

Electronic Discovery in Historical Perspective

Before the civil rules became effective in 1938, discovery in both law and equity cases in the federal courts was extremely limited. The 1938 civil rules provided for liberal discovery, further expanded by amendments in 1946 and 1970. Since then, the discovery rules have been amended in 1980, 1983, 1993, and 2000 to provide more effective means for controlling overuse and occasional misuse of the discovery devices. Each of these proposed sets of discovery amendments was vigorously opposed both by those who perceived any narrowing of discovery as inimical to the basic premise of American litigation, and by those who protested that the rules committees had not gone far enough to control discovery and the attendant costs and delays. The present proposals have prompted similar reactions.

The present electronic discovery proposals grew out of the advisory committee's work on the 2000 amendments, which focused on the "architecture of discovery rules" to determine whether changes could be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management when appropriate. The proposed amendments to make the rules apply better to electronic discovery problems share the same focus.

The historical perspective shows that any proposal to add or strengthen rule provisions for discovery containment produces significant debate. Such debate is not in itself a sign that the proposals are fundamentally flawed. It is right to be concerned if the proposals are supported only by a narrow segment of the bench or bar. But it is not surprising to find that proposals to increase judicial involvement in discovery or to encourage the application of the existing proportionality factors — which require a court to limit discovery if the costs and burdens outweigh its likely benefits — would be opposed more by one side of the bar than the other.

In general, there is a high level of support for rules changes to recognize and accommodate electronic discovery. The American Bar Association Section on Litigation, the Federal Bar Council, and the New York State Bar Association Commercial and Federal Litigation Section, all submitted comments generally supporting the proposed electronic discovery amendments and made helpful criticisms during the public comment period. The Department of Justice, which both brings and defends civil actions, also favors the proposals. To achieve yet a larger consensus, specific aspects of the published proposal that had been criticized during the public comment period were revised.

The advisory committee unanimously approved the amendments proposed to Rules 16, 26(a), 26(b)(5), 26(f), 33, 34, and Form 35. All but two members of the advisory committee voted in favor of recommending approval of the amendments to Rule 37(f) and Rule 26(b)(2), including the parallel provisions in the proposed amendment to Rule 45. The Committee supported all but two of the proposed amendments unanimously. The only exceptions were the proposed amendments to Rule 26(b)(5) and the parallel provisions in the proposed amendment to Rule 45, as to which four members withheld their support, and the proposed amendment to Rule

37(f), as to which one member abstained. The Committee Note has been revised to address certain of the concerns raised about Rule 26(b)(5).

Proposed Amendments to Rules 16, 26(a), 26(f), 33, 34, 45, and Form 35

The proposed amendments to Rule 16, Rule 26(a) and (f), and Form 35 present a framework for the parties and the court to give early attention to issues relating to electronic discovery, including the frequently-recurring problems of the preservation of evidence and the assertion of privilege and work-product protection.

The amendment to Rule 16 is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation, if such discovery is expected to occur. Rule 16 is amended to invite the court to address the disclosure or discovery of electronically stored information in the Rule 16 scheduling order. The amendment also gives the court discretion to enter an order adopting any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after inadvertent production in discovery.

The proposed amendment to Rule 26(a) clarifies a party's duty to include in its initial disclosures electronically stored information by substituting "electronically stored information" for "data compilations." The amendment makes the rule consistent with disclosure practices in the courts and with the proposed electronic discovery amendment. It was not published for public comment and is recommended as a conforming amendment.

Under the proposed amendment to Rule 26(f), the parties' conference is to include discussion of any issues relating to disclosure or discovery of electronically stored information. The topics to be discussed include the form of producing electronically stored information, a distinctive and recurring problem in electronic discovery resulting from the fact that, unlike

paper, electronically stored information may exist and be produced in a number of different forms. The parties are to discuss preservation, which has new importance in this context because of the dynamic character of electronic information. The parties are also directed to discuss whether they can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production in discovery.

The problems that can result from efforts to guard against privilege waiver often become more acute when discovery of electronically stored information is sought. The volume of the information and the forms in which it is stored may make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming, yet less likely to detect all privileged information. Inadvertent production is increasingly likely to occur. Because the failure to screen out even one privileged item may result in an argument that there has been a waiver as to all other privileged materials related to the same subject matter, early attention to this problem is more important as electronic discovery becomes more common. Under the proposed amendments to Rules 26(f) and 16, if the parties are able to reach an agreement to adopt protocols for asserting privilege and work-product protection claims that will facilitate discovery that is faster and at lower cost, they may ask the court to include such arrangements in a case-management or other order.

The proposed amendments to Rules 33 and 34 clarify how these discovery workhorses are to apply to electronically stored information. The proposed amendment to Rule 33 clarifies that a party may answer an interrogatory involving review of business records by providing access to the information if the interrogating party can find the answer as readily as the responding party can.

Under the proposed amendment to Rule 34, electronically stored information is explicitly recognized as a category subject to discovery that is distinct from "documents" and "things." The term "documents" should not continue to be stretched to accommodate all the differences between paper and electronically stored information. Distinguishing in the rules between documents and electronically stored information makes it clear that there are differences between them important to managing discovery. Rule 34 is also amended to authorize a requesting party to specify the form of production, such as in paper or electronic form, and for the responding party to object. The rule provides an electronic discovery analogue to the existing language that prevents massive "dumps" of disorganized documents by requiring production of documents as they are ordinarily maintained or labeled to correspond with the categories in the request. Under the proposed amended rule, absent a court order, party agreement, or a request for a specific form for production, a party may produce responsive electronically stored information in the form in which the party ordinarily maintains it or in a reasonably usable form. Absent a court order, the party need only produce the same electronically stored information in one form.

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

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 Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 16, 26(a), 26(f), 33, 34, 45, and Form 35 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.

Proposed Amendment to Rule 26(b)(5)

The proposed amendment to Rule 26(b)(5) provides a procedure for asserting privilege after production that is parallel to the similar proposals for Rules 16 and 26(f). As noted in describing Rules 16 and 26(f), the volume of electronically stored information searched and produced in response to discovery can be enormous, and certain features of the forms in which such information is stored make it more difficult to review for privilege and work-product protection than paper. The inadvertent production of privileged or protected material is a substantial risk. The proposed amendment to Rule 26(b)(5) clarifies the procedure to apply when a responding party asserts a claim of privilege or of work-product protection after production.

Under the proposed amendment, if a party has produced information in discovery that it claims is privileged or protected as trial-preparation material, it may notify the receiving party of the claim, stating the basis for it. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. If the receiving party disclosed the information before being notified, the receiving party also must take reasonable steps to retrieve the information. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether a waiver has occurred. A producing party is not free to give belated notice of privilege or protection at any point in the litigation; courts will continue to examine whether a privilege or work-product protection claim was made at a reasonable time when delay is part of the substantive law on waiver.

Because the proposed amendment only establishes a procedure for asserting privilege or work-product protection claims after production and does not attempt to change the rules that determine whether production waives the privilege or protection asserted, it does not trigger the

special statutory process for adopting rules that modify privilege. By providing a clear procedure to allow the responding party to assert privilege after production, the amendment helpfully addresses the parties' burden of privilege review, which is particularly acute in electronic discovery.

The proposed amendment to Rule 26(b)(5) did not attract controversy or much comment during the public comment period. However, it was the occasion of considerable debate at the Committee meeting. The four members who voted against the amendment to Rule 26(b)(5) expressed the view that the new procedure could be used to disrupt litigation, particularly if the claim of privilege or work-product was made late in the case. The majority of the Committee did not share the concern that parties would deliberately delay a claim of privilege or work product because to do so might waive the protection under the applicable substantive law. Moreover, bad faith litigation tactics are subject to sanctions and control by the court.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 26(b)(5) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 26(b)(2)

The 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 because of undue burden or cost. While the features that may make it burdensome or costly to access electronically stored information vary from system to system and with the progress of electronic storage systems over time, examples under current technology include deleted information, information kept on some

backup-tape systems for disaster recovery purposes, and legacy data remaining from systems no longer in use.

The amendment requires the responding party to identify the sources of potentially responsive information that it has not searched or produced because of the costs and burdens of accessing the information. This is an improvement over the present practice, in which responding parties simply do not produce electronically stored information that is difficult to access. Under the amended rule, 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 responding party makes this showing, a court may order discovery for good cause and may impose appropriate terms and conditions. The proposed amendment codifies the best practices of parties and courts with experience in these issues.

The proposed amendment to Rule 26(b)(2) responds to distinctive problems encountered in discovery of electronically stored information that have no close analogue in the more familiar discovery of paper documents. Although computer storage often facilitates discovery, some forms of computer storage make it very difficult to access, search for, and retrieve information. The difficulties may arise for a number of different reasons primarily related to the technology of information storage, reasons that are likely to change over time. The information contained on easily accessed sources — whether computer-based, paper, or human — may be all that is reasonably useful or necessary for the litigation, particularly given the voluminous amounts of information characteristically available on computers. Lawyers sophisticated in these problems are developing a two-tier practice in which they first obtain and examine the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.

The relationship between the proposed rule and preservation is specifically addressed in the Committee Note, which states that the rule does not undermine or reduce common-law or statutory preservation obligations. A party is reminded that it may be obliged to preserve information stored on sources it has identified as not reasonably accessible, but the amendment does not attempt to define, and does not change, the preservation obligations that arise from independent sources of law. The amended rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes. A party that makes information "inaccessible" because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed amendment.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 26(b)(2) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 37(f)

The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without an affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper. Even when litigation is anticipated, it can be very difficult to interrupt or suspend the routine operation of computer systems to isolate and preserve discrete parts of the information they overwrite, delete, or update on an ongoing basis, without creating problems for the larger system. Routine cessation or suspension of these features of computer operation is

also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time-consuming. At the same time, a litigant's right to obtain evidence must be protected. There is considerable uncertainty as to whether a party must, at risk of severe sanctions, interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that the information might be sought in discovery. The advisory committee has heard strong arguments in support of better guidance in the rules.

The proposed amendment provides limited protection against sanctions under the rules for a party's failure to provide electronically stored information in discovery. The proposed amendment states that absent exceptional circumstances, sanctions may not be imposed under the civil rules if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith. The proposed rule recognizes that all electronic information systems are designed to recycle, overwrite, and change information in routine operation, not because of any relationship between the content of particular information and litigation, but because they are necessary functions of regular business operations. The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, again in ways that have no counterpart in managing hard-copy information. Using an example from current technology, many large organizations routinely recycle hundreds of backup tapes every two or three weeks; placing a hold on the recycling of these tapes for even short periods can result in hundreds of thousands of dollars of expense. Similarly, the regular purging of e-mails or other electronic communications is necessary to prevent a build-up of data that can overwhelm the most robust electronic information systems.

Systems must also be able to filter other types of communications in order to continue operations. Sophisticated and often custom-designed databases may be functional only if they continually revise the information they manage. Such information destruction features are an integral part of computer system design and operation. The amended rule applies only to information lost due to the "routine operation of an electronic information system" — the ways in which such systems are generally designed and programmed to meet the party's technical and business needs.

Sanctions are not avoided simply by showing that information was lost in the routine operation of an information system. It also must be shown that the operation was in good faith. The proposed amendment does not provide a shield for a party that intentionally destroys specific information because of its relationship to litigation, or for a party that allows such information to be destroyed in order to make it unavailable in discovery by exploiting the routine operation of an information system. Depending on the circumstances, good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation. When such a preservation obligation arises depends on the substantive law of each jurisdiction, which is not affected by the proposed rule. If a party is under a duty to preserve information because of pending or reasonably anticipated litigation, such intervention in the routine operation of an informational system is one aspect of what is often called a "litigation hold."

By stating that, absent exceptional circumstances, sanctions may not be imposed under the discovery rules for electronically stored information lost because of the routine good faith operation of a computer system, the proposed rule provides guidance in a troublesome area distinctive to electronic discovery.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 37(f) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed Amendment to Rule 50

Present Rule 50(b) allows a party to renew after trial a motion for judgment as a matter of law under Rule 50(a) made only at the close of all the evidence. The proposed amendment deletes the requirement that the Rule 50(a) motion be made again at the close of all the evidence, allowing renewal of a Rule 50(a) motion made at any time during trial. 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 the evidence but has failed to renew the motion at the close of all the evidence. The proposed amendment recognizes that a motion made at any time before the case is submitted to the jury fills the functional needs served by a motion made 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.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 50 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed New Supplemental Rule G on Forfeiture Actions and Conforming Amendments to Supplemental Rules A, C, E, and Civil Rules 9, 14, 26(a)(1)(E), 65.1

Proposed new Supplemental Rule G establishes comprehensive procedures governing in rem civil forfeiture actions. The new rule consolidates the procedures located in several admiralty rules and sets up a unified procedural framework solely intended to address civil asset forfeiture cases. Conforming amendments cross-referencing the new Rule G are also proposed to

Supplemental Rules A, C, and E and Civil Rules 9, 14, 26(a)(1)(E), and 65.1. Representatives from the Department of Justice and the National Association of Criminal Defense Lawyers worked with the advisory committee in developing the rule. Because of the helpful participation of these two organizations during the drafting of the rule, the published rule attracted no significant comment.

Forfeiture actions are presently litigated under various Supplemental Rules, which are primarily designed to handle admiralty actions and present difficult issues when applied to asset forfeiture actions. Moreover, the Supplemental Rules have not been revised to take account of the Civil Asset Forfeiture Reform Act of 2000, which made comprehensive changes affecting civil forfeiture proceedings. Nor have the Supplemental Rules been revised to take account of the constitutional jurisprudence dealing with adequate notice that has developed since the rules were last revised. The disconnect between the Supplemental Rules and in rem forfeiture procedures has become acute because the number of forfeiture actions has increased. The proposed new rule addresses these problems in an integrated and coherent fashion.

Among other things, the proposed rule sets out procedures governing the filing and response to complaints involving in rem forfeitures, requires judicial authorization of arrest warrants in some cases, specifies notice requirements — including provisions for personal notice to potential claimants and anticipating the use of the internet to provide a designated government forfeiture web site as 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 proposed amendments to Rules 9, 14, and 65.1 are technical conforming amendments, which were not published for public comment.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Supplemental Rules A, C, E, and new Rule G and conforming amendments to Civil Rules 9, 14, 26(a)(1)(E), 65.1 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.

Rule Approved for Publication and Comment

The advisory committee proposed new Rule 5.2 with a recommendation that it be published for comment.

The proposed new Rule 5.2 is part of a package of proposals to the Appellate, Bankruptcy, Civil, and Criminal Rules that addresses the privacy and security concerns arising from electronic case filings in compliance with the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281). The package is derived from and implements the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The proposed new rule specifically limits remote access to social security and immigration case electronic filings. The Social Security Administration and Department of Justice asked the advisory committee to give special treatment to these cases due to the prevalence 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 unless the court orders otherwise.

The Committee approved the recommendation of the advisory committee to circulate the proposed new rule to the bench and bar for comment.

Informational Items

In February 2005, a comprehensive revision of the Civil Rules designed to simplify, clarify, and eliminate ambiguities in the rules was circulated to the bench and bar for comment. The comment period expires on December 15, 2005. The advisory committee has revised the illustrative forms contained in the Appendix of Forms to the Federal Rules of Civil Procedure consistent with the plain-English conventions adopted in the proposed restyled Civil Rules. In order to synchronize both style projects, the proposed form revisions are expected to be published for public comment in August, and the comment period will expire on February 15, 2006. This timetable will ensure that both the proposed restyled rules and forms will be considered simultaneously.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules proposed amendments to Rules 5, 6, 32.1, 40, 41, and 58 with a recommendation that they be approved and transmitted to the Judicial Conference. The scheduled public hearings on the amendments were canceled because no person submitted a request to testify.

The proposed amendments to Rules 5(c), 32.1, and 41 authorize a magistrate judge to handle discrete transactions in certain proceedings by reliable electronic means, including by facsimile. The amendments recognize the growing number of courts accepting electronic filings and are intended to facilitate the use of electronic transmissions of official documents as an efficient and convenient means of conducting business. In determining which electronic means are reliable, a court is advised to consider the expected quality, security, and clarity of the transmission.

Under the proposed amendment to Rule 5(c), a magistrate judge may accept an arrest warrant transmitted by reliable electronic means when ordering the transfer of a defendant arrested in a district other than where the offense was allegedly committed to the district where the offense allegedly was committed. The present rule requires the government to produce the warrant, a certified copy, or a facsimile copy of either document.

Under the proposed amendment to Rule 32.1, a magistrate judge may accept a certified copy of a judgment, warrant, or warrant application by reliable electronic means, including by facsimile, when ordering the transfer of a defendant arrested in a district that does not have jurisdiction to hold a revocation hearing to the district that has jurisdiction to conduct a probation or supervised release revocation or modification hearing.

The proposed amendment to Rule 41 authorizes a magistrate judge to issue a search and seizure warrant based on information communicated by reliable electronic means or by telephone.

The proposed amendment to Rule 6 makes technical changes to the language added to the rule by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458) in order to conform the new language with the conventions adopted during the comprehensive restyling of the Criminal Rules. No substantive change is made. The amendments were not published for comment because they are entirely technical and conforming in nature.

The proposed amendment to Rule 40 authorizes a magistrate judge to set conditions of release for a defendant arrested for violating any condition of release set originally in another district. The present rule authorizes a magistrate judge to set release conditions for a defendant who fails to appear in another district as ordered by the court in that other district. The advisory committee concluded that it is inconsistent to empower a magistrate judge to release a defendant

who fails to appear altogether, but not to release one who only violated conditions of release in a minor way.

The proposed amendment to Rule 41 provides procedural guidance to a judge issuing a "tracking device" warrant authorized under 18 U.S.C. § 3117 and case law. These warrants may be required to monitor devices when they are used to track persons or property in areas where there is a reasonable expectation of privacy. The proposed amendment regulates the installation of the device; the contents, execution, and return of a tracking-device warrant; and the notice to the person who had been subject to the tracking device. The proposed amendment conforms to the USA PATRIOT ACT (Pub. L. No. 107-56) and includes a provision authorizing a judge to delay any notice required in conjunction with issuing any search warrant. The proposed amendment to Rule 41 had been approved by the Committee at its June 2003 meeting, but it was later withdrawn at the request of the Department of Justice. After further review, the Department of Justice had no additional recommendations and voted in favor of the proposal.

The proposed amendment to Rule 58 clarifies that a defendant's right to a preliminary hearing is governed by Rule 5.1, and it is not limited to defendants held in custody.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 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 Criminal Procedure are in Appendix D with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 11, 32, 35, 45, and new Rule 49.1 with a recommendation that they be published for comment.

The proposed amendments to Rules 11, 32, and 35 are part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005).

Rule 11 would be amended to eliminate the requirement that a court advise a defendant during the Rule 11 plea colloquy that it is obligated to apply the Sentencing Guidelines. Instead, the amended rule requires the court to advise the defendant that it is obligated to calculate the applicable sentencing guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553.

Amendments to three subdivisions of Rule 32 are proposed to conform with the *Booker* ruling. The proposed amendment to Rule 32(d) makes clear that the court can instruct the probation officer to gather in the presentence report information relevant to the factors under 18 U.S.C. § 3553. The proposed amendment to Rule 32(h) requires notice not only when the court is considering departing from the guidelines on the basis of factors not identified in the presentence report or pleadings, but also when it is considering a non-guideline sentence based on the factors in 18 U.S.C. § 3553(a) on a ground not identified in the presentence report or pleadings. The purpose of the amendment is to continue to avoid unfair surprise to the parties in the sentencing process. Under the proposed amendment to Rule 32(k), a court is required to enter judgment using the form prescribed by the Judicial Conference to facilitate the collection of useful and accurate sentencing data. (On June 27, 2005, the Executive Committee, acting on the Conference's behalf, approved a revised form reflecting the changes in sentencing law and practice resulting from *Booker*.)

The proposed amendment to Rule 35 removes language, inconsistent with the ruling in *Booker*, that treats the guidelines as mandatory.

Amended Rule 45 clarifies the computation of the additional three days provided a party to respond when service is made by mail, leaving with the clerk of court, or electronic means. The Supreme Court approved a similar proposal to Civil Rule 6, which is due to take effect on December 1, 2005, unless Congress acts otherwise.

The proposed new Rule 49.1 is part of a package of proposals to the Appellate, Bankruptcy, Civil, and Criminal Rules that addresses the privacy and security concerns arising from electronic case filings in compliance with the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281). The package is derived from and implements the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The proposed new rule differs from the common provisions proposed in the other sets of rules in several respects to account for special considerations arising in criminal cases, including provisions that permit the partial redaction of an individual's home address and an exemption from redaction for certain information needed for forfeitures. Also no reference is made to immigration and social security cases, which are exclusively civil in nature. The proposed provisions specifically account for writs of habeas corpus.

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

Informational Item

The advisory committee continues to study proposed amendments to Rule 29 that would prohibit a judge from entering a judgment of acquittal before a verdict unless the defendant waives Double Jeopardy rights. It also is considering a proposed amendment to Rule 16 that

clarifies when and what type of exculpatory evidence must be disclosed before trial consistent with *Brady* requirements.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules proposed amendments to Rules 404, 408, 606, and 609 with a recommendation that they be approved and transmitted to the Judicial Conference. Each addresses a longstanding conflict among the courts of appeals. The proposed amendments were published for comment in August 2004. The scheduled public hearing was canceled because no request to testify was submitted. The Committee vote was unanimous to approve each of the four amendments.

The proposed amendment to Rule 404(a) resolves the conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case. The original purpose of the rule was to bar the admission of character evidence when offered to prove a person's conduct, because the evidence might lead to a trial of personality and cause a jury to decide the case on improper grounds. A limited exception was recognized in criminal cases in deference to the possibility that character evidence might be the defendant's sole defense and as a counterweight to the resources of the government. Over time, some courts began extending this limited exception and permitted the use of character evidence in civil cases. Under the amendment, evidence of a person's character is never admissible in a civil case to prove that the person acted in conformity with the character trait. The advisory committee concluded that a clear rule is necessary to avoid the serious risks of prejudice, confusion, and delay that may arise when character evidence is used to prove that a person acted in conformity with the character trait.

The proposed amendment to Rule 408 resolves three longstanding conflicts in the courts about the admissibility of statements and offers made in settlement negotiations when offered to prove the validity or amount of the claim. The amendment does not alter the current rule that such information can be used for other purposes.

Resolving the first conflict, the proposed amendment provides that a statement or conduct regarding a claim made in the course of settlement negotiations in a civil dispute is barred in a subsequent criminal case, unless the statement was made in an action brought by a government regulatory, investigative, or enforcement agency. When an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The proposed amendment published for comment contained a broader exception, which would have permitted a statement or conduct regarding a claim made during settlement negotiations to be admitted in any subsequent criminal case. The proposal was revised to except such a statement or conduct only when made in a civil dispute initiated by a government agency.

The proposed amendment distinguishes statements and conduct in settlement negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise settlement of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded from all criminal cases if offered against the defendant as an admission of fault because a defendant may offer or agree to settle a litigation for reasons other than a recognition of fault.

Resolving the second conflict, the proposed amendment to Rule 408 also prohibits the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. The advisory committee concluded that broad impeachment would impair the public policy of promoting settlements by chilling

settlement negotiations as the parties may fear that anything they say could somehow be found inconsistent with a later statement at trial.

Resolving the third conflict, the proposed amendment to Rule 408 bars a party from introducing its own statements and offers made during settlement negotiations when offered to prove the validity, invalidity, or amount of the claim. Waiving the protection unilaterally would implicitly disclose the adversary's involvement in the compromise negotiations and might also require testimony from the participating attorneys about what statements and offers were made in the alleged compromise, leading to disqualifications.

The proposed amendment to Rule 606(b) clarifies whether statements from jurors can be admitted to prove disparity between the verdict rendered and the verdict intended by the jurors. All courts have permitted jury testimony to prove certain errors in the verdict, even though the text of the rule is silent on the issue. But there is a longstanding conflict among the courts about the breadth of that exception, with some courts finding an exception whenever the verdict has an effect that is different from the result that the jury intended to reach.

The proposed amendment generally prohibits parties from introducing testimony or affidavits from jurors in an attempt to impeach the jury verdict. It admits proof of juror statements, but only to show "whether there was a mistake in entering the verdict onto the verdict form."

The advisory committee concluded that adopting a broad exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would unduly interfere with juror deliberations and undermine the finality of jury verdicts. In addition, a broad exception was rejected because an inquiry into whether the jury misunderstood or misapplied an instruction improperly would intrude into the jurors' mental processes underlying

the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. The proposed amendment does not prevent the court from polling the jurors before the jury is discharged and taking steps to remedy any error that seems obvious when the jury is polled.

The proposed amendment to Rule 609 resolves the conflict among the courts about whether a prior conviction involves dishonesty or false statement, which can automatically be used to impeach the witness. The proposed amendment permits automatic impeachment only "if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness."

Under the amendment, the crime must be a crime of dishonesty or false statement. Evidence of all other crimes is inadmissible under the rule, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. The proposed amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. If the deceitful nature of the crime is not apparent from the statute and the face of the judgment — as, for example, when a state court conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly — a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. But the proposed amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 404, 408, 606, and 609 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 Evidence are in Appendix E with an excerpt from the advisory committee report.

LONG-RANGE PLANNING

The Committee was provided a report of the March 14, 2005, meeting of the Judicial Conference's committee chairs involved in long-range planning.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select proposed amendments generating significant interest is set forth in Appendix F.

Respectfully submitted,

David F. Levi, Chair

David M. Bernick	Mary Kay Kane
David J. Beck	John G. Kester
James B. Comey	Mark R. Kravitz
Charles J. Cooper	J. Garvan Murtha
Sidney A. Fitzwater	Thomas W. Thrash
Harris L. Hartz	Charles Talley Wells

Appendix A — Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B — Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C — Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D — Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix E — Proposed Amendments to the Federal Rules of Evidence
Appendix F — Report to the Chief Justice on Proposed Amendments Generating Significant Interest

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

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JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 6, 2005

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 18, 2005, in Washington, D.C. The Committee gave final approval to two amendments, approved another amendment for publication, and removed two items from its study agenda.

* * * * *

II. Action Items

* * * * *

A. Items for Final Approval

1. New Rule 32.1

a. Introduction

The Committee proposes to add a new Rule 32.1 that will require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished" or "non-precedential" by a federal court. New Rule 32.1 will also require parties who cite unpublished or non-precedential opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties.

b. Text of Proposed Amendment and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

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

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions collectively as "unpublished" opinions.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a contention of issue preclusion or claim preclusion. But the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. Some circuits have freely permitted such citation, others have discouraged it but permitted it in limited circumstances, and still others have forbidden it altogether.

Rule 32.1(a) is intended to replace these inconsistent standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal

court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion of a federal court must provide a copy of that opinion to the court of appeals and to the other parties, unless that opinion is available in a publicly accessible electronic database — such as a commercial database maintained by a legal research service or a database maintained by a court. A party who is required under Rule 32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

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c. Changes Made After Publication and Comment*

The changes made by the Advisory Committee after publication are described in my May 14, 2004 report to the Standing Committee. At its April 2005 meeting, the Advisory Committee directed that two additional changes be made.

First, the Committee decided to add "federal" before "judicial opinions" in subdivision (a) and before "judicial opinion" in subdivision (b) to make clear that Rule 32.1 applies only to the unpublished opinions of federal courts. Conforming changes were

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*At its June 15-16, 2005, meeting, the Standing Rules Committee with the advisory committee chair's concurrence agreed to delete sections of the Committee Note, which provided background information on the justification of the proposal.

made to the Committee Note. These changes address the concern of some state court judges — conveyed by Chief Justice Wells at the June 2004 Standing Committee meeting — that Rule 32.1 might have an impact on state law.

Second, the Committee decided to insert into the Committee Note references to the studies conducted by the Federal Judicial Center ("FJC") and the Administrative Office ("AO"). (The studies are described below.) These references make clear that the arguments of Rule 32.1's opponents were taken seriously and studied carefully, but ultimately rejected because they were unsupported by or, in some instances, actually refuted by the best available empirical evidence.

d. Summary of Public Comments

The 500-plus comments that were submitted regarding Rule 32.1 were summarized in my May 14, 2004 report to the Standing Committee. I will not again describe those comments. Rather, I will describe the empirical work that has been done at the request of the Advisory Committee.

You no doubt recall that, at its June 2004 meeting, the Standing Committee returned Rule 32.1 to the Advisory Committee with the request that the proposed rule be given further study. The Standing Committee was clear that its decision did not signal a lack of support for Rule 32.1. Rather, given the strong opposition to the proposed rule expressed by many commentators, and given that some of the arguments of those commentators could be tested empirically, the Standing Committee wanted to ensure that every reasonable step was taken to gather information before Rule 32.1 was considered for final approval.

Over the past year, Dr. Timothy Reagan and several of his colleagues at the FJC have conducted an exhaustive — and, I am sure, exhausting — study of the citation of unpublished opinions. A copy of the FJC's lengthy report has been distributed under separate cover. Before I summarize that report, I again want to thank Dr. Reagan and his colleagues at the FJC for their extraordinarily thorough and helpful research.

The FJC's study involved three components: (1) a survey of all 257 circuit judges (active and senior); (2) a survey of the attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. I will focus on the results of the two surveys, for those are the components of the research that are most relevant to the question of whether Rule 32.1 should be approved.

The attorneys received identical surveys. The judges did not. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which altogether forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C. Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. The response rate for both judges and attorneys was very high.

The FJC's survey of judges revealed the following, among other things:

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote to preparing those opinions. A large majority of judges said that neither would change. Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to *discourage* the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said "no." Opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them "citable") or decrease in length (as judges make them "uncitable"). The responses of the judges in the circuits that now permit citation provide no support for these contentions.

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a "permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

3. The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions — a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions in unrelated cases.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a "very small," "small," or "moderate" increase. Only a small minority agreed with the argument of Rule 32.1's opponents that the proposed rule would result in a "great" or "very great" increase in the time devoted to preparing unpublished opinions.

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges in the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great" or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

4. The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any "special characteristics" of their particular circuits. A majority of Seventh Circuit judges said "no." A majority of Second, Ninth, and Federal Circuit judges said "yes." In response to a request that they describe those "special circumstances," most respondents cited arguments that would seem to apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them. Only a few described anything that was unique to their particular circuit.

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creates either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

6. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (68) said "never" or "seldom," but quite a large minority (55) said "occasionally," "often," or "very often." Only a small minority (14) agreed with the contention of some of Rule 32.1's opponents that unpublished opinions are "never" helpful.

7. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit's published opinions.

According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that view, as a majority of judges responded that unpublished opinions are "never" (19) or "seldom" (67) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (36) said that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.

8. The FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1 have consistently claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges — save one — said that the time they devote to preparing unpublished opinions had "remained unchanged." Only one reported a "small increase" in work. And all of the judges — save one — said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work. Only one reported that the work had become more difficult, but even that judge said that the change had been "very small."

As noted, the FJC also surveyed the attorneys that had appeared in a random sample of fully briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

1. The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion *of the forum circuit* that they wanted to cite but could not, because of a no-citation rule. Just over a third of attorneys (39%) said "yes." It was not surprising that the percentage of attorneys who said "yes" was highest in the restrictive circuits (50%) and lowest in the permissive circuits (32%). What was surprising was that almost a third of the attorneys in the *permissive* circuits responded "yes." Given that the Third and Fifth Circuits impose no restriction on the citation of unpublished opinions — and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002 — the number of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than 32%. When pressed by the Advisory Committee to explain this anomaly, Dr. Reagan responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules.

2. The FJC asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of *another circuit* that they wanted to cite but could not, because of a no-citation rule. Not quite a third of attorneys (29%) said "yes." Again, the affirmative responses were highest in the restrictive circuits (39%).

3. The FJC asked attorneys, with respect to the particular appeal, whether they *would* have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (47%) said that they would have cited at least one unpublished opinion of *that circuit*, and about a third (34%) said that they would have cited at least one unpublished opinion of *another circuit*. Again, affirmative responses were highest in the restrictive circuits (56% and 36%, respectively), second highest in the discouraging circuits (45% and 34%), and lowest in the permissive circuits (40% and 30%).

4. The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were "substantially less burdensome" (1 point), "a little less burdensome" (2 points), "no appreciable impact" (3 points), "a little bit more burdensome" (4 points), and "substantially more burdensome" (5 points). The average "score" was 3.1. In other words, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would *not* have an "appreciable impact" on their workloads — contradicting the predictions of opponents of Rule 32.1.

5. Finally, the FJC asked attorneys to provide a narrative response to an open-ended question asking them to predict the likely impact of Rule 32.1. If one assumes that an attorney who predicted a negative impact opposes Rule 32.1 and that an attorney who predicted a positive impact supports Rule 32.1, then 55% of attorneys favored the rule, 24% were neutral, and only 21% opposed it. In every circuit — save the Ninth — the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact. The difference was almost always at least 2 to 1, often at least 3 to 1, and, in a few circuits, over 4 to 1. Only in the

Ninth Circuit — the epicenter of opposition to Rule 32.1 — did opponents outnumber supporters, and that was by only 46% to 38%.

The AO also did research for us — research for which we are also very grateful. The AO identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule. The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year. The AO focused on median case disposition times and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). The AO's report is attached. As you will see, the AO found little or no evidence that liberalizing a citation rule affects median case disposition times or the frequency of summary dispositions. The AO's study thus failed to support two of the key arguments made by opponents of Rule 32.1: that permitting citation of unpublished opinions results in longer case disposition times and in more cases being disposed of by one-line orders.

The Advisory Committee discussed the FJC and AO studies at great length at our April meeting. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, fail to support the main arguments against Rule 32.1. Some Committee members — including one of the two opponents of Rule 32.1 — went further and contented that the studies in some respects actually refute those arguments. Needless to say, for the seven members of the Advisory Committee who have supported Rule 32.1, the studies confirmed their views. But I should note that, even for the two members of the Advisory Committee who have opposed Rule 32.1, the studies were influential. Both announced that, in light of the studies, they were now prepared to support a national rule on citing unpublished opinions. Those two members still do not support Rule 32.1 — they

prefer a discouraging citation rule to a permissive citation rule — but it is worth emphasizing that, in the wake of the FJC and AO studies, not a single member of the Advisory Committee now believes that the no-citation rules of the four restrictive circuits should be left in place.

2. Rule 25(a)(2)(D)

a. Introduction

At the request of the Committee on Court Administration and Case Management ("CACM"), the Appellate Rules Committee has proposed amending Appellate Rule 25(a)(2)(D) to authorize the circuits to use their local rules to mandate that all papers be filed electronically. Virtually identical amendments to Bankruptcy Rule 5005(a)(2) and Civil Rule 5(e) (which is incorporated by reference into the Criminal Rules) — accompanied by virtually identical Committee Notes — were published for comment at the same time as the proposed amendment to Appellate Rule 25(a)(2)(D).

b. Text of Proposed Amendment and Committee Note

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit or require 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. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under Rule 25(a)(2)(D), a local

rule that requires electronic filing must include reasonable exceptions, but Rule 25(a)(2)(D) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 25(a)(2)(D).

A local rule may require that both electronic and "hard" copies of a paper be filed. Nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise.

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c. Changes Made After Publication and Comment

Rule 25(a)(2)(D) has been changed in one significant respect: It now authorizes the courts of appeals to require electronic filing only "if reasonable exceptions are allowed."* The published version of Rule 25(a)(2)(D) did not require "reasonable exceptions." The change was made in response to the argument of many commentators that the national rule should require that the local rules include exceptions for those for whom mandatory electronic filing would pose a hardship.

Although Rule 25(a)(2)(D) requires that hardship exceptions be included in any local rules that mandate electronic filing, it does not attempt to define the scope of those exceptions. Commentators were largely in agreement that the local rules should include hardship exceptions of some type. But commentators did not agree about the

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*At its June 15-16, 2005, meeting, the Standing Rules Committee with the concurrence of the advisory committee chair agreed to set out the "reasonable exception" clause as a separate sentence in the rule, consistent with drafting conventions of the Style Project.

perimeters of those exceptions. The Advisory Committee believes that, at this point, it does not have enough experience with mandatory electronic filing to impose specific hardship exceptions on the circuits. Rather, the Advisory Committee believes that the circuits should be free for the time being to experiment with different formulations.

The Committee Note has been changed to reflect the addition of the "reasonable exceptions" clause to the text of the rule. The Committee Note has also been changed to add the final two sentences. Those sentences were added at the request of Judge Sandra L. Lynch, a member of CACM. Judge Lynch believes that there will be few appellate judges who will want to receive only electronic copies of briefs, but there will be many who will want to receive electronic copies in addition to hard copies. Thus, the local rules of most circuits are likely to require a "written" copy or "paper" copy, in addition to an electronic copy. The problem is that the last sentence of Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." Judge Lynch's concern is that this sentence may leave attorneys confused as to whether a local rule requiring a "written" or "paper" copy of a brief requires anything in addition to the electronic copy. The final two sentences of the Committee Note are intended to clarify the matter.

d. Summary of Public Comments

Leroy White, Esq. (04-AP-001) is concerned that requiring mandatory electronic filing may be "premature." He senses "no enthusiasm" for electronic filing among lawyers and asserts that only one court of appeals (the Eleventh Circuit) requires it. "Congress should take the lead" on this issue.

The **Office of General Counsel of the Department of Defense** (04-AP-002) does not have any suggested changes.

The **American Bar Association** (04-AP-003) is "concerned that the proposed rules may impede full access because they do not require that local rules make some provision for those who might be unable to use an electronic filing system." The ABA believes that the amendments should be revised to require that local rules mandating electronic filing include accommodations for indigent, disabled, and pro se litigants. Specifically, the ABA urges that the amendments incorporate the safeguards of ABA Standard 1.65(c)(ii):

> *Mandatory Electronic Filing Processes:* Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees in appropriate circumstances, the court allows for the exceptions needed to ensure access to justice for indigent, disabled or self-represented litigants, the court provides adequate advanced notice of the mandatory participation requirements, and the court (or its representative) provides training for filers in the use of the process.

Mr. Eliot S. Robinson (04-AP-004) is concerned about the impact of the amendment on pro se litigants. He believes that pro se litigants should be exempt from mandatory electronic filing and that those who want to file electronically should receive assistance, such as training and "remote pro se system access." He also urges that "[o]nly non-proprietary files standards [such as PDF] shall be used."

The **Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board** (04-AP-005)

opposes the amendments. The Committee believes that permitting courts to mandate electronic filing is "premature" and argues that, "if mandatory filing is allowed, then there must be exceptions provided for in accordance with nationally applicable standards that assure equal and full access to the courts." Without such exceptions, the Committee asserts, the amendments "are a recipe for inconsistency, inequality, and inaccessibility." The Committee is particularly concerned about the impact of the amendments on pro se litigants, the disabled, the elderly, the incarcerated, those without access to technology, and those who may have access to technology but do not know how to use it. The Committee is concerned not only with the absence of any hardship exception, but with the lack of "requirements . . . for in forma pauperis sta[tus]."

HALT: An Organization of Americans for Legal Reform (04-AP-006) recommends that the following sentence be added at the end of Rule 25(a)(2)(D): "Courts requiring electronic filing must make exceptions for parties such as *pro se* litigants who cannot easily file by electronic means, allowing such parties to file manually upon showing of good cause." HALT asserts that it is not enough to encourage a hardship exception in the Committee Note; rather, such an exception should be required by the rule itself.

The **Self Help Committee of the Northwest Women's Law Center** (04-AP-007) reports that a significant percentage of its clientele does not have access to technology and expresses concern that the amendments "do not take into account the probability that mandatory electronic filing will pose yet another hurdle for individuals representing themselves." The Committee urges that the amendments be revised to "include a mandate for all federal courts to ensure access for *pro se* litigants."

The **Committee on Federal Courts of the State Bar of California** (04-AP-008) supports the proposed amendments.

The **Standing Committee on the Delivery of Legal Services of the State Bar of California** (04-AP-009) argues that the amendments should require exceptions for "pro se litigants who lack resources and/or the ability to comply, such as incarcerated individuals" and "attorneys who lack the technological resources to file papers electronically such as some legal aid attorneys and some pro bono attorneys."

Richard Zorza, Esq. (04-AP-010) is concerned that the amendments will "add[] an additional barrier to access to self represented litigants." Local rules may not include hardship exceptions or may include hardship exceptions that are inadequate. He urges that mandatory filing be imposed only on those represented by counsel.

* * * * *

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

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JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Thomas S. Zilly, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 2, 2005**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 10-11, 2005, in Sarasota, Florida. The purpose of this report is to outline actions taken by the Advisory Committee at its spring meeting. The Advisory Committee considered public comments regarding the preliminary draft of proposed amendments to Bankruptcy Rules 1009, 2002(g), 4002, 5005(c), 7004(b)(9), 7004(g), 9001, and 9036, and Schedule I of Official Form 6 that were published in August 2004 and the preliminary draft of the proposed amendment to Rule 5005(a)(2) that was published in November 2004. After review of the public comments, the Committee gave its final approval to various proposed amendments which we ask the Standing Committee to approve. The proposed amendments to Rules 2002(g), 9001, and 9036 were approved by the Committee by an email ballot and by the Standing Committee before the meeting.

* * * * *

III. Action items

(A) Proposed Amendments to Bankruptcy Rules 1009, 4002, 5005(a)(2), 5005(c), 7004(b)(9), and 7004(g) Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.*

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the following amendments for submission to the Judicial Conference.

1. *Public Comment.*

The proposed amendments to Bankruptcy Rules 1009, 4002, 5005(c), 7004(b)(9), and 7004(g), and Schedule I of Official Form 6 were published for comment in August 2004. The proposed amendment to Rule 5005(a)(2) was published for comment in November 2004. Public hearings on the proposed amendments were scheduled for February 3 and February 7, 2005. There was only one timely request to appear at a hearing and that commentator agreed to submit his comments in writing. The comments on the proposals are summarized immediately following the text of each rule to which the particular comment applied. After review of the comments, the Advisory Committee approved the following proposed amendments either as published or with slight changes that are described in the Changes Made After Publication section. The Committee recommends to the Standing Committee that final approval be given to each of the following amendments:

2. *Synopsis of Proposed Amendments:*

(a) Rule 1009. This amendment would require the debtor to submit a corrected social security number when the debtor becomes aware of an error in a previously submitted statement.

* * * * *

(c) Rule 5005(a)(2). This amendment would allow courts to permit or require electronic filings. The Advisory Committee voted to amend the published rule to add a new second sentence as follows: "Courts requiring electronic filing shall reasonably accommodate parties who cannot feasibly comply with the mandatory electronic filing rule". This change was made in light of the public comments expressing concerns about the burden upon pro se and other litigants who would find it difficult to comply with mandatory filing requirements.

*The advisory committee withdrew the proposed amendment to Rule 4002 for further consideration in light of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. Law No. 109-8).

(d) Rule 5005(c). This amendment adds district judges and the clerk of the bankruptcy appellate panel to a list of persons who can transmit erroneously delivered papers to the clerk of the bankruptcy court.

(e) Rule 7004(b)(9). This amendment removes "or statement of affairs" from the rule. The Advisory Committee voted to amend the Committee Note to explain the removal of this language.

(f) Rule 7004(g). This amendment revises the method of service of a summons and complaint on the attorney for the debtor whenever an entity serves the debtor with a summons and complaint.

(g) An amendment to Schedule I to Form 6 was approved by the Advisory Committee. After the meeting, however, the amendment was referred back to the Forms Subcommittee for further review in light of the bankruptcy legislation.

3. *Text of Proposed Amendments to Rules 1009, 4002, 5005(a)(2), 5005(c), 7004(b)(9), and 7004(g)*

The text of the proposed amendments and Committee Notes, summaries of the comments which apply to each of the proposed amendments, and changes made since publication are attached to this report.

* * * * *

ATTACHMENTS

Text of proposed amendments recommended for approval and Committee Notes, summaries of the comments on each proposed amendment, and changes made since publication.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements.

* * * * *

(c) STATEMENT OF SOCIAL SECURITY NUMBER.

If a debtor becomes aware that the statement of social security number submitted under Rule 1007(f) is incorrect, the debtor shall promptly submit an amended verified statement setting forth the correct social security number. The debtor shall give notice of the amendment to all of the entities required to be included on the list filed under Rule 1007(a)(1) or (a)(2).

(d) TRANSMISSION TO UNITED STATES TRUSTEE.

The clerk shall ~~forthwith~~ promptly transmit to the United States trustee a copy of every amendment filed or submitted under ~~pursuant to~~ subdivision (a), (b), or (c) ~~or (b)~~ of this rule.

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

COMMITTEE NOTE

Subdivision (c). Rule 2002(a)(1) provides that the notice of the § 341 meeting of creditors include the debtor's social security number. It provides creditors with the full number while limiting publication of the social security number otherwise to the final four digits of the number to protect the debtor's identity from others who do not have the same need for that information. If, however, the social security number that the debtor submitted under Rule 1007(f) is incorrect, then the only notice to the entities contained on the list filed under Rule 1007(a)(1) or (a)(2) would be incorrect. This amendment adds a new subdivision (c) that directs the debtor to submit a verified amended statement of social security number and to give notice of the new statement to all entities in the case who received the notice containing the erroneous social security number.

Subdivision (d). Former subdivision (c) becomes subdivision (d) and is amended to include new subdivision (c) amendments in the list of documents that the clerk must transmit to the United States trustee.

Other amendments are stylistic.

Changes Made After Publication: No changes since publication.

Public Comment on Proposed Amendments to Rule 1009:

1. Comment 04-BK-039 Submitted by the State Bar of California Committee on Federal Courts. The Committee supports the amendment without qualification.

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Filing by Electronic Means.* A court may by local rule permit or require documents 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. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

(c) ERROR IN FILING OR TRANSMITTAL. A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the

trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

COMMITTEE NOTE

Subdivision (a). Amended Rule 5005(a)(2) acknowledges that many courts have required electronic filing by means of a

standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filings. Courts requiring electronic filing must make reasonable exceptions for persons for whom electronic filing of documents constitutes an unreasonable denial of access to the courts. Experience with the rule will facilitate convergence on uniform exceptions in an amended Rule 5005(a)(2).

Subdivision (c). The rule is amended to include the clerk of the bankruptcy appellate panel among the list of persons required to transmit to the proper person erroneously filed or transmitted papers. The amendment is necessary because the bankruptcy appellate panels were not in existence at the time of the original promulgation of the rule. The amendment also inserts the district judge on the list of persons required to transmit papers intended for the United States trustee but erroneously sent to another person. The district judge is included in the list of persons who must transmit papers to the clerk of the bankruptcy court in the first part of the rule, and there is no reason to exclude the district judge from the list of persons who must transmit erroneously filed papers to the United States trustee.

Changes Made After Publication: The published version of the Rule did not include the sentence set out on lines 7-10 above. The Advisory Committee concluded, based on the written comments received and additional Advisory Committee consideration, that the text of the rule should include a statement regarding the need for courts to protect access to the courts for those whose status might not allow for electronic participation in cases. The published version had relegated this notion to the Committee Note, but further deliberations led to the conclusion that this matter is too important to leave to the

Committee Note and instead should be included in the text of the rule.

Public Comment on Proposed Amendment to Rule 5005(a):

1. Comment 04-BK-003 Submitted by Mr. Henry Sommer. Mr. Sommer asserts that the rule should provide exceptions for both pro se filers and attorneys who do not generally appear in bankruptcy cases. These attorneys may be assisting debtors through pro bono programs, or they may just happen to have an occasional client who may need bankruptcy relief, or who is a creditor in a case, and the cost of participating electronically in the matter in the bankruptcy court is prohibitive. He urges the Committee to consider amending the proposal to provide in the rule itself for such exceptions.

2. Comment 04-BK-013 Submitted by the Defense Contract Management Agency, an Agency of the Department of Defense. The Agency expressed concern that the mandatory electronic filing rule would constitute a form of consent to be served electronically. The memorandum transmitting the proposed amendment indicates that the rule is not intended to constitute such a form of consent, and that the courts with electronic filing have uniformly allowed entities to "opt out" of the electronic service system. The Agency suggests that this uniform practice be codified in the rule rather than left unsaid on the assumption that current practices will continue.

3. Comment 04-BK-016 Submitted by the American Bar Association. The ABA has adopted a policy standard which it suggests the Committee should consider in proposing amendments to Rule 5005(a)(2). Specifically, Standard 1.65(c)(ii) provides that a mandatory electronic filing rule must either be at no cost or must include a provision for waiver of such fees as appropriate, and it must

include exceptions to assure equal access to the courts for those who are disabled or otherwise face barriers to entry into the court system. The policy also requires adequate advance notice of the implementation of mandatory electronic filing programs and that the courts provide adequate training for use of these processes. The ABA asks that these standards be imported into the rule to ensure as complete access to the courts as possible.

4. Comment 04-BK0-020 Submitted by Mr. Eliot S. Richardson. Mr. Richardson indicates that he has had experience as a pro se litigant, and he suggests that the rule provide for full access to the court records both at the courthouse and remotely, as well as providing filing assistance for pro se parties. He also asserts that any file standards adopted to implement mandatory electronic filing should be limited to non-proprietary files such as PDF and RTF.

5. Comment 04-BK-025 Submitted by the National Association of Consumer Bankruptcy Attorneys. NACBA recognizes the many advantages to electronic filing, and it notes that since many of its members are regular users of electronic filing systems it is somewhat against their self-interest to oppose the proposed amendment. Nonetheless, they assert that the rule should be revised to protect access to the courts for attorneys who may handle only a few cases a year, perhaps as a part of a volunteer lawyer program, as well as legal services attorneys with limited resources. They also propose that the adoption of the amendment be deferred until exceptions to its reach are set out in the rule itself.

6. Comment 04-BK-036 Submitted by the Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board. The Committee offered a lengthy comment on the proposed amendment to Rule 5005(a)(2). The group has

engaged in a multi-year study of these issues that led to the promulgation by the Washington State Supreme Court of an Order adopting the Committee's Access to Justice Technology Principles. The comments, authored by Former Superior Court Judge Donald J. Horowitz as chair of the Committee, note that the courts need to act efficiently and economically. Nevertheless, the courts are not a business, and access to the courts is a more important principle than judicial economy or efficiency. He also lists groups that would be particularly disadvantaged by the proposed amendments. In addition to the pro se filers identified by other comments, this comment lists the incarcerated, the elderly, the disabled, persons who don't know how to use the technology, persons in rural areas, and persons who cannot gain access to the technology, wherever they may reside. He notes especially that lawyers in rural areas may have the hardware to file electronically, but that there may be issues of broadband capacity to handle the amount of data that may need to be filed electronically. The comment asserts that the rule should include specific exclusions for appropriate circumstances, and it offers the Washington State Rule GR 30 as an example. That rule, however, specifically provides that electronic filing is purely permissive. Any person may file documents in hard copy, and the filing must be accepted.

7. Comment 04-BK-037 Submitted by HALT, An Organization of Americans for Legal Reform. This organization represents the interests of consumers of legal services and seeks to make the civil justice system more accessible and accountable. It expressed concern that the rule, as proposed, will limit access to the courts by pro se litigants, a group that the organization notes is more significant in bankruptcy than in general civil litigation. They suggest that the material in the Committee Note to the Rule should be moved into the text of the rule and suggest adding the following sentence to the end of subdivision (a)(2) of Rule5005:

Courts requiring electronic filing must make exceptions for parties such as *pro se* litigants who cannot easily file by electronic means, allowing such parties to file manually upon showing of good cause.

8. Comment 04-BK-038 Submitted by the Self Help Committee of the Northwest Women's Law Center. This Comment also asserts that the rule should not apply to pro se litigants. The Center assists 3,000 to 5,000 telephone callers annually by providing information and directing them to resources, including attorneys. In their experience, approximately 25% of the callers do not or cannot hire an attorney, so they are aware of the need for access to the courts by pro se parties. They have surveyed their callers and their data indicates that at least 65% of their survey participants prefer hard copies of documents rather than email or other electronic versions of the materials. They also suggest increasing technical assistance at the courts.

9. Comment 04-BK-039 Submitted by The State Bar of California Committee on Federal Courts. This Committee of the State Bar generally favors the proposed amendments to Civil Rule 5, Appellate Rule 25, and Bankruptcy Rule 5005(a)(2). The Committee recognizes the advantages of electronic filing and concludes that the references in the Committee Notes that courts should be sensitive to the needs of those who may not be able to access the court and that local experience should be used to determine the extent and nature of exceptions to the requirement that documents be filed electronically is sufficient. The Committee also agrees with the statement contained in the transmittal memorandum for the amendments that the filing of a document electronically does not constitute agreement to be served electronically. Therefore, this Committee supports the proposal and suggests no changes.

10. Comment 04-BK-040 Submitted by The State Bar of California Standing Committee on the Delivery of Legal Services. The Committee supports the proposal but states that there should be exceptions made for pro se filers and attorneys who lack the technological resources to file papers electronically. They note in particular that legal aid offices and some pro bono attorneys may not have the technological capacity to file documents electronically. They also suggest that the courts ensure that sufficient technical support personnel are available to help persons unfamiliar with the electronic filing process.

11. Comment 04-BK-041 Submitted by Mr. Richard Zorza. Mr. Zorza, an attorney in Washington, D.C., noted that he "works extensively with many groups dealing with issues facing the unrepresented" although his comments are submitted individually. Mr. Zorza notes that the courts have thus far taken a practical approach to ensuring access to the courts for the unrepresented, but he suggests that it is inadvisable to rely on this experience as opposed to including an appropriate provision in the rule itself. He further argues that leaving the crafting of exceptions to the local courts may lead to further inconsistencies, and that attempts to codify specific exceptions will face a wide range of pitfalls. Instead, Mr. Zorza proposes that the rule be amended to limit its application to parties represented by counsel. Thus, his comment is consistent with a number of others that urged the Committee to include within the rule a specific exception for pro se parties.

Public Comment on Proposed Amendments to Rule 5005(c):

1. Comment 04-BK-039 Submitted by the State Bar of California Committee on Federal Courts.

The Committee supports the amendment without qualification.

Rule 7004. Process; Service of Summons, Complaint

* * * * *

(b) SERVICE BY FIRST CLASS MAIL.

* * * * *

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition ~~or statement of affairs~~ or to such other address as the debtor may designate in a filed writing ~~and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address~~.

* * * * *

(g) ~~[abrogated]~~ SERVICE ON DEBTOR'S ATTORNEY. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F. R. Civ. P.

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COMMITTEE NOTE

Under current Rule 7004, an entity may serve a summons and complaint upon the debtor by personal service or by mail. If the entity chooses to serve the debtor by mail, it must also serve a copy of the summons and complaint on the debtor's attorney by mail. If the entity effects personal service on the debtor, there is no requirement that the debtor's attorney also be served.

Subdivision (b)(9). The rule is amended to delete the reference in subdivision (b)(9) to the debtor's address as set forth in the statement of financial affairs. In 1991, the Official Form of the statement of financial affairs was revised and no longer includes a question regarding the debtor's current residence. Since that time, Official Form 1, the petition, has required the debtor to list both the debtor's residence and mailing address. Therefore, the subdivision is amended to delete the statement of financial affairs as a document that might contain an address at which the debtor can be served.

Subdivision (g). The rule is amended to require service on the debtor's attorney whenever the debtor is served with a summons and complaint. The amendment makes this change by deleting that portion of Rule 7004(b)(9) that requires service on the debtor's attorney when the debtor is served by mail, and relocates the obligation to serve the debtor's attorney into new subdivision (g). Service on the debtor's attorney is not limited to mail service, but may be accomplished by any means permitted under Rule 5(b) F. R. Civ. P.

Changes Made After Publication: The Committee Note was amended to add the final paragraph of the Note. The new paragraph describes the reason for the deletion of the reference in the rule to the statement of affairs as a source for the debtor's address. This was a secondary reason for amending the rule, and even in the absence of public comment on the proposed amendment, the Advisory Committee believes that the additional explanation in the Committee Note is appropriate.

Public Comment on Proposed Amendments to Rule 7004:

1. Comment 04-BK-039 Submitted by the State Bar of California Committee on Federal Courts. The Committee supports the amendment without qualification.

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To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **May 27, 2005 (Revised July 25, 2005)**

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

Introduction

The Civil Rules Advisory Committee held three hearings in 2005 on proposed rules amendments published for comment in August 2004. The hearings were held on January 12 in San Francisco, January 28 in Dallas, and February 11 and 12 in Washington, D.C. The Committee met at the Administrative Office of the United States Courts on April 14-15, 2005. Draft minutes of the April 2005 meeting are attached. Summaries of the written comments and testimony presented at the hearings are also provided with the several recommendations of proposed rule amendments for adoption.

Parts I and II present action items. Part I recommends transmission for approval of amendments to several rules. Rules 5(e) and 50(b) come first. The next set of rule amendments is a comprehensive package addressing discovery of electronically stored information, including revisions of Rules 16, 26, 33, 34, 37, and 45, as well as Form 35. The last set of rule amendments recommended for approval is a new Supplemental Rule G governing civil forfeiture actions; this package includes conforming changes to other Supplemental Rules, including the title and Rules A, C, and E. Part I includes a conforming amendment to Rule 26(a)(1) that was published with Rule G and conforming amendments to Rules 9(h) and 14 and 26(a)(1)(E) that are recommended for adoption without publication. For each of the four categories of rule amendments recommended for approval, these materials set out a brief introductory discussion, followed by the text of the proposed rule amendment and Committee Note and a summary and explanation of the changes made since publication.

* * * * *

I. Action Items: Rule Amendments Recommended for Approval

A. Rule 5(e)

1. Discussion

The Advisory Committee recommends approval for adoption of amended Rule 5(e). The proposed amendment to Rule 5(e) authorizes adoption of local rules that require electronic filing. The proposed amendment was published last November, with parallel changes to the Appellate, Bankruptcy, and Civil Rules. The Criminal Rules incorporate the Civil Rules on filing and will absorb the proposed revision of Rule 5(e).

The published proposal was simple. It added two words to Rule 5(e), saying that a court "may by local rule permit or require" filing by electronic means. The Committee Note included this sentence: "Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general 'good cause' exceptions." Several comments suggested that this Committee Note advice would not sufficiently protect litigants who face serious — perhaps insurmountable — obstacles to electronic filing. Meeting before the Civil Rules Committee, the Bankruptcy Rules Committee recommended that the parallel Bankruptcy Rule text include an express limit directing that a court reasonably accommodate parties who cannot feasibly comply with mandatory electronic filing. Several drafting alternatives were considered by the Civil Rules Committee. The Appellate Rules Committee met last, and also considered several drafting alternatives. Discussions carried on after the committee meetings led to agreement by the Appellate and Civil Rules Committees to recommend a version adding a separate sentence: "A local rule may require filing by electronic means only if reasonable exceptions are allowed."[1] Corresponding Committee Note language was also agreed to.

The Appellate Rules Committee proposes to include Committee Note language recognizing that a local rule may direct that a party file a hard copy of a paper that must be filed by electronic means. The Civil Rules Committee concluded that this statement is appropriate for the Appellate Rule Note because of the nearly universal desire to have paper briefs on appeal, a circumstance that distinguishes appellate practice from district court practice. District courts face a great variety of filings. At times it may be desirable to require the parties to provide hard copies of papers filed electronically, but it seems unwise to attempt advice on this topic until there is more experience with mandatory electronic filing.

[1] The Advisory Committee had proposed language that put the rule and limit in a single sentence: ". . . may by local rule permit or — if reasonable exceptions are allowed — require 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." At its June 15-16, 2005, meeting, the Standing Committee adopted the separate-sentence formulation.

PROPOSED AMENDMENTS TO THE FEDERAL RULES CIVIL PROCEDURE*

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit or require 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. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

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

Committee Note

Amended Rule 5(e) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under amended Rule 5(e), a local rule that requires electronic filing must include reasonable exceptions, but Rule 5(e) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 5(e).

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3. Changes Made after Publication and Comment

This recommendation is of a modified version of the proposal as published. The changes from the published version limit local rule authority to implement a caution stated in the published Committee Note. A local rule that requires electronic filing must include reasonable exceptions. This change was accomplished by a separate sentence stating that a "local rule may require filing by electronic means only if reasonable exceptions are allowed." Corresponding changes were made in the Committee Note, in collaboration with the Appellate Rules Committee. The changes from the published proposal are shown below.

Rule 5. Service and Filing of Pleadings and Other Papers*

* * * * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit or require 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. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

Summary of Comments: Civil Rule 5(e)

04-CV-060: Hon. Robert J. Hallisey: This comment addresses a part of present Rule 5(e) that is not affected by the proposed amendment. The rule directs a judge who accepts a paper for filing to "forthwith transmit" the paper to the clerk. The comment suggests that courtesy to the judge would be better served by directing action within a reasonable time. (Style Rule 5(d) directs the judge to "promptly" send the paper to the clerk.)

04-CV-071, Regina Mullen, Director, Prison Services Project: Electronic filing has clear advantages, particularly for lawyers in small firms and organizations. It could be a great advantage for prisoners in jails and mental institutions, but only if they are provided access to computers and to Internet services "without interference or intrusion." The Rule cannot ensure computers and Internet access. Thus the Rule "must include a provision providing a blanket exception for filings by prisoners who are not represented by counsel." Otherwise some court will adopt a local rule that does not recognize the prisoner problem. Greater flexibility may be appropriate with respect to other pro se litigants, but they should be required to use electronic filing only if the court provides a computer and scanning facilities for local litigants, and permits non-local litigants to file electronically from their own local federal courthouse.

04-CV-097, Hon. William M. Acker, J., N.D.Ala.: Most district courts already require electronic filing by local rule. "Either we have the authority to do what we have already done, in which event we do not need a rule change, or we do not have that authority and we should be ashamed."

04-CV-117, Eliot S. Robinson: Writing as one who has experience as a pro se litigant, urges that "pro se parties must be provided with full access to any electronic system for the filing of papers with the court. Full access includes without limitation system access at the Pro Se Office, remote pro se system access, training, filing capability, searching capability, reading capability, bi-directional file transfers and printing capability." If a pro se litigant elects not to use electronic filing, the pro se office must accept paper and convert it to electronic form. Only non-proprietary file standards should be used, such as PDF, TIFF, and others.

04-CV-139, Joseph R. Compoli, Esq.: "E-filing is atrocious. It is almost impossible to send attachment documents by e-filing as a result of the enormous time to download them." He and defense counsel both had to manually file attachments — and defense counsel was from a large firm. Remote filing also thwarts face-to-face discussions that occur when judge, counsel, and clients are all together in the same place.

04-CV-168, American Bar Assn.: The Rule text should incorporate the protections for disadvantaged litigants that are described in the Committee Note. It should incorporate the safeguards of Standard 1.65(c)(ii), ABA Standards Relating to Court Organization:

Mandatory Electronic Filing Processes: Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees in appropriate circumstances, the court allows for the exceptions needed to ensure access to justice for indigent, disabled or self-represented litigants, the court provides adequate advanced notice of the mandatory participation requirements, and the court (or its representative) provides training for filers in the use of the process.

04-CV-171, Washington State Access to Justice Board, Hon. Donald J. Horowitz: Urges first that it is premature to authorize mandatory electronic filing, and second that if mandatory electronic filing is authorized there must be provisions for alternative filing means that ensure equal treatment of all filers. The Board has devoted much time to developing an electronic filing rule for Washington that does not allow for exclusive mandatory electronic filing; it allows local courts to decide whether to charge extra for electronic filing, but requires application of the same forma pauperis standards as apply to waiving regular filing fees.

The central concern is that mandatory e-filing may impede access to justice. Courts cannot decide which segments of the population to serve for greatest profit; "courts must be equally available to all." Pro se litigants will face the greatest barriers, including access to technology, a particular problem in rural communities and many inner-city areas; inability to use technology, including physical disabilities; and incarceration. Even if a person suffering these disadvantages manages to accomplish electronic filing, there is no ability to receive notices or other electronic transmissions from the court.

It is a mistake to rely on local rules to address these problems. "Without standards [in the national rule] there is no rule of law." No guidance is provided for local courts adopting local rules. The belief that local rules so far have proved wise is no cure-all: "Why is there a need for any national rule at all if reliance is simply on local practice?" National standards can be drafted so as to accommodate variations in local conditions and needs.

04-CV-172, HALT (Americans for Legal Reform): HALT "works to reduce and eliminate barriers that might prevent consumers from resolving their legal issues through self-help at the lowest possible cost." The Note comments about the need to make exceptions for pro se litigants should be included in the Rule text, and most especially in the Bankruptcy Rule that applies to people who by definition are least likely to have access to effective legal help. Rule 5(e) would include this new sentence and a fraction: "Courts requiring electronic filing must make exceptions for parties such as *pro se* litigants who cannot easily file by electronic means, allowing such parties to file manually upon showing of good cause. In any event, the clerk shall not refuse to accept * * *." (The comment notes an ABA estimate that 38,000,000 low- and moderate-income Americans are shut out of the legal system each year because they cannot afford to hire lawyers.)

04-CV-173, Northwest Women's Law Center: They handle 3,000 to 5,000 calls for legal information annually. Mandatory electronic filing will raise yet another hurdle for self-represented individuals. The rule should mandate that all federal courts "ensure access for pro se litigants. We recommend assistance from staff at federal courthouses, including technical assistance using court equipment and conversion of hard copies by court staff. In addition, the rule should include exceptions for those who cannot make use of this type of assistance." It is not enough to rely on gradual convergence on uniform exceptions.

04-CV-174, Committee on Federal Courts, State Bar of California: The Committee Note recognizes the problems posed by parties "who may have difficulty complying with an electronic filing requirement, including economically disadvantaged and incarcerated parties." This statement should remain in the Note.

04-CV-175, Standing Committee on the Delivery of Legal Services, State Bar of California: Supports "provided that exceptions are made for file [sic] by traditional means for: 1) pro se litigants who lack resources and/or the ability to comply, such as incarcerated individuals, and 2) attorneys who lack the technological resources to file papers electronically such as some legal aid attorneys and some pro bono attorneys. In addition, any electronic filing program implemented by the courts should offer sufficient technical support with a designated number of people to call to speak with * * * to walk the pro se litigant or attorney through the e-filing process."

04-CV-184, California Commn. on Access to Justice: Mandatory e-filing may raise the barriers facing pro se litigants, particularly those with limited English proficiency. The Committee Note should be revised, or — better — the proposed Rule should be amended to make it clear "that an exception to electronic filing should be made for unrepresented parties. The rule should make clear that local courts have the option of setting up a system that allows unrepresented parties to use the electronic filing system if they prefer to do so."

04-CV-217, Executive Committee, State Bar of Michigan: "[O]pposes the proposed rule, to the extent that it permits local courts to require e-filing of persons other than attorneys." The rule would be supported if it applied only to filings by attorneys and assured that local rules must allow an attorney to show good cause for failing to file electronically. (1) Most attorneys use computers and the Internet. Unrepresented persons should be allowed to use e-filing. But they should not be required to do so. Barriers include limited English proficiency, special obstacles for incarcerated persons, costs, unfamiliarity with the process, lack of appropriate software, and the intimidating nature of the process. (2) Attorneys may have good cause for paper filing — lack of access to adobe acrobat software, cost, or the like. (3) Any system must be "Bobby compliant" — it must comply with the guidelines developed by the Center for Applied Special Technology to ensure access for persons with disabilities. (4) Provision must be made to permit payment of filing fees in person because some legal organizations or litigants may not be able to pay by credit card. (5) Provision

should be made for forma pauperis paper filings, including waiver of any additional fees charged for e-filing and conditional acceptance of paper filings while the petition for leave to proceed i.f.p. is pending. (6) [Anticipating the E-Government Act rules] Provision must be made to shield various data fields, particularly social security numbers and other account numbers. Information about addresses (domestic violence situations are an example) and medical conditions should not be readily available through the Internet. (7) Advisory bodies should be established, including representatives from organizations representing populations with special needs that affect the ability to file electronically.

04-CV-234, John H. Messing, Esq.: (Mr. Messing speaks only for himself, but is chair of the Electronic Filing Committee of the ABA Science and Technology Law Section.) Endorses the ABA comments in 04-CV-168, and suggests further protections. A court that requires electronic filing is obligated to ensure security on an ongoing basis "because security threats evolve and become more sophisticated at an ever-increasing rate. * * * Electronic court orders [] are often subject to tampering in undetectable ways. Without available standard security protections, it is unfair to require the use of court electronic systems by all practitioners, who may not understand what must be done from their side properly to protect their computers and the integrity of the documents being exchanged. We see examples in electronic commerce daily of identity theft and electronic document alterations. * * * Just last week some mainland Chinese cryptographers broke the encryption that is used commonly to protect the integrity of electronic court documents in the courthouses of this country."

04-CV-251, Richard Zorza, Esq.: The ideal rule would authorize mandatory e-filing for lawyers, but leave it optional for unrepresented parties. Even if a local rule purports to adopt more limited exceptions, they may not be adequate to protect the rights of those who have difficulty using electronic filing. The exceptions may be vague; they may be discouraging; they may provide alternative filing methods that are impracticable or expensive; they may not address cost problems "in dealing with a fee based system," address the problems of those with physical or other disabilities, recognize religious objections, help the technologically challenged, or recognize the situation of those incarcerated; and include a general "good cause" exception that does not reassure. Finally, consider the present provision in Civil Rule 5(e) that prohibits the clerk from refusing to accept a paper for filing solely because it is not presented in proper form — does that require that a paper be accepted in paper form despite a mandatory e-filing rule?

B. Rule 50(b)

1. Discussion

The Advisory Committee recommends approval for adoption of amended Rule 50(a) and (b). Proposed amendments of Rule 50(b) were published in August 2004. The first would permit renewal after trial of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion made before the close of the evidence be renewed at the close of all the evidence. Separately, the proposed amendment adds a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion. Style revisions of Rule 50(a) were published at the same time.

The few comments made during the public comment period did not raise any new issues. The Committee unanimously recommends that the amendments be recommended to the Judicial Conference for adoption.

The first proposed amendment addresses the problem that arises when a party moved for judgment as a matter of law before the close of all the evidence, failed to renew the motion at the close of all the evidence, then filed a postverdict motion renewing the motion for judgment as a matter of law. The appellate decisions have begun to permit slight relaxations of the requirement that a postverdict motion be supported by — be a renewal of — a motion made at the close of all the evidence. These are departures, however, made to avoid harsh results that seemed required by the current rule language. The departures come at the price of increasingly uncertain doctrine and practice and may invite more frequent appeals. Other courts adhere to the rule's language, holding that a motion at the close of all the evidence was necessary even if the party had made an earlier motion based on the same grounds.

The proposed amendment deletes the requirement of a motion at the close of all the evidence, permitting renewal of any Rule 50(a) motion for judgment as a matter of law made during trial. The proposed amendment reflects the belief that a motion made during trial serves all the functional needs served by a motion at the close of all of the evidence. As now, the posttrial motion renews the trial motion and can be supported only by arguments made to support the trial motion. The opposing party has had clear notice of the asserted deficiencies in the case and a final opportunity to correct them. Satisfying these functional purposes equally satisfies Seventh Amendment concerns.

Separately, the proposed amendment also provides a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion. The Advisory Committee agenda has carried for some years the question whether to revise Rule 50(b) to establish a clear time limit for renewing a motion for judgment as a matter of law after

the jury has failed to return a verdict. The question was raised by Judge Stotler while she chaired the Standing Committee. The problem appears on the face of the rule, which seems to allow a motion at the close of the evidence at the first trial to be renewed at any time up to ten days after judgment is entered following a second (or still later) trial. It would be folly to disregard the sufficiency of the evidence at a second trial in favor of deciding a motion based on the evidence at the first trial, and unwise to allow the question to remain open indefinitely during the period leading up to the second trial. There is authority saying that the motion must be renewed ten days after the jury is discharged. *See* C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d*, § 2357, p. 353. This authority traces to the 1938 version of Rule 50(b), which set the time for a judgment n.o.v. motion at ten days after the jury was discharged if a verdict was not returned. This provision was deleted in 1991, but the Committee Note says only that amended Rule 50(b) "retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment." Research into the Advisory Committee deliberations that led to the 1991 amendment has failed to show any additional explanation. It now seems better to restore the 1991 deletion.

2. Proposed Amended Rule 50 and Committee Note

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

~~(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.~~

~~(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.~~

(1) **In General.** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) **Motion.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion ~~for Judgment~~ After Trial; Alternative Motion for a New Trial. If~~, for any reason,~~ the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment or—if the motion addresses a jury issue not decided by a verdict—no later than 10 days after the jury was discharged. ~~—and~~ The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

* * * * *

Committee Note

The language of Rule 50(a) has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Finally, an explicit time limit is added for making a posttrial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

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3. Changes Made After Publication and Comment

This recommendation modifies the version of the proposal as published. The only changes made in the rule text after publication are matters of style. One sentence in the Committee Note was changed by adopting the wording of the 1991 Committee Note describing the grounds that may be used to support a renewed motion for judgment as a matter of law. A paragraph also was added to the Committee Note to explain the style revisions in subdivision (a). The changes from the published rule text are set out below.

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings*

(a) Judgment as a Matter of Law.

* * * * *

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

(A) ~~determine~~ resolve the issue against the party; and

* * * * *

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is ~~deemed~~ considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

* * * * *

Summary of Comments: Rule 50(b)

04-CV-109, Federal Civil Procedure Committee, American College of Trial Lawyers: There is no Committee consensus. "Some of our members support the notion of removing traps for the unwary; others believe that it is not unreasonable to require that parties be wary of and follow the rules, and the rule as it exists serves a salutary purpose of permitting the trial court the opportunity to correct its own errors."

Federal Magistrate Judges Assn., 04-CV-127: Supports the proposal. "The present Rule is a trap for the unwary." The motion at the close of all the evidence "is usually just a formality, but * * * can result in a harsh result. * * * Since the motion can only be renewed, but not added to, there is no unfairness to the party opposing the motion."

04-CV-128, Gregory B. Breedlove, Esq., for Cuningham, Bounds, Yance, Crowder & Brown, L.L.C.: A motion should be required at the close of all the evidence because "any deficiency in the evidence at an earlier stage of the proceeding may have been cured by the time all the evidence is in. * * * By the close of the evidence, the plaintiff might cure any such deficiency either through cross-examination of a defense witness or through rebuttal testimony." The proposed change is not justified by the argument that parties continue to fail to meet the close-of-all-the-evidence requirement. It is not necessarily a bad thing that courts allow relief from the requirement in some circumstances, but this should not be generalized in the rule.

04-CV-174, Committee on Federal Courts, State Bar of California: Supports both proposed amendments. Allowing renewal after trial of any Rule 50(a) motion made during trial "serves all the functional needs" and "address[es] conflicting views by the courts." Setting a time limit to renew after the jury fails to return a verdict "would restore the 1991 deletion — and clarity — to the Rule."

04-CV-203, United States Department of Justice: "[S]upports the proposed amendment. This is a fair and practical solution to an issue that can confuse practitioners."

04-CV-218, U.S. Courts Committee, State Bar of Michigan: "[E]ndorses the proposed amendments to Rule 50 for the reasons set forth in the report."

C. Rules 16, 26, 33, 34, 37, 45, and Form 35

1. Introduction

Over five years ago, the Advisory Committee began examining whether the discovery rules could better accommodate discovery directed at information generated by, stored in, retrieved from, and exchanged through, computers. The proposed amendments published for comment in August 2004 resulted from an extensive and intensive study of such discovery. That study included several mini-conferences and one major conference, bringing together lawyers, academics, judges, and litigants with a variety of experiences and viewpoints. The Committee also sought out experts in information technology and heard from those involved in the rapidly expanding field of providing electronic discovery services to lawyers and litigants.

Through this study, the Committee reached consensus on two points. First, electronically stored information has important differences from information recorded on paper. The most salient of these differences are that electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic, rather than static; and electronically stored information may be incomprehensible when separated from the system that created it. Second, these differences are causing problems in discovery that rule amendments can helpfully address.

In August 2004, the Committee published five categories of proposed amendments: amending Rules 16 and 26(f) to provide early attention to electronic discovery issues; amending Rule 26(b)(2) to provide better management of discovery into electronically stored information that is not reasonably accessible; amending Rule 26(b)(5) to add a new provision setting out a procedure for assertions of privilege after production; amending Rules 33 and 34 to clarify their application to electronically stored information; and amending Rule 37 to add a new section to clarify the application of the sanctions rules in a narrow set of circumstances distinctive to the discovery of electronically stored information. In addition, Rule 45 was to be amended to adapt it to the changes made in Rules 26-37.

At the three public hearings held in 2005, 74 witnesses testified, many of whom also submitted written comments. An additional 180 written comments were submitted. The Committee revised the proposed rules amendments and note language in light of the public comments. The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rules 16, 26(b)(5)(B), 26(f), 33, 34, 45, and Form 35, as well as a conforming amendment to Rule 26(a). All but two members of the Committee voted in favor of recommending that the Standing Committee approve the proposed amendments to Rules 26(b)(2) and 37(f). The Committee unanimously recommends that the Standing Committee approve the corresponding changes to Rule 45 except for the change that tracks proposed Rule 26(b)(2), and all but two

members of the Committee recommend that the Standing Committee approve this portion of proposed amendment Rule 45. This introduction sets out a brief background of the Committee's work and discusses each of the proposed amendments.

When the 2000 amendments were in their early stages of consideration, it was very helpful to step back and consider what brought the Committee to that point. In a 1997 conference held at Boston College Law School – a meeting very similar in purpose to the 2003 conference on electronic discovery held at the Fordham University School of Law – Professors Stephen Subrin and Richard Marcus presented papers on the historical background of the discovery rules. Some highlights of their papers usefully put the present issues into perspective and context.

Before the civil rules became law in 1938, discovery in both law and equity cases in the federal courts had been extremely limited. When the Committee deliberated on the liberal discovery rules that Professor Edson Sunderland drafted, they raised the concern that expanded discovery would force settlements for reasons and on terms that related more to the costs of discovery than to the merits of the case, a concern raised frequently in the context of electronic discovery.[1] But the debates did not focus on discovery. Instead, the focus was on issues of national uniformity and separation of powers.

In 1946 and 1970, amendments to the discovery rules continued to expand the discovery devices. The 1970 amendments were what Professor Marcus has called the high-water mark of "party-controlled discovery."[2] Those amendments included the elimination of the requirement for a motion to obtain document production and of the good cause standard for document production. Since the "high-water mark," the discovery rules have been amended in 1980, 1983, 1993, and 2000, to provide more effective means for controlling the discovery devices. In 1980, the Committee made the first change designed to increase judicial supervision over discovery, adding a provision that allowed counsel to seek a discovery conference with the court. The Committee considered, and rejected, a proposal to narrow the scope of discovery from "relevant to the subject matter" to "relevant to the issues raised by the claims or defenses," and to limit the number of interrogatories. The public comment that proposal generated was similar in tone and in approach to some of the comments on certain of the electronic discovery proposals published in August 2004. Many protested any narrowing of discovery as inimical to the basic premise of American litigation; others protested that the Committee had not gone far enough in restricting discovery and controlling the costs and delay it caused; yet others worried that the Committee would feel

[1]Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 Boston Coll. L. Rev. 691, 730 (1998).

[2]Marcus, *Discovery Containment Redux*, 39 Boston Coll. L. Rev. 747, 749 (1998).

"pressure" to approve rules prematurely.[3] In the face of the vigorous debate, the Committee withdrew these proposals and submitted what then-chair Judge Walter Mansfield characterized as "watered down" proposals. The scope change rejected in 1980 did become law, but not until 2000, and then in a modification that emphasized the supervisory responsibility of the court.

Despite an institutional bias against frequent rule changes, the lack of meaningful amendments in 1980 resulted in significant amendments three years later. The 1983 amendments marked a significant shift toward greater judicial involvement in all pretrial preparation, most particularly in the discovery process. The amendments expanded Rule 16 case-management orders; deleted the final sentence of Rule 26(a), which had said that "[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency and use of these methods is not limited"; and added the paragraph to Rule 26(b) directing the court to limit disproportionate discovery. The newly-appointed reporter to the Advisory Committee, Professor Arthur Miller, described these changes as a "180 degree shift in orientation." Yet, as Professor Miller pointed out in his written submission to the Committee endorsing the proposed electronic discovery amendments, the 1983 amendments turned out not to be effective by themselves to calibrate the amount of discovery to the needs of particular cases.[4]

In 1993, continued unhappiness about discovery costs and related litigation delays led to a package of proposals that included mandatory broad initial disclosures (with a local rule opt-out feature added in response to vigorous criticism) and presumptive limits on the number of interrogatories and depositions. In part, these amendments were "designed to give teeth to the proportionality provisions added in 1983."[5] In 2000, the initial disclosure obligations were cut back and made uniform, and Rule 26(b)(1) was changed to limit the scope of party-controlled discovery to matters "relevant to the claim or defense of any party," allowing discovery into "the subject matter involved in the action" only on court order for good cause.

During the study that led to the 2000 amendments, the Advisory Committee became aware of problems relating to electronic discovery. The Committee was urged by lawyers, litigants, and a number of organized bar groups to examine these problems. In 1999, when the 2000 proposals were recommended for adoption following the public comment period, the Committee fully understood that its work was incomplete. In his 1999 report to the Standing Committee recommending adoption of the 2000 amendments, Judge Niemeyer observed that since the work on the proposals had begun in 1996, "the Committee . . . kept its focus on the long-range discovery issues that will confront it in the emerging information age. The Committee recognized that it will be faced with the task of devising mechanisms

[3]Marcus, 39 Boston Coll. L. Rev. at 770.

[4] Prof. Arthur Miller, 04-cv-221.

[5] Marcus, *Discovery Containment*, 39 Boston Coll. L. Rev. at 766.

for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation. While the tasks of designing discovery rules for an information age are formidable and still face the Committee, the mechanisms adopted in the current proposals begin the establishment of a framework in which to work." The present electronic discovery proposals grow out of the Committee's work on the 2000 amendments and in many ways continue that work. As noted in the report to the Standing Committee in 1999, the Committee's efforts leading to the 2000 amendments focused on the "architecture of discovery rules" to determine whether changes can be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management. The proposed amendments to make the rules apply better to electronic discovery problems have the same focus.

The historical perspective is a reminder that any proposal to add or strengthen rule provisions for what Professor Marcus calls "discovery containment" produces significant debate. The vigor, volume, and themes of the public comment on the August 2004 electronic discovery proposals are not new to proposed discovery rule amendments. The debates over the amendments that became effective in 1983, 1993, and 2000 were vigorous, with many favoring liberal party-controlled discovery and many advocating more effective tools for discovery management and limits. Such debate is not in itself a sign that the proposals are fundamentally flawed. It is right to be concerned if the proposals are only supported by a narrow segment of the bench or bar. But it is not surprising to find that proposals to increase judicial involvement in discovery or to encourage the application of the existing proportionality factors would be opposed more by one side of the bar than the other.

Without understating the nature or depth of the concerns raised in response to specific proposals, discussed at length below, it is useful to note some points of agreement. There was a high level of support for changes to the federal rules to recognize and accommodate electronic discovery. Although there was certainly disagreement as to the proposed amendments to Rules 26(b)(2) and 37(f), there was also support from broad-based organizations that do not represent a reflexive plaintiff or defense view, such as the American Bar Association Section of Litigation,[6] the Federal Bar Council,[7] and the New York State Bar Association Commercial and Federal Litigation Section.[8] Many of the comments criticized aspects of the published proposals that have now been revised. As noted, after the comment period, all but two members of the Advisory Committee approved these proposed amendments as revised in light of the comments. The proposals calling for early attention to electronic discovery and addressing

[6] 04-cv-062.

[7] 04-cv-191.

[8] 04-cv-045.

problems in the form of producing electronically stored information received broad support from the bar and the unanimous approval of the Advisory Committee.

The historical review also provides a useful context for considering the question of timing. The Advisory Committee has a history of carefully considering rule amendments and, when appropriate, withdrawing proposed amendments after public comment. The class action proposals of 1996 are a good example. The history of discovery amendments in particular shows great caution. The most prominent example is the 1978 decision to defer the "scope" proposal because there was vigorous opposition, as well as vigorous support. That decision to defer was criticized on the ground that it would significantly delay the proposal. A version of the scope limitation did become effective – twenty years later. It is always tempting to defer action because more time brings more information, particularly in an area of ongoing technological change. But deferring has costs. The calendar of the rules enabling process makes any delay a significant one. As long ago as the 1998-99 hearings on what became the discovery amendments of 2000, lawyers were urging the Committee to proceed with alacrity in rulemaking for e-discovery. The need for rulemaking now in this area is reflected in the local rules and state rules that have been enacted and the growing number of such rules that have been proposed. Many of these local rule efforts have been deferred because of the proposals to amend the national rules, but the perceived need for such rules means that they will not remain in check indefinitely. The 1993 amendments led in part to the 2000 amendments, teaching us much about the problems of local rulemaking in areas that the national discovery rules address, problems that we do not want to create in the area of electronic discovery. And the possibility of technological change will always exist; there is no reason to think that stability on that front will arrive any time soon.

The Committee has been studying electronic discovery for the last five years. We have learned a great deal, reflected in the rule proposals and the refinements made since publication. Those proposals and refinements are summarized below.

2. The Specific Proposals

i. Early Attention to Electronic Discovery Issues: Rules 16, 26(a), 26(f), and Form 35

Introduction

The comments consistently applauded the directives in Rule 16(b) and Rule 26(f) for the parties to discuss electronically stored information in cases that involve such discovery and to include these topics in the report to the court, and for the court to include these topics in its scheduling orders. The overall directive is broad, but specific provisions focus on three areas recognized as frequent sources of difficulty in electronic discovery: the form of producing electronically stored information in discovery; preserving information for the litigation; and the assertion of privilege and work-product protection claims.

The proposed amendments that direct early attention to electronic discovery issues, as published, did not include a revision to Rule 26(a)(1), although the amendments to Rule 26(f) referred to disclosures as well as discovery of electronically stored information. The Committee approved a proposed conforming amendment to Rule 26(a), making the Rule 26(a)(1) description of information subject to disclosure requirements consistent with the addition of electronically stored information to the discovery rules. Present Rule 26(a)(1) is redundant in requiring disclosure of both certain "documents" and "data compilations," because the present version of Rule 34 makes "data compilation" a subset of "documents." Present Rule 26(a)(1) is potentially inconsistent with the proposed revision of Rule 34, which adds "electronically stored information" as a category separate from "documents." Amending Rule 26(a)(1) to make it apply to "documents and electronically stored information," and deleting the words "data compilations," cures this inconsistency. Because Rule 34(a) is revised to distinguish between "documents" and "electronically stored information," revising Rule 26(a)(1) to conform to this distinction removes the argument that there is a duty to provide in discovery, but not to disclose, electronically stored information.

One concern initially raised about adding electronically stored information to Rule 26(a)(1) was that it could require parties to locate and review such information too early in the case. Such information, often voluminous and dispersed, can be burdensome to locate and review, and early in the case the parties may not be able to identify with precision the information that will be called for in discovery. The Committee concluded that this concern was not an argument against this conforming amendment. The disclosure obligation has been read as applying to electronically stored information and will continue to apply. The obligation does not force a premature search, but only requires disclosure, either initially or by way of supplementation, of information that the disclosing party has decided it may use to support its case.

The Committee decided against revising Rule 26(a)(3) to include "electronically stored information." Rule 26(a)(3) applies "in addition to the disclosures required by Rule 26(a)(1)" and is directed to identifying exhibits for trial. Electronically stored information is included in "each document or other exhibit" that the current rule requires to be identified in pretrial disclosures.

Proposed amended Rule 26(f) states that the parties are to discuss "any issues relating to preserving discoverable information." Some comments urged that this directive should be downgraded to the Note, in part out of concern that calling for discussion of the question will promote early applications for preservation orders. Most comments supported the inclusion of preservation as a topic to be discussed early in the case. The dynamic nature of electronically stored information, and the fact that routine operation of computer systems changes and deletes information, make it important to address preservation issues early in cases involving discovery of such information. The Committee decided not to change the published rule language, which includes not only electronically stored information but all forms of information. In response to the concerns raised in the comment period about preservation orders, the Note has been revised to state that preservation orders entered over objections should be narrowly tailored and that preservation orders should rarely be issued on ex parte applications.

Proposed new Rule 26(f)(3) directs parties to discuss "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." Form 35 is amended to provide that in the report to the court of their proposed discovery plan, the parties include their proposals for disclosure or discovery of electronically stored information. Rule 16(b)(5) provides that the scheduling order the court enters may include "provisions for disclosure or discovery of electronically stored information." The comments emphasized the importance of discussing these topics early in the case, to identify disputes before costly and time-consuming searches and production occur. Only one change is proposed to this part of the published proposals. Many comments noted that more than one form of production might be appropriate in a case, because a party may store different information in different forms. Accordingly, this proposed amendment is revised to state that the parties should discuss "any issues relating to . . . electronically stored information, including the form or forms in which it should be produced." Consistent changes are made in other proposed amendments addressing the form of production as well.

Proposed new Rule 26(f)(4) adds issues relating to the assertion of privilege and work-product protection to the list of topics to be addressed in the parties' initial conference. For years, the Committee has wrestled with how to address the problem of privilege waivers within the rules. The Committee began this work in response to concerns over the expense and delay attendant to reviewing hard-copy documents for privilege and generating a privilege log. During the study of electronic discovery, the Committee learned that reviewing electronically stored information for privilege and work product protection adds to the expense and delay, and risk of waiver, because of the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information. Metadata and embedded data are examples of such complexities; they may contain privileged communications, yet

are not visible when the information is displayed on a computer monitor in ordinary use or printed on paper. Parties can ameliorate some of the costs and delays created by the steps necessary to avoid waiving privilege or work-product protection during discovery through agreements that allow the assertion of privilege or work production protection after documents or electronically stored information are produced. Including this topic among those to be discussed encourages early attention to the problem and facilitates efforts to reach such agreements. Form 35 is amended to provide that if the parties have agreed to an order regarding claims of privilege or protection as trial-preparation material asserted after production, they are to include a description of the proposed order provisions in their report to the court. Rule 16(b)(6) is amended to state that if the parties have reached an agreement for "asserting claims of privilege or protection as trial-preparation material after production," the court may include those agreements in the scheduling order.

The proposed rule as published described the topic that the parties should discuss as whether, if the parties agreed, the court should enter an order protecting the right to assert privilege after production. During the comment period, some expressed uneasiness about the language that the court enter an order "protecting" against waiver of privilege because it is not clear that this protection is effective against third parties. The Committee has revised the proposed rule and note language to meet these concerns, without changing the substance of what this aspect of the parties' discovery planning conference is to include.

Many comments urged the Committee to include work-product protection as well as privilege within this rule, as well as proposed Rule 26(b)(5)(B). Although the consequences of waiver are less acute for work product protection than for attorney-client privilege, many documents and electronically stored information involve both and issues of waiver frequently involve both. The Committee decided to amend the published proposed rule to include both privilege and work-product protection, using the label for such protection that appears elsewhere in the discovery rules, "trial-preparation materials."

The Proposed Rules and Committee Notes

The Advisory Committee recommends approval for adoption of amended Rules 16(b), 26(a), 26(f), and Form 35.

Rule 16(b)

The Committee recommends approval of the following amendment:

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order also may include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

(75) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(86) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

* * * * *

Committee Note

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

Changes Made After Publication and Comment

This recommendation is of a modified version of the proposal as published. Subdivision (b)(6) was modified to eliminate the references to "adopting" agreements for "protection against waiving" privilege. It was feared that these words might seem to promise greater protection than can be assured. In keeping with changes to Rule 26(b)(5)(B), subdivision (b)(6) was expanded to include agreements for asserting claims of protection as trial-preparation materials. The Committee Note was revised to reflect the changes in the rule text.

The proposed changes from the published rule are set out below.

Rule 16. Pretrial Conferences; Scheduling; Management*

* * * * *

(b) Scheduling and Planning.

* * * * *

The scheduling order may also include

* * * * *

(6) ~~adoption of the parties'~~ any agreements the parties reach for ~~protection against waiving~~ asserting claims of privilege or of protection as trial-preparation material after production;

* * * * *

Rule 26(a)

The Committee recommends approval of the following amendment:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) ***Initial Disclosures.*** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, ~~data compilations~~, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

* * * * *

Committee Note

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data

compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

Changes Made After Publication and Comment

As noted in the introduction, this provision was not included in the published rule. It is included as a conforming amendment, to make Rule 26(a)(1) consistent with the changes that were included in the published proposals.

Rule 26(f)

The Committee recommends approval of the following amendments to Rule 26(f).

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed

discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;

(53) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(64) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Committee Note

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the

topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these

considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the

history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection — sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements — sometimes called "clawback agreements"— that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

Changes Made After Publication and Comment

The Committee recommends a modified version of what was published. Rule 26(f)(3) was expanded to refer to the form "or forms" of production, in parallel with the like change in Rule 34. Different forms may be suitable for different sources of electronically stored information.

The published Rule 26(f)(4) proposal described the parties' views and proposals concerning whether, on their agreement, the court should enter an order protecting the right to assert privilege after production. This has been revised to refer to the parties' views and proposals concerning any issues relating to claims of privilege, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order. As with Rule 16(b)(6), this change was made to avoid any implications as to the scope of the protection that may be afforded by court adoption of the parties' agreement.

Rule 26(f)(4) also was expanded to include trial-preparation materials.

The Committee Note was revised to reflect the changes in the rule text.

The changes from the published rule are shown below.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure*

* * * * *

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

* * * * *

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order; ~~whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information;~~

* * * * *

Form 35

The Committee recommends conforming changes in Form 35, the parties' report to the court of their discovery plan.

Form 35. Report of Parties' Planning Meeting

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _____ (brief description of subjects on which discovery will be needed)_____

Disclosure or discovery of electronically stored information should be handled as follows: _____(brief description of parties' proposals)_____

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order)

All discovery commenced in time to be completed by _____(date)_____. [Discovery on _____(issue for early discovery)_____to be completed by _____(date)_____.]

Changes Made After Publication and Comment

The Committee recommends approval of Form 35 with modifications made from the published version, consistent with changes made to Rule 26(f). The changes are shown below.

Form 35. Report of Parties' Planning Meeting*

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: * * *

Disclosure or discovery of electronically stored information should be handled as follows: _____ (brief description of parties' proposals)

The parties have agreed to ~~a privilege protection~~ an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order). * * *

* * * * *

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

ii. Discovery Into Electronically Stored Information that is Not Reasonably Accessible: Rule 26(b)(2)

Introduction

The Rule 26(b)(2)(B) proposal authorizes a party to respond to a discovery request by identifying sources of electronically stored information that are not reasonably accessible because of undue burden or cost. If the requesting party seeks discovery from such sources, the responding party has the burden to show that the sources are not reasonably accessible. Even if that showing is made, the court may order discovery if — after considering the limitations established by present Rule 26(b)(2) — the requesting party shows good cause. The court may specify conditions for the discovery.

Several changes have been made in the rule text to express more clearly the procedure established by the published proposal. The Committee Note is revised to describe more clearly the problems that the rule addresses. The changes both in rule text and Note draw from a large body of public testimony and comments that suggested better ways to implement the proposed procedure without changing the procedure established by the published language.

The proposed rule has frequently been referred to as a "two-tier" system. It responds to distinctive problems encountered in discovery of electronically stored information that have no close analogue in the more familiar discovery of paper documents. Although computer storage often facilitates discovery, some forms of computer storage can be searched only with considerable effort. The responding party may be able to identify difficult-to-access sources that may contain responsive information, but is not able to retrieve the information — or even to determine whether any responsive information in fact is on the sources — without incurring substantial burden or cost. The difficulties in accessing the information may arise from a number of different reasons primarily related to the technology of information storage, reasons that are likely to change over time. Examples from current technology include back-up tapes intended for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was "deleted" but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information. Such difficulties present particular problems for discovery. A party may have a large amount of information on sources or in forms that may be responsive to discovery requests, but would require recovery, restoration, or translation before it could be located, retrieved, reviewed, or produced. At the same time, more easily accessed sources — whether computer-based, paper, or human — may yield all the information that is reasonably useful for the action. Lawyers sophisticated in these problems are developing a two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.

In many circumstances, the two-tier approach will be worked out by negotiation. The Rule 26(b)(2)(B) amendment expressly incorporates the better practice as the method for judicial control when the parties cannot resolve the problem on their own. The amendment builds on the two-tier structure of scope of discovery defined in Rule 26(b)(1) and applies this structure to discovery of electronically stored information. The proposed rule recognizes a distinctive, recurring problem that electronically stored information presents for discovery and builds on the existing rules to facilitate judicial supervision when it is necessary to calibrate discovery to a particular case.

Much of the criticism during the public comment period focused on specific drafting problems in the published rule, including a lack of clarity in the term "not reasonably accessible," how that term and the "good cause" showing related to the existing Rule 26(b)(2) proportionality limits, and how a party designation or a court finding that information is not reasonably accessible related to preservation obligations. The proposed rule and Note have been revised to respond to the concerns identified.

The published rule required a party to identify potentially responsive "information" that is not reasonably accessible. The problem, however, is that a responding party cannot identify information without actually searching and retrieving it. The revised rule directs the party to identify the sources of information that may be responsive but is not reasonably accessible.

The published rule did not provide any guide to the considerations that bear on determining whether electronically stored information is not reasonably accessible. Many comments suggested that the test should be based on the burden and cost of locating, restoring, and retrieving potentially responsive information from the sources in which it is stored. The revised rule incorporates this test, which reflects the common understanding of the published proposal. The responding party may identify sources containing potentially responsive information that is not reasonably accessible "because of undue burden or cost."

Once the responding party has identified a source of information that is not reasonably accessible, the published rule provided for a motion to compel discovery. The revision recognizes that the responding party may wish to resolve the issue by moving for a protective order. Among the reasons that may lead a responding party to raise the issue is to resolve whether, or the extent to which, it must preserve the information stored on the difficult-to-access sources until discoverability is resolved.

A finding that the responding party has shown that a source of information is not reasonably accessible does not preclude discovery; the court may order discovery for good cause. Many comments suggested that the "good cause" standard seemed to contemplate the limitations identified by parts (i), (ii), and (iii) of present Rule 26(b)(2). The revised text clarifies the "good cause" showing by expressly referring to consideration of these limitations.

The Committee Note is revised extensively to provide a clearer description of the two-tier procedure. It recognizes that in some cases a single proceeding may suffice both to find that a source is not reasonably accessible and also to determine whether good cause nonetheless justifies discovery and to set any conditions that should be imposed. But it also recognizes that proceedings may need to be staged if focused discovery is necessary to determine the costs and burdens in obtaining the information from the sources identified as not reasonably accessible, the likelihood of finding responsive information on such sources, and the value of the information to the litigation. In such circumstances, a finding that a source is not reasonably accessible may lead to further proceedings to determine whether there is good cause to order limited or extensive searches and the production of information stored on such sources.

The proposed amendment is modest. The public comments and testimony confirmed that parties conducting discovery, particularly when it involves large volumes of information, first look in the places that are likely to produce responsive information. Parties sophisticated in electronic discovery first look in the reasonably accessible places that are likely to produce responsive information. On that level, stating in the rule that initial production of information that is not reasonably accessible is not required simply recognizes reality. Under proposed Rule 26(b)(2), this existing practice would continue; parties would search sources that are reasonably accessible and likely to contain responsive, relevant information, with no need for a court order. But in an improvement over the present practice, in which parties simply do not produce inaccessible electronically stored information, the amendment requires the responding party to identify the sources of information that were not searched, clarifying and focusing the issue for the requesting party. In many cases, discovery obtained from accessible sources will be sufficient to meet the needs of the case. If information from such sources does not satisfy the requesting party, the proposed rule allows that party to obtain additional discovery from sources identified as not reasonably accessible, subject to judicial supervision.

One criticism leveled against the proposal is that it allows the responding party to "self-designate" information not produced because it is not reasonably accessible. All party-managed discovery and privilege invocation rests on "self-designation" to some extent. That is happening now, without the insights for the requesting party that the identification requirement provides. The responding party must disclose categories and types of sources of potentially responsive information that are not searched, enabling the requesting party to decide whether to challenge that designation.

Two other areas of concern were expressed during the comment period. One is the relationship to preservation. A second, related concern is that this proposal would lead corporations to make information inaccessible in order to frustrate discovery. As to the first concern, the Note is revised to clarify that the rule does not undermine or reduce common-law or statutory preservation obligations. The Committee Note includes a reminder that a party may be obliged to preserve information stored on sources it has identified as not reasonably accessible, but in keeping with the approach taken in proposed Rule 37(f) does not attempt to state or define a preservation obligation. As to the second concern, many witnesses and comments rejected the argument that the rule would encourage entities or individuals to

"bury" information that is necessary or useful for business purposes or that regulations or statutes require them to retain. Moreover, the rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes, not for a particular litigation. A party that makes information "inaccessible" because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed rule changes.

The Proposed Rule and Committee Note

Rule 26(b)(2)

The Committee recommends approval of the following amendment:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(2) Limitations.

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies

as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the

amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

* * * * *

Committee Note

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources

containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of — and the ability to search — much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing

some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light

of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Changes Made after Publication and Comment

This recommendation modifies the version of the proposed rule amendment as published. Responding to comments that the published proposal seemed to require identification of information that cannot be identified because it is not reasonably accessible, the rule text was clarified by requiring identification of sources that are not reasonably accessible. The test of reasonable accessibility was clarified by adding "because of undue burden or cost."

The published proposal referred only to a motion by the requesting party to compel discovery. The rule text has been changed to recognize that the responding party may wish to determine its search and potential preservation obligations by moving for a protective order.

The provision that the court may for good cause order discovery from sources that are not reasonably accessible is expanded in two ways. It now states specifically that the requesting party is the one who must

show good cause, and it refers to consideration of the limitations on discovery set out in present Rule 26(b)(2)(i), (ii), and (iii).

The published proposal was added at the end of present Rule 26(b)(2). It has been relocated to become a new subparagraph (B), allocating present Rule 26(b)(2) to new subparagraphs (A) and (C). The Committee Note was changed to reflect the rule text revisions. It also was shortened. The shortening was accomplished in part by deleting references to problems that are likely to become antique as technology continues to evolve, and in part by deleting passages that were at a level of detail better suited for a practice manual than a Committee Note.

The changes from the published proposed amendment to Rule 26(b)(2) are set out below.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure*

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(2) Limitations.

* * * * *

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

(B) A party need not provide discovery of electronically stored information from sources that

the party identifies as not reasonably accessible because of undue burden or cost. On motion ~~by the requesting party~~ to compel discovery or for a protective order, the ~~responding~~ party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery ~~of the information~~ from such sources ~~for~~ if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).~~and~~ The court may specify ~~terms and~~ conditions for the discovery.

(C) . . . . ~~A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause~~

~~and may specify terms and conditions for such discovery.~~

iii. Procedure For Asserting Claims of Privilege and Work Product Protection After Production: Rule 26(b)(5)

Introduction

Ever since the Committee began its intensive examination of discovery in 1996, a frequent complaint has been the expense and delay that accompany privilege review. The Committee has long studied whether it could offer a rule that would helpfully address this problem, within the limitations of the Rules Enabling Act and 28 U.S.C. § 2074(b). The Committee's more recent focus on electronic discovery revealed that the problems of privilege review are often more acute in that setting than with conventional discovery. The volume of electronically stored information responsive to discovery and the varying ways such information is stored and displayed make it more difficult to review for privilege than paper. The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic. The proposed amendment to Rule 26(b)(5) addresses these problems by setting up a procedure to assert privilege and work-product protection claims after production.

Under the proposed rule, if a party has produced information in discovery that it claims is privileged or protected as trial-preparation material, that party may notify the receiving party of the claim, stating the basis for it. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether a waiver has occurred. A receiving party that has disclosed or provided the information to a nonparty before getting notice must take reasonable steps to obtain the return of the information. The producing party must preserve the information pending the court's ruling on whether the information is privileged or protected and whether any privilege or work product protection has been waived or forfeited by production.

The proposed amendment does not address the substantive questions whether privilege or work product protection has been waived or forfeited. Instead, the amendment sets up a procedure to allow the responding party to assert a claim of privilege or of work-product protection after production. This supplements the existing procedure in Rule 26(b)(5) for a party that has withheld information on the ground of privilege or of protection to assert the claim, the requesting party to contest the claim, and the court to resolve the dispute. It is a nod to the pressures of litigating with the amount and nature of electronically stored information available in the present age, a procedural device for addressing the increasingly costly and time-consuming efforts to reduce the number of inevitable blunders.

The published rule addressed claims of privilege, but did not specifically include claims of protection as trial-preparation material. During the comment period, many suggested adding work-product protection to the rule. Doing so is consistent with present Rule 26(b)(5)(A) and reflects the reality that privilege and work- product protection often overlap; review is conducted simultaneously; and both have waiver consequences, although the extent may differ. The Committee decided to include both privilege and protection as trial-preparation material in the rule.

The published rule required the producing party to assert the claim of privilege within a "reasonable time." Several concerns were raised about the "reasonable time" provision that convinced the Committee to delete it from the proposed rule. Under the law of many jurisdictions, whether a party asserted a privilege claim within a reasonable time is important to determining whether there is a waiver; focusing on a reasonable time might carry implications inconsistent with the Committee's intent to avoid the substantive law of privilege and privilege waiver. In addition, the "reasonable time" formulation was not tied to any particular triggering event, such as the date of production or the date when the responding party learned or should have learned that it had produced information subject to a privilege or protection claim. A "reasonable time" requirement unmoored to a particular triggering event proved confusing. It is deleted from the revised proposal. The deletion does not mean that parties are free to assert a privilege or protection claim at any point in the litigation. Courts will continue to examine whether such a claim was made at a reasonable time, but as part of determining whether a waiver has occurred under the substantive law governing that issue.

The proposed rule is also revised to include what many comments recommended: a provision authorizing the receiving party to submit the information asserted to be privileged or protected under seal to the court. As a related change, the rule language is revised to require the party asserting the claim to set out the basis for it when giving notice; the Committee Note states that the receiving party should submit that statement to the court, along with the information itself, if the receiving party chooses to contest the claim. The notice informs the court of the basis for the claim and allows the receiving party to use the submission to seek a ruling as to waiver, privilege or protection, or both. Additional rule and Note language are provided to clarify this point.

As published, the Note stated that after receiving notice that information is claimed to be privileged, the party that received the information may not disseminate or use the information until the claim is resolved. Many comments urged that this directive be elevated to the rule. The Committee decided to add the directive to the rule text itself, adding clarity and emphasizing the purpose of providing a consistent and predictable procedure and preserving the status quo pending resolution of claims asserted after production.

The published rule did not specifically address an obligation by the receiving party to retrieve information it disclosed to third parties before the responding party asserted a privilege claim. Although the Committee Note stated that a receiving party should attempt to obtain return of the information if it

had been disclosed to a nonparty, the absence of such language emerged as a concern during the comment period. The Committee decided to address this issue in the rule text, but to limit any such obligation to "reasonable steps" to retrieve such information. Such a formulation provides appropriate protection for the party asserting the claim pending its resolution, but also limits the burden on the receiving party.

The Committee specifically sought reaction during the comment period on whether to require the party that received the notice to certify compliance with the rule. There was little support for this addition during the comment period. One concern was that by requiring the creation of a new, separate document, such a provision would go beyond the certification that Rule 26(g) reads into the signature on a discovery document. Imposing an added requirement on a party that did not make the mistake precipitating the problem in the first place also raised concerns. The Committee decided not to include a certification requirement in the rule.

The Proposed Rule and Committee Note

Rule 26(b)(5)(B)

The Committee recommends approval of the following proposed amendment.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by

claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must

take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * * * *

Committee Note

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was

waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Changes Made After Publication and Comment

The rule recommended for approval is modified from the published proposal. The rule is expanded to include trial-preparation protection claims in addition to privilege claims.

The published proposal referred to production "without intending to waive a claim of privilege." This reference to intent was deleted because many courts include intent in the factors that determine whether production waives privilege.

The published proposal required that the producing party give notice "within a reasonable time." The time requirement was deleted because it seemed to implicate the question whether production effected a waiver, a question not addressed by the rule, and also because a receiving party cannot practicably ignore a notice that it believes was unreasonably delayed. The notice procedure was further changed to require that the producing party state the basis for the claim.

Two statements in the published Note have been brought into the rule text. The first provides that the receiving party may not use or disclose the information until the claim is resolved. The second provides that if the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.*

The rule text was expanded by adding a provision that the receiving party may promptly present the information to the court under seal for a determination of the claim.

*In response to concerns about the proposal raised at the June 15-16, 2005, Standing Committee meeting, the Committee Note was revised to emphasize that the courts will continue to examine whether a privilege claim was made at a reasonable time, as part of substantive law.

The published proposal provided that the producing party must comply with Rule 26(b)(5)(A) after making the claim. This provision was deleted as unnecessary.

Changes are made in the Committee Note to reflect the changes in the rule text.

The changes from the published rule are shown below.

* * * * *

Rule 26. General Provisions Governing Discovery; Duty of Disclosure*

* * * * *

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) ~~***Privileged i***~~***Information Withheld.*** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

other parties to assess the applicability of the privilege or protection.

(B) ~~***Privileged iInformation Produced.***~~ If ~~When a party produces~~ information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, ~~without intending to waive a claim of privilege,~~ the party making the claim ~~it~~ may~~, within a reasonable time,~~ notify any party that received the information of the claim and the basis for its ~~claim of privilege~~. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The

producing party must ~~comply with Rule 26(b)(5)(A) with regard to the information and~~ preserve it the information until the ~~privilege~~ claim is resolved ~~pending a ruling by the court~~.

iv. Interrogatories and Requests for Production Involving Electronically Stored Information: Rules 33 and 34(a) and (b)

Introduction

(a). Rule 33

The proposed amendment to Rule 33 clarifies how the option to produce business records to respond to an interrogatory operates in the information age. The rule is amended to make clear that the option to produce business records or make them available for examination, audit, or inspection, includes electronically stored information. The Note language clarifies how the limitation in Rule 33(d), permitting the production of records to respond to an interrogatory when "the burden of deriving or ascertaining the answer" is substantially the same for either party, applies to electronically stored information. The Note explains that depending on the circumstances, "the responding party may be required to provide some combination of technical support, information on application software, or other assistance" to enable the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. In response to comments, the Note has been revised from the published version to clarify when such support might include direct access to a party's electronic information system. Because such access may raise sensitive problems of confidentiality or privacy, the Note states that the responding party may choose to derive or ascertain the answer itself.

(b). Rule 34

The proposed amendment to Rule 34(a) adds "electronically stored information" as a category subject to production, in addition to "documents." Rule 34(b) is amended to add procedures for requesting and objecting to the form for producing such information and to provide "default" forms of production. Such requests and objections did not arise with paper discovery, because paper can generally be produced in only one form. By contrast, electronically stored information may exist in a number of different forms, some of which may be inappropriate for the litigation or costly or burdensome for the requesting or responding party.

Rule 34(a)

Adding "electronically stored information" to Rule 34(a)'s list of what is subject to production is an obvious change. In 1970, this list was revised to add "data or data compilations." This discovery rule revision was made to accommodate changes in technology; it is safe to say that the technological developments that prompted the 1970 amendment have been dwarfed by the revolution in information technology in the intervening decades, which we are grappling with today. The gap between the rule's present terminology and existing technology is exacerbated by the inclusion of "phonorecords" in the items subject to discovery and the reference to having to use "detection devices" to translate data or compilations

into a usable form. Proposed revisions made since publication delete the archaic and redundant words "through detection devices," from the rule text. The term "electronically stored information" was further focused by addition of the word "stored" to Rule 34(a)(1), so that it speaks of information "stored" in any medium.

The public comments focused on whether "electronically stored information" should be included within the term "documents," or whether it should be a third category with "documents" and "things." The Committee heard that good arguments support both choices and that few negative consequences flow from either choice. The Committee decided to recommend making "electronically stored information" separate from "documents." Although courts and litigants have included such information in the word "documents" to make it discoverable under the present rule language, there are significant and growing differences that the distinction acknowledges. During the hearings, many technically sophisticated witnesses confirmed that significant types of electronically stored information — most notably dynamic databases — are extremely difficult to characterize as "documents." When the Advisory Committee decided in 1970 to include "data or data compilations" as a subset of "documents," the Committee expected that the rule would require a producing party to provide a "print-out of computer data." By contrast, while electronically stored information often can be produced in the form of a document, it also exists, and will more often be produced, in forms other than a document. Rather than continue to try to stretch the word "document" to make it fit this new category of stored information, the published proposed amendment to Rule 34 explicitly recognized electronically stored information as a separate category.

Some comments expressed concern that parties seeking production of "documents" under Rule 34 might not receive electronically stored information and would have to ask for it specifically. Note language responds to this concern. Even if a request refers only to documents — or to electronically stored information — the responding party must produce responsive information no matter what the storage form may be. In addition, the rules provide other steps that should alert a party to request electronically stored information if it is involved in a case. The parties are directed by Rule 26(f) to discuss discovery of electronically stored information if such discovery will occur in the case, and Rule 34(b) permits the requesting party to specify the form or forms for production of electronically stored information.

One other drafting matter with respect to Rule 34(a) deserves mention: the significance of the listed items in the parenthetical following the word "documents" in the current rule and the published draft. During the public comment period, some asked whether the listed items in that parenthetical refer only to "documents," and not "electronically stored information. The items listed refer, as applicable, to either or both electronically stored information and documents. For example, "data compilations" could be produced as paper, in a print-out of electronically stored information, or in electronic form; an "image" could be in a document or in an electronic form. The items listed reflect the breadth of both the terms "documents" and "electronically stored information." To clarify this point, redrafting after the public comment period reversed the order of "documents" and "electronically stored information" and changed the punctuation to replace the parentheses with a dash.

Rule 34(b)

Proposed amended Rule 34(b) provides a procedure for an issue that generally does not arise with paper discovery — electronically stored information exists and can be produced in a number of forms. The form or forms in which it is kept may not be a form that the requesting party can use or use efficiently or that the responding party wants to use for production. The form of producing electronically stored information is increasingly a source of dispute in discovery. The proposed amendment provides a structure and procedure for the parties to identify the form or forms of production that are most useful or appropriate for the litigation; provides guidance to the responding party if no request, order, or agreement specifies the form or forms of production; and provides guidance to the court if there is a dispute.

Proposed amended Rule 34(b) allows, but does not require, a requesting party to specify a form or forms for producing electronically stored information, clarifies that a responding party's objection to a request may include an objection to the specified form, requires a responding party to state the form or forms it intends to use for production in the written response it must file to the production request, and provides "default" forms of production to apply if the requesting party did not specify a form and there is no agreement or order requiring a particular form.

During the public comment period, concern was expressed as to the published language that described the so-called default forms of production. Rule 34(b), as published, stated that if the parties did not agree on forms of producing electronically stored information, and the court did not order specific forms of production, the responding party could produce in a "form in which it is ordinarily maintained, or in an electronically searchable form." These alternatives were intended to provide functional analogues to the existing rule language that provides choices for producing hard-copy documents: the form in which they are kept in the usual course of business or organized and labeled to correspond to the categories in the request. A number of commentators expressed concern that "a form ordinarily maintained" required "native format" production, which can have disadvantages ranging from an inability to redact, leading to privilege problems; an inability to bates-stamp the "document" for purposes of litigation management and control, which is not an insignificant consideration, particularly in complex multi-party cases; and the receiving party's ability to create "documents" from the produced native format data and present them back to the producing party as deposition or proposed trial exhibits that, while based on the native format data produced, are totally unfamiliar to the producing party. The commentators expressed concern that the alternative provided, an "electronically searchable form," might exert pressure for "native format" production due to the difficulties that attend providing an electronically searchable form. Other comments challenged this alternative default as a standard that should not be applied for all cases. A form that is readily searchable on one party's system may not be easily searched, or searched at all, on another party's system. And there is a converse concern that the requesting party might insist on production in a form searchable in its own unique system, imposing undue conversion costs on the producing party. Other information may exist in an electronic form that is not searchable in any meaningful sense. Requiring electronic searchability, moreover, may be unnecessary or even unwanted in some cases. Many parties

continue to seek and provide information in paper form by printing out electronic files. On the other hand, commentators noted that it is important to frame the rule to provide the same kind of protection against discovery abuse that is provided for paper discovery by the present choice between producing documents as they are kept in the usual course of business or organized and labelled to correspond with the categories in the request. Producing electronically stored information with the ability to search by electronic means removed or degraded is the electronic discovery version of the "document dump," the production of large amounts of paper with no organization or order.

In response to these and other concerns, rule and Note language have been revised. The existing language of Rule 34(a) provided the starting point, by requiring a responding party to "translate" electronic information, if necessary, "into reasonably usable form." The Committee was concerned in its discussion that the Rule 34(b) "default" forms of production should be consistent with this Rule 34(a) requirement. After discussion, the Committee decided to retain the published rule language that one default form of production be the form or forms in which the responding party ordinarily maintains the information, but to make the alternative "a form or forms that are reasonably usable." Under Rule 34(a) and (b), the form or forms in which the responding party ordinarily maintains its information can be the default choice of the responding party, but if necessary that party might have to translate the information to make it "reasonably usable." Or the responding party can choose a form that it does not ordinarily use, as long as it is reasonably usable. This is consistent with Rule 34(a) as it has stood since 1970.

If the information is maintained in a way that is not usable by anyone – for example, it may be stored on obsolete sources or require equipment that is unavailable – the problem is properly addressed under Rule 26(b)(2), which covers electronically stored information that is not reasonably accessible. If the requesting party has esoteric or idiosyncratic features on its information system that would be unduly burdensome or costly for the responding party to accommodate, producing the information in a form that can be used with software that is in general commercial use should be "reasonably usable."

During the comment period, as noted, concerns were raised about whether the "default forms" of production would permit responding parties to produce electronically stored information in ways that remove or degrade functions that are useful to the requesting party, such as features that make it electronically searchable. Committee Note language responds to this concern, stating that the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Rule 34(b) was changed from the published version to permit the parties to specify the form "or forms" for production of electronically stored information. This change recognizes the fact that different

types of information may best be produced in different forms. In addition, the provision stating that a producing party need produce the same electronically stored information in only one form was relocated to make it clear that this limitation applies when the requesting party specifies the desired form or forms in the request.

The Proposed Rules and Committee Notes

Rule 33

The Committee recommends approval of the following amendment:

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, <u>including electronically stored information,</u> of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A

specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

* * * * *

Committee Note

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as can the party served," and that the responding party must give the interrogating party a "reasonable opportunity to examine, audit, or inspect" the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the

responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).

Changes Made after Publication and Comment

No changes are made to the rule text. The Committee Note is changed to reflect the sensitivities that limit direct access by a requesting party to a responding party's information system. If direct access to the responding party's system is the only way to enable a requesting party to locate and identify the records from which the answer may be ascertained, the responding party may choose to derive or ascertain the answer itself.

Rule 34

The Committee recommends the following rule amendment and accompanying Committee Note:

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated documents or electronically stored information — (including writings, drawings, graphs, charts, photographs, sound recordings, images ~~phonorecords~~, and other data or data compilations stored in any medium from which information can be obtained; — translated, if necessary, by the

respondent ~~through detection devices~~ into reasonably usable form~~)~~, or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, ~~in which event~~ stating the reasons for the objection ~~shall be stated~~. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) ~~A~~a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request~~.~~;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

* * * * *

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly

difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers — either as documents or as electronically stored information — information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to "documents" appear in discovery

rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term "electronically stored information" is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must — like documents and land sought to be examined — be designated in the request.

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information

should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically

stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

Changes Made after Publication and Comment

The proposed amendment recommended for approval has been modified from the published version. The sequence of "documents or electronically stored information" is changed to emphasize that the parenthetical exemplifications apply equally to illustrate "documents" and "electronically stored information." The reference to "detection devices" is deleted as redundant with "translated" and as archaic.

The references to the form of production are changed in the rule and Committee Note to refer also to "forms." Different forms may be appropriate or necessary for different sources of information.

The published proposal allowed the requesting party to specify a form for production and recognized that the responding party could object to the requested form. This procedure is now amplified by directing that the responding party state the form or forms it intends to use for production if the request does not specify a form or if the responding party objects to the requested form.

The default forms of production to be used when the parties do not agree on a form and there is no court order are changed in part. As in the published proposal, one default form is "a form or forms in which [electronically stored information] is ordinarily maintained." The alternative default form, however, is changed from "an electronically searchable form" to "a form or forms that are reasonably usable." "[A]n electronically searchable form" proved to have several defects. Some electronically stored information cannot be searched electronically. In

addition, there often are many different levels of electronic searchability — the published default would authorize production in a minimally searchable form even though more easily searched forms might be available at equal or less cost to the responding party.

The provision that absent court order a party need not produce the same electronically stored information in more than one form was moved to become a separate item for the sake of emphasis.

The Committee Note was changed to reflect these changes in rule text, and also to clarify many aspects of the published Note. In addition, the Note was expanded to add a caveat to the published amendment that establishes the rule that documents — and now electronically stored information — may be tested and sampled as well as inspected and copied. Fears were expressed that testing and sampling might imply routine direct access to a party's information system. The Note states that direct access is not a routine right, "although such access might be justified in some circumstances."

The changes in the rule text since publication are set out below.

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes*

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information ~~or any designated documents~~ (– including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium – from which information can be obtained, translated, if necessary, by the respondent ~~through detection devices~~ into reasonably usable form), . . .

* * * * *

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

* * * * *

The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders,

* * * * *

(ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in ~~an electronically searchable form~~ a form or forms that are reasonably usable; ~~The party need only produce such information in one form.~~ and

(iii) a party need not produce the same electronically stored information in more than one form.

v. Sanctions for a Certain Type of Loss of Electronically Stored Information: Rule 37(f)

Introduction

Proposed Rule 37(f) responds to a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use. The proposed rule provides limited protection against sanctions for a party's inability to provide electronically stored information in discovery when that information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith.

Examples of this feature in present systems include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been "deleted"; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period. Similarly, many database programs automatically create, discard, or update information without specific direction from, or awareness of, users. By protecting against sanctions for loss of information as a result of the routine operation of a computer system, the proposed rule recognizes that such automatic features are essential to the operation of electronic information systems. The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, again in ways that have no counterpart to managing hard-copy information. One reason is that hard-copy document retention and destruction programs are not intertwined with, nor an inextricable part of, ongoing business processes. A data producer can warehouse large volumes of papers without affecting ongoing activities and can maintain and manage hard-copy records separately from the creation of products or services. By contrast, electronic information is usually part of the data producer's activities, whether it be the manufacture of products or the provision of services. It can be difficult to interrupt the routine operation of computer systems to isolate and preserve discrete parts of the information they overwrite, delete, or update on an ongoing basis, without creating problems for the larger system. It is unrealistic to expect parties to stop such routine operation of their computer systems as soon as they anticipate litigation. It is also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time-consuming. There is considerable uncertainty as to whether a party — particularly a party that produces large amounts of information — nonetheless has to interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that it might be sought in discovery, or risk severe sanctions.

Proposed Rule 37(f) is not intended to provide a shield for parties that intentionally destroy information because of its relationship to litigation by, for example, exploiting the routine operation of an information system to target specific electronically stored information for destruction in order to avoid producing that information in discovery. Defining the culpability standard that would make a party ineligible for protection under Rule 37(f) presented a challenge. Rule 37(f) was therefore published in two versions and the Committee particularly invited commentary on the appropriate culpability standard. The text version adopted essentially a negligence test, requiring that the party seeking protection under the proposed rule have taken reasonable steps to preserve information after it knew the information was discoverable in the action. A footnote offered an alternative version setting a higher culpability threshold — that sanctions could not be imposed unless the party intentionally or recklessly failed to preserve the information. Both versions of the published Rule 37(f) draft also precluded protection when the loss of the information violated a court order.

Much public commentary focused on Rule 37(f). A number of comments urged that the text version — precluding any protection under the rule even for negligent loss of information — provided no meaningful protection, but rather protected against conduct unlikely to be sanctioned in the first place. Any mistake in interrupting the routine operation of a computer system might be found not reasonable, defeating application of the rule. Others urged that the footnote version was too restrictive. Proving that a litigant acted intentionally or recklessly in permitting the regular operation of an information system to continue might prove quite difficult and require discovery and fact-finding that could involve inquiry into difficult subjective issues. Adopting the footnote version could insulate conduct that should be subject to sanctions.

Public commentary also focused on the court-order provision included in both published drafts. Many argued that this provision would promote applications for preservation orders as a way to defeat application of the proposed rule. Others urged that the court-order provision be narrowed to orders that "specifically" called for preservation of certain electronically stored information, for fear that broad preservation orders would nullify the Rule 37(f) protection altogether.

Public commentary also emphasized the possible relationship between Rule 37(f) and the proposed amendment to Rule 26(b)(2) that — unless the court orders discovery — excuses a responding party from providing discovery of electronically stored information that is not reasonably accessible. Many commentators expressed a concern or expectation that the interaction of Rules 26(b)(2) and 37(f) meant that absent a preservation order, there would be no obligation to preserve information a party contended was not reasonably accessible because such information was not "discoverable" under Rule 26(b)(2).

The Advisory Committee carefully considered the comments and made adjustments in the rule and the Note to respond to them. It retained the fundamental focus on the routine operation of an electronic information system. But it revised Rule 37(f) to adopt a culpability standard intermediate

between the two published versions. The proposed rule provides protection from sanctions only for the "good faith" routine operation of an electronic information system.

As the Note explains, good faith may require that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. Such intervention is often called a "litigation hold." The rule itself does not purport to create or affect such preservation obligations, but recognizes that they may arise from many sources, including common law, statutes, and regulations. The steps taken to implement an effective litigation hold bear on good faith, as does compliance with any agreements the parties have reached regarding preservation and with any court orders directing preservation. Such party agreements may emerge from the early discovery-planning conference, which the proposed amendments to Rule 26(f) provide should include discussion of preserving discoverable information.

The revised rule also includes a provision that permits sanctions in "exceptional circumstances" even when information is lost because of a party's good-faith routine operation of a computer system. The exceptional circumstances provision adds flexibility not included in the published drafts.

The Advisory Committee also decided that the court-order provision should be removed from the rule. Many comments noted that the provision would create an incentive to obtain a preservation order to make the rule's protection unavailable. As stated in the Note to Rule 26(f) (regarding the discussion of preservation during the discovery-planning conference), preservation orders should not be routinely entered. The existence of a court order remains important, however; as the Rule 37(f) Note recognizes, steps taken to comply with orders calling for preservation of information bear on the good faith of a party that has lost information due to the routine operation of a computer system.

To respond to concerns that the proposed rule would insulate routine destruction of information on sources a party identifies as not reasonably accessible, the Notes to both Rules 37(f) and 26(b)(2) have been revised to make clear that there is no necessary linkage between these rules. Thus, the Rule 37(f) Note says that good faith may require preservation of information on sources a party believes are not reasonably accessible under Rule 26(b)(2).

In addition, the Advisory Committee changed the reference to routine operation from "a party's" information system to "an" information system. This change recognizes that in many cases, a party's electronically stored information is actually stored on a system owned by another, such as a vendor in a contractual relationship with the party. Absent this change, the rule could result in holding a party subject to sanctions for the loss of information resulting from the routine, good-faith operation of a computer system because the information was on a system operated by a vendor or other entity. The rule continues to focus on the party's good faith in the operation of a system containing the party's information. For example, if a party stored certain electronically stored information on a vendor's computer system and

that information became subject to a preservation obligation, the party's good faith would be measured by its efforts to arrange for the preservation of the information on that system.

The Proposed Rule and Committee Note

Rule 37(f)

The Committee recommends approval of the following proposed amendment:

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

* * * * *

(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Committee Note

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the "routine operation of an electronic information system" — the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

Changes Made after Publication and Comment

The published rule barred sanctions only if the party who lost electronically stored information took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action. A footnote invited comment on an alternative standard that barred sanctions unless the party recklessly or intentionally failed to preserve the information. The present proposal establishes an intermediate standard, protecting against sanctions if the information was lost in the "good faith" operation of an electronic information system. The present proposal carries forward a related element that was a central part of the published proposal — the information must have been lost in the system's "routine operation." The change to a good-faith test made it possible to eliminate the reference to information "discoverable in the action," removing a potential source of confusion as to the duty to preserve information on sources that are identified as not reasonably accessible under Rule 26(b)(2)(B).

The change to a good-faith standard is accompanied by addition of a provision that permits sanctions for loss of information in good-faith routine operation in "exceptional circumstances." This provision recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.

As published, the rule included an express exception that denied protection if a party "violated an order in the action requiring it to preserve electronically stored information." This exception was deleted for fear that it would invite routine applications for preservation orders, and often for overbroad orders. The revised Committee Note observes

that violation of an order is an element in determining whether a party acted in good faith.

The revised proposal broadens the rule's protection by applying to operation of "an" electronic information system, rather than "the party's" system. The change protects a party who has contracted with an outside firm to provide electronic information storage, avoiding potential arguments whether the system can be characterized as "the party's." The party remains obliged to act in good faith to avoid loss of information in routine operations conducted by the outside firm.

The Committee Note is changed to reflect the changes in the rule text.

The changes from the published version of the proposed rule text are set out below.

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

* * * * *

(f) Electronically Stored Information. Absent exceptional circumstances, ~~Unless a party violated an order in the action requiring it to preserve electronically stored information,~~ a court may not impose sanctions under these rules on a ~~the~~ party for failing to provide ~~such~~ electronically stored information lost as

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

a result of the routine, good-faith operation of an electronic information system. ~~if:~~

~~(1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and~~

~~(2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.~~

* * * * *

vi. Rule 45

Introduction

Rule 45 provisions for subpoenas to produce documents apply to electronically stored information as well as traditional paper documents. The published amendments proposed revisions designed to keep Rule 45 in line with the other amendments addressing electronically stored information. Virtually all of the public comment and testimony focused on the other amendments. It was assumed that Rule 45 would conform, where appropriate, to any changes proposed for the other rules. A description of the changes made since publication serves also to describe the Rule 45 amendments in general.

A simple change was to expand the Rule 45(a)(1) provision that a subpoena may specify the form for producing electronically stored information to include the "forms." This change parallels changes made in Rules 26(f) and 34. The same change is made in the Rule 45(c)(2)(B) provision for objecting to the form or forms requested in the subpoena and in the Rule 45(d)(1)(B) provision for the default form or forms of production.

Similarly, the default form of the production provision was changed to accord with revised Rule 34(b), dropping the alternative for "an electronically searchable form" and substituting a form or forms that are "reasonably usable."

The Rule 45(d)(1)(E) provision protecting against production of electronically stored information that is not reasonably accessible was revised to mirror the changes made in Rule 26(b)(2)(B). The producing person must identify the sources, not the information; "undue burden or cost" is added to provide a test of reasonable accessibility; motions both to compel discovery and to quash are expressly recognized; discovery of information not reasonably accessible is allowed on court order after finding good cause, considering the limitations of Rule 26(b)(2)(C); and the court's authority to specify conditions for discovery is expressly stated.

Several changes were made in the Rule 45(d)(2)(B) provision that tracks the Rule 26(b)(5)(B) provision for asserting a claim of privilege after information is produced. Trial-preparation material is added to this procedure. The person making the claim must state the basis for the claim. The party receiving the information may not use or disclose it until the claim is resolved, but may present it to the court under seal for a determination of the claim. The receiving party also must take reasonable steps to retrieve the information if it was disclosed to others.

The Proposed Rule and Committee Note

Rule 45

The Committee recommends approval of amendments to Rule 45 that incorporate the corresponding changes made to the discovery rules.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, ~~and~~ copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2)* A subpoena must issue as follows:

* * * * *

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

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

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

*Amendments to subdivision (a)(2) are due to take effect on December 1, 2005.

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any

place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, ~~or~~ inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, ~~or~~ inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, ~~and~~ copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, ~~and~~ copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for

compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing ~~inspection or copying of~~ any or all of the designated materials or inspection of the premises ~~or~~ to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, ~~and~~ copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection ~~and~~, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; ~~,or~~

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

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the

usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the

requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) **(A)** When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving

party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. Failure ~~by~~ of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a ~~non-party~~ nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

* * * * *

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule

45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and

electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

Changes Made After Publication and Comment

The Committee recommends a modified version of the proposal as published. The changes were made to maintain the parallels between Rule 45 and the other rules that address discovery of electronically stored information. These changes are fully described in the introduction to Rule 45 and in the discussions of the other rules.

The changes from the published proposed amendment are shown below.

Rule 45. Subpoena*

(a) Form; Issuance.

* * * * *

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

* * * * *

(c) Protection of Persons Subject to Subpoenas.

* * * * *

(2) (B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

the party or attorney designated in the subpoena written objection to providing any or all of the designated materials or inspection of the premises—or to providing electronically stored information in the form or forms requested. . . .

* * * * *

(d) Duties in Responding to Subpoena.

* * * * *

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable ~~an electronically searchable form~~.

(C) The person producing electronically stored information need only produce the same information ~~it~~ in one form.

(D~~C~~) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion

to compel discovery or to quash ~~by the requesting party~~, the ~~responding party~~ person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources ~~of the information for~~ if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for such discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If ~~When a person produces~~ information is produced in response to a subpoena that is subject ~~without intending~~ to ~~waive~~ a claim of privilege or of

protection as trial-preparation material, the person making the claim ~~it~~ may ~~within a reasonable time~~ notify any party that received the information of ~~its~~ the claim ~~of privilege~~ and the basis for it. After being notified, a ~~any~~ party must promptly return, sequester, or destroy the specified information and ~~all~~ any copies it has and may not disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must ~~comply with Rule 45(d)(2)(A) with regard to the information and~~ preserve the information until the claim is resolved ~~pending a ruling by the court~~.

* * * * *

c. Conclusion

When the electronic discovery proposals were published in August 2004, the Committee hoped for vigorous and broad comment from a variety of experiences and perspectives. The hearings and written comment provided many thoughtful and helpful criticisms, for which the Committee is grateful. The process has worked precisely as it should, aided by the very electronic communication capability that inspired the work in the first place.

The proposed rule amendments reflect and accommodate changes in discovery practice that have been in the making for years, brought about by profound changes in information technology. The proposed amendments work in tandem. Early attention to the issues is required. The requesting party is authorized to specify the forms in which electronically stored information should be produced and a framework is established to resolve disputes over the forms of producing such information. A party need not review or provide discovery of electronically stored information that is not reasonably accessible unless the court orders such discovery, for good cause. A procedure for asserting claims of privilege or of work-product protection after production is established. Absent exceptional circumstances, a party that is unable to provide discovery of electronically stored information lost as a result of the routine operation of an electronic information system cannot be sanctioned, if that operation was in good faith.

Electronically stored information has the potential to make discovery more efficient, less time-consuming, and less costly, if it is properly managed and effectively supervised. The volume, the dynamic character, and the numerous forms of electronically stored information, among other qualities, also have the potential to increase discovery costs and delays, further burdening the litigation process and exacerbating problems the Advisory and Standing Committees have been grappling with for years. The proposed rules provide support for early party management and, where necessary, effective judicial supervision. Keeping discovery manageable, affordable, and fair is a problem that litigants and judges in all courts share. The Committee looks forward to continuing to work to solve it fairly and well.

(4) Supplemental Rule G, with Conforming Changes To Supplemental Rules A, C, E and Civil Rules 9, 14, and 65.1; and Rule 26(a)(1)(E)

Admiralty Rule G: Civil Forfeiture

Admiralty Rule G represents the culmination of several years of work to adapt the Supplemental Rules to the great growth of civil forfeiture actions. Many civil forfeiture statutes explicitly invoke the Supplemental Rules. The procedures that best serve civil forfeiture actions, however, often depart from the procedures that best serve traditional admiralty and maritime actions. Rule G was developed in close cooperation with the Department of Justice and representatives of the National Association of Criminal Defense Lawyers to establish distinctive forfeiture procedures within the framework of the Supplemental Rules. In addition, Rule G establishes new provisions to reflect enactment of the Civil Asset Forfeiture Reform Act of 2000, and to reflect developments in decisional and constitutional law. The result is a nearly complete separation of civil forfeiture procedure from Supplemental Rules A through F, invoking them for civil forfeiture only to address interstitial questions that are not covered by Rule G.

The only lengthy comments on Rule G were provided by the Department of Justice. A summary of all the comments is set out below.

Several modest changes in Rule G and the Committee Note are proposed as a result of the comments.

Conforming amendments to other Supplemental Rules were published with Rule G. An addition to Rule 26(a)(1)(E) was published, adding "a forfeiture action in rem arising from a federal statute" to the exemptions from initial disclosure requirements. There was no comment on these amendments.

In addition to the published proposals, technical changes are needed to conform Rule 9(h) to the new Rule G title and to conform Rule 14 cross-references to the Supplemental Rule C(6) provisions redesignated in the conforming amendments that were published with Rule G. Because these changes are purely mechanical, they are recommended for adoption without publication.

With the changes proposed below, it is recommended that Rule G be sent to the Judicial Conference with a recommendation for adoption.

SUPPLEMENTAL RULES FOR ~~CERTAIN~~ ADMIRALTY ~~AND~~ OR MARITIME CLAIMS AND ASSET FORFEITURE ~~CLAIMS~~ ACTIONS

Rule G. Forfeiture Actions In Rem

(1) Scope. This rule governs a forfeiture action in rem arising from a federal statute. To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

(2) Complaint. The complaint must:

(a) be verified;

(b) state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;

(c) describe the property with reasonable particularity;

(d) if the property is tangible, state its location when any seizure occurred and — if different — its location when the action is filed;

(e) identify the statute under which the forfeiture action is brought; and

(f) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

(3) Judicial Authorization and Process.

(a) Real Property. If the defendant is real property, the government must proceed under 18 U. S. C. § 985.

(b) Other Property; Arrest Warrant. If the defendant is not real property:

(i) the clerk must issue a warrant to arrest the property if it is in the government's possession, custody, or control;

(ii) the court — on finding probable cause — must issue a warrant to arrest the property if it is not in the government's possession, custody, or control and is not subject to a judicial restraining order; and

(iii) a warrant is not necessary if the property is subject to a judicial restraining order.

(c) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be: (A) a marshal or any other United States officer or employee; (B) someone under

contract with the United States; or (C) someone specially appointed by the court for that purpose.

(ii) The authorized person or organization must execute the warrant and any supplemental process on property in the United States as soon as practicable unless:

(A) the property is in the government's possession, custody, or control; or

(B) the court orders 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.

(iii) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

(iv) If executing a warrant on property outside the United States is required, the warrant may be transmitted to an appropriate authority for serving process where the property is located.

(4) Notice.

(a) Notice by Publication.

(i) When Publication Is Required. A judgment of forfeiture may be entered only if the government has published notice of the action within a reasonable time after filing the complaint or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than $1,000 and direct notice is sent under Rule G(4)(b) to every person the government can reasonably identify as a potential claimant; or

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(ii) Content of the Notice. Unless the court orders otherwise, the notice must:

(A) describe the property with reasonable particularity;

(B) state the times under Rule G(5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(iii) Frequency of Publication. Published notice must appear:

(A) once a week for three consecutive weeks; or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an official internet government forfeiture site for at least 30 consecutive days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under Rule G(4)(a)(iv).

(iv) Means of Publication. The government should select from the following options a means of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, publication in a newspaper generally circulated in the district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is outside the United States, publication in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located; or

(C) instead of (A) or (B), posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than 20 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant.

(B) Notice may be sent to the potential claimant or to the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case.

(C) Notice sent to a potential claimant who is incarcerated must be sent to the place of incarceration.

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is sent may be sent to the

address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom the property was seized who is not incarcerated when notice is sent may be sent to the last address that person gave to the agency that seized the property.

(iv) When Notice Is Sent. Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.

(v) Actual Notice. A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to send the required notice.

(5) Responsive Pleadings.

(a) Filing a Claim.

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed by the claimant under penalty of perjury; and

(D) be served on the government attorney designated under Rule G(4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under Rule G(4)(b);

(B) if notice was published but direct notice was not sent to the claimant or the claimant's attorney, no later than 30 days after final publication of newspaper notice or legal notice under Rule G(4)(a) or no later than 60 days after the first day of publication on an official internet government forfeiture site; or

(C) if notice was not published and direct notice was not sent to the claimant or the claimant's attorney:

(1) if the property was in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under Rule G(3)(b); or

(2) if the property was not in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C § 985(c) as to real property, or 60 days after process was executed on the property under Rule G(3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor, and if filed on the bailor's behalf must state the authority to do so.

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim. A claimant waives an objection to in rem

jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served.

(b) Answers or Objections. Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.

(c) Government's Response Deferred. The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until 20 days after the claimant has answered these interrogatories.

(7) Preserving, Preventing Criminal Use, and Disposing of Property; Sales.

(a) Preserving and Preventing Criminal Use of Property. When the government does not have actual possession of the defendant property the court, on motion or on its own, may enter any order necessary to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense.

(b) Interlocutory Sale or Delivery.

(i) Order to Sell. On motion by a party or a person having custody of the property, the court may order all or part of the property sold if:

(A) the property is perishable or at risk of deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or is disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(ii) Who Makes the Sale. A sale must be made by a United States agency that has authority to sell the

property, by the agency's contractor, or by any person the court designates.

(iii) Sale Procedures. The sale is governed by 28 U.S.C. §§ 2001, 2002, and 2004, unless all parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.

(iv) Sale Proceeds. Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.

(v) Delivery on a Claimant's Motion. The court may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit sale under Rule G(7)(b)(i) and gives security under these rules.

(c) Disposing of Forfeited Property. Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

(8) Motions.

(a) Motion To Suppress Use of the Property as Evidence. If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) Motion To Dismiss the Action.

(i) A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).

(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 Rule G(2).

(c) Motion To Strike a Claim or Answer.

(i) At any time before trial, the government may move to strike a claim or answer:

(A) for failing to comply with Rule G(5) or (6);, or

(B) because the claimant lacks standing.

(ii) The motion:

(A) must be decided before any motion by the claimant to dismiss the action; and

(B) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of the evidence.

(d) Petition To Release Property.

(i) If a United States agency or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f), a person who has filed a claim to the property may petition for its release under § 983(f).

(ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the petition may be filed either in the district where the property was seized or in the district where a warrant to seize the property issued. If a judicial forfeiture action against the

property is later filed in another district — or if the government shows that the action will be filed in another district — the petition may be transferred to that district under 28 U.S.C. § 1404.

(e) Excessive Fines. A claimant may seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment or by motion made after entry of a forfeiture judgment if:

(i) the claimant has pleaded the defense under Rule 8; and

(ii) the parties have had the opportunity to conduct civil discovery on the defense.

(9) Trial. Trial is to the court unless any party demands trial by jury under Rule 38.

Committee Note

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings. As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel

interpretations of common rules that may not be suitable for admiralty proceedings.

Rule G generally applies to actions governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and also to actions excluded from it. The rule refers to some specific CAFRA provisions; if these statutes are amended, the rule should be adapted to the new provisions during the period required to amend the rule.

Rule G is not completely self-contained. Subdivision (1) recognizes the need to rely at times on other Supplemental Rules and the place of the Supplemental Rules within the basic framework of the Civil Rules.

Supplemental Rules A, C, and E are amended to reflect the adoption of Rule G.

Subdivision (1)

Rule G is designed to include the distinctive procedures that govern a civil forfeiture action. Some details, however, are better supplied by relying on Rules C and E. Subdivision (1) incorporates those rules for issues not addressed by Rule G. This general incorporation is at times made explicit — subdivision (7)(b)(v), for example, invokes the security provisions of Rule E. But Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.

The Civil Rules continue to provide the procedural framework within which Rule G and the other Supplemental Rules operate. Both Rule G(1) and Rule A state this basic proposition. Rule G, for example, does not address pleadings amendments. Civil Rule 15 applies, in light of the circumstances of a forfeiture action.

Subdivision (2)

Rule E(2)(a) requires that the complaint in an admiralty action "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts

and to frame a responsive pleading." Application of this standard to civil forfeiture actions has evolved to the standard stated in subdivision (2)(f). The complaint must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. *See U. S. v. Mondragon*, 313 F.3d 862 (4th Cir. 2002). Subdivision (2)(f) carries this forfeiture case law forward without change.

Subdivision (3)

Subdivision (3) governs in rem process in a civil forfeiture action.

Paragraph (a). Paragraph (a) reflects the provisions of 18 U.S.C. § 985.

Paragraph (b). Paragraph (b) addresses arrest warrants when the defendant is not real property. Subparagraph (i) directs the clerk to issue a warrant if the property is in the government's possession, custody, or control. If the property is not in the government's possession, custody, or control and is not subject to a restraining order, subparagraph (ii) provides that a warrant issues only if the court finds probable cause to arrest the property. This provision departs from former Rule C(3)(a)(i), which authorized issuance of summons and warrant by the clerk without a probable-cause finding. The probable-cause finding better protects the interests of persons interested in the property. Subparagraph (iii) recognizes that a warrant is not necessary if the property is subject to a judicial restraining order. The government remains free, however, to seek a warrant if it anticipates that the restraining order may be modified or vacated.

Paragraph (c). Subparagraph (ii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession, custody, or control. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or have won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (ii) does not reflect any

independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is shown for reasons unrelated to a seal or stay. Subparagraph (iv) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. The rule requires only that the warrant be transmitted to an appropriate authority.

Subdivision (4)

Paragraph (a). Paragraph (a) reflects the traditional practice of publishing notice of an in rem action.

Subparagraph (i) recognizes two exceptions to the general publication requirement. Publication is not required if the defendant property is worth less than $1,000 and direct notice is sent to all reasonably identifiable potential claimants as required by subdivision (4)(b). Publication also is not required if the cost would exceed the property's value and the court finds that other means of notice would satisfy due process. Publication on a government-established internet forfeiture site, as contemplated by subparagraph (iv), would be at a low marginal publication cost, which would likely be the cost to compare to the property value.

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants. The government should choose from among these means a method that is reasonably likely to reach potential claimants at a cost reasonable in the circumstances.

If the property is in the United States and newspaper notice is chosen, publication may be where the action is filed, where the property was seized, or — if the property was not seized — where the property is located. Choice among these places is influenced by the probable location of potential claimants.

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located.

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph (iv)(C) contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site could allow much more direct access to notice as to any specific property than publication provides.

Paragraph (b). Paragraph (b) is entirely new. For the first time, Rule G expressly recognizes the due process obligation to send notice to any person who reasonably appears to be a potential claimant.

Subparagraph (i) states the obligation to send notice. Many potential claimants will be known to the government because they have filed claims during the administrative forfeiture stage. Notice must be sent, however, no matter what source of information makes it reasonably appear that a person is a potential claimant. The duty to send notice terminates when the time for filing a claim expires.

Notice of the action does not require formal service of summons in the manner required by Rule 4 to initiate a personal action. The process that begins an in rem forfeiture action is addressed by subdivision (3). This process commonly gives notice to potential claimants. Publication of notice is required in addition to this process. Due process requirements have moved beyond these traditional means of notice, but are satisfied by practical means that are reasonably calculated to accomplish actual notice.

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C.

§ 983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced by subparagraph (ii)(B) reflects the procedure of § 983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed "not later than the deadline set forth in a personal notice letter (which may be not earlier than 35 days after the date the letter is sent) * * *." This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period; a claimant anxious to expedite proceedings can file the claim before the deadline; and the government has flexibility to set a still longer period when circumstances make that desirable.

Subparagraph (iii) begins by stating the basic requirement that notice must be sent by means reasonably calculated to reach the potential claimant. No attempt is made to list the various means that may be reasonable in different circumstances. It may be reasonable, for example, to rely on means that have already been established for communication with a particular potential claimant. The government's interest in choosing a means likely to accomplish actual notice is bolstered by its desire to avoid post-forfeiture challenges based on arguments that a different method would have been more likely to accomplish actual notice. Flexible rule language accommodates the rapid evolution of communications technology.

Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to the seizure of the property, or in a related investigation, administrative forfeiture proceeding, or criminal case.

Subparagraph (iii)(C) reflects the basic proposition that notice to a potential claimant who is incarcerated must be sent to the place of incarceration. Notice directed to some other place, such as a pre-incarceration residence, is less likely to reach the potential claimant. This provision does not address due process questions that may arise if a particular prison has deficient procedures for delivering notice to prisoners. *See Dusenbery v. U.S.*, 534 U.S. 161 (2002).

Items (D) and (E) of subparagraph (iii) authorize the government to rely on an address given by a person who is not incarcerated. The

address may have been given to the agency that arrested or released the person, or to the agency that seized the property. The government is not obliged to undertake an independent investigation to verify the address.

Subparagraph (iv) identifies the date on which notice is considered to be sent for some common means, without addressing the circumstances for choosing among the identified means or other means. The date of sending should be determined by analogy for means not listed. Facsimile transmission, for example, is sent upon transmission. Notice by personal delivery is sent on delivery.

Subparagraph (v), finally, reflects the purpose to effect actual notice by providing that a potential claimant who had actual notice of a forfeiture proceeding cannot oppose or seek relief from forfeiture because the government failed to comply with subdivision (4)(b).

Subdivision (5)

Paragraph (a). Paragraph (a) establishes that the first step of contesting a civil forfeiture action is to file a claim. A claim is required by 18 U.S.C. § 983(a)(4)(A) for actions covered by § 983. Paragraph (a) applies this procedure as well to actions not covered by § 983. "Claim" is used to describe this first pleading because of the statutory references to claim and claimant. It functions in the same way as the statement of interest prescribed for an admiralty proceeding by Rule C(6), and is not related to the distinctive meaning of "claim" in admiralty practice.

If the claimant states its interest in the property to be as bailee, the bailor must be identified. A bailee who files a claim on behalf of a bailor must state the bailee's authority to do so.

The claim must be signed under penalty of perjury by the person making it. An artificial body that can act only through an agent may authorize an agent to sign for it. Excusable inability of counsel to obtain an appropriate signature may be grounds for an extension of time to file the claim.

Paragraph (a)(ii) sets the time for filing a claim. Item (C) applies in the relatively rare circumstance in which notice is not published and

the government did not send direct notice to the claimant because it did not know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. § 983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim "shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by § 983(a)(4)(B) serves all of the purposes advanced by Rule 12(a)(4), *see U.S. v. $8,221,877.16*, 330 F.3d 141 (3d Cir. 2003); permits a uniform procedure for all civil forfeiture actions; and recognizes that a motion under Rule 12 can be made only after a claim is filed that provides background for the motion.

Failure to present an objection to in rem jurisdiction or to venue by timely motion or answer waives the objection. Waiver of such objections is familiar. An answer may be amended to assert an objection initially omitted. But Civil Rule 15 should be applied to an amendment that for the first time raises an objection to in rem jurisdiction by analogy to the personal jurisdiction objection provision in Civil Rule 12(h)(1)(B). The amendment should be permitted only if it is permitted as a matter of course under Rule 15(a).

A claimant's motion to dismiss the action is further governed by subdivisions (6)(c), (8)(b), and (8)(c).

Subdivision (6)

Subdivision (6) illustrates the adaptation of an admiralty procedure to the different needs of civil forfeiture. Rule C(6) permits interrogatories to be served with the complaint in an in rem action without limiting the subjects of inquiry. Civil forfeiture practice does not require such an extensive departure from ordinary civil practice. It remains useful, however, to permit the government to file limited interrogatories at any time after a claim is filed to gather information that bears on the claimant's standing. Subdivisions (8)(b) and (c) allow a

claimant to move to dismiss only if the claimant has standing, and recognize the government's right to move to dismiss a claim for lack of standing. Subdivision (6) interrogatories are integrated with these provisions in that the interrogatories are limited to the claimant's identity and relationship to the defendant property. If the claimant asserts a relationship to the property as bailee, the interrogatories can inquire into the bailor's interest in the property and the bailee's relationship to the bailor. The claimant can accelerate the time to serve subdivision (6) interrogatories by serving a motion to dismiss — the interrogatories must be served within 20 days after the motion is served. Integration is further accomplished by deferring the government's obligation to respond to a motion to dismiss until 20 days after the claimant moving to dismiss has answered the interrogatories.

Special interrogatories served under Rule G(6) do not count against the presumptive 25-interrogatory limit established by Rule 33(a). Rule 33 procedure otherwise applies to these interrogatories.

Subdivision (6) supersedes the discovery "moratorium" of Rule 26(d) and the broader interrogatories permitted for admiralty proceedings by Rule C(6).

Subdivision (7)

Paragraph (a). Paragraph (a) is adapted from Rule E(9)(b). It provides for preservation orders when the government does not have actual possession of the defendant property. It also goes beyond Rule E(9) by recognizing the need to prevent use of the defendant property in ongoing criminal offenses.

Paragraph (b). Paragraph (b)(i)(C) recognizes the authority, already exercised in some cases, to order sale of property subject to a defaulted mortgage or to defaulted taxes. The authority is narrowly confined to mortgages and tax liens; other lien interests may be addressed, if at all, only through the general good-cause provision. The court must carefully weigh the competing interests in each case.

Paragraph (b)(i)(D) establishes authority to order sale for good cause. Good cause may be shown when the property is subject to

diminution in value. Care should be taken before ordering sale to avoid diminished value.

Paragraph (b)(iii) recognizes that if the court approves, the interests of all parties may be served by their agreement to sale, aspects of the sale, or sale procedures that depart from governing statutory procedures.

Paragraph (c) draws from Rule E(9)(a), (b), and (c). Disposition of the proceeds as provided by law may require resolution of disputed issues. A mortgagee's claim to the property or sale proceeds, for example, may be disputed on the ground that the mortgage is not genuine. An undisputed lien claim, on the other hand, may be recognized by payment after an interlocutory sale.

Subdivision (8)

Subdivision (8) addresses a number of issues that are unique to civil forfeiture actions.

Paragraph (a). Standing to suppress use of seized property as evidence is governed by principles distinct from the principles that govern claim standing. A claimant with standing to contest forfeiture may not have standing to seek suppression. Rule G does not of itself create a basis of suppression standing that does not otherwise exist.

Paragraph (b). Paragraph (b)(i) is one element of the system that integrates the procedures for determining a claimant's standing to claim and for deciding a claimant's motion to dismiss the action. Under paragraph (c)(ii), a motion to dismiss the action cannot be addressed until the court has decided any government motion to strike the claim or answer. This procedure is reflected in the (b)(i) reminder that a motion to dismiss the forfeiture action may be made only by a claimant who establishes claim standing. The government, moreover, need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered any subdivision (6) interrogatories.

Paragraph (b)(ii) mirrors 18 U.S.C. § 983(a)(3)(D). It applies only to an action independently governed by § 983(a)(3)(D), implying nothing as to actions outside § 983(a)(3)(D). The adequacy of the

complaint is measured against the pleading requirements of subdivision (2), not against the quality of the evidence available to the government when the complaint was filed.

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a claimant has standing. It does not address the principles that govern claim standing.

Paragraph (c)(i)(A) provides that the government may move to strike a claim or answer for failure to comply with the pleading requirements of subdivision (5) or to answer subdivision (6) interrogatories. As with other pleadings, the court should strike a claim or answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15. Not every failure to respond to subdivision (6) interrogatories warrants an order striking the claim. But the special role that subdivision (6) plays in the scheme for determining claim standing may justify a somewhat more demanding approach than the general approach to discovery sanctions under Rule 37.

Paragraph (c)(ii) directs that a motion to strike a claim or answer be decided before any motion by the claimant to dismiss the action. A claimant who lacks standing is not entitled to challenge the forfeiture on the merits.

Paragraph (c)(ii) further identifies three procedures for addressing claim standing. If a claim fails on its face to show facts that support claim standing, the claim can be dismissed by judgment on the pleadings. If the claim shows facts that would support claim standing, those facts can be tested by a motion for summary judgment. If material facts are disputed, precluding a grant of summary judgment, the court may hold an evidentiary hearing. The evidentiary hearing is held by the court without a jury. The claimant has the burden to establish claim standing at a hearing; procedure on a government summary judgment motion reflects this allocation of the burden.

Paragraph (d). The hardship release provisions of 18 U.S.C. § 983(f) do not apply to a civil forfeiture action exempted from § 983 by § 983(i).

Paragraph (d)(ii) reflects the venue provisions of 18 U.S.C. § 983(f)(3)(A) as a guide to practitioners. In addition, it makes clear the status of a civil forfeiture action as a "civil action" eligible for transfer under 28 U.S.C. § 1404. A transfer decision must be made on the circumstances of the particular proceeding. The district where the forfeiture action is filed has the advantage of bringing all related proceedings together, avoiding the waste that flows from consideration of different parts of the same forfeiture proceeding in the court where the warrant issued or the court where the property was seized. Transfer to that court would serve consolidation, the purpose that underlies nationwide enforcement of a seizure warrant. But there may be offsetting advantages in retaining the petition where it was filed. The claimant may not be able to litigate, effectively or at all, in a distant court. Issues relevant to the petition may be better litigated where the property was seized or where the warrant issued. One element, for example, is whether the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial. Another is whether continued government possession would prevent the claimant from working. Determining whether seizure of the claimant's automobile prevents work may turn on assessing the realities of local public transit facilities.

Paragraph (e). The Excessive Fines Clause of the Eighth Amendment forbids an excessive forfeiture. *U.S. v. Bajakajian*, 524 U.S. 321 (1998). 18 U.S.C. § 983(g) provides a "petition" "to determine whether the forfeiture was constitutionally excessive" based on finding "that the forfeiture is grossly disproportional to the offense." Paragraph (e) describes the procedure for § 983(g) mitigation petitions and adopts the same procedure for forfeiture actions that fall outside § 983(g). The procedure is by motion, either for summary judgment or for mitigation after a forfeiture judgment is entered. The claimant must give notice of this defense by pleading, but failure to raise the defense in the initial answer may be cured by amendment under Rule 15. The issues that bear on mitigation often are separate from the issues that determine forfeiture. For that reason it may be convenient to resolve the issue by summary judgment before trial on the forfeiture issues. Often, however, it will be more convenient to determine first whether the property is to be forfeited. Whichever time is chosen to address mitigation, the parties must have had the opportunity to conduct civil discovery on the defense. The extent and timing of discovery are governed by the ordinary rules.

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38. It does not expand the right to jury trial. *See U.S. v. One Parcel of Property Located at 32 Medley Lane*, 2005 WL 465241 (D.Conn.2005), ruling that the court, not the jury, determines whether a forfeiture is constitutionally excessive.

Changes Made After Publication and Comment

Rule G(6)(a) was amended to delete the provision that special interrogatories addressed to a claimant's standing are "under Rule 33." The government was concerned that some forfeitures raise factually complex standing issues that require many interrogatories, severely depleting the presumptive 25-interrogatory limit in Rule 33. The Committee Note is amended to state that the interrogatories do not count against the limit, but that Rule 33 governs the procedure.

Rule G(7)(a) was amended to recognize the court's authority to enter an order necessary to prevent use of the defendant property in a criminal offense.

Rule G(8)(c) was revised to clarify the use of three procedures to challenge a claimant's standing — judgment on the pleadings, summary judgment, or an evidentiary hearing.

Several other rule text changes were made to add clarity on small points or to conform to Style conventions.

Changes were made in the Committee Note to explain some of the rule text revisions, to add clarity on a few points, and to delete statements about complex matters that seemed better left to case-law development.

Supplemental Rules A, C, E Amended To Conform to G

Rule A. Scope of Rules

1 (1) These Supplemental Rules apply to:

(A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(i) maritime attachment and garnishment;

(ii) actions in rem;

(iii) possessory, petitory, and partition actions, and;

(iv) actions for exoneration from or limitation of liability;

(B) forfeiture actions in rem arising from a federal statute; and

(C) These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

(2) The general Federal Rules of Civil Procedure for the United States District Courts are also applicable apply to the foregoing

proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Committee Note

Rule A is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions. Rule G(1) contemplates application of other Supplemental Rules to the extent that Rule G does not address an issue. One example is the Rule E(4)(c) provision for arresting intangible property.

Rule C. In Rem Actions: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

* * * * *

(2) Complaint. In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action; and

(c) ~~in an admiralty and maritime proceeding~~ state that the property is within the district or will be within the district while the action is pending;

~~(d) in a forfeiture proceeding for violation of a federal statute, state:~~

~~(i) the place of seizure and whether it was on land or on navigable waters;~~

~~(ii) whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and~~

~~(iii) all allegations required by the statute under which the action is brought~~.

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

~~(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.~~

~~(iii)(A) In other actions, t~~The court must review the complaint and any supporting papers. If the conditions

for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(iiB) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any ~~postarrest~~ post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A)

a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

* * * * *

(6) Responsive Pleading; Interrogatories.

~~**(a) Civil Forfeiture.** In an in rem forfeiture action for violation of a federal statute:~~

~~**(i)** a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:~~

~~**(A)** within 30 days after the earlier of (1) the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or~~

~~**(B)** within the time that the court allows.~~

~~**(ii)** an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and~~

~~(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.~~

(ab) Maritime Arrests and Other Proceedings. ~~In an rem action not governed by Rule C(6)(a):~~

* * * * *

(bc) Interrogatories.

* * * * *

Committee Note

Rule C is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

* * * * *

(3) Process.

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

~~(b) In forfeiture cases process in rem may be served within the district or outside the district when authorized by statute.~~

(bc) Issuance and Delivery.

* * * * *

(5) Release of Property.

(a) Special Bond. ~~Except in cases of seizures for forfeiture under any law of the United States, w~~Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

* * * * *

(9) Disposition of Property; Sales.

~~**(a) Actions for Forfeitures.** In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.~~

(ab) Interlocutory Sales; Delivery.

* * * * *

(ii) In the circumstances described in Rule E(9)(ab)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

(bc) Sales, Proceeds.

* * * * *

Committee Note

Rule E is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures.

* * * * *

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

* * * * *

(ii) a forfeiture action in rem arising from a federal statute;

(iiiii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iiiiv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(ivv) an action to enforce or quash an administrative summons or subpoena;

(vvi) an action by the United States to recover benefit payments;

(vivii) an action by the United States to collect on a student loan guaranteed by the United States;

(viiviii) a proceeding ancillary to proceedings in other courts; and

(viiiix) an action to enforce an arbitration award.

* * * * *

Committee Note

Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Technical Conforming Amendments, Civil Rules 9(h), 14, 65.1

The process of revising Rule G included conforming amendments to the Supplemental Rules affected by the change, but overlooked the need to conform Civil Rules 9(h) and 65.1 to the new title for the Supplemental Rules and to conform Rules 14(a) and (c) to the changes made in Supplemental Rule C(6). It is recommended that the following technical conforming changes be transmitted to the Judicial Conference for adoption without a period for public comment.

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime Claims and Asset Forfeiture Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Committee Note

Rule 9(h) is amended to conform to the changed title of the Supplemental Rules.

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party.

* * * * *

The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(~~b~~a)(1) in the property arrested.

* * * * *

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(~~b~~a)(1), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a

case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Committee Note

Rule 14 is amended to conform to changes in designating the paragraphs of Supplemental Rule C(6).

Rule 65.1. Security: Proceedings Against Sureties

Whenever these rules, including the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime Claims and Asset Forfeiture Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice

of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Committee Note

Rule 65.1 is amended to conform to the changed title of the Supplemental Rules.

Summary of Comments, Rule G

04-CV-127, Federal Magistrate Judges Assn., 04-CV-127: Supports. It is appropriate to adopt a rule that consolidates civil forfeiture procedure in one place and that takes account of the changes in forfeiture practice arising from CAFRA.

04-CV-203, U.S. Department of Justice: (These are long comments, focused on details rather than the larger enterprise. Adoption of Rule G is supported, with suggested refinements. "Consolidating civil forfeiture provisions in one rule will aid the administration of justice." "Nevertheless, there are a number of areas in which the Rule could be improved by resolving unnecessary ambiguities.")

Title: The title should be changed: "Supplemental Rules for Admiralty and Asset Forfeiture Claims."

G(3): This rule authorizes the clerk to issue a warrant to arrest property already in the government's possession. It should be expanded to include "custody or control" to avoid ambiguity in such circumstances as deposit in a financial institution account.

G(4): (1) The Note says that it suffices to make a reasonable choice of the means of notice most likely to reach potential claimants at a reasonable cost. The Rule says only that the government should select a means reasonably calculated to notify potential claimants. The Note should be revised to reflect the Rule.

(2) (a)(iv)(C) should read "instead of (A) ~~and~~ or (B)."

(3) (b)(i) requires notice to any person who reasonably appears to be a potential claimant. It seems clear, but a court has cited it to support notice to crime victims who do not have standing to contest forfeiture. The rule should include a new sentence: "Notice need not be sent to persons without standing to contest the forfeiture."

(4) (b)(iii)(B) allows notice either to a potential claimant or to the potential claimant's attorney, without expressing a preference. The Note says that notice should be sent to the attorney only when that appears to be the most reliable means. This statement is inconsistent with Mullane. Typically the government sends notice to both. But notice to the attorney alone should suffice if for any reason the attempt to send notice to the claimant proves inadequate.

(5) (b)(iii)(D) and (E) provide for notice to the last address a potential claimant gave to the agency that arrested or released the claimant or to the agency that seized the property. This is ambiguous. As drafted, the rule could be read to require notice to an address given to an agent or employee acquainted with the claimant even though the agent or employee had no connection whatsoever with the case. The Note should be revised to make clear that this does not count.

(6) (b)(iv) is awkward; the cure is to delete some words: "Notice ~~by the following means~~ is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail."

G(5): (a)(iii) says a bailee filing a claim must identify the bailor. The Note only says "should"; it should be amended to say "must."

(a)(iii) should be amended to reflect present C(6)(a)(ii), which says that a bailee who files a statement of interest must state the authority to file on behalf of another. This would be accomplished by adding: "A claim filed by a person asserting an interest as a bailee must identify the bailor and state the person is authorized to file a claim in the bailor's behalf."

(b) should be amended for the sake of clarity: "A claimant must serve and file an answer * * * or a motion under Rule 12 * * *. A

claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion under Rule 12 or stated in the answer."

G(6): The rule describes the special interrogatories served by the government to address a claimant's identity and relationship to the defendant property as interrogatories "under Rule 33." That is appropriate, but the Note is wrong in saying that these interrogatories count against the presumptive 25-interrogatory limit in Rule 33. The Note should say that they do not count against the limit. "Otherwise, a claimant who created complex standing issues by styling its claim in a particular way would enjoy a windfall vis a vis similarly situated claimants: the more complex the standing issues, the fewer interrogatories the Government could serve under Rule 33 on the merits of the case."

G(7): (a) recognizes authority to enter orders "to preserve the property and to prevent its removal or encumbrance." A restraining order also may be needed to prevent use of property in ongoing criminal offenses — examples are an Internet domain name or Website used to collect money for terrorists, to promote child pornography offenses, or to facilitate the distribution of illegal drugs. The rule should be amended: "to preserve the property, ~~and~~ to prevent its removal or encumbrance, or to present its use in the commission of a criminal offense."

(b)(i) was drafted as a compromise. The government wanted it to include explicit authorization for sale to protect against diminution in the defendant property's value. The response was sale on this ground could be sought under item (D), which allows sale for "other good cause." But the Note says that diminution in value is a ground that "should be invoked with restraint in circumstances that do not involve physical deterioration." The Note could frustrate the government's effort to obtain fair market value in the many cases that do not involve physical deterioration. The Note should be revised to include a neutral statement about balancing interests of all parties, including victims.

(b)(1)(C) authorizes sale of property subject to defaulted mortgage or tax obligations. The Note says that the rule does not address the question whether a mortgagee or other lien holder can force sale of property held for forfeiture, or whether the court can enjoin the sale. Although intended to be neutral, this Note statement may be read to suggest that there is some uncertainty in the law. The Note should be revised to say that it does not change the existing law with respect to the

court's authority to enjoin third parties from collecting through foreclosure.

G(8): (b)(i) refers to dismissing the action, while (ii) refers to dismissing the complaint. "Complaint" should be used in both places, as well as in the caption. The same change should be made in (c)(ii).

(c) represents a compromise. The government relinquished arguments that Rule G should establish claim-standing standards, leading to provisions that define only the procedure for determining claim standing. Case law continues to develop, warranting further development of this procedure in subdivision (8). It should address separately a government motion for judgment on the pleadings (not simply a motion to strike the claim); a motion to dismiss the claim for lack of standing, imposing the burden of establishing standing on the claimant and leaving fact issues to be determined by the court; and disposition of the motion to dismiss the claim by summary judgment.

The Note to (8)(c) should be supplemented by a statement that it regulates only government motions addressed to standing and does not limit the government's right to seek dismissal on other grounds.

04-CV-208, Hon. Mark Kravitz: Proposed G(9) states that trial is to the court unless any party demands trial by jury under Rule 38. Although "under Rule 38" is intended to incorporate all the limits of Rule 38 — a demand does not create a right to jury trial that does not otherwise exist — there is a risk that the rule will be read to expand the right to jury trial. In keeping with style conventions, the cure may be to add a sentence to the Committee Note stating that paragraph (9) does not expand the right to jury trial.

* * * * *

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

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To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 17, 2005**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure met on April 4-5, 2005 in Charleston, South Carolina and took action on a number of proposed amendments to the Rules of Criminal Procedure.

* * * * *

II. Action Items – Overview

First, the Committee considered two public comments to the following rules:

- Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

- Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

- Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

- Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

As noted in the following discussion, the Advisory Committee proposes that amendments to Rule 6 be approved by the Committee and forwarded to the Judicial Conference without being published for comment.

Second, the Committee considered technical and conforming amendments to the following rule:

- Rule 6, The Grand Jury.

As noted in the following discussion, the Advisory Committee proposes that this amendment be forwarded to the Judicial Conference.

* * * * *

III. Action Items–Recommendations to Forward Amendments to the Judicial Conference

At its June 2004 meeting, the Standing Committee approved the publication of proposed amendments to Rules 5, 32.1, 40, 41, and 58. The comment period for the proposed amendments was closed on February 15, 2005. The Advisory Committee received two comments on the proposed amendments, and several suggestions from the Style Committee. The Committee made only minor changes as proposed by the Style Committee, and it recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmitted to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM–Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

The amendment to Rule 5 is intended to permit the magistrate judge to accept a warrant by reliable electronic means. At present, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. The amendment reflects the availability of improved technology, which makes the use of electronic media as reliable and efficient as using a facsimile. The term "electronic" is used to provide some flexibility, allowing for further technological advances in transmitting data. If electronic means are used, the rule requires that the means be "reliable," and leaves the definition of that term to a court or magistrate judge at the local level. The Advisory Committee received two comments on the published amendment. Federal Public Defender Frank Dunham wrote that the rule should make clear that "non-certified electronic copies" are not reliable electronic means. The Federal Magistrate Judges Association expressed its support for the rule as drafted.

Following consideration of the comments, the Committee unanimously approved the amendment, as published.

Recommendation–The Advisory Committee recommends that the amendment to Rule 5 be approved and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

This amendment to Rule 32.1 permits the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. It parallels similar changes to Rule 5, reflecting the same enhancements in technology. As in Rule 5, what constitutes "reliable" electronic means is left to a court or magistrate judge to determine as a local matter. The Committee received only one comment on

the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee).

Recommendation–The Advisory Committee recommends that the amendment to Rule 32.1 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

This amendment to Rule 40 is intended to fill a perceived gap in the rule related to persons who are arrested for violating the conditions of release in another district. It authorizes the magistrate judge in the district where the arrest takes place to set conditions of release. The amendment makes it clear that the judge has this authority not only in cases where the arrest takes place because of failure to appear in another district, but also for violation of any other condition of release. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee).

Recommendation–The Advisory Committee recommends that the amendment to Rule 40 be approved and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

This amendment to Rule 41 authorizes magistrate judges to use reliable electronic means to issue warrants. This parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i), allowing the use of improved technology, and leaving what constitutes "reliable" electronic means to a court or magistrate judge to determine as a local matter. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

Rule 58(b)(2) governs the advice to be given to defendants at an initial appearance on a misdemeanor charge. The amendment eliminates a conflict with Rule 5.1(a) concerning a defendant's entitlement to a preliminary hearing. Instead of attempting to define in this rule when a misdemeanor defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published.

Recommendation–The Advisory Committee recommends that the amendment to Rule 58 be approved and forwarded to the Judicial Conference.

6. ACTION ITEM–Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

An amendment to Rule 41 which would provide procedures for tracking device warrants was recommended, published for public comment, reviewed by the Advisory Committee, and approved by the Standing Committee at its June 2003 meeting for submission to the Judicial Conference. However, subsequent to that meeting the Department of Justice requested additional time to review the proposal. At the April 2005 meeting of the Advisory Committee, Ms. Rhodes stated that the Department had completed its review of the amendment and had no further recommendations for changes to it. In light of the clarification of the Department's position, there is no longer any need to defer submission to the Judicial Conference.

The rule and committee note as approved by the Standing Committee at its June 2003 meeting, including changes proposed by the Style Committee, are submitted again for consideration.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

7. ACTION ITEM–Rule 6. The Grand Jury; Technical and Conforming Amendments.

This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

The Advisory Committee unanimously approved the proposal as a technical and conforming amendment, for which no publication and comment period would be necessary.

Recommendation–The Advisory Committee recommends that the technical and conforming amendment to Rule 6 be approved and forwarded to the Judicial Conference.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 ~~or Rule 58(b)(2)(G)~~;

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

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, ~~a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

Subdivisions (c)(3)(C) and (D). The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Changes Made After Publication and Comment

The Committee made no changes in the Rule and Committee Note as published. It considered and rejected the suggestion that the rule should refer specifically to non-certified photocopies, believing it preferable to allow the definition of reliability to be resolved at the local level. The Committee Note provides examples of the factors that would bear on reliability.

SUMMARY OF PUBLIC COMMENTS

The committee received only two written comments on Rule 5. One supported the amendment. The other stated that the rule should make clear that non-certified photocopies are not reliable electronic means.

Mr. Frank W. Dunham, Esq. (04-CR-001)
Federal Public Defender
Alexandria, VA
November 29, 2004

Mr. Dunham believes that the rule should make it clear that non-certified photocopies are not reliable electronic means.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in the courts, and agrees that the term "reliable electronic form" includes facsimilies, which no longer need to be referred to in the rule.

Rule 6. The Grand Jury

* * * * *

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) ***Exceptions.***

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An

attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal ~~Federal~~, state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the

conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any stateState, stateState subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information ~~only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue~~ only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

* * * * *

(7) ***Contempt.*** A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence ~~pursuant to~~ under Rule 6, may be punished as a contempt of court.

* * * * *

COMMITTEE NOTE

Subdivision (e)(3) and (7). This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district

that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

* * * * *

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

* * * * *

COMMITTEE NOTE

Subdivision (a)(5)(B)(i). Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. Currently, the rule requires the government to produce certified

copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term "electronic" would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may

consider whether there are reliable means of preserving the document for later use.

Changes Made After Publication and Comment

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

SUMMARY OF PUBLIC COMMENTS

The committee received only one written comment on Rule 32.1, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in terms of the acceptance of electronic filings.

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

~~**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear — as required by the terms of that person's release under 18~~

~~U.S.C. §§ 3141–3156 or by a subpoena — the person must be taken without unnecessary delay before a magistrate judge in the district of the arrest.~~

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

COMMITTEE NOTE

Subdivision (a). Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See,*

e.g., *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believes that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

Changes Made After Publication and Comment

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

SUMMARY OF PUBLIC COMMENTS

The committee received only one written comment on Rule 40, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in terms of the acceptance of electronic filings.

Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

(2) ***Definitions.*** The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~ — with authority in any district in which activities related to the terrorism may have occurred~~, may~~ has authority to issue a warrant for a person or property within or outside that district~~.~~; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may

authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ~~***Probable Cause***~~ ***In General.*** After receiving an affidavit or other information, a magistrate judge — or if authorized by Rule 41(b), ~~or~~ a judge of a state court of record — must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device ~~under Rule 41(c)~~.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information

communicated by telephone or other reliable electronic means. ~~appropriate means, including facsimile transmission.~~

(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, ~~T~~the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

~~(A)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed duplicate original warrant, the ~~The~~ magistrate judge must enter ~~the~~ those contents ~~of the proposed duplicate original warrant~~ into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modifications.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly. ~~In that case, the judge must also modify the original warrant.~~

(D) *Signing the ~~Original Warrant and the Duplicate Original~~ Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on it ~~its face~~ the exact date and time it ~~is~~ was executed.

~~(2)~~(B) *Inventory.* An officer present during the execution of the warrant must prepare and

verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

~~(3)~~(C) *Receipt.* The officer executing the warrant must: ~~(A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or ~~(B)~~ leave a copy of the warrant and receipt at the place where the officer took the property.

~~(4)~~(D) *Return.* The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate

judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) *Warrant for a Tracking Device.*

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant

must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) ***Delayed Notice.*** Upon the government's request, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — may delay any notice required by this rule if the delay is authorized by statute.

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COMMITTEE NOTE

The amendments to Rule 41 address three issues: first, procedures for issuing tracking device warrants; second, a provision for delaying any notice required by the rule; and third, a provision permitting a magistrate judge to use reliable electronic means to issue warrants.

Subdivision (a). Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Subdivision (b). Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(a) and by caselaw, *see, e.g.*, *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo*, *supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to

install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into an area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g., United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Subdivision (d). Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has

acknowledged that the standard for installation of a tracking device is unresolved, and has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate judge must issue the warrant. And the warrant is only needed if the device is installed (for example, in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Subdivision (e). Rule 41(e) has been amended to permit magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in

transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Subdivision (f). Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate judge designated in the warrant, within 10 calendar days after use of the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person, or both by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further service of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing

and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to delay any notice required in conjunction with the issuance of any search warrants.

Changes Made After Publication and Comment

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d), regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note.

SUMMARY OF PUBLIC COMMENTS

The Committee received eight written comments on Rule 41. The commentators generally approved of the concept of including a reference to tracking-device warrants in the rule. Several commentators, however, offered suggested language that they believed would clarify several issues, including the definition of probable cause vis a vis tracking device warrants, and language that would more closely parallel provisions in Title III of the Omnibus Crime Control Act of 1968.

Mr. Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley believes that the proposed amendments concerning tracking-device warrants should be adopted.

Hon. Joel M. Feldman (02-CR-007)
United States District Court, N.D. Ga,
Atlanta, Georgia
December 2, 2002

Judge Feldman suggests that the Committee consider further amendments to Rule 41 regarding warrants used to obtain electronic records from providers of electronic communications services. He attaches a written inquiry from one of colleagues pointing out a number of questions that are likely to arise in such cases.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judge's Association generally supports the proposed amendments to Rule 41. But the Association believes that either the rule itself or the committee note should be changed to clarify whether a separate warrant is needed to enter constitutionally protected property to install the device. The Association states that the current rule and note are not clear on that point, and believe that as written, unnecessary litigation will result.

Mr. Kent S. Hofmeister (02-CR-014)
President, Federal Bar Association
Dallas, Texas
February 14, 2003

The Federal Bar Association approves of the amendments to Rule 41, noting that they fill a void.

Mr. Saul Bercovitch (02-CR-015)
Staff Attorney
State Bar of California's Committee on Federal Courts
December 14, 2003

The Committee on Federal Courts for the State Bar of California generally approves of the proposed amendments to Rule 41. But it raises two points that it believes should be addressed. First, the amendments do not clarify what the probable cause finding must be made upon, or whether a showing less than probable cause will suffice. Second, the rule does not address the

consequences of failure to comply with the delayed notice provisions in Rule 41(f)(2).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Jaso, on behalf of the Department of Justice, offers several suggested changes to the proposed amendments to Rule 41. First, the Department is concerned that the language in Rule 41(d) might be read to require that a warrant is required anytime a tracking-device is installed; he suggests alternative language. Second, he states that some members of the Appellate Chiefs Working Group recommend deletion of the requirement that the installation occur during daylight hours. And third, he recommends a change to Rule 41(f)(2)(C), which permits delayed notification following execution of a tracking device; he believes that it would be better to delete the "good cause shown" language, and simply cross reference Rule 41(f)(3), which is the general provision dealing with delayed notice.

Mr. William Genego & Mr. Peter Goldberger (02-CR-021)
National Association of Criminal Defense Lawyers
March 21, 2003

NADCL offers a number of suggestions on Rule 41. First, it urges the Committee to use two benchmarks in amending Rule 41: tradition and jurisprudence of issuing warrants and Title III of the Omnibus Crime Control Act of 1968. Second, it notes that there is a lack of parallelism in Rule 41(b)(3) and (b)(4) from (b)(1) and (b)(2); it notes that use of the words "may issue" in

(b)(4) are ambiguous. Third, NADCL also suggests that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology when it comes to the reliability of electronic transmission of information. This rule clarifies procedures and avoids unnecessary effort on the part of magistrate judges, who must, for example, currently enter the contents of a proposed duplicate original which has been read to them over the telephone.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the~~ any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(G). Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the

circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

Changes Made After Publication and Comment

The Committee no changes to the Rule or Committee note after publication.

SUMMARY OF PUBLIC COMMENTS

The committee received only one written comment on Rule 58, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment.

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

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 16, 2005**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 28, 2005, in Phoenix, Arizona. At the meeting the Committee approved proposed amendments to Evidence Rules 404(a), 606(b) and 609; subsequently the Committee conducted an electronic vote and approved an amendment to Evidence Rule 408. The Evidence Rules Committee recommends that the Standing Committee approve each of the proposed amendments and forward them to the Judicial Conference. Part II of this Report summarizes the Committee's approval of the four proposed amendments. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for each of the proposed amendments to the Evidence Rules.

* * * * *

II. Action Items

1. Recommendation To Forward the Proposed Amendment to Evidence Rule 404(a) to the Judicial Conference

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule Rule 404(a). This amendment is made necessary because of a long-standing conflict in the circuits over whether character evidence can be offered to prove conduct in civil cases. This circuit split has caused disruption and disuniform results in the federal courts. The question of the admissibility of character evidence to prove conduct arises frequently in cases brought under 42 U.S.C § 1983, so an amendment to the Rule will have a helpful impact on a fairly large number of cases.

After careful consideration over a number of years, the Evidence Rules Committee has concluded that character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. But none of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide. Moreover, an amendment prohibiting the circumstantial use of character evidence in civil cases is in accord with the original intent of Rule 404, which was to permit character evidence circumstantially only when offered in the first instance by the "accused." The reference is clearly to a criminal defendant, indicating an original intent to prohibit the circumstantial use of character evidence in civil cases.

Only a few public comments were received on the proposed amendment. Most were positive, and the ones that were critical mistook the proposal as one that would affect character evidence when offered to prove a character trait that is actually in dispute in the case (e.g., in a case brought for defamation of character). Rule 404(a) by its terms does not apply when character is "in issue", and the proposed

amendment does not change that fact. Another comment argued that the amendment might create the inference was no longer applicable to civil cases. While Committee members did not believe such an inference could fairly be derived from the amendment, the Committee resolved to add a sentence to the Committee Note to express the point that nothing in the amendment was intend to affect the admissibility of evidence under Rule 404(b). The Committee unanimously determined that no changes to the text of the proposed amendment were warranted by the public comment.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a) be approved and forwarded to the Judicial Conference.

2. Recommendation To Forward the Proposed Amendment to Evidence Rule 408 to the Judicial Conference

Federal courts have long been divided on three important questions concerning the scope of Rule 408, the rule prohibiting admissibility of statements and offers during compromise negotiations when offered to prove the validity or amount of the claim:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence.

These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

Over a number of meetings, the Committee unanimously agreed that Rule 408 should be amended to 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The reason for the former amendment is that a broader impeachment exception is likely to chill settlement negotiations, as the parties may fear that anything they say could somehow be found inconsistent with a later statement at trial. The reason for the latter amendment is that a rule permitting a party to admit its own statements and offers in compromise could result in the strategic manufacturing of evidence, and also could lead to attorneys having to testify about just what statements and offers were made in alleged compromise.

The remaining issue–whether compromise evidence should be admissible in criminal cases–has been the subject of extensive discussion at Evidence Rules Committee meetings over a number of years. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed a crime. But other Committee members argued that any rule permitting compromise evidence to be admitted in a criminal case would deter the settlement of civil cases.

Eventually a compromise was reached that distinguished between statements made in settlement negotiations (admissible in a subsequent criminal case) and the offer or acceptance of the settlement itself (inadmissible in a subsequent criminal case if offered to prove the validity or amount of the claim). It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. In such cases the settlement itself should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities. At the April 2004 meeting, a majority of the Committee voted to release a proposed amendment to Rule 408 that would exclude offers and acceptances of settlement in criminal cases, but that would admit in such cases conduct and

statements made in the course of settlement negotiations. The Standing Committee approved the proposal for release for public comment.

The public comment on the proposed amendment to Rule 408 was negative. Criticisms included: 1) the rule would deter settlement discussions; 2) it would create a trap for the poorly counseled and the otherwise unwary, who might not know that statements of fault made in a settlement of a civil case might later be used against them in a criminal case; 3) it would allow private parties to abuse the rule by threatening to give over to the government alleged statements of fault made during private settlement negotiations; 4) it would result in attorneys having to become witnesses against their civil clients in a subsequent criminal case, as a lawyer may be called to testify about a statement that either the lawyer or the client made in a settlement negotiation; and 5) it would raise a problematic distinction between protected offers and unprotected statements and conduct—a distinction that was rejected as unworkable when Rule 408 was originally enacted. The public comment supported a rule providing that statements as well as offers and acceptances made during compromise negotiations are never admissible in a subsequent criminal case when offered to prove the validity or amount of the claim.

At the April 2005 meeting, most of the Evidence Rules Committee members expressed significant concern over and sympathy with the negative public comment. But the DOJ representative argued at length that the comment was misguided. He made the following points: 1) the comment overstates the protection of the existing rule, which prohibits compromise evidence in criminal cases only when it is offered to prove the validity or amount of the claim; 2) the comment fails to note that several circuits already employ a rule that admits compromise evidence in criminal cases even when offered as an admission of guilt; 3) the comment fails to take account of the fact that many statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are essential for proving the defendant's guilt in a subsequent criminal case—the primary example being a statement to a revenue agent that is later critical evidence against the defendant in a criminal tax prosecution; 4) the rule preferred by the public comment would allow a defendant to make a statement in compromise and later testify in a criminal case inconsistently with that statement, free from impeachment.

Extensive discussion ensued in response to the DOJ representative's presentation in favor of the proposed amendment as issued for public comment. Several committee members were sympathetic to the government's position that

statements of fault made to government regulators would provide critical evidence of guilt in a subsequent criminal prosecution. They noted, however, that the government's concerns did not apply to statements made in compromise between private parties. The practicing lawyers on the Committee noted that it was often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred to the government and used as an admission of guilt, it is highly likely that such an apology would never be made, and many cases could not be settled. In light of this concern, a compromise provision was proposed that would permit statements in compromise to be admitted as evidence of guilt, *but only when made in an action brought by a government regulatory agency.*

Committee members recognized that the proposed compromise would require some work on the language of the proposal, as well as work on the Committee Note. The Committee therefore resolved to allow the Reporter to prepare language that would permit statements of compromise to be admitted in criminal cases only when made in an action brought by a government regulatory agency. That language would be reviewed by the Chair and if the Chair approved, the proposal could be sent out for an electronic vote by the Committee members. On May 9, 2005 a proposed amendment to Rule 408 was sent electronically to all Committee members. That proposal would permit statements of compromise to be admitted in criminal cases only if made in cases brought by a government regulatory agency. An e-mail vote was taken and the proposed amendment was approved by a 5-2 vote.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 408, as modified after public comment, be approved and forwarded to the Judicial Conference.

3. Recommendation To Forward the Proposed Amendment to Evidence Rule 606(b) to the Judicial Conference

Evidence Rule 606(b) generally prohibits parties from introducing testimony or affidavits from jurors in an attempt to impeach the jury verdict. Federal courts have established an exception to the rule that permits juror proof on certain errors in rendering the verdict, even though there is no language permitting such an exception in the text of the Rule. But the circuits have long been in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other

courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

The Evidence Rules Committee has determined that an amendment to Rule 606(b) is necessary in order to bring the case law on the rule into conformance with the text of the Rule, and, more importantly, to clarify the breadth of the exception for mistakes in entering the verdict.

The proposed amendment to Rule 606(b) that was released for public comment in 2004 added an exception permitting juror testimony or affidavit when offered to prove that "the verdict reported is the result of a clerical mistake." The Committee determined that a broader exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broader exception would be in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

Only a few public comments were received on the proposed amendment to Rule 606(b). The comments were largely positive; but one comment contended that the term "clerical mistake" was vague and could be interpreted to provide an exception for juror proof that was broader than that intended by the Committee, as the Committee intended to provide an exception only in those limited cases in which the jury's decision was inaccurately entered onto the verdict form.

For the April 2005 meeting, the Committee considered language for the amendment to Rule 606(b) that was drafted by the Reporter in response to the public comment. This language was intended to sharpen and narrow the "clerical mistake"

exception that was released for public comment. The language permitted juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form." Committee members unanimously agreed that this language was an improvement on the language of the amendment that was released for public comment. The Committee approved the amendment to Rule 606(b), as modified, with one member dissenting.

The Committee Note to the proposed amendment emphasizes that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 606(b), as modified after public comment, be approved and forwarded to the Judicial Conference.

4. Recommendation To Forward the Proposed Amendment to Evidence Rule 609 to the Judicial Conference

Evidence Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Evidence Rule 609(a)(2) for release for public comment. The amendment was intended to resolve the long-standing conflict in the courts over how to determine whether a conviction involves dishonesty or false statement within the meaning of that Rule. The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

One possible way to amend the rule is to provide a definition of crimes involving dishonesty or false statement by looking only to the elements of the conviction. This is the rule favored by most commentators—and initially by most

members of the Evidence Rules Committee—on the ground that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts. Finally, if a crime not involving false statement as an element (e.g., murder or drug dealing) is found inadmissible under Rule 609(a)(2), it is still likely to be admitted under the balancing test of Rule 609(a)(1). Thus, the costs of an "elements" approach would appear to be low–all that is lost is automatic admissibility.

The Department of Justice, while agreeing that Rule 609 should be amended, has opposed a strict "elements" test. The Department has emphasized that it is not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

After extensive discussion over several meetings, the Committee as a whole determined that there was no real conflict within the Committee about the basic goals of an amendment to Rule 609. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness. Therefore, a compromise was thought appropriate.

The proposal released for public comment provided for automatic impeachment with any conviction "that readily can be determined to have been a

crime of dishonesty or false statement." The public comment on the proposed amendment was largely negative. Public commentators generally favored a strict "elements" test. They contended that anything broader would lead to difficulties of application and the very kind of mini-trial into the facts of a conviction that the Committee sought to avoid. Public comments also noted that the term "crime of dishonesty or false statement" was undefined, and that this would lead to disputes in the courts over its meaning.

At the April 2005 meeting Committee members considered the public comment. The Department of Justice remained opposed to a strict "elements" test for Rule 609(a)(2). The DOJ representative did not disagree, however, with Committee members' comments that the term "crime of dishonesty or false statement" should be clarified to provide courts and counsel with a better indication of when it is permissible to go behind the elements of the conviction. After extensive discussion, the Committee agreed that the language of the proposed amendment be changed to provide for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." This language would permit some limited inquiry behind the conviction, but would provide for automatic admissibility only where it is clear that the jury had to find, or the defendant had to admit, that an act of dishonesty or false statement occurred that was material to the conviction. The language had the additional benefit of specifically encompassing convictions that resulted from guilty pleas.

The Committee discussed this alternative and all members agreed that it better captured what the Committee had agreed was necessary for an amendment to Rule 609(a)(2)—to limit enquiry behind the judgment to those cases where it can be determined easily and efficiently that an act of dishonesty or false statement was essential to the conviction. All members of the Committee — including the DOJ representative — were in favor of this change to the proposal issued for public comment. The Committee unanimously approved the proposed amendment as modified after public comment.

Recommendation — The Evidence Rules Committee unanimously recommends that the proposed amendment to Evidence Rule 609, as modified after public comment, be approved and forwarded to the Judicial Conference.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations imposed by Rule

*New matter is underlined and matter to be omitted is lined through.

412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness.—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

* * * * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which

was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of

evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused," the "prosecution," and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made to the text of the proposed amendment as released for public comment. A paragraph was added to the Committee Note to state that the amendment does not affect the use of Rule 404(b) in civil cases.

SUMMARY OF PUBLIC COMMENTS

Jack E. Horsley, Esq., (04-EV-001) states that the "thrust" of the proposed amendment is "well supported." He questions, however, whether the rule should be "enlarged" by stating that "an exception exists if the case involves the element of the person's character."

Professor Thomas J. Reed (04-EV-003) declares that the proposed change to Rule 404(a) would "do more harm than good" and if picked up by the states could result in the unintentional creation of a "rule that bars character evidence in civil actions where character evidence is routinely admitted, e.g., child custody cases."

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment to Rule 404(a), noting that it "reinforces the original intent of the Rule to prohibit the

circumstantial use of character evidence in civil cases" and "clarifies that Fed.R.Evid. 404(a)(2) is subject to the more stringent limitations of Fed.R.Evid. 412 regarding the use of character evidence of a victim."

Professor Peter Nicolas, (04-EV-010) contends that the amendment "might result in some confusion" as it might be construed to mean that Rule 404(b) applies only in criminal cases.

The State Bar of California's Committee on Federal Courts (04-EV-012) supports the proposed amendment to Rule 404(a), observing that "the use of character evidence carries serious risks of prejudice, confusion and delay" and therefore that "the exceptions applicable to the use of character evidence in criminal cases should not be extended to civil cases."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) is in favor of the proposed amendment.

Rule 408. Compromise and Offers to Compromise

(a) **Prohibited uses.**—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish~~,~~ ~~—~~or ~~(2)~~ accepting or offering or promising to accept~~,~~ ~~—~~a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount~~; and ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. ~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Permitted uses.—This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples

of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~ ; ~~negativing~~ negating a contention of undue delay~~,~~ ;~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment provides that Rule 408 does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.

Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any civil claim is excluded under the Rule if offered against the defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as evidence of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter a defendant from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity," "invalidity," or "amount" of the disputed claim. The intent

is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.,* 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.,* 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). So for example, Rule 408 is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation.

The amendment does not affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent

statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.*, Advisory

Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In response to public comment, the proposed amendment was changed to provide that statements and conduct during settlement negotiations are to be admissible in subsequent criminal litigation only when made during settlement discussions of a claim brought by a government regulatory agency. Stylistic changes were made in accordance with suggestions from the Style Subcommittee of the Standing Committee. The Committee Note was altered to accord with the change in the text, and also to clarify that fraudulent statements made during settlement negotiations are not protected by the Rule.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) is "dubious about allowing any conduct or statement made in compromise negotiations to be used in criminal cases." Judge Weinstein notes that a party will often be unsupervised by counsel "and may make statements for a variety of reasons that throw doubt on reliability."

Frank W. Dunham, Jr., Esq., (04-EV-004), a Federal Public Defender, states that it should be made clear within the Rule "that statements made by a representative or agent of a party in an attempt to settle a claim are never admissible against the party in any context, civil or criminal."

Professor Lynn McClain (04-EV-006) is opposed to the "compromise" taken in the proposed amendment as it was released for public comment, that would have prohibited settlements from admissibility in criminal cases, but would have permitted statements made during the settlement to be admissible in such cases. He states that "the compromise in the proposed Rule, by having a foot in each court, achieves neither full encouragement of settlement nor full-out prosecutions."

The Federal Magistrate Judges Association (04-EV-007) "does not support the proposed amendment which would bar for use *only in civil cases* the conduct or statements of a party made in compromise negotiations." The Association states that "there is nothing in the materials provided that demonstrates" that exclusion of settlement statements from a criminal trial "is a serious problem in connection with the Justice Department's efforts to ferret out crime." The Association also notes that the amendment as it was released for public comment would have hampered "the efforts of civil litigants' legal counsel and those serving as mediators to successfully resolve civil disputes during the course of settlement negotiations."

The Law Firm of Cunningham, Bounds, Yance, Crowder and Brown, L.L.C., (04-EV-008) opposed the proposed amendment to Rule 408 as it was released for public comment, insofar as it would have permitted statements made in settlement negotiations to be admitted in subsequent criminal cases. The Firm noted that it is "hard to draw a line" between offers of compromise, which would not be

admissible in criminal cases, and statements made during settlement negotiations, which would have been admissible under the proposed amendment as released for public comment. The Firm also noted that "[i]f a plaintiff or a defendant might be subject to criminal prosecution for anything he or she says or does during settlement negotiations, this new rule would have a tendency both to prevent such negotiations from taking place at all and to minimize their usefulness if they do occur."

Daniel E. Monnat, Esq., (04-EV-009) applauds the "wise decision" to limit the exception for impeachment evidence and to provide that compromises or offers to compromise are not admissible in criminal cases. But Mr. Monnat was opposed to the provision in the amendment as released for public comment that would have allowed all statements made in compromise negotiations to be admissible in a subsequent criminal case. Mr. Monnat argued that "[t]he same reasons that weigh in favor of this prohibition in civil cases weigh equally if not more strongly in favor of extending the prohibition to criminal cases." Mr. Monnat contended that statements admitting criminal conduct, made during civil settlement negotiations, are questionable as evidence because "they may be made merely to encourage settlement, or may be demanded as a condition of settlement." He also was concerned that a "civil lawyer may not fully understand the criminal consequences of statements made during settlement negotiations" and that the proposed amendment as released for public comment placed "an additional burden on civil lawyers to anticipate and understand how their representation in a civil matter might leave their clients vulnerable to future criminal prosecution."

Professor David Leonard and 25 Signatory Law Professors (04-EV-011) opposed the amendment to Rule 408 as released for public comment, but only insofar as it would have permitted all

statements made in settlement negotiations to be admitted in subsequent criminal cases. They noted that in this respect the proposed amendment would have had "a substantial chilling effect in certain types of disputes that often lead to criminal prosecution." The professors stated that under the amendment as released for public comment, even the statements of an attorney made during a settlement negotiation would have been admissible, as agency-admissions against the client in a subsequent criminal case. "The possibility that lawyer statements may be admissible against clients in subsequent criminal cases may chill lawyers in their civil representation, make civil case lawyers witnesses against their clients in criminal proceedings, and result in their inability to continue to represent their clients in any proceedings."

On other aspects of the proposed amendment, the professors state that "the Advisory Committee has made an appropriate choice in proposing to exclude compromise evidence when offered to impeach by contradiction or by prior inconsistent statement" and that "the Advisory Committee has most likely reached the most appropriate conclusion in proposing to make clear that Rule 408 bars a party from offering evidence of its own settlement activity as well as that of its adversary." Finally, the professors support the deletion of the sentence referring to discoverable material, as that sentence is "unnecessary," and also support the other proposed stylistic changes to the Rule.

The Committee on Federal Courts of the State Bar of California (04-EV-012) supports the proposed amendment to Rule 408 as it was released for public comment. The Committee states that the amendment "would resolve a number of long-standing disputes concerning the scope of Rule 408 by eliminating a number of exceptions to the Rule that some courts have recognized." The

Committee believes that "the elimination of such exceptions furthers the purpose of the Rule by promoting and facilitating settlements."

Professor Jeffrey S. Parker (04-EV-014) opposed the amendment to Rule 408 insofar as it would have permitted all statements made in settlement negotiations to be used in subsequent criminal cases. He stated that "[a]ttaching potential criminal liability to unguarded statements in settlement discussions discourages settlement even more than attaching civil liability, given the harshness of the criminal sanction." He also contended that "[t]he opportunities for ripping even hypothetical statements out of context, and then arguing inferences in the highly charged atmosphere of a criminal trial, are legion, and they will lead to abuses." Professor Parker argued that the amendment as released for public comment would have provided a trap for the unwary, as "unsophisticated parties will be entrapped by a staged atmosphere of amicability and conciliation."

Phil R. Richards, Esq., (04-EV-015) was "very concerned" with the proposed amendment to Rule 408 as it was released for public comment, because that amendment would have authorized "the use of statements of fault made during settlement negotiations as evidence in a subsequent criminal case." He stated that "[d]uring settlement conferences and mediations, the candor of the parties is routinely encouraged through assurances that anything they say cannot be used outside of the settlement proceeding for any purpose. To then use statements made under such circumstances to establish the guilt of the party in a criminal proceeding is fundamentally unfair, and deprives them of the protections that are built in to the criminal justice system to insure that such admissions are not unwittingly made."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers ((04-EV-017) opposed the amendment to Rule 408 as released for public comment, insofar as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. The Committee contended that such an amendment would "reduce, not encourage compromise." The Committee questioned "whether conduct or a statement during settlement negotiations is any more reliable or probative of a criminal defendant's guilt than evidence of an offer or acceptance of settlement." It predicted that the result of such an amendment would be "a reversion to the earlier practice of using hypothetical statements to avoid a factual admission, a practice the Rule was intended to avoid." The Committee also opined that the proposed amendment would have been inconsistent with other federal law that favors confidentiality of communications during settlement negotiations, such as the Alternative Dispute Resolution Act of 1998, and local rules governing court-sponsored mediation. The Committee is in favor of the other amendments to Rule 408, as they "further the larger purpose of the Rule which is to encourage compromise."

Professor James Duane (04-EV-018) was opposed to the proposed amendment to Rule 408 as it was released for public comment, as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. He argued that "the proposed amendment would pose a powerfully chilling effect on the willingness of civil parties and their lawyers to engage in the robust and uninhibited give-and-take that is common in settlement negotiations." He also contended that the amendment would have created problems in determining whether a party even made a certain statement during a settlement negotiation. Therefore, "cautious lawyers representing the defendant in any civil case — even in state court — will completely refrain from participating in any sort of oral settlement talks if there is any possibility that federal criminal

charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argued that statements made in settlement negotiations are not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without experienced counsel.

Rule 606. Competency of Juror as Witness

* * * * *

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; ~~except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention,

(2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of

juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.,* 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.,* 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.,* 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.,* 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the exception established by the amendment is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the

rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

CHANGES MADE AFTER PUBLICATION AND COMMENTS

Based on public comment, the exception established in the amendment was changed from one permitting proof of a "clerical mistake" to one permitting proof that the verdict resulted from a mistake in entering the verdict onto the verdict form. The Committee Note was modified to accord with the change in the text.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment. It notes that the amendment "addresses the incongruity between the Rule and case law" and that by limiting the exception to clerical error, it "preserves the sanctity of jury deliberations and the finality of jury verdicts." The Association notes that the proposed amendment does not prevent the court "from polling the jury and taking steps to remedy any obvious errors evidence from that poll."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the amendment to Rule 606(b) as it was released for public comment. The College agrees that the Rule should be amended to resolve a conflict in the case law over the scope of an exception for mistaken jury verdicts. But it argues that "the new rule's exception for 'clerical mistakes' is unclear, and even if that term's meaning can be divined by reference to the case law cited by the Advisory Committee, that meaning is not adequately clarified or justified." The College suggests that the term "inadvertence, oversight or mistake" should be substituted for "clerical mistake" in the proposed amendment as it was issued for public comment.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that

the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement,~~ regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not

admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a

juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under

subdivision (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subdivision regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (*e.g.*, 18 U.S.C. § 1503, Obstruction of Justice).

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment — as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly — a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor*

v. United States, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States,* 125. S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The language of the proposed amendment was changed to provide that convictions are automatically admitted only if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) opposes the amendment to Rule 609(a) as it was released for public comment. Judge Weinstein questions the fairness of expanding a conviction "beyond its operative elements." He contends that the amendment as originally proposed would "seriously disadvantage defendants in some cases."

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment to Rule 609(a). It notes that the intent of the amendment "is to clearly limit the Rule to the admission of convictions that only involve an act of dishonesty or false statement."

Professor Peter Nicolas (04-EV-010) contends that "notwithstanding the concerns expressed by the Justice Department," the Committee's "initial impulse — to draft an amendment that focused on the elements of the conviction — was a sounder approach than that followed in the proposed amendment" as it was issued for public comment. Professor Nicholas contends that "courts will no doubt differ on the meaning of the phrase 'readily can be determined,' leading to inconsistent application of the rule." He also argues that even under the stricter "elements" test, the cost is ordinarily not exclusion, "but merely the benefit of automatic admissibility." He concludes that if a crime somehow involved an act of dishonesty or false statement (but not an element), it is very likely to be admissible under the balancing test of Rule 609(a)(1).

Professor Jeffrey Parker (04-EV-014) states that the proposed amendment to Rule 609(a) as released for public comment was "unwise and unjustified" and "is likely to create satellite disputes over the reliability of the *crimen falsi* classification."

Professor Myrna Raeder and Twenty Signatory Law Professors (04-EV-016) oppose the amendment to Rule 609(a) as it was released for public comment, noting that "[w]hile the Committee Notes indicate that a mini-trial is not contemplated" to determine whether the crime is one of dishonesty or false statement, "any procedure that is not limited to statutory elements is likely to result in wide variation among trial courts." Professor Raeder argues that "issues of fairness and ease of administration" justify the need to "confine proof of 609(a)(2) crimes to statutory elements." Finally, as to "the Justice Department's concern that some obstructions of justice may involve deceit, in a specific case this argument would likely be successful when made to the judge under 609(a)(1) test balancing whether the conviction's probative value outweighs its prejudicial effect to the accused. What 609(a)(2) provides is an automatic admit, which should be reserved for convictions where the statutory elements provide the necessary proof."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the proposed amendment to Rule 609(a)(2) as it was released for public comment. The Committee argues that the automatic admissibility mandated by Rule 609(a)(2) "should be interpreted narrowly and viewed with caution." It notes that the choice "is not between categorically admitted prior convictions under (a)(2) and excluding them entirely" because the court "retains broad discretion under Rule 609(a)(1) to admit virtually all prior felony convictions that are less than ten years old." The Committee "objects only to enlarging the cases in which the trial judge has no choice but to admit" a conviction. The Committee also expresses concern about the difficulty of learning the facts of the prior conviction and the

"efficient use of judicial time." It notes that an "advantage of relying only on statutory criteria is that they can be quickly, easily, and objectively determined simply by referring to widely available reference sources."

PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate Procedure

I. Appellate Rule 32.1

A. Brief Description

The present practices governing citation of unpublished opinions vary among the circuits, with some permitting citation, others disfavoring citation but permitting it in certain circumstances, and others prohibiting citation. Nine circuits now permit citation of unpublished opinions, at least when, in the judgment of counsel, there is no precedential opinion on point.

Proposed new Rule 32.1 permits the citation in briefs of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like and supersedes limitations imposed on such citation by circuit rules. The new rule is very limited. The rule expressly takes no position on whether unpublished opinions should have any precedential value, leaving that issue exclusively for the circuits to decide.

B. Arguments in Favor

- In 2001, the Department of Justice requested the advisory committee to amend the rules to establish uniform procedures permitting citation of unpublished opinions. Many bar associations, attorneys, and members of the public, and numerous law review and bar journal articles had been urging a review of the disparate citation practices, which caused confusion.[1]

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[1] A thorough discussion of the subject can be found in *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers in the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002). The American College of Trial Lawyers recommended that "the rules governing access to and use of 'unpublished' opinions in the circuit courts should be uniform. The existing circuit-by-circuit patchwork is confusing, perilous, and getting worse."

- Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official public actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions.

- The rules committees found the evidence overwhelming that unpublished opinions can be a valuable source of "insight" and "information." Unpublished opinions are widely read by both attorneys and judges, and often cited by attorneys, district court judges, and appellate court judges, even in circuits that purport to forbid such citation. Unpublished opinions can be particularly helpful to district court judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts. That may explain why only four of the 1000-plus active and senior district judges have expressed concerns about Rule 32.1.

- No-citation rules forbid attorneys from bringing to the court's attention information in unpublished opinions that might help their client's cause. No-citation rules prohibit attorneys from explaining how substantive legal rules have actually been applied by the court and in what actual — not hypothetical — circumstances the issue at hand has been coming before the court.

- No-citation rules are especially troublesome when an unpublished opinion has been erroneously characterized as routine, even though some courts mitigate this problem by adopting procedures allowing a court to reconsider publishing a particular opinion.

C. Objections

- There is nothing of value in unpublished opinions. These opinions merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err.

- Unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Judges do not spend as much time on drafting unpublished opinions because they know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished opinions (or both). Both practices would harm the justice system.

- Abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will increase the size of the body of case law that will have to be researched by attorneys. Second, it will make the body of case law more difficult to understand.

D. Rules Committees' Consideration

The Federal Judicial Center (FJC) conducted an empirical study to assess the rule's potential impact on the courts' workload and the Administrative Office conducted a comparative statistical study of the median case disposition time and the number of summary dispositions in the nine circuits that permit citation of unpublished opinions. Both studies failed to support the main arguments against proposed Rule 32.1.

Unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). Many unpublished opinions include lengthy discussions of legal issues and may include a dissenting opinion. The Supreme Court has granted review of several unpublished decisions.[2] The FJC findings showed that a large minority of surveyed judges (55) found citations to unpublished opinions to be "occasionally," "often," or "very often" helpful. It also found that over a third of the attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not.

Numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has been significantly burdened. The rules committees received no comment from any judge from a circuit that permitted citation of unpublished opinions asserting that the citation policy has had bad consequences. When the FJC asked the judges of the nine circuits that permit citation of unpublished opinions how much additional work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. The AO's study found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" — that is, the time it takes appellate courts to dispose of cases — and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions."

Attorneys surveyed as part of the FJC study reported that proposed Rule 32.1 would not have an "appreciable impact" on their workloads. Moreover, the attorneys who expressed positive views about proposed Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits.

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[2] *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit); and *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004) (reversing unpublished decision of Sixth Circuit).

Whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today in changed circumstances. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Federal Rules of Civil Procedure

The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents; computer networks store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text. Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores, and computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, unlike words on paper, may be incomprehensible when separated from the system that created it. These and other differences are causing problems in discovery that are difficult to address under the present rules. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of varying local rules is likely to develop in areas in which the federal civil rules are designed to provide uniformity.

I. Civil Rule 26(b)(2)

A. Brief Description

The 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, a recurring area of dispute in such discovery. Examples from current technology of information that is not reasonably accessible include information that has been "deleted" but may be restored using computer forensics; information on some backup-tape systems that are intended for disaster-recovery and are not susceptible to electronic searching; and legacy data remaining from systems no longer in use. Under the amendment, a party is authorized to respond to a discovery request by identifying sources of potentially responsive electronically stored information that are not reasonably accessible because of undue burden or cost. The responding party need not search or produce information from those sources absent court order. If the requesting party seeks

discovery from such sources, the responding party has the burden to show that the sources are not reasonably accessible. Even if that showing is made, the court may order discovery if, after considering the limitations established by present Rule 26(b)(2), including proportionality, the requesting party shows good cause. The court may impose terms and conditions for the discovery.

B. Arguments in Favor

- The proposed amendment responds to problems encountered in discovery of electronically stored information that have no close analogue in the more familiar discovery of paper documents. Although computer storage can facilitate discovery, some forms of computer storage make it very burdensome and expensive to access, search for, and retrieve the information they contain.

- The proposed amendment incorporates a common-sense approach by requiring parties to identify sources of information that may be responsive to discovery requests but are not reasonably accessible and to examine information that can be provided from more easily-accessed sources to determine whether it is necessary to search the more difficult-to-access sources, and by facilitating judicial supervision when necessary to resolve disputes.

C. Objections

- The rule allows a party to self-designate information not produced because it is not reasonably accessible.

- The rule may lead to parties making information inaccessible to avoid producing it in discovery.

D. Rules Committees' Consideration

All party-managed discovery rests on self-designation. The amendment is an improvement over present practice, in which responding parties simply object or do not respond to a request for information that is not reasonably accessible, because the amendment requires the responding party to identify the sources of potentially responsive information that it is neither searching nor producing because of the costs and burdens of accessing the information. The amendment codifies the best practices of parties and courts sophisticated in these problems and supports the application of the proportionality factors in present Rule 26(b)(2) to problems that are unfamiliar to many and that, without appropriate supervision, can result in significant cost and delay.

The amended rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes. A party that makes information "inaccessible" because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed amendment

II. Civil Rule 26(b)(5)

A. Brief Description

The proposed amendment to Rule 26(b)(5) clarifies the procedure to apply when a responding party asserts a claim of privilege or of work-product protection after production. Under the proposed amendment, if a party has produced information in discovery that it claims is privileged or protected as trial-preparation material, it may notify the receiving party of the claim, stating the basis for it. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. The amendment does not address the substantive questions of whether privilege or work-product protection has been waived or forfeited.

B. Arguments in Favor

- The inadvertent production of privileged or protected material is a substantial risk in all forms of discovery, but that risk is particularly acute with discovery of electronically stored information. The volume of electronically stored information searched and produced in response to discovery can be enormous, and certain features of the forms in which such information is stored make it more difficult to review for privilege and work-product protection than paper. Because of the potential consequences of such production, a consistent and clear procedure for litigating such claims is increasingly important.

C. Objections

- The new procedure could be used to disrupt litigation, particularly if the claim of privilege or work-product is made late in the case.

D. Rules Committees' Consideration

The amended rule received general support. The rules committees did not believe that parties would be likely deliberately to delay asserting claims of

privilege or work-product protection, because to do so would waive the protection under the applicable substantive law of many jurisdictions. The amendment does not affect the substantive law of waiver; courts will continue to examine whether a privilege or work-product protection claim was made at a reasonable time when delay is part of the substantive law on waiver. The amendment does not create opportunities for delaying claims of privilege or protection in order to disrupt pretrial discovery or trials, and courts are fully capable of recognizing and responding to such tactics if they are used.

III. Civil Rule 37(f)

A. Brief Description

The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. The proposed amendment states that absent exceptional circumstances, sanctions may not be imposed under the civil rules if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith.

B. Arguments in Favor

- Computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper. To control the amount of information stored, computer systems regularly purge e-mail and other communications and information. To continue operations, systems must be able to filter the communications they store. To have certain databases function, they must continually revise the information they manage. Such information destruction features are an integral part of computer system design and operation.

- The proposed rule recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, and in many cases unnecessary for the reasonable discovery needs of a particular case.

- There is considerable uncertainty as to whether a party must, at risk of severe sanctions, interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that the information might be sought in discovery.

C. Objections

- The rule provides an incentive for a party to set up a records destruction policy that systematically destroys relevant information harmful to its interests.

D. Rules Committees' Consideration

The rules committees recognized the need to ensure litigants' ability to obtain evidence through discovery. At the same time, the rules committees recognized the need for limited protection from sanctions in the narrow circumstance of an inability to provide electronically stored information lost as a result of the routine operation of an electronic information system operated in good faith. The amendment strikes this balance. The primary objection assumes that responding parties will invariably want to destroy information, which in turn assumes that all such information is damaging. In most cases, responding parties have both favorable and unfavorable information and need to retain information for a variety of reasons ranging from legal and regulatory requirements to business and organizational needs. The proposed amendment does not provide a shield for a party that intentionally destroys specific information because of its relationship to litigation, or for a party that allows such information to be destroyed in order to make it unavailable in discovery by exploiting the routine operation of an information system. Selective loss of unfavorable information is not good faith, as the rule and note make clear. Depending on the circumstances, good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation.

Federal Rules of Evidence

I. Evidence Rule 408

A. Brief Description

The proposed amendment to Rule 408 published for comment provided that a statement or conduct regarding a claim made in the course of settlement negotiations in a civil dispute may be admitted in any subsequent criminal case. The amendment distinguishes statements and conduct in settlement negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise settlement of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded from all criminal cases if offered against the defendant as an

admission of fault because a defendant may offer or agree to settle a litigation for reasons other than a recognition of fault.

B. Arguments in Favor

- Statements of fault may provide the sole or critical evidence of guilt in a subsequent criminal prosecution.

C. Objections

- The rule would deter settlement discussions.

- It would create a trap for the poorly counseled who might not know that statements of fault made in a settlement of a civil case might be later used against them in a criminal case.

- It is often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred by the government and used as an admission of guilt, such an apology would not be made in the first place.

D. Rules Committees' Consideration

The proposed amendment published for comment contained a broader exception, which would have permitted a statement or conduct regarding a claim made during settlement negotiations to be admitted in any subsequent criminal case. In light of the concern that such a broad exception would chill settlement negotiations in a civil case, a compromise provision was adopted to admit such a statement or conduct in a later criminal prosecution only if made in a civil dispute initiated by a government regulatory agency. When an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected.