

**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 the proposed amendments to Civil Rules 4, 5, 12, 14, 26(a), 26(b)(1), 26(b)(2), 26(d) and (f), 30, 34, and 37 and to Supplemental Admiralty Rules B, C, and E and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 2-11
2. Approve the proposed amendments to Evidence Rules 103, 404(a), 701, 702, 703, 803(6), and 902 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 12-18
3. Approve the proposed amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, and 5003 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.. . . . pp. 19-20

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

- ▶ Federal Rules of Civil Procedure . . . . . pp. 2-12
- ▶ Federal Rules of Evidence . . . . . pp. 12-19
- ▶ Federal Rules of Bankruptcy Procedure . . . . . pp. 19-22
- ▶ Federal Rules of Appellate Procedure . . . . . p. 22
- ▶ Federal Rules of Criminal Procedure . . . . . p. 23
- ▶ Rules Governing Attorney Conduct . . . . . p. 24
- ▶ Financial Reporting Rule Amendments . . . . . p. 24
- ▶ Long-Range Planning and Budgeting . . . . . pp. 24-25
- ▶ Report to the Chief Justice . . . . . p. 25

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

**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 14-15, 1999. All the members attended, except Judge Morey L. Sear. The Department of Justice was represented by Eric H. Holder, Deputy Attorney General, Raymond C. Fisher, Associate Attorney General, and Neal K. Katyal, Advisor to the Deputy Attorney General.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, Judge David F. Levi, member, Professor Edward H. Cooper, reporter, and Professor Richard L. Marcus, special reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Fern M. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, chief, and Mark D. Shapiro, deputy chief of the Administrative Office's Rules Committee Support Office; Joseph S. Cecil of

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the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol and Bryan A. Garner, consultants to the Committee.

## FEDERAL RULES OF CIVIL PROCEDURE

### Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 4, 5, 12, 14, 26(a), 26(b)(1), 26(b)(2), 26(d) and (f), 30, 34, and 37 and to Supplemental Admiralty Rules B, C, and E 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 1998. Three public hearings were held in Chicago, Baltimore, and San Francisco.

*Discovery Package — In General.* Discovery concerns have been on the advisory committee's agenda for many years. In 1993, a number of rule amendments were made to address those concerns, but it was not intended that those changes remain in exactly their 1993 form for the long-term. Indeed, many changes had opt-out features allowing for local experimentation, in part because Civil Justice Reform Act (CJRA) plans included various experiments with discovery procedures in many districts.

In 1996, partly in response to a request by the American College of Trial Lawyers that it again consider narrowing the scope of discovery, as the American Bar Association (ABA) Section of Litigation had first proposed twenty years ago, the advisory committee inaugurated a comprehensive study of discovery practice. In its final report to Congress on the CJRA in mid-1997, the Judicial Conference took note of the advisory committee's ongoing study of discovery, and it specifically recommended that the committee consider the scope of discovery and reexamine the need for national uniformity, particularly in regard to initial disclosure and development of discovery plans.

The advisory committee developed an unusually broad and full base of information for its discovery proposals. It appointed a subcommittee to study the area and sponsored two conferences involving judges and lawyers from across the country. The second conference included written submissions from a number of major legal organizations, including the ABA Section of Litigation, the American College of Trial Lawyers, the Association of Trial Lawyers of America, the Defense Research Institute, the Trial Lawyers for Public Justice, and the Product Liability Advisory Council. At the advisory committee's request, the Federal Judicial Center surveyed lawyers in 1,000 recently closed cases randomly selected from across the nation in 1997, and the RAND Institute for Civil Justice provided a report on discovery practice from the database it developed for its study of the CJRA.

Only after this information base had been developed did the advisory committee begin to consider specific changes leading to the amendments now proposed, and it then focused its attention on those thought most likely to have desirable effects. During this process, it developed several objectives:

- *Restoring national uniformity:* The review suggested by the Conference has persuaded the advisory committee that national uniformity on most aspects of discovery and disclosure is important. The organized bar is almost unanimous in its strong support for uniformity. The opt-out authority has led to a remarkable growth in local discovery variations, sometimes promoting forum shopping. Several districts have even "opted out" of national rules that do not authorize local deviation. Because discovery is a central strand of the pretrial process, those developments appear antithetical to the existence of a single national law and threaten the entire fabric of the national rules.

- *Reducing unnecessary expense and delay:* Changes are proposed in a variety of areas to reduce waste while preserving the basic policy of full disclosure. Even though the advisory committee found that discovery is actively employed in only a small percentage of cases, its costs represent about 50% of the litigation costs in average cases and up to 90% of litigation costs in cases when discovery is actively employed.
- *Enhancing judicial discretion:* Individual tailoring of discovery to the needs of the given case also was widely endorsed, and the proposed amendments therefore preserve and enhance the authority of the judge to direct an appropriate level of discovery. Indeed, among lawyers the greatest desire is for the judge to attend to the discovery needs of cases.

#### Specific proposals

*Rule 5(d) (Service and Filing Pleadings and Other Papers).* The proposed amendment would forbid the filing of discovery materials until they are used in the proceeding, or filing is ordered by the court. It responds to suggestions by the Conference's Local Rules Project and by the Ninth Circuit Judicial Conference, and establishes national uniformity on terms consistent with the local rules of most districts.

*Rule 26 (General Provisions Regarding Discovery; Duty of Disclosure).* The proposed amendments to this basic discovery rule address a number of matters.

*Initial disclosure — Rule 26(a)(1).* As amended in 1993, Rule 26(a)(1) introduced initial disclosure but also permitted opting out that led to a wide variety of practices across the country. Each year a listing of the different disclosure regimes that prevail in different districts is updated and published by the Federal Judicial Center. Nevertheless, the pervasiveness and frequency of disclosure in actual practice was surprising, with about two-thirds of the cases in the 1997 FJC

study involving some sort of disclosure, often in districts considered to be opt-outs. The effects of disclosure were not as great as its proponents or detractors predicted. But those who use it clearly like it; most attorneys report that when it has an effect it reduces expense, the amount of discovery, the number of discovery disputes, and the time to resolution. All agree that fears of satellite litigation have not been realized.

The proposed amendments remove the opt-out provision, but make significant modifications in the disclosure rule:

- *Narrowed disclosure obligation:* A party need disclose only those witnesses and documents it “may use to *support* its claims or defenses.” The proposal removes the present requirement that attorneys disclose information harmful to their clients without a formal discovery request.
- *Categories of proceedings exempted:* Eight categories of cases (estimated to include approximately more than one-third of civil filings nationwide) are exempted from disclosure.
- *Court and parties may control disclosure:* The parties may agree to forgo disclosure, and if they cannot agree any party may present the matter to the judge by objecting to disclosure, and the judge may order disclosure appropriate for the case. Thus, the court’s authority over this phase of discovery is enhanced.

The Conference instructed the advisory committee to consider whether national uniformity should be adopted for initial disclosure. Some courts that apply the current national rule favor making that rule nationally applicable, while courts that opted out prefer retaining their own practices. The organized bar strongly supports a uniform rule: for example, the ABA Section of Litigation, which opposed the 1993 amendments, supports this package of changes

because it provides for a consistent national rule while removing the present requirement that harmful information be disclosed. The committee determined that there is no reason for local variations by rule. Like other discovery, disclosure is an important feature of the pretrial process, and it may affect a variety of other aspects of the pretrial development of cases. Accordingly, the initial disclosure proposals narrow the basic obligation, but make it nationwide — subject always to the control of the individual judge. The committee approved the proposed amendment by a vote of 11 to 1.

*Scope of discovery — Rule 26(b)(1).* The amendments narrow the scope of attorney-managed discovery to matter “relevant to the claim or defense of any party.” If there is a dispute about whether certain matters are properly discoverable, the court retains authority to order discovery of any matter relevant to the subject matter involved in the action — the same scope that Rule 26(b)(1) now provides for attorney-managed discovery. The amendments thus fortify judicial control over discovery. In addition, the amendments call attention to the “proportionality” limitations of Rule 26(b)(2) and specify that only matters relevant are discoverable.

The advisory committee was told repeatedly that the current rule provides insufficient guidelines for limiting overbroad discovery. The amendment is intended to signal that the parties should usually limit discovery to the claims and defenses, but it leaves the court free to order discovery appropriate to the case. In this way, it fosters early judicial involvement in cases when that is needed; provides a useful benchmark for the court, and grants the judge full latitude to tailor discovery to the case. The committee approved the amendment by a vote of 10 to 2.

*Cost-bearing — Rule 26(b)(2).* The proposed amendments to Rule 26(b)(2) make explicit the authority that the advisory committee believes is implicit in the current rule — to condition “disproportionate” discovery on payment of part or all of the resulting cost. The advisory committee was told repeatedly about excessive expenses due to discovery requests that held little promise of producing useful information. Rule 26(b)(2) already directs that disproportionate discovery be limited, but it is infrequently used. Dealing with disproportionate discovery emerged as an important way to reduce unduly costly litigation.

The amendments make it clear that the judge has this management tool available in instances of overbroad discovery. The authority should be used only when a discovery request exceeds the existing limitations of Rule 26(b)(2), and it does not introduce improper differential treatment among litigants based on ability to pay. The court is also to take account of ability to pay in making its determination how to use this management tool. In addition, Rule 26(b)(2) is amended to apply the numerical limitations on interrogatories and depositions in a nationally uniform manner. The committee approved the proposed amendment by a vote of 11 to 1.

*Discovery management under auspices of the court — Rules 26(d) and (f).* In its final report to Congress on the CJRA, the Conference endorsed the discovery plan provisions of Rule 26(f) and recommended that the advisory committee consider whether national uniformity should be adopted on this subject. The committee has determined that uniformity is very important, and the proposed amendments remove the authority to opt out of the Rule 26(d) discovery “moratorium” or the Rule 26(f) provision for a discovery plan.

The goal of these changes is to enhance the court’s authority and ability to manage the discovery in the case. The Rule 26(f) conference — and the resulting discovery plan to be submitted to the court — were roundly endorsed by the bar, but the rule’s current requirement of



a face-to-face meeting was questioned as unduly expensive in some instances. Accordingly, the amendment removes this requirement, while confirming that the court may order a face-to-face meeting instead of a telephone conference in a particular case.

There was some concern that provisions requiring reports and other activities associated with the Rule 26(f) conference be completed by a certain time might interfere with effective management in districts that initiate Rule 16 management very rapidly. In response to that concern, rule language was added to permit such districts to adopt local rules that shorten the period specified for the completion of these tasks. This change should avoid any disruption in these fast-moving districts.

*Rule 30 (Deposition Upon Oral Examination).* The FJC survey demonstrated that depositions often are the most expensive form of discovery, and lawyers from all sectors of the bar informed the advisory committee that overlong depositions contribute to that cost. The proposed amendment adopts a presumptive limit of “one day of seven hours” for depositions. The advisory committee was informed that shorter limits — for example, three hours in the state courts in Illinois — have worked well. The proposed limitation may be extended by party agreement or court order. The question of deposition duration should often be addressed during the preparation of the discovery plan called for by Rule 26(f).

Rule 30(f)(1) was amended to delete the requirement that a deposition be filed with the court — consistent with the proposed change to Rule 5(d). Because this is only a conforming amendment, the advisory committee believed that there was no need to publish it for public comment.

*Rule 34(b) (Production of Documents)*. Because disproportionate discovery is frequently an issue in document discovery, a cross-reference has been inserted calling attention to the cost-bearing amendment to Rule 26(b)(2).

*Rule 37(c)(1) (Failure to Disclose)*. The 1993 amendments failed to provide that the exclusion sanction of Rule 37(c)(1) — forbidding use of materials not properly disclosed — also applies to failure to supplement a formal discovery response. The amendment closes this gap in Rule 37(c)(1).

Service on the United States — Rules 4 and 12

*Rule 4 (Summons)*. Rule 4 would be amended to require service on the United States when a federal employee is sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. Case law is unclear on whether the United States must be served in these actions. The amendment will help to protect the interest of the individual defendant in securing representation by the United States and will expedite the process of determining whether the United States will provide representation.

The rule is also amended to ensure that an action is not dismissed until a reasonable time has been allowed to serve all the persons required to be served under the rule who have not been served.

*Rule 12 (Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings)*. Rule 12(a)(3)(B) would be amended consistent with the proposed changes to Rule 4. The time to answer a claim that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of official duties would be extended to 60 days, the same as when a United States officer is sued in an official capacity.

## Supplemental Rules for Certain Admiralty and Maritime Claims

*Admiralty Rule B (In Personam Actions: Attachment and Garnishment).* The proposed amendment to Rule B reflects the 1993 Rule 4 amendments, which redistributed throughout Rule 4 the service provisions that were originally found only in Rule 4(d) and (i). The references to the service provisions in Rule B now simply incorporate Rule 4, without designating specific subdivisions. The amendment also provides alternatives to service by a United States marshal if the property to be seized is not a vessel or tangible property on board a vessel. Recourse to state law quasi-in-rem jurisdiction remedies would be eliminated in admiralty proceedings, but Rule B would expressly confirm the availability of alternative state security remedies through Civil Rule 64.

*Admiralty Rule C (In Rem Actions: Special Provisions).* Rule C, which governs true in rem proceedings, has been invoked for civil forfeiture proceedings by a growing number of statutes. As the forfeiture practice has grown, it has become apparent that some distinctions should be made between admiralty and forfeiture proceedings. The proposed amendments adopt some differences in procedure between the two. For example, the amendment would allow a longer time to appear in a forfeiture proceeding than in an admiralty proceeding. The amendment would also establish some distinctions in the procedures for asserting interests in the property brought before the court. Finally, the proposed amendment conforms the rule to jurisdictional and venue statutes enacted since the rule was last amended.

*Admiralty Rule E (Actions In Rem and Quasi In Rem: General Provisions).* Rule E would be amended to reflect statutory provisions that allow a forfeiture proceeding to be brought in a district in which the property is not located. Rule E(10) is new and makes clear the court's authority to preserve and to prevent removal of attached property that remains in the possession

of the owner or other person under Rule E(4)(b). The rule has been restyled, and references to changes proposed in the other amended admiralty rules are incorporated.

*Rule 14 (Third-Party Practice).* Rule 14 would be amended consistent with changes in terminology in the proposed amendments to the Admiralty Rules.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure are in Appendix A together with an excerpt from the advisory committee report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 4, 5, 12, 14, 26(a), 26(b)(1), 26(b)(2), 26(d) and (f), 30, 34, and 37 and to Supplemental Admiralty Rules B, C, and E and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

#### Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Civil Rules 5 and 77 and recommended that they be published for public comment.

At the request of the Standing Committee, the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules have been considering uniform rule amendments that would authorize electronic service of papers other than the initial summons or other process and subpoenas. Courts now permit by local rule and on a party's consent service by electronic means. The number of these courts is growing, and the need to establish uniform national guidelines governing such service is becoming apparent.

A subcommittee consisting of representatives from each of the advisory committees met with officers of the courts that have been permitting service by electronic means on a pilot basis and discussed the best approach to handle this issue. The subcommittee agreed that electronic service should be complete on dispatch by the person making the service. Whether the "three-

day mail” rule should apply to electronic and other analogous transmissions was left for future discussion.

It was decided that the proposed amendments to the Civil Rules have matured to a point that makes them suitable for publication. Information obtained on the proposals during the comment stage will assist the other advisory committees in proposing similar amendments to their rules at a later time.

### Mass Torts Project

The Mass Torts Working Group, chaired by Judge Anthony J. Scirica, completed its task and submitted its report to the Chief Justice on February 15, 1999.

## **FEDERAL RULES OF EVIDENCE**

### Rules for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Evidence Rules 103, 404(a), 701, 702, 703, 803(6), and 902, together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1998. (An earlier version of proposed amendments to Rule 103 had been circulated for comment in 1995, but it was deferred for further study. The amendment had been revised and after further modification had been included in this package of proposed amendments.) Public hearings were held in San Francisco and Washington, D.C.

### Rule 103 (Rulings on Evidence)

Under the proposed amendment to Rule 103(a), a party need not renew an objection or offer of proof at trial if the advance ruling by the judge is definitive; otherwise renewal is required. The amendment applies to all rulings on evidence whether they occur at or before trial, including “in limine” rulings.

Courts are currently in conflict over whether it is necessary for a party to renew an objection or offer of proof at trial after the trial court has made an advance ruling on the admissibility of the proffered evidence. Some courts hold that a renewed objection or offer of proof is always required to preserve a claim of error on appeal. Other courts have taken a more flexible approach, holding that renewal is necessary only under certain circumstances. The conflict has created uncertainty for litigants and unnecessary litigation for the appellate courts. The proposed amendment provides helpful guidance to the litigants and courts on this issue. Public comment on the proposed amendment's resolution of the renewal issue was almost uniformly positive.

The amendment omits the proposed codification and extension of the Supreme Court's decision in *Luce v. United States*, 469 U.S. 38 (1984), which was included in the proposal published for comment. Under *Luce*, a criminal defendant must testify at trial to preserve the right to appeal an advance ruling admitting impeachment evidence. Lower courts have extended the *Luce* rule to comparable situations. The public comment on the extension of *Luce* was generally negative. Substantial concerns were expressed about the problematic and largely undefinable impact of *Luce* in civil cases.

The advisory committee decided to eliminate the provision and leave the issue open for further case-law development. It did consider the possibility that deletion of the sentence could create an unintended inference that the omission in the proposed amendment purported to overrule *Luce*. The advisory committee determined that this construction would be unreasonable because the proposed amendment concerns renewal of objections or offers of proof, while *Luce* concerns fulfillment of a condition precedent to the trial court's ruling. To eliminate any

possible misunderstanding, however, the Committee Note was revised to indicate explicitly that the proposed amendment is not intended to affect the rule set forth in *Luce* or its progeny.

Rule 404(a) (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes)

Rule 404(a) would be amended to permit an alleged victim to introduce evidence of a defendant's character trait if the defendant attacked the same character trait of the victim. Current law does not allow the government to introduce negative character evidence regarding the accused unless the accused introduces evidence of good character. The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. The amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

Rule 701 (Opinion Testimony by Lay Witnesses)

Under the proposed amendments to Rule 701, a witness's testimony must be scrutinized under the Evidence Rules regulating expert opinion to the extent that the witness is providing scientific, technical, or other specialized information within the scope of Rule 702. The proposed amendment is intended to eliminate the risk that the reliability factors contained in Rule 702 will be evaded through the simple expedient of proffering an expert as a lay witness. By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Civil Rule 26 and Criminal Rule 16.

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Any part of a witness's testimony that is based on scientific,

technical, or other specialized knowledge would be governed explicitly by the standards of Rule 702.

The representatives of the Department of Justice were particularly concerned with the disclosure requirements regarding law enforcement officers or “fact” witnesses who were called to testify as lay witnesses, but whose testimony might include some expert testimony. The advisory committee carefully considered the Department’s concerns, but decided that the need to ensure the reliability of this type of testimony outweighed any disadvantages in disclosing a potential expert prior to trial. The amendment was clarified, however, to provide that only testimony based on scientific, technical, or other specialized knowledge “within the scope of Rule 702” would not qualify under Rule 701. The Committee Note was also revised to emphasize that Rule 701 does not prohibit lay witness testimony on matters of common knowledge that traditionally have been the subject of lay opinions. The advisory committee believes that the amendment will help to protect against evasion of Rule 702 reliability requirements, without requiring parties to qualify as experts those witnesses who traditionally and properly have been considered as providing lay witness testimony.

#### Rule 702 (Testimony by Experts)

Rule 702 would be amended in response to the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). District courts and courts of appeals have reached different conclusions regarding *Daubert*’s meaning and application in particular cases. Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert’s basis, methods, and applications. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert’s opinion is



something more than unfounded speculation. The proposed amendment addresses the conflicts in the courts about the meaning of *Daubert* and provides guidance for courts and litigants on the factors to consider in determining whether an expert's testimony is reliable.

The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. In particular, the amendments require a showing of reliable methodology and sufficient basis, and that the expert's methodology must be applied properly to the facts of the case. Consistent with *Kumho*, the amendment provides that expert testimony of all types — not only the scientific testimony specifically addressed in *Daubert* — presents questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.

No attempt has been made to codify the specific factors listed in *Daubert* for trial courts to use in assessing the reliability of expert testimony. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors when appropriate. Courts have also found other factors relevant in determining whether expert testimony is sufficiently reliable. All these factors remain relevant to the determination of the reliability of expert testimony. The amendment is also broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise.

The Committee Note was revised to address the concerns expressed in the comment stage that the gatekeeping role of the judge would be enhanced at the expense of the fact-finding role of the jury. The advisory committee concluded that many of these concerns were not directed at the proposal, but at the case law that the proposal codifies, most importantly *Daubert* and

*Kumho.* The Committee Note was revised, however, to clarify that the amendment was not intended to usurp the role of the jury, nor to provide an excuse to challenge every expert, nor to prohibit experience-based expert testimony.

Rule 703 (Bases of Opinion Testimony by Experts)

Rule 703 would be amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference — and not the information — that is admitted as evidence. Under current law and practices, attorneys often adopt a trial tactic of evading an exclusionary rule of evidence at trial by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis.

Under the amendment, the underlying inadmissible information may be disclosed to the jury only if the trial court finds that the probative value of the information substantially outweighs its prejudicial effect. In these circumstances, a limiting instruction must be given on request, which informs the jury that the underlying information cannot be used for substantive purposes.

Rule 803(6) (Hearsay Exceptions: Availability of Declarant Immaterial)

Rule 803(6) would be amended to permit the admission of certain records of regularly conducted activity (e.g., business records), which have been authenticated by means other than by testimony of foundation witnesses. The proposal is based on the procedures in criminal cases governing the certification of foreign records of regularly conducted activity as provided by 18 U.S.C. § 3505. Under the statutory provision, the foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. The amendment is intended to provide for uniform

treatment of business records and to save the parties the expense and inconvenience of producing live witnesses for what is often perfunctory testimony.

#### Rule 902 (Self-authentication)

Rule 902 would be amended to implement the authentication of certain records of regularly conducted activity consistent with the proposed amendment of Rule 803(6).

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Evidence are in Appendix B together with an excerpt from the advisory committee report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 103, 404(a), 701, 702, 703, 803(6), and 902 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

#### Information Item

The advisory committee was reactivated in 1992 following a 17-year hiatus. It has now completed a survey of all the rules and taken action on those rules that had been causing serious problems in the courts. With the significant exception of Rule 501 governing privileges, the committee does not have — subject to any pending legislation affecting particular evidence rules — any particular rule change on its agenda.

Several bills were introduced in the last congressional session that created evidentiary privileges, e.g., parent-child and taxpayer-preparer. The Judicial Conference has a longstanding policy opposing legislation that amends a federal rule of procedure or evidence outside the "Rules Enabling Act" rulemaking process. In accordance with that policy, the rules committees have opposed bills that directly create new privileges in the rules. But Congress and others continue to focus attention on evidentiary privileges. The advisory committee believes that the

time is right to begin a comprehensive, long-term study of Rule 501. In particular, the study will revisit the set of individual rules governing specific privileges that was rejected by Congress in 1976. The rejection was based primarily on one or two especially controversial privileges.

## **FEDERAL RULES OF BANKRUPTCY PROCEDURE**

### Rules for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, and 5003, together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1998. A public hearing was held in Washington, D.C.

The advisory committee had published for comment proposed amendments to 27 other rules, which were described as the "Litigation Package." The amendments would have substantially revised procedures relating to litigation (other than adversary proceedings) in bankruptcy courts. In light of the numerous comments, the advisory committee decided to withdraw this "Litigation Package" for further study.

### Rule 1017(e) (Dismissal or Conversion of Case; Suspension)

Rule 1017 would be amended to permit the court to extend, on timely request, the time to file a motion to dismiss a chapter 7 case under § 707(b) of the Bankruptcy Code, whether the court rules on the request before or after the expiration of the 60-day time limit for filing the motion to dismiss.

Rule 2002(a) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee)

Under the proposed amendments to Rule 2002(a), notice to all creditors of a hearing on a request for compensation or reimbursement of expenses would be necessary only if the amount requested exceeds \$1,000, instead of \$500.

Rule 4003(b) (Exemptions)

Rule 4003(b) would be amended to permit the court to extend, on timely request, the time to object to a list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day limit for filing objections.

Rule 4004(c) (Grant or Denial of Discharge)

Rule 4004(c) would be amended to delay the granting of a discharge in a chapter 7 case while a motion for an extension of time to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code is pending.

Rule 5003 (Records Kept by the Clerk)

Rule 5003 would be amended to permit the United States and the state in which the court is located to file statements designating safe harbor mailing addresses for notice purposes. Pending legislation would impose more burdensome obligations on the clerk.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Bankruptcy Procedure are in Appendix C together with an excerpt from the advisory committee report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, and 5003 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

## Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1007, 2002(c) and (g), 3016, 3017, 3020, 9006(f), 9020, and 9022(a) with a recommendation that they be published for comment. The Committee concurred. Under the proposed amendment to Rule 1007, if the debtor knows that a creditor is an infant or incompetent person, the debtor would be required to include in the list of creditors and schedules the name, address, and legal relationship of any representative on whom process would be served in an adversary proceeding against that creditor. Rule 2002(c) would be amended to ensure that parties given notice of a hearing to consider confirmation of a plan are given adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by the Bankruptcy Code. Rule 2002(g) amendments would clarify that when a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a different mailing address, the last paper filed determines the proper address. Rule 2002(g) amendments also would assure that notices to an infant or incompetent person are mailed to the appropriate guardian or other legal representative

Rule 3016 would be amended to ensure that entities whose conduct would be enjoined under a plan, rather than by operation of the Bankruptcy Code, are given adequate notice of the proposed injunction by specific and conspicuous language in the plan and disclosure statement. Rule 3017 would be amended to assure that entities whose conduct would be enjoined under a plan — but who would not ordinarily receive copies of the plan and disclosure statement or information regarding the confirmation hearing because they are neither creditors nor equity security holders — are provided with adequate notice of the proposed injunction, the confirmation hearing, and the deadline for objecting to confirmation of the plan. Rule 3020

would be amended to provide notice in an order of confirmation to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by the Bankruptcy Code.

The changes to Rules 9006(f) and 9022(a) would be consistent with changes proposed to the Civil Rules dealing with the service of papers by electronic means. The change to Rule 9006 would expand the "three-day" rule, while the change to Rule 9022 would authorize the clerk to send notice of entry of a judgment or order by electronic means. Rule 9020 would be amended to delete provisions that delay for 10 days the effectiveness of an order of civil contempt issued by a bankruptcy judge and that render the order subject to *de novo* review by the district court.

### **FEDERAL RULES OF APPELLATE PROCEDURE**

The Advisory Committee on Appellate Rules determined that — barring an emergency — no amendment to the rules would be forwarded until the bench and bar became accustomed to the comprehensive revision of the appellate rules that took effect on December 1, 1998.

Since 1997, the advisory committee has tentatively approved but deferred forwarding several proposed rule amendments. It has retained the amendments and plans to transmit them as a single package to the Committee in January 2000. At its April 1999 meeting, the advisory committee approved amendments to two rules dealing with time periods and one rule requiring the signature of an attorney on certain papers. But in accordance with its earlier decision to defer submitting proposed amendments, the advisory committee retained them and will later transmit them to the Committee. The advisory committee also reconsidered and revised proposed amendments that it had earlier tentatively approved to Rule 4 capping the time within which to file an appeal.

The advisory committee presented no items for the Committee's action.

## FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action. The advisory committee is reviewing a comprehensive redraft of the criminal rules prepared by the Standing Committee's Style Subcommittee. The project is similar in nature to the revision of the Federal Rules of Appellate Procedure, which took effect in December 1998. In the course of its review, the advisory committee secured the assistance of Professor Stephen A. Saltzburg, the former committee's reporter. The advisory committee has nearly completed work on the first 20 rules.

At the same time, the advisory committee is continuing its review of substantive amendments proposed to the rules. Amendments are proposed to Rules 10 (Arrest) and 43 (Presence of Defendant) that would permit a defendant to waive an appearance at arraignment. The advisory committee is also reconsidering whether teleconferencing of these and other pretrial proceedings should be permitted. Rule 12.2 (Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition) would be amended to require a defendant in a capital case to notify the government if expert testimony on the issue of mental condition will be introduced at sentencing. The proposed amendment would also make clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. The proposed amendments to Rule 26 (Taking of Testimony) would permit a court to take testimony by remote transmission under certain limited circumstances. The amendment would parallel recent amendments to Civil Rule 43. Rule 35(b) (Reduction of Sentence) would be amended to provide sentence relief to a defendant who supplied information to the government within the prescribed one-year limit, but the information was not actually useful to the government until much later.



## **RULES GOVERNING ATTORNEY CONDUCT**

A subcommittee consisting of members from each of the advisory committees was formed and met in May 1999 to discuss and make recommendations on national attorney conduct rules to the respective advisory committees. Options presented to the subcommittee included a general default provision that relies on the applicable state law, a default provision combined with a set of "core" national rules, and an option to maintain the status quo. Another meeting of the subcommittee is planned for September 1999.

## **FINANCIAL REPORTING RULE AMENDMENTS**

At the request of the Committee on Codes of Conduct, the advisory committees considered changes to their respective rules requiring parties to disclose certain financial interests so that a trial judge could ascertain whether recusal under the law was necessary. The Federal Judicial Center has agreed to conduct a survey of the court's practices regarding financial disclosure statements. Preliminary results may be available for the advisory committees' consideration by their fall meetings.

## **LONG-RANGE PLANNING AND BUDGETING**

In 1996, the Committee completed and published in the Federal Rules Decisions (168 F.R.D. 679 (1996)) a self-study that reviewed the present operation and the future course of the rulemaking process. The Committee continues to rely on that document and the three implementation strategies in the *Long Range Plan for the Federal Courts* regarding the Plan's single recommendation dealing with the rulemaking process.

The Committee was provided with an agenda item on long-range planning and budgeting. One of the principal recommendations contained in that report is to provide "the estimated impact on staffing and other resources, operations, services, individuals or institutions, and/or the

quality of justice” of any program initiative or policy recommendation forwarded to the Judicial Conference. The Committee has provided cost estimates of proposed rule amendments that would directly and substantially affect the judiciary when hard data was available, i.e., proposed amendment requiring 12-person jury in a civil case. The Committee will continue to provide this information under similar conditions. In other cases when the impact of a proposed rule amendment is impossible to estimate, subject to conflicting and on occasion diametrically inconsistent cost estimates, and based on factors impossible to quantify empirically, the Committee will weigh the competing interests in determining whether to proceed further with estimating the amendment’s impact.

### REPORT TO THE CHIEF JUSTICE

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

Respectfully submitted,



Anthony J. Scirica  
Chair

Frank W. Bullock	James A. Parker
Charles J. Cooper	Sol Schreiber
Geoffrey C. Hazard, Jr.	Morey L. Sear
Gene W. Lafitte	A. Wallace Tashima
Patrick F. McCartan	E. Norman Veasey
	William R. Wilson, Jr.

Appendix A — Proposed Amendments to the Federal Rules of Civil Procedure  
Appendix B — Proposed Amendments to the Federal Rules of Evidence  
Appendix C — Proposed Amendments to the Federal Rules of Bankruptcy Procedure  
Appendix D — Report to the Chief Justice on Proposed Rule Amendments Generating Controversy

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE **Agenda F-18 (Appendix A)**  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

Rules  
September 1999

**ANTHONY J. SCIRICA**  
CHAIR

**PETER G. McCABE**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**WILL L. GARWOOD**  
APPELLATE RULES

**ADRIAN G. DUPLANTIER**  
BANKRUPTCY RULES

**PAUL V. NIEMEYER**  
CIVIL RULES

**W. EUGENE DAVIS**  
CRIMINAL RULES

**FERN M. SMITH**  
EVIDENCE RULES

MEMORANDUM

To: Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure

From: Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules

Date: May 11, 1999

Re: Report of the Advisory Committee on Civil Rules

I. INTRODUCTION

At its meeting on April 19 and 20, 1999, in Gleneden Beach, Oregon, the Civil Rules Advisory Committee approved recommendations for the adoption of the three rules packages that were published for comment in August 1998. The first package, involving Rules 4 and 12, would regulate service on the United States and the time to answer when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of public duties. The second package, involving Admiralty Rules B, C, and E, along with conforming changes to Civil Rule 14, would adjust these rules to reflect the growing use of admiralty procedure in civil forfeiture proceedings and also to reflect 1993 changes in Civil Rule 4. The third package would amend discovery Rules 5, 26, 30, 34, and 37 to reduce cost and increase the efficiency of discovery, while yet preserving the policy of full disclosure and judicial discretion in case management.

\* \* \* \* \*

Service Rules Package.

The first package, involving service on the United States, was initiated at the suggestion of the Department of Justice to provide service on the United States and 60 days to answer a complaint against an individual sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. This change would make the practice essentially the same as when a United States officer is sued in an official capacity. The Committee's recommendation was adopted without any substantial opposition.

### Admiralty Rules Package.

The proposals to amend the Admiralty Rules grew from the desire to adjust the rules to reflect the growing importance of civil forfeiture proceedings. In rem admiralty procedure has long been employed for civil forfeiture proceedings. With the dramatic growth in land-based civil forfeiture proceedings, the need to adopt changes making some distinctions between maritime and forfeiture procedures became apparent. The process of considering these changes also led to a number of other proposed changes, including some designed to reflect the 1993 reorganization of Rule 4.

These proposals were developed over a long period, beginning with groundwork done by the Maritime Law Association and the Department of Justice. The proposals that emerged from that process were considered at length by the Committee's Admiralty Rules Subcommittee. When the Committee finally discussed the proposals in October 1997, the chair of the Maritime Law Association Rules Committee and a representative of the Department of Justice attended and participated.

The Committee is pleased that lawyers using the Admiralty Rules seem satisfied with the proposed changes. Several comments received in response to publication indicated minor changes that the Committee has made. Through comment, the Federal Magistrate Judges Associations endorsed particularly the style changes as "a significant improvement" that "provide clarity."

### Discovery Rules Package.

The discovery package has received the most attention from the public. The Committee received over 300 comments and heard testimony from over 70 witnesses during 3 hearings in December 1998 and January 1999. While the comments did not reveal much that was new to the Committee, the Committee did learn of minor deficiencies which have prompted some further changes that are described in more detail below. In substance, the package remains as published in August 1998.

### Discovery Rules Process.

Before undertaking to present the specific proposals, I believe that it would be useful both to the Standing Committee and to those who may consider this package later to be given a brief background of the process because the Committee believes that the process pursued in connection with the discovery rules package created an unusually well-informed Committee that acted most selectively to adopt a modest, balanced package to address identified problems in a manner comfortable to the practicing bar and to the courts. While the Committee has received the usual criticisms about various of its decisions — often competing criticisms — it has also received an unusual amount of support. From past experience, the Committee usually hears mostly from those offering criticism and not those offering support.

The discovery project formally began in the fall of 1996. For many years before then, the Committee had received complaints from the bar and the public that discovery costs too much. During the same period, the American College of Trial Lawyers advanced a proposal that had been advanced earlier by the American Bar Association Section of Litigation and by other bar groups to limit the scope of discovery to meet these concerns. In addition, the Civil Justice Reform Act directed the Judicial Conference to examine discovery and initial disclosure issues as part of its response to Congress, and in its final report to Congress on the Civil Justice Reform Act, the Conference called on the Committee to examine whether local variations of disclosure should continue, whether the scope of discovery should change, and whether specific time limits on discovery should be put into national rules. With all of these stirrings, the Committee determined to focus on the architecture of discovery rules and determine whether modest changes could be effected to reduce the costs of discovery, to increase its efficiency, to restore uniformity of practice, and to encourage the judiciary to participate more actively in case management. The Committee determined expressly not to review the question of discovery abuse, a matter that had been the subject of repeated rules activity over the years.

A discovery subcommittee was formed, and Judge David F. Levi was appointed chair and Professor Richard L. Marcus, special reporter. The subcommittee set to work immediately, establishing the framework for a conference that was held in January 1997 with a group of litigators drawn from a wide array of practice areas and locations. The views expressed at that conference helped shape the planning for a major conference held at Boston College Law School in September 1997.

The Boston College conference, to which the Committee invited a most distinguished group from the academic community, the bench, the bar, and representatives from various bar associations, was particularly successful. The Committee received formal responses not only from some academics, but also from the American Bar Association Section of Litigation, the American College of Trial Lawyers, the Association of Trial Lawyers of America, the Defense Research Institute, the Trial Lawyers for Public Justice, and the Product Liability Advisory Council. At the Committee's request, the Federal Judicial Center conducted a survey of attorneys across the country about discovery and prepared a comprehensive report of its findings. The Committee also asked the RAND Institute for Civil Justice to reevaluate its database collected in connection with its work under the Civil Justice Reform Act for information on discovery practice. The RAND Institute also prepared a report. Much of this material was printed in a symposium issue of the Boston College Law Review, and copies of this issue were provided to the members of the Standing Committee last year.

In all, the Committee received a wide range of information, including that which is summarized in connection with our formal request for comment when publishing the proposed rules package in August 1998. Important to the package, the Committee learned that in almost 40% of federal cases, discovery is not used at all, and in an additional substantial percentage of cases, only about three hours of discovery occurs. In short, the discovery rules are relevant to only a limited portion of cases in which discovery is actively employed by the parties. In these cases, however,

discovery was often thought to be too expensive, and concerns about undue expense were expressed by both plaintiffs' and defendants' attorneys. The Committee learned that the cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed. The attorneys responding to the FJC survey indicated overwhelmingly — 83% — that they wanted changes made to the discovery rules.

At the Boston conference in particular, the Committee heard a nearly universal demand from the bar for national uniformity in discovery rules and a profound wish that the judiciary could be encouraged to engage in discovery issues earlier in each case and more completely. Both anecdotal and survey data seem to demonstrate that early judicial supervision of discovery reduces the cost of discovery and increases the parties' satisfaction with it.

Finally, from the FJC study, the Committee learned that some form of mandatory disclosure is used in a majority of districts. Even in "opt-out districts," the courts or individual judges have often imposed some form of mandatory disclosure. The FJC survey revealed that attorneys who have practiced disclosure are highly satisfied with it. Moreover, the Committee learned that an earlier expressed fear of satellite litigation with respect to disclosure was unfounded.

The discovery subcommittee, drawing on the matters presented at the conferences, on the data generated by the Federal Judicial Center and the RAND Institute, and on published legal literature, developed over 40 possible revisions to discovery rules for consideration by the Committee. The Committee narrowed this list and instructed the subcommittee to draft proposed amendments to implement specific proposals. In considering the various proposals offered by the subcommittee, the Committee engaged in debate at the highest level. Proposals that were thought to risk damage to procedural foundations were discarded, and proposals that unnecessarily favored particular interests were discarded. A balanced approach was sought in which more focused discovery could be employed, preserving the underlying purpose of discovery to provide the parties with full disclosure of opposing parties' positions in the litigation. When the vote in Committee on a proposal was close, the Committee chose not to proceed with the proposed change but elected rather to discuss the proposal further until a substantial majority in one direction or the other could be achieved. In the end, every proposal adopted for presentation to the Standing Committee in June 1998 was passed by a substantial majority. Through this process, the Committee satisfied itself that its recommendations represented changes that were modest, balanced, and likely designed to improve the efficiency and fairness of the rules.

As important to the immediate concerns that faced the Committee, the Committee also kept its focus on 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 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.

### Committee Response to Comments.

Following publication, public hearings, and the receipt of numerous comments, the discovery subcommittee proposed modest changes to the Committee to various of the rules to reflect deficiencies that had been discovered. At its April 1999 meeting in Oregon, the Committee again discussed each proposal and either approved or rejected it by unanimous vote or by a large majority.

In addition to a review of the changes proposed by the discovery subcommittee, the Committee independently debated motions made by members to review earlier substantive decisions of the Committee. While the debates on these motions uncovered again all of the policy considerations for and against, the Committee voted to remain with the proposals that it had submitted to the Standing Committee in June 1998. Nevertheless, in order to present fairly the views of the members making these motions, I am presenting the opposition views to give the Standing Committee a more complete background.

### Professor Rowe's Motion.

Professor Rowe moved to abandon the proposed change to Rule 26(b)(1) relating to the scope of discovery. Rule 26(b)(1) now defines the scope of discovery to include any matter "relevant to the subject matter involved in the pending action." The Committee's proposal would limit the presumptive scope to include any "matter relevant to the claim or defense of any party." At the same time, the court would be given the power, for good cause shown, to authorize discovery to the present "subject matter" limit. The proposal would change the balance between attorney-controlled discovery and court-controlled discovery, but the overall scope of discovery authorized by Rule 26(b)(1) would not be altered.

Professor Rowe's motion to abandon this proposed change was presented to the Committee in written form, a copy of which is attached to the minutes prepared by the reporter. Professor Rowe noted that twenty years ago the Committee rejected a proposal to narrow the scope of discovery by amending Rule 26(b)(1) to authorize discovery of matters relevant to "the claim or defense." He noted that the Committee then felt that the change would substitute one general term for another and therefore would invite litigation. He urged that the Committee recognize this wisdom.

While he acknowledged that the proposed change was somewhat different, he concluded that it "makes no improvement in clarity." He argued that the change will lead to satellite litigation, "stonewall resistance," and overpleading. He observed that support for the change is spotty and that other means to curb discovery abuse are preferable, particularly by emphasizing the "burdensomeness limits" of Rule 26(b)(2) and the availability of protective orders under Rule 26(c).

Following debate on Professor Rowe's motion, four members voted in favor and nine against. Thus, the Committee, by a substantial majority, elected to continue with the original proposal presented to the Standing Committee in June 1998. The views of the various members, both for and against, are ably described in the minutes of the meeting prepared by the reporter.

After the vote was taken, Professor Rowe commended the Committee for the thoughtfulness and thoroughness of the debate.

#### Mr. Lynk's Motion.

In addition to Professor Rowe's motion, Mr. Lynk made a motion to delete the proposal that affirms the court's authority to require a party to pay for excessive discovery. In the Committee's proposal, which originally was contained in Rule 34(b) and now has been moved to Rule 26(b), the Committee makes explicit the court's implicit authority to condition discovery which exceeds the limitations of Rule 26(b)(2)(i), (ii), and (iii), on the payment of reasonable costs of the discovery. The limitations of Rule 26(b)(2)(i), (ii), and (iii) are against excessive discovery. The Committee acted on the assumption that even now the courts have the authority to refuse excessive discovery or implicitly to condition it on the payment of costs.

Mr. Lynk moved to delete the proposed change, arguing that there was no need to add an explicit provision to the rules because judges already have the authority. By making the authority explicit, he maintained, the change would encourage courts to permit excessive discovery on the condition that costs be paid, thus undermining the limitations of (i), (ii), and (iii). He also maintained that moving the cost-bearing provision from Rule 34(b) to Rule 26(b)(2) only heightened this encouragement by applying it more clearly to all discovery. In the end, he argued, the result would be differential justice: the party who cannot afford to pay will not get this discovery, while the one who can pay — who may be eager to pay, — will get the discovery.

Again, the Committee debated the motion at length, reviewing the policy considerations for and against, and following debate, five members voted in favor and eight voted against the motion. Accordingly, the Committee again elected to remain with its original proposal to the Standing Committee, subject to the change of moving the provision from Rule 34(b) to Rule 26(b).

#### Committee Vote on Package.

After all of the recommendations of the subcommittee were debated and voted on and after the two additional motions were debated and voted on, the Advisory Committee voted unanimously to recommend the attached discovery package for adoption.

#### Personal Observations.

On a personal note, as chair of the Committee, I am particularly pleased with the thorough process that the Committee followed in making its recommendations, and I am proud of the sensitive judgment that it exercised. I do not recall Committee action ever having been taken with as much information as this Committee considered and with the depth of debate over the policy considerations. I would find it difficult to believe that this Committee — or another — could devise a significantly improved overall package. As I have already complimented the Committee, this was democratic action at its best.



I now proceed to summarize in detail the items requested for action by the Standing Committee. As already noted, Part II describes the rules proposed for Judicial Conference approval and Part III describes the rules proposed for possible publication.

*II Action Items: Rules Transmitted for Judicial Conference Approval*

**A. Individual-Capacity Actions Against Federal Employees: Rules 4, 12**

The proposed amendments to Rule 4 and Rule 12 were published in August 1998. The amendments are designed to do three things. Rule 4(i)(2) is amended to require service on the United States when a federal employee is sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. Rule 4(i)(3) also is amended to ensure that an action is not dismissed for failure to serve all the persons required to be served under Rule 4(i)(2). Rule 12(a)(3) is amended to provide 60 days to answer in these individual-capacity actions, just as when a United States officer is sued in an official capacity.

The public comments and testimony suggested drafting changes that were adopted by the Advisory Committee. These changes are described in the Gap Report. Some of the comments also suggested that the dual-service requirement, and the extended time to answer, should be made available in individual-capacity actions against state employees. The Advisory Committee had considered this issue in drafting the published proposal. On reconsideration, the Advisory Committee concluded again that the time has not come to expand these provisions beyond the United States and its officers and employees.

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**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE\***

**Rule 4. Summons**

\* \* \* \* \*

**(i) ~~Servin~~gce Upon the United States, and Its Agencies,  
Corporations, or Officers, or Employees.**

\* \* \* \* \*

**(2) (A)** Service upon on an officer, agency, or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, ~~shall be~~ is effected by serving the United States in the manner prescribed by paragraph ~~(1)~~ of this subdivision Rule 4(i)(1) and by also sending a copy of the summons and ~~of the~~ complaint by registered or certified mail to the officer, employee, agency, or corporation.

**(B)** Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with

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

17 the performance of duties on behalf of the United  
 18 States — whether or not the officer or employee  
 19 is sued also in an official capacity — is effected  
 20 by serving the United States in the manner  
 21 prescribed by Rule 4(i)(1) and by serving the  
 22 officer or employee in the manner prescribed by  
 23 Rule 4 (e), (f), or (g).

24 (3) The court shall allow a reasonable time for to  
 25 ~~service of process under this subdivision~~ Rule 4(i) for  
 26 the purpose of curing the failure to serve:

27 (A) all persons required to be served in an action  
 28 governed by Rule 4(i)(2)(A), multiple officers,  
 29 agencies, or corporations of the United States if the  
 30 plaintiff has effected service on served either the  
 31 United States attorney or the Attorney General of the  
 32 United States, or

33 (B) the United States in an action governed by  
 34 Rule 4(i)(2)(B), if the plaintiff has served an officer or  
 35 employee of the United States sued in an individual  
 36 capacity.

\* \* \* \* \*

**Committee Note**

Paragraph (2)(B) is added to Rule 4(i) to require service on the United States when a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. Decided cases provide uncertain guidance on the question whether the United States must be served in such actions. See *Vaccaro v. Dobre*, 81 F.3d 854, 856-857 (9th Cir. 1996); *Armstrong v. Sears*, 33 F.3d 182, 185-187 (2d Cir. 1994); *Ecclesiastical Order of the Ism of Am v. Chasin*, 845 F.2d 113, 116 (6th Cir. 1988); *Light v. Wolf*, 816 F.2d 746 (D.C. Cir. 1987); see also *Simpkins v. District of Columbia*, 108 F.3d 366, 368-369 (D.C. Cir. 1997). Service on the United States will help to protect the interest of the individual defendant in securing representation by the United States, and will expedite the process of determining whether the United States will provide representation. It has been understood that the individual defendant must be served as an individual defendant, a requirement that is made explicit. Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).

Paragraph 2(B) reaches service when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." This phrase has been chosen as a functional phrase that can be applied without the occasionally distracting associations of such phrases as "scope of employment," "color of office," or "arising out of the employment." Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever to their governmental roles. There is no reason to require service on the United States in these actions. The connection to federal employment that requires service on the United States must be

4 FEDERAL RULES OF CIVIL PROCEDURE

determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

An action against a former officer or employee of the United States is covered by paragraph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States.

Paragraph (3) is amended to ensure that failure to serve the United States in an action governed by paragraph 2(B) does not defeat an action. This protection is adopted because there will be cases in which the plaintiff reasonably fails to appreciate the need to serve the United States. There is no requirement, however, that the plaintiff show that the failure to serve the United States was reasonable. A reasonable time to effect service on the United States must be allowed after the failure is pointed out. An additional change ensures that if the United States or United States attorney is served in an action governed by paragraph 2(A), additional time is to be allowed even though no officer, employee, agency, or corporation of the United States was served.

#### **Summary of Comments**

The comments focused on the Rule 4 and Rule 12 amendments together. They are summarized following Rule 12.

#### **GAP Report**

The most important changes were made to ensure that no one would read the seemingly independent provisions of paragraphs 2(A) and 2(B) to mean that service must be made twice both on the United

States and on the United States employee when the employee is sued in both official and individual capacities. The word “only” was added in subparagraph (A) and the new phrase “whether or not the officer or employee is sued also in an individual capacity” was inserted in subparagraph (B).

Minor changes were made to include “Employees” in the catchline for subdivision (i), and to add “or employee” in paragraph 2(A). Although it may seem awkward to think of suit against an employee in an official capacity, there is no clear definition that separates “officers” from “employees” for this purpose. The published proposal to amend Rule 12(a)(3) referred to actions against an employee sued in an official capacity, and it seemed better to make the rules parallel by adding “employee” to Rule 4(i)(2)(A) than by deleting it from Rule 12(a)(3)(A).

**Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings**

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**(a) When Presented.**

\* \* \* \* \*

**(3) (A)** ~~The United States, an agency of the United States, or an officer or agency thereof~~ employee of the United States ~~sued in an official capacity,~~ shall serve an answer to the complaint or to a cross-claim; ~~—~~ or a reply to a counterclaim; ~~—~~ within 60 days after ~~the service upon the~~

6 FEDERAL RULES OF CIVIL PROCEDURE

9 United States attorney is served with of the  
10 pleading in which asserting the claim is asserted.

11 (B) An officer or employee of the United States  
12 sued in an individual capacity for acts or omissions  
13 occurring in connection with the performance of  
14 duties on behalf of the United States shall serve an  
15 answer to the complaint or cross-claim — or a reply  
16 to a counterclaim — within 60 days after service on  
17 the officer or employee, or service on the United  
18 States attorney, whichever is later.

19 \* \* \* \* \*

**Committee Note**

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action

against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

### **GAP Report**

No changes are recommended for Rule 12 as published.

### **Comments on Rule 4, 12 Proposals**

98-CV-007, James E. Garvey: Favors Rules 4 and 12.

98-CV-070, Chicago Bar Assn.: "has no objections."

98-CV-124, Hon. David L. Piester (D.Neb. Magistrate Judge): The proposal may imply that an officer must be served with two summons when sued in both official and individual capacities. This reading draws from the literal wording of Rule 4(i)(2)(A) and (B) as published. (A) requires that when an officer is sued in an official capacity, service be made on the United States and by mailing a copy of the summons and complaint to the officer. (B) requires that when an officer is sued in an individual capacity, service be made on the United States and service also must be made on the officer in the manner prescribed by Rule 4(e), (f), or (g).

Certainly there is no purpose to require that the same officer be served twice. The proposed cure is a rewording of (B) that does not change this problem and destroys the parallel with the wording of (A), and addition of a new subparagraph (C):

(C) Service on an officer or employee of the United States sued in both an individual capacity and an official capacity is effected by serving the officer or employee as prescribed in subparagraph (B), above, noting on the summons that the officer is sued in both capacities.



98CV147: Department of Justice — Drug Enforcement Administration: The proposals to amend Rules 4 and 12 are good for the reasons given.

98CV159: Pennsylvania Trial Lawyers Assn.: Supports the Rules 4 and 12 proposals “as written for the salutary reason of ensuring that federal officials where the subject of litigation receive legal representation.”

98CV167: Florida Attorney General Robert A. Butterworth: Both Rule 4 and Rule 12 should be amended to include state officials. A state too must decide whether to provide legal representation. Twenty days is not time enough to frame an answer — the realities of bureaucratic processing mean that even after it is decided to provide an attorney for the state-official defendant, very little time is left. There is a corresponding temptation to file a motion to dismiss based on such legal challenges as can be found, providing shelter for a fact investigation that will support proper pleading.

98CV193: Philadelphia Bar Assn.: pp. 23-24: Picks up on a drafting oversight. Rule 4(i)(2) now refers to service on “an officer, agency, or corporation of the United States”; “employee” is not used. Rule 12(a)(3) likewise refers to “The United States or an officer or agency thereof,” without referring to an “employee.” In redrafting Rule 4(i), paragraph (2)(A) continues to refer only to “an officer of the United States sued in an official capacity.” Proposed Rule 12(a)(3)(A), however, refers to “an officer or employee of the United States sued in an official capacity.” The two rules should be made parallel. The Philadelphia Bar recommends that “employee[s]” be added to the caption of Rule 4(i), a desirable addition because paragraph (2)(B) will include employees. It also recommends that “employee” be added to (2)(A) at lines 7 and 13 of the published version. It seems odd, however, to think of an “employee” sued “in an official

capacity.” Perhaps it is better to take “employee” out of Rule 12(a)(3)(A).

98CV214: Civil Litigation Unit, FBI General Counsel: Favors the Rules 4 and 12 proposals for the reasons advanced by the Department of Justice.

98CV258: Mr. Paige: Favors the Rule 4 and 12 proposals.

98CV267: D.C. Bar, Courts Lawyers & Admn. of Justice Section: Expresses support for the Rule 4 and 12 proposals, but without elaborating the reasons.

98CV268: Federal Magistrate Judges Assn.: Supports the Rule 4 and 12 proposals, characterizing them as non-controversial. “The amendment will assist the practitioner (as well as the courts) in clarifying and making explicit a party’s service obligations. \*\*\* [S]ervice on the United States will help to protect the interests of the individual defendant \* \* \* and will expedite the process of determining whether the United States will provide representation.” The new Rule 4(i)(3) requirement of notice and opportunity to cure a failure to make all required service provides “clear direction” and a “spirit” that should be endorsed. The Rule 12 time for service complements the Rule 4 provisions — time is needed for the United States to decide whether to provide representation, and to prepare an answer if representation is provided.

**B. Admiralty Rules B, C, E; Civil Rule 14**

The Admiralty Rules proposals published in August 1998 were prompted by two primary goals. The first was to reflect the growing use of Admiralty procedure in civil forfeiture proceedings; the most important change in this area appears in Rule C(6), which for the first time establishes separate provisions for civil forfeiture proceedings. The second goal was to adjust for the 1993 amendments of Civil Rule 4. Civil Rule 14 is changed only to reflect the change of nomenclature in Admiralty Rule C(6).

There was little comment or testimony on these proposals. Minor drafting changes, made to reflect useful suggestions, are described in the GAP Report. One of these changes, in Rule C(3), acts on a comment that was addressed only to Rule B(1)(d). The change modifies the requirement that the court's clerk deliver the warrant of arrest to the marshal, so that the requirement is only that the warrant must be delivered to the marshal. The Advisory Committee recommends that there is no need to republish Rule C(3) to reflect this change, which establishes a parallel with Rule B in a way that conforms to changes earlier made in Civil Rule 4.

**Rule B. In Personam Actions: Attachment and Garnishment: Special Provisions**

- 1           ~~(1) When Available; Complaint, Affidavit, Judicial~~  
 2           ~~Authorization, and Process. With respect to any admiralty~~  
 3           ~~or maritime claim in personam a verified complaint may~~  
 4           ~~contain a prayer for process to attach the defendant's goods~~

5 ~~and chattels, or credits and effects in the hands of garnishees~~  
6 ~~to be named in the process to the amount sued for, if the~~  
7 ~~defendant shall not be found within the district. Such a~~  
8 ~~complaint shall be accompanied by an affidavit signed by the~~  
9 ~~plaintiff or the plaintiff's attorney that, to the affiant's~~  
10 ~~knowledge, or to the best of the affiant's information and~~  
11 ~~belief, the defendant cannot be found within the district. The~~  
12 ~~verified complaint and affidavit shall be reviewed by the court~~  
13 ~~and, if the conditions set forth in this rule appear to exist, an~~  
14 ~~order so stating and authorizing process of attachment and~~  
15 ~~garnishment shall issue. Supplemental process enforcing the~~  
16 ~~court's order may be issued by the clerk upon application~~  
17 ~~without further order of the court. If the plaintiff or the~~  
18 ~~plaintiff's attorney certifies that exigent circumstances make~~  
19 ~~review by the court impracticable, the clerk shall issue a~~  
20 ~~summons and process of attachment and garnishment and the~~  
21 ~~plaintiff shall have the burden on a post-attachment hearing~~

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22 ~~under Rule E(4)(f) to show that exigent circumstances~~  
23 ~~existed. In addition, or in the alternative, the plaintiff may,~~  
24 ~~pursuant to Rule 4(e), invoke the remedies provided by state~~  
25 ~~law for attachment and garnishment or similar seizure of the~~  
26 ~~defendant's property. Except for Rule E(8) these~~  
27 ~~Supplemental Rules do not apply to state remedies so~~  
28 ~~invoked.~~

29 **(2) Notice to Defendant.** ~~No judgment by default shall~~  
30 ~~be entered except upon proof, which may be by affidavit, (a)~~  
31 ~~that the plaintiff or the garnishee has given notice of the~~  
32 ~~action to the defendant by mailing to the defendant a copy of~~  
33 ~~the complaint, summons, and process of attachment or~~  
34 ~~garnishment, using any form of mail requiring a return~~  
35 ~~receipt, or (b) that the complaint, summons, and process of~~  
36 ~~attachment or garnishment have been served on the defendant~~  
37 ~~in a manner authorized by Rule 4(d) or (i), or (c) that the~~

38 ~~plaintiff or the garnishee has made diligent efforts to give~~  
39 ~~notice of the action to the defendant and has been unable to~~  
40 ~~do so.~~

41 **(1) When Available; Complaint, Affidavit, Judicial**  
42 **Authorization, and Process.** In an in personam action:

43 (a) If a defendant is not found within the district, a  
44 verified complaint may contain a prayer for process to  
45 attach the defendant's tangible or intangible personal  
46 property — up to the amount sued for — in the hands of  
47 garnishees named in the process.

48 (b) The plaintiff or the plaintiff's attorney must sign  
49 and file with the complaint an affidavit stating that, to the  
50 affiant's knowledge, or on information and belief, the  
51 defendant cannot be found within the district. The court  
52 must review the complaint and affidavit and, if the  
53 conditions of this Rule B appear to exist, enter an order so

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54 stating and authorizing process of attachment and  
55 garnishment. The clerk may issue supplemental process  
56 enforcing the court's order upon application without  
57 further court order.

58 (c) If the plaintiff or the plaintiff's attorney certifies  
59 that exigent circumstances make court review  
60 impracticable, the clerk must issue the summons and  
61 process of attachment and garnishment. The plaintiff has  
62 the burden in any post-attachment hearing under Rule  
63 E(4)(f) to show that exigent circumstances existed.

64 (d) (i) If the property is a vessel or tangible  
65 property on board a vessel, the summons, process,  
66 and any supplemental process must be delivered  
67 to the marshal for service.

68 (ii) If the property is other tangible or  
69 intangible property, the summons, process, and

70 any supplemental process must be delivered to a  
71 person or organization authorized to serve it, who  
72 may be (A) a marshal; (B) someone under contract  
73 with the United States; (C) someone specially  
74 appointed by the court for that purpose; or, (D) in  
75 an action brought by the United States, any officer  
76 or employee of the United States.

77 (e) The plaintiff may invoke state-law remedies under  
78 Rule 64 for seizure of person or property for the purpose  
79 of securing satisfaction of the judgment.

80 **(2) Notice to Defendant.** No default judgment may be  
81 entered except upon proof — which may be by affidavit —  
82 that:

83 (a) the complaint, summons, and process of  
84 attachment or garnishment have been served on the  
85 defendant in a manner authorized by Rule 4;



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86 (b) the plaintiff or the garnishee has mailed to the  
87 defendant the complaint, summons, and process of  
88 attachment or garnishment, using any form of mail  
89 requiring a return receipt; or

90 (c) the plaintiff or the garnishee has tried diligently to  
91 give notice of the action to the defendant but could not do  
92 so.

93 \* \* \* \* \*

**Committee Note**

Rule B(1) is amended in two ways, and style changes have been made.

The service provisions of Rule C(3) are adopted in paragraph (d), providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel.

The provision that allows the plaintiff to invoke state attachment and garnishment remedies is amended to reflect the 1993 amendments of Civil Rule 4. Former Civil Rule 4(e), incorporated in Rule B(1), allowed general use of state quasi-in-rem jurisdiction if the defendant was not an inhabitant of, or found within, the state. Rule 4(e) was replaced in 1993 by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the

defendant cannot be obtained in the district where the action is brought. Little purpose would be served by incorporating Rule 4(n)(2) in Rule B, since maritime attachment and garnishment are available whenever the defendant is not found within the district, a concept that allows attachment or garnishment even in some circumstances in which personal jurisdiction also can be asserted. In order to protect against any possibility that elimination of the reference to state quasi-in-rem jurisdiction remedies might seem to defeat continued use of state security devices, paragraph (e) expressly incorporates Civil Rule 64. Because Rule 64 looks only to security, not jurisdiction, the former reference to Rule E(8) is deleted as no longer relevant.

Rule B(2)(a) is amended to reflect the 1993 redistribution of the service provisions once found in Civil Rule 4(d) and (i). These provisions are now found in many different subdivisions of Rule 4. The new reference simply incorporates Rule 4, without designating the new subdivisions, because the function of Rule B(2) is simply to describe the methods of notice that suffice to support a default judgment. Style changes also have been made.

### **Rule C. Actions In Rem Actions: Special Provisions**

1

\* \* \* \* \*

2

~~(2) **Complaint.** In actions in rem the complaint shall be~~

3

~~verified on oath or solemn affirmation. It shall describe with~~

4

~~reasonable particularity the property that is the subject of the~~

5

~~action and state that it is within the district or will be during~~

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6 ~~the pendency of the action. In actions for the enforcement of~~  
7 ~~forfeitures for violation of any statute of the United States the~~  
8 ~~complaint shall state the place of seizure and whether it was~~  
9 ~~on land or on navigable waters, and shall contain such~~  
10 ~~allegations as may be required by the statute pursuant to~~  
11 ~~which the action is brought.~~

12 ~~(3) Judicial Authorization and Process. Except in~~  
13 ~~actions by the United States for forfeitures or federal statutory~~  
14 ~~violations, the verified complaint and any supporting papers~~  
15 ~~shall be reviewed by the court and, if the conditions for an~~  
16 ~~action in rem appear to exist, an order so stating and~~  
17 ~~authorizing a warrant for the arrest of a vessel or other~~  
18 ~~property that is the subject of the action shall issue and be~~  
19 ~~delivered to the clerk who shall prepare the warrant. If the~~  
20 ~~property is a vessel or a vessel and tangible property on board~~  
21 ~~the vessel, the warrant shall be delivered to the marshal for~~

22 ~~service. If other property, tangible or intangible is the subject~~  
23 ~~of the action, the warrant shall be delivered by the clerk to a~~  
24 ~~person or organization authorized to enforce it, who may be~~  
25 ~~a marshal, a person or organization contracted with by the~~  
26 ~~United States, a person specially appointed by the court for~~  
27 ~~that purpose, or, if the action is brought by the United States,~~  
28 ~~any officer or employee of the United States. If the property~~  
29 ~~that is the subject of the action consists in whole or in part of~~  
30 ~~freight, or the proceeds of the property sold, or other~~  
31 ~~intangible property, the clerk shall issue a summons directing~~  
32 ~~any person having control of the funds to show cause why~~  
33 ~~they should not be paid into court to abide the judgment.~~  
34 ~~Supplemental process enforcing the court's order may be~~  
35 ~~issued by the clerk upon application without further order of~~  
36 ~~the court. If the plaintiff or the plaintiff's attorney certifies~~  
37 ~~that exigent circumstances make review by the court~~  
38 ~~impracticable, the clerk shall issue a summons and warrant~~

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39 ~~for the arrest and the plaintiff shall have the burden on a post-~~  
40 ~~arrest hearing under Rule E(4)(f) to show that exigent~~  
41 ~~circumstances existed. In actions by the United States for~~  
42 ~~forfeitures for federal statutory violations, the clerk, upon~~  
43 ~~filing of the complaint, shall forthwith issue a summons and~~  
44 ~~warrant for the arrest of the vessel or other property without~~  
45 ~~requiring a certification of exigent circumstances.~~

46 ~~(4) Notice. No notice other than the execution of the~~  
47 ~~process is required when the property that is the subject of the~~  
48 ~~action has been released in accordance with Rule E(5). If the~~  
49 ~~property is not released within 10 days after execution of~~  
50 ~~process, the plaintiff shall promptly or within such time as~~  
51 ~~may be allowed by the court cause public notice of the action~~  
52 ~~and arrest to be given in a newspaper of general circulation in~~  
53 ~~the district, designated by order of the court. Such notice shall~~  
54 ~~specify the time within which the answer is required to be~~

55 ~~filed as provided by subdivision (6) of this rule. This rule~~  
56 ~~does not affect the requirements of notice in actions to~~  
57 ~~foreclose a preferred ship mortgage pursuant to the Act of~~  
58 ~~June 5, 1920, ch. 250, §30, as amended.~~

59 \* \* \* \* \*

60 ~~(6) Claim and Answer; Interrogatories.~~ The claimant of  
61 ~~property that is the subject of an action in rem shall file a~~  
62 ~~claim within 10 days after process has been executed, or~~  
63 ~~within such additional time as may be allowed by the court,~~  
64 ~~and shall serve an answer within 20 days after the filing of the~~  
65 ~~claim. The claim shall be verified on oath or solemn~~  
66 ~~affirmation, and shall state the interest in the property by~~  
67 ~~virtue of which the claimant demands its restitution and the~~  
68 ~~right to defend the action. If the claim is made on behalf of~~  
69 ~~the person entitled to possession by an agent, bailee, or~~  
70 ~~attorney, it shall state that the agent, bailee, or attorney is duly~~

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71 ~~authorized to make the claim. At the time of answering the~~  
72 ~~claimant shall also serve answers to any interrogatories served~~  
73 ~~with the complaint. In actions in rem interrogatories may be~~  
74 ~~so served without leave of court.~~

75 (2) Complaint. In an action in rem the complaint must:

76 (a) be verified;

77 (b) describe with reasonable particularity the property  
78 that is the subject of the action;

79 (c) in an admiralty and maritime proceeding, state that  
80 the property is within the district or will be within the  
81 district while the action is pending;

82 (d) in a forfeiture proceeding for violation of a federal  
83 statute, state:

84 (i) the place of seizure and whether it was on  
85 land or on navigable waters;

86                    (ii) whether the property is within the district,  
87                    and if the property is not within the district the  
88                    statutory basis for the court's exercise of  
89                    jurisdiction over the property; and  
90                    (iii) all allegations required by the statute  
91                    under which the action is brought.

92                    **(3) Judicial Authorization and Process.**

93                    **(a) Arrest Warrant.**

94                    (i) When the United States files a complaint  
95                    demanding a forfeiture for violation of a federal  
96                    statute, the clerk must promptly issue a summons  
97                    and a warrant for the arrest of the vessel or other  
98                    property without requiring a certification of  
99                    exigent circumstances.  
100                   (ii) (A) In other actions, the court must review  
101                   the complaint and any supporting papers. If



102 the conditions for an in rem action appear to  
103 exist, the court must issue an order directing  
104 the clerk to issue a warrant for the arrest of the  
105 vessel or other property that is the subject of  
106 the action.

107 (B) If the plaintiff or the plaintiff's  
108 attorney certifies that exigent circumstances  
109 make court review impracticable, the clerk  
110 must promptly issue a summons and a warrant  
111 for the arrest of the vessel or other property  
112 that is the subject of the action. The plaintiff  
113 has the burden in any post-arrest hearing  
114 under Rule E(4)(f) to show that exigent  
115 circumstances existed.

116           **(b) Service.**

117                   (i) If the property that is the subject of the  
118                   action is a vessel or tangible property on board a  
119                   vessel, the warrant and any supplemental process  
120                   must be delivered to the marshal for service.

121                   (ii) If the property that is the subject of the  
122                   action is other property, tangible or intangible, the  
123                   warrant and any supplemental process must be  
124                   delivered to a person or organization authorized to  
125                   enforce it, who may be: (A) a marshal; (B)  
126                   someone under contract with the United States;  
127                   (C) someone specially appointed by the court for  
128                   that purpose; or, (D) in an action brought by the  
129                   United States, any officer or employee of the  
130                   United States.

131            (c) Deposit in court. If the property that is the  
132            subject of the action consists in whole or in part of freight,  
133            the proceeds of property sold, or other intangible property,  
134            the clerk must issue — in addition to the warrant — a  
135            summons directing any person controlling the property to  
136            show cause why it should not be deposited in court to  
137            abide the judgment.

138            (d) Supplemental process. The clerk may upon  
139            application issue supplemental process to enforce the  
140            court's order without further court order.

141            (4) Notice. No notice other than execution of process is  
142            required when the property that is the subject of the action has  
143            been released under Rule E(5). If the property is not released  
144            within 10 days after execution, the plaintiff must promptly —  
145            or within the time that the court allows — give public notice  
146            of the action and arrest in a newspaper designated by court

147 order and having general circulation in the district, but  
148 publication may be terminated if the property is released  
149 before publication is completed. The notice must specify the  
150 time under Rule C(6) to file a statement of interest in or right  
151 against the seized property and to answer. This rule does not  
152 affect the notice requirements in an action to foreclose a  
153 preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as  
154 amended.

155 \* \* \* \* \*

156 **(6) Responsive Pleading; Interrogatories.**

157 **(a) Civil Forfeiture.** In an in rem forfeiture action for  
158 violation of a federal statute:

159 (i) a person who asserts an interest in or right  
160 against the property that is the subject of the  
161 action must file a verified statement identifying  
162 the interest or right:

163                    (A) within 20 days after the earlier of (1)  
164                    receiving actual notice of execution of  
165                    process, or (2) completed publication of notice  
166                    under Rule C(4), or

167                    (B) within the time that the court allows:

168                    (ii) an agent, bailee, or attorney must state the  
169                    authority to file a statement of interest in or right  
170                    against the property on behalf of another; and

171                    (iii) a person who files a statement of interest  
172                    in or right against the property must serve an  
173                    answer within 20 days after filing the statement.

174                    **(b) Maritime Arrests and Other Proceedings.** In an  
175                    in rem action not governed by Rule C(6)(a):

176                    (i) A person who asserts a right of possession  
177                    or any ownership interest in the property that is

178 the subject of the action must file a verified  
179 statement of right or interest:

180 (A) within 10 days after the earlier of (1)  
181 the execution of process, or (2) completed  
182 publication of notice under Rule C(4), or

183 (B) within the time that the court allows:

184 (ii) the statement of right or interest must  
185 describe the interest in the property that supports  
186 the person's demand for its restitution or right to  
187 defend the action;

188 (iii) an agent, bailee, or attorney must state  
189 the authority to file a statement of right or interest  
190 on behalf of another; and

191 (iv) a person who asserts a right of possession  
192 or any ownership interest must file an answer

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193 within 20 days after filing the statement of interest

194 or right.

195 **(c) Interrogatories:** Interrogatories may be served

196 with the complaint in an in rem action without leave of

197 court. Answers to the interrogatories must be served with

198 the answer to the complaint.

**Committee Note**

Style changes have been made throughout the revised portions of Rule C. Several changes of meaning have been made as well.

Subdivision 2. In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(b)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. Section 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. Section 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. Section 1395 establishes venue of a civil proceeding for forfeiture in

the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments of Rule E(3), bring these Rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been separated into lettered paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b)(i) is amended to make it clear that any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant, is to be served by the marshal.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a statement of interest or claim. The amendment requires that both times be stated.

A new provision is added, allowing termination of publication if the property is released more than 10 days after execution but before



publication is completed. Termination will save money, and also will reduce the risk of confusion as to the status of the property.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeiture proceedings and to in rem admiralty proceedings. Because some differences in procedure are desirable, these proceedings are separated by adopting a new paragraph (a) for civil forfeiture proceedings and recasting the present rule as paragraph (b) for in rem admiralty proceedings. The provision for interrogatories and answers is carried forward as paragraph (c). Although this established procedure for serving interrogatories with the complaint departs from the general provisions of Civil Rule 26(d), the special needs of expedition that often arise in admiralty justify continuing the practice.

Both paragraphs (a) and (b) require a statement of interest or right rather than the "claim" formerly required. The new wording permits parallel drafting, and facilitates cross-references in other rules. The substantive nature of the statement remains the same as the former claim. The requirements of (a) and (b) are, however, different in some respects.

In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or a right against the property involved. This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession. In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings.

In an admiralty and maritime proceeding governed by paragraph (b), a statement is filed only by a person claiming a right of

possession or ownership. Other claims against the property are advanced by intervention under Civil Rule 24, as it may be supplemented by local admiralty rules. The reference to ownership includes every interest that qualifies as ownership under domestic or foreign law. If an ownership interest is asserted, it makes no difference whether its character is legal, equitable, or something else.

Paragraph (a) provides more time than paragraph (b) for filing a statement. Admiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings.

Paragraphs (a) and (b) do not limit the right to make a restricted appearance under Rule E(8).

**Rule E. Actions In Rem and Quasi In Rem: General Provisions**

\* \* \* \* \*

1           **(3) Process.**

2           ~~(a) Territorial Limits of Effective Service. Process in~~  
3           ~~rem and of maritime attachment and garnishment shall be~~  
4           ~~served only within the district.~~

5           (a) In admiralty and maritime proceedings process in  
6           rem or of maritime attachment and garnishment may be  
7           served only within the district.

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8 (b) In forfeiture cases process in rem may be served  
9 within the district or outside the district when authorized  
10 by statute.

11 **(bc) Issuance and Delivery.** Issuance and delivery of  
12 process in rem, or of maritime attachment and  
13 garnishment, shall be held in abeyance if the plaintiff so  
14 requests.

15 \* \* \* \* \*

16 ~~(7) Security on Counterclaim.~~ Whenever there is  
17 ~~asserted a counterclaim arising out of the same transaction or~~  
18 ~~occurrence with respect to which the action was originally~~  
19 ~~filed, and the defendant or claimant in the original action has~~  
20 ~~given security to respond in damages, any plaintiff for whose~~  
21 ~~benefit such security has been given shall give security in the~~  
22 ~~usual amount and form to respond in damages to the claims~~  
23 ~~set forth in such counterclaim, unless the court, for cause~~

24 ~~shown, shall otherwise direct, and proceedings on the original~~  
25 ~~claim shall be stayed until such security is given, unless the~~  
26 ~~court otherwise directs. When the United States or a corporate~~  
27 ~~instrumentality thereof as defendant is relieved by law of the~~  
28 ~~requirement of giving security to respond in damages it shall~~  
29 ~~nevertheless be treated for the purposes of this subdivision~~  
30 ~~E(7) as if it had given such security if a private person so~~  
31 ~~situated would have been required to give it.~~

32 **(7) Security on Counterclaim.**

33 (a) When a person who has given security for  
34 damages in the original action asserts a counterclaim that  
35 arises from the transaction or occurrence that is the  
36 subject of the original action, a plaintiff for whose benefit  
37 the security has been given must give security for  
38 damages demanded in the counterclaim unless the court,  
39 for cause shown, directs otherwise. Proceedings on the

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40 original claim must be stayed until this security is given,  
41 unless the court directs otherwise.

42 (b) The plaintiff is required to give security under  
43 Rule E(7)(a) when the United States or its corporate  
44 instrumentality counterclaims and would have been  
45 required to give security to respond in damages if a  
46 private party but is relieved by law from giving security.

47 ~~(8) Restricted Appearance. An appearance to defend~~  
48 ~~against an admiralty and maritime claim with respect to which~~  
49 ~~there has issued process in rem, or process of attachment and~~  
50 ~~garnishment whether pursuant to these Supplemental Rules or~~  
51 ~~to Rule 4(c), may be expressly restricted to the defense of~~  
52 ~~such claim, and in that event shall not constitute an~~  
53 ~~appearance for the purposes of any other claim with respect~~  
54 ~~to which such process is not available or has not been served.~~

55       **(8) Restricted Appearance.** An appearance to defend  
56       against an admiralty and maritime claim with respect to which  
57       there has issued process in rem, or process of attachment and  
58       garnishment, may be expressly restricted to the defense of  
59       such claim, and in that event is not an appearance for the  
60       purposes of any other claim with respect to which such  
61       process is not available or has not been served.

62       **(9) Disposition of Property; Sales.**

63                                   \* \* \* \* \*

64               ~~(b) Interlocutory Sales. If property that has been~~  
65               ~~attached or arrested is perishable, or liable to~~  
66               ~~deterioration, decay, or injury by being detained in~~  
67               ~~custody pending the action, or if the expense of keeping~~  
68               ~~the property is excessive or disproportionate, or if there is~~  
69               ~~unreasonable delay in securing the release of property, the~~  
70               ~~court, on application of any party or of the marshal, or~~

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71 ~~other person or organization having the warrant, may~~  
72 ~~order the property or any portion thereof to be sold; and~~  
73 ~~the proceeds, or so much thereof as shall be adequate to~~  
74 ~~satisfy any judgment, may be ordered brought into court~~  
75 ~~to abide the event of the action; or the court may, upon~~  
76 ~~motion of the defendant or claimant, order delivery of the~~  
77 ~~property to the defendant or claimant, upon the giving of~~  
78 ~~security in accordance with these rules.~~

79 **(b) Interlocutory Sales; Delivery.**

80 (i) On application of a party, the marshal, or  
81 other person having custody of the property, the  
82 court may order all or part of the property sold —  
83 with the sales proceeds, or as much of them as  
84 will satisfy the judgment, paid into court to await  
85 further orders of the court — if:

86                    (A) the attached or arrested property is  
87                    perishable, or liable to deterioration, decay, or  
88                    injury by being detained in custody pending  
89                    the action;

90                    (B) the expense of keeping the property is  
91                    excessive or disproportionate; or

92                    (C) there is an unreasonable delay in  
93                    securing release of the property.

94                    (ii) In the circumstances described in Rule  
95                    E(9)(b)(i), the court, on motion by a defendant or  
96                    a person filing a statement of interest or right  
97                    under Rule C(6), may order that the property,  
98                    rather than being sold, be delivered to the movant  
99                    upon giving security under these rules.

100

\* \* \* \* \*



101 (10) Preservation of Property. When the owner or  
102 another person remains in possession of property attached or  
103 arrested under the provisions of Rule E(4)(b) that permit  
104 execution of process without taking actual possession, the  
105 court, on a party's motion or on its own, may enter any order  
106 necessary to preserve the property and to prevent its removal.

#### Committee Note

Style changes have been made throughout the revised portions of Rule E. Several changes of meaning have been made as well.

Subdivision (3). Subdivision (3) is amended to reflect the distinction drawn in Rule C(2)(c) and (d). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivision (7). Subdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action.

Subdivision (8). Subdivision (8) is amended to reflect the change in Rule B(1)(e) that deletes the former provision incorporating state quasi-in-rem jurisdiction. A restricted appearance is not appropriate

when state law is invoked only for security under Civil Rule 64, not as a basis of quasi-in-rem jurisdiction. But if state law allows a special, limited, or restricted appearance as an incident of the remedy adopted from state law, the state practice applies through Rule 64 “in the manner provided by” state law.

Subdivision (9). Subdivision 9(b)(ii) is amended to reflect the change in Rule C(6) that substitutes a statement of interest or right for a claim.

Subdivision (10). Subdivision 10 is new. It makes clear the authority of the court to preserve and to prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

#### **Rule 14. Third-Party Practice**

- 1           **(a) When Defendant May Bring in Third Party.** At
- 2           any time after commencement of the action a defending party,
- 3           as a third-party plaintiff, may cause a summons and complaint
- 4           to be served upon a person not a party to the action who is or
- 5           may be liable to the third-party plaintiff for all or part of the
- 6           plaintiff’s claim against the third-party plaintiff. The third-
- 7           party plaintiff need not obtain leave to make the service if the
- 8           third-party plaintiff files the third-party complaint not later

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9 than 10 days after serving the original answer. Otherwise the  
10 third-party plaintiff must obtain leave on motion upon notice  
11 to all parties to the action. The person served with the  
12 summons and third-party complaint, hereinafter called the  
13 third-party defendant, shall make any defenses to the third-  
14 party plaintiff's claim as provided in Rule 12 and any  
15 counterclaims against the third-party plaintiff and cross-  
16 claims against other third-party defendants as provided in  
17 Rule 13. The third-party defendant may assert against the  
18 plaintiff any defenses which the third-party plaintiff has to the  
19 plaintiff's claim. The third-party defendant may also assert  
20 any claim against the plaintiff arising out of the transaction or  
21 occurrence that is the subject matter of the plaintiff's claim  
22 against the third-party plaintiff. The plaintiff may assert any  
23 claim against the third-party defendant arising out of the  
24 transaction or occurrence that is the subject matter of the  
25 plaintiff's claim against the third-party plaintiff, and the third-

26 party defendant thereupon shall assert any defenses as  
27 provided in Rule 12 and any counterclaims and cross-claims  
28 as provided in Rule 13. Any party may move to strike the  
29 third-party claim, or for its severance or separate trial. A  
30 third-party defendant may proceed under this rule against any  
31 person not a party to the action who is or may be liable to the  
32 third-party defendant for all or part of the claim made in the  
33 action against the third-party defendant. The third-party  
34 complaint, if within the admiralty and maritime jurisdiction,  
35 may be in rem against a vessel, cargo, or other property  
36 subject to admiralty or maritime process in rem, in which case  
37 references in this rule to the summons include the warrant of  
38 arrest, and references to the third-party plaintiff or defendant  
39 include, where appropriate, the claimant of a person who  
40 asserts a right under Supplemental Rule C(6)(b)(i) in the  
41 property arrested.

42 \* \* \* \* \*

44 FEDERAL RULES OF CIVIL PROCEDURE

43 (c) **Admiralty and Maritime Claims.** When a plaintiff  
44 asserts an admiralty or maritime claim within the meaning of  
45 Rule 9(h), the defendant or claimant person who asserts a  
46 right under Supplemental Rule C(6)(b)(i), as a third-party  
47 plaintiff, may bring in a third-party defendant who may be  
48 wholly or partly liable, either to the plaintiff or to the third-  
49 party plaintiff, by way of remedy over, contribution, or  
50 otherwise on account of the same transaction, occurrence, or  
51 series of transactions or occurrences. In such a case the third-  
52 party plaintiff may also demand judgment against the third-  
53 party defendant in favor of the plaintiff, in which event the  
54 third-party defendant shall make any defenses to the claim of  
55 the plaintiff as well as to that of the third-party plaintiff in the  
56 manner provided in Rule 12 and the action shall proceed as if  
57 the plaintiff had commenced it against the third-party  
58 defendant as well as the third-party plaintiff.

**Committee Note**

Subdivisions (a) and (c) are amended to reflect revisions in Supplemental Rule C(6).

**GAP Report**

Rule B(1)(a) was modified by moving "in an in personam action" out of paragraph (a) and into the first line of subdivision (1). This change makes it clear that all paragraphs of subdivision (1) apply when attachment is sought in an in personam action. Rule B(1)(d) was modified by changing the requirement that the clerk deliver the summons and process to the person or organization authorized to serve it. The new form requires only that the summons and process be delivered, not that the clerk effect the delivery. This change conforms to present practice in some districts and will facilitate rapid service. It matches the spirit of Civil Rule 4(b), which directs the clerk to issue the summons "to the plaintiff for service on the defendant." A parallel change is made in Rule C(3)(b).

**Summary of Comments**

98CV011: Jack E. Horsley: Speaking apparently to Rule C(6)(b)(i), suggests that it may invite a statement of right or interest that is conclusionary. Recommends adding these words at the end: " \* \* \* must file a verified statement of right or interest based upon facts which support such a statement and not upon the conclusions of the person who asserts a right of possession and must file such a statement: \* \* \*"

98CV077: Comm. on Civil Litigation. EDNY: This is the only extensive comment on the admiralty rules proposals. There are two suggestions for change. (1) Rule B now begins "With respect to any admiralty or maritime claim in personam \* \* \*." The proposed rule

begins merely "if a defendant in an in personam action \* \* \*." The suggestion is that an explicit reference to admiralty or maritime proceedings be restored: "if a defendant in an in personam action is not found within the district, a verified complaint that asserts an admiralty or maritime claim may \* \* \*." This suggestion stems from a fear that plaintiffs may attempt to invoke Admiralty Rule B in non-admiralty proceedings. Use of Rule B in non-admiralty proceedings might, in turn, reopen the question whether Rule B is constitutional — it has been accepted only by distinguishing the special needs of admiralty from the needs of land-based litigation. The fact that Admiralty Rule A limits Rule B to admiralty and maritime claims, as well as "statutory condemnation proceedings analogous to maritime actions in rem," is not protection enough. (2) Rule B(1) does not now direct what happens to process of attachment and garnishment after the clerk issues it. Proposed Rule B(1)(d) directs the clerk to deliver the process to the marshal or another person eligible to make service. The present practice in E.D.N.Y. is that the clerk delivers the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Requiring that process be delivered by the clerk to the server "very likely will occasion delay in cases where time is usually of the essence." The rule should provide that process "must be delivered" to the person making service, without designating who is to effect the delivery.

98CV214: Civil Litigation Unit, FBI General Counsel: Recommends adoption of the Rule 14 conforming amendment, but does not address the Admiralty Rules proposals otherwise.

98CV258, Mr. Paige: Is in favor of the proposed changes to Rule 14 and Admiralty Rules B, C, and E.

98CV267: D.C. Bar, Courts, Lawyers & Admn. of Justice Section:  
Supports the Rule 14 change without elaboration.

98CV268: Federal Magistrate Judges Assn.: Supports all of the Admiralty Rules proposals. There are repeated statements endorsing the style changes: The style changes in Rule B "are a significant improvement and provide clarity"; in Rule C, "[t]he result is much greater clarity" in a rule that "is written in rather archaic language, probably because it has been an outgrowth of admiralty law," and the effect is to "bring the verbiage of the rule into the 20th Century (just in time for the 21st)."

The changes in Rule B are supported because they reduce the need for service by the United States Marshal, reflect the 1993 changes in Civil Rule 4, and expressly confirm the availability of state security remedies through Civil Rule 64.

The changes in Rule C recognize the broadened statutory bases for forfeiture, and clearly identify differences in procedure between admiralty in rem proceedings and civil forfeiture proceedings. The continued practice that permits interrogatories with the complaint "recognizes the often exigent nature of admiralty actions." Other "small changes" "appear calculated merely to establish more clearly the actions expected of parties rather than place new duties or restrictions upon them."

The Rule E changes "are not considered controversial or significant in nature or scope."



**C. Discovery Rules 5, 26, 30, 34, and 37**

As detailed in last year's report and the Introduction, the package of proposed amendments to the discovery rules was developed on the basis of an unusually extensive information-gathering effort by the Advisory Committee. In October 1996, it appointed a Discovery Subcommittee, chaired by Hon. David F. Levi, and a Special Reporter, Prof. Richard L. Marcus, to explore possible improvements to the discovery rules. Over the following year, the Discovery Subcommittee hosted a conference of lawyers and judges from around the country to discuss possible discovery amendments, representatives of the Subcommittee attended an ABA Section of Litigation convention at which a session was devoted to discovery problems, and the whole Advisory Committee hosted a two-day conference at Boston College Law School to explore a wide range of discovery problems and solutions. In addition, the Federal Judicial Center did a survey of 1,000 recently closed cases to obtain information on current discovery practice and possible rule amendments to improve that practice.

Having received this information, the Advisory Committee reviewed over 40 possible rule amendments and selected those that seemed most promising, directing the Discovery Subcommittee to prepare specific proposed amendments to address those areas. The Discovery Subcommittee then met for two days to develop specific proposals, and the Advisory Committee adopted the proposed amendments it brought to the Standing Committee last year from among those proposals.

At its June 1998 meeting, the Standing Committee authorized publication of proposed amendments to various rules relating to discovery — Civil Rules 5, 26, 30, 34, and 37.

The Advisory Committee held three public hearings on these proposed rule amendments — in Baltimore on Dec. 7, 1998, in San Francisco on Jan. 22, 1999, and in Chicago on Jan. 29, 1999. Altogether over 70 witnesses appeared and testified in the public hearings. In addition, the Advisory Committee received over 300 written comments.\*\* Almost all of these comments and all of the testimony related to the proposed amendments to the discovery rules.

Perhaps in part due to the extent of the prepublication investigation of discovery issues — which had been on the Advisory Committee agenda almost continuously for over 20 years — the high volume of commentary made few new points.

The Advisory Committee's Discovery Subcommittee met in Chicago on Jan. 28, 1999, to discuss issues raised by commentary and testimony received by that time. In addition, after the formal comment period closed, the Subcommittee held a telephone conference to discuss possible proposals to the full Committee responsive to the public comments and testimony.

The Discovery Subcommittee recommended that the Advisory Committee adhere to the package that was published, subject to consideration of several adjustments based on the public comments and testimony. Most of the adjustments focused on the Committee

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\*\* Approximately 30 of these comments were received after the agenda materials were prepared for the Advisory Committee's April 19-20 meeting, and were not included in the Summaries of Public Comments circulated in connection with that meeting \* \* \*. All of these comments were received more than six weeks after Feb. 1, 1999, the last date on which comments were to be received.

Notes, but a few went to the language of the Rules themselves. Specific recommendations were made as to most of these matters. The Advisory Committee acted to adopt several proposed refinements of rule language and Committee Notes. With these changes, the Advisory Committee voted unanimously to recommend adoption of the complete discovery package.

Because the discovery package is lengthy, it is best introduced by a short summary. Detailed development follows. The package was the focus of the great majority of the public comments and testimony on the August 1998 Civil Rules proposals. Because the entire Summary of Public Comments is of necessity so long that it would interfere with ready review of this Report, the summary is attached at Tab\_\_\_. The summary is organized to coincide with the topics in the order of presentation, which corresponds to the numerical order of the Rules. Brief summaries of the most salient points are included in this Report.

**1. Rule 5(d). Service and Filing Pleadings and Other Papers**

The amendment forbids filing discovery materials until they are used in the proceeding. The Advisory Committee has proposed no changes to this rule or the Committee Note as published.

**2. Rule 26. General Provisions Regarding Discovery; Duty of Disclosure**

The published amendment proposals included a number of changes to Rule 26. For purposes of comprehension, it seems desirable to separate these changes into categories, and they will be so treated in this memorandum.

**(a) Rule 26(a). Required Disclosures; Methods to Discover  
Additional Matter**

The proposed amendments make a number of changes in the disclosure provision adopted in the 1993 amendments. They narrow the initial disclosure obligation and remove the previous authority to "opt out" of this requirement by local rule. At the same time, they exclude eight specified categories of proceedings from the initial disclosure requirements. They also permit any party to object that disclosure is not appropriate for the action and thereby submit to the court the question whether disclosure should occur. The amendments also provide for disclosure by added parties — who are not addressed in the current rule — and make a slight change in the timing of initial disclosures.

The Advisory Committee has decided to recommend different wording for the initial disclosure obligation. The published proposal called on each party to disclose information "supporting its claims or defenses." The new recommendation calls for disclosure of information that the disclosing party "may use to support its claims or defenses." This alternative wording was included in the published proposed amendments, and commentary was invited on the choice between that wording and the wording initially proposed. Except for this change, the Advisory Committee recommends no change to the rule as published. It has proposed some clarifications to the Committee Note to address issues raised during the public commentary period.

**(b) Rule 26(b)(1). Discovery Scope and Limits. In General.**

The published proposed amendment limited attorney-controlled discovery to matter "relevant to the claim or defense of any party," and authorized the court to order discovery "relevant to the subject matter involved in the action" on a showing of good cause. It also modified the last sentence of the current rule and included a reference to the limitations of Rule 26(b)(2) in this subdivision.

The Advisory Committee proposes changing one word in the amended rule as published to avoid the risk of an untoward interpretation. The published proposal provided that the court might, for good cause, order discovery of any "information" relevant to the subject matter involved in the action. The recommendation is to substitute "matter" for "information"; this change will avoid any confusion that might arise from the first sentence of current subdivision (b)(1), which defines the scope of discovery as "any matter" relevant to the claim or defense of any party. In addition, the Advisory Committee proposes adding explanatory material to the Committee Note to address concerns raised during the public commentary period.

**(c) Rule 26(b)(2). Discovery Scope and Limits: Limitations.**

The published proposed amendment removed prior authority to deviate from the national limitations on the number of depositions or interrogatories by local rule, or to establish durational limitations on depositions by local rule. The published materials also noted that the Advisory Committee was considering relocating to Rule 26(b)(2) the explicit authority to impose cost-bearing conditions on discovery that

exceeded the limitations of Rule 26(b)(2) that was published for comment a proposed amendment to Rule 34(b). The materials invited public comment on the question of proper location.

The Advisory Committee now proposes including cost-bearing in Rule 26(b)(2) rather than in Rule 34(b). The form of this change is exactly the one included in the memorandum that accompanied the published proposals. It also proposes additional explanatory material in the Committee Note regarding cost-bearing, as well as minor changes in the Note to accommodate concerns that arose during the public commentary period.

**(d) Rule 26(d) Timing and Sequence of Discovery.**

**Rule 26(f) Conference of Parties; Planning for Discovery**

The published proposed amendments to Rule 26(d) remove the present authority to exempt cases by local rule from the moratorium on discovery before the Rule 26(f) conference, but exempt from that moratorium the categories of proceedings exempted from initial disclosure.

The Advisory Committee is not proposing any change in the published proposed amendments to Rule 26(d) or to the Committee Note.

The published proposed amendments to Rule 26(f) remove the present authority to exempt cases by local rule from the discovery conference requirement, but exempt from the conference requirement the categories of proceedings exempted from initial disclosure. The amendment also removed the requirement that this conference be a face-to-face meeting, but conferred authority on courts to require that

it be conducted face-to-face. In addition, it changed the timing for the meeting in order to ensure that the resulting report is received by the court before its action under Rule 16(b).

Based on concerns raised during the public commentary period, the Advisory Committee proposes that a sentence be added to the rule to permit courts that move very rapidly with initial case management to adopt a local rule to shorten the period between the Rule 26(f) conference and the Rule 16(b) conference with the court, and to shorten the time for submission of the written report or relieve the parties of the obligation to submit a written report if they instead give the court an oral report. Additional language for the Committee Note is also proposed to address this additional rule provision. The Advisory Committee concluded that this addition need not be published for comment; it responds to an issue that was raised in the comment process and should not be controversial.

### **3. Rule 30. Depositions Upon Oral Examination**

The published proposed amendments would impose a presumptive limitation of depositions to "one day of seven hours." In addition, they would clarify a number of matters, including that any person — not only a party — who purports to instruct a deposition witness not to answer is subject to the limitations on such instructions imposed by amendments to Rule 30(d) in 1993.

The Advisory Committee proposes amending the published proposal to remove the "deponent veto" — the requirement that the deponent consent to extension of a deposition beyond the presumptive time limitation. The Advisory Committee also proposes to add clarifying language to the Committee Note regarding the proper computation of the deposition length limitation. In addition,

it proposes a technical conforming amendment to Rule 30(f)(1) to remove the current direction to the court reporter to file a deposition transcript once it is completed. This change is necessary to give effect to the published change to Rule 5(d), which the Committee is recommending be forwarded to the Judicial Conference. Because it is purely a technical and conforming amendment, the Advisory Committee believes there is no need to publish it for comment.

#### **4. Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**

The published proposed amendments added to Rule 34(b) a provision explicitly authorizing the court to condition discovery beyond the limitations of Rule 26(b)(i), (ii), or (iii) on payment of part or all of the costs of the responding party.

As noted above, the Advisory Committee decided that this cost-bearing provision would better be included in Rule 26(b)(2) itself (in the alternative form included in the published proposed amendments). Accordingly, it recommends that this proposed amendment to Rule 34(b) not be adopted. Owing to the reported frequency of concerns in document production situations, however, the Advisory Committee also proposes addition of a sentence to Rule 34(b) calling attention to the authority now made explicit in Rule 34(b). Appropriate changes to the Committee Note are also proposed. Because this change merely calls attention to a rule provision that has been published, the Committee does not believe that republication is needed.



**5. Rule 37(c). Failure to Disclose; False or Misleading Disclosure; Refusal to Admit**

The published proposal added failure to amend a prior response to discovery as required by Rule 26(e)(2) to the circumstances warranting the sanction of Rule 37(c)(1) — refusal to permit use of material not properly provided via supplementation — listed in the current rule.

The Advisory Committee proposes a clarifying revision of the wording of the published rule change.

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

\* \* \* \* \*

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**(d) Filing; Certificate of Service.** All papers after the complaint required to be served upon a party, together with a certificate of service, ~~shall~~ must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry

10 ~~upon land, and (iv) requests for admission the court may on~~  
11 ~~motion of a party or on its own initiative order that~~  
12 ~~depositions upon oral examination and interrogatories,~~  
13 ~~requests for documents, requests for admission, and answers~~  
14 ~~and responses thereto not be filed unless on order of the court~~  
15 ~~or for use in the proceeding.~~

16 \* \* \* \* \*

**Committee Note**

Subdivision (d). Rule 5(d) is amended to provide that disclosures under Rule 26(a)(1) and (2), and discovery requests and responses under Rules 30, 31, 33, 34, and 36 must not be filed until they are used in the action. "Discovery requests" includes deposition notices and "discovery responses" includes objections. The rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action. The former Rule 26(a)(4) requirement that disclosures under Rule 26(a)(1) and (2) be filed has been removed. Disclosures under Rule 26(a)(3), however, must be promptly filed as provided in Rule 26(a)(3). Filings in connection with Rule 35 examinations, which involve a motion proceeding when the parties do not agree, are unaffected by these amendments.

Recognizing the costs imposed on parties and courts by required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or

forbid filing. In 1989 the Judicial Conference Local Rules Project concluded that these local rules were inconsistent with Rule 5(d), but urged the Advisory Committee to consider amending the rule. Local Rules Project at 92 (1989). The Judicial Conference of the Ninth Circuit gave the Committee similar advice in 1997. The reality of nonfiling reflected in these local rules has even been assumed in drafting the national rules. In 1993, Rule 30(f)(1) was amended to direct that the officer presiding at a deposition file it with the court or send it to the attorney who arranged for the transcript or recording. The Committee Note explained that this alternative to filing was designed for "courts which direct that depositions not be automatically filed." Rule 30(f)(1) has been amended to conform to this change in Rule 5(d).

Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules. There is no apparent reason to have different filing rules in different districts. Even if districts vary in present capacities to store filed materials that are not used in an action, there is little reason to continue expending court resources for this purpose. These costs and burdens would likely change as parties make increased use of audio- and videotaped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.

The amended rule provides that discovery materials and disclosures under Rule 26(a)(1) and (a)(2) must not be filed until they are "used in the proceeding." This phrase is meant to refer to proceedings in court. This filing requirement is not triggered by "use" of discovery materials in other discovery activities, such as depositions. In connection with proceedings in court, however, the rule is to be interpreted broadly; any use of discovery materials in

court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding.

Once discovery or disclosure materials are used in the proceeding, the filing requirements of Rule 5(d) should apply to them. But because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used need be filed. Any party would be free to file other pertinent portions of materials that are so used. *See* Fed. R. Evid. 106; *cf.* Rule 32(a)(4). If the parties are unduly sparing in their submissions, the court may order further filings. By local rule, a court could provide appropriate direction regarding the filing of discovery materials, such as depositions, that are used in proceedings.

“Shall” is replaced by “must” under the program to conform amended rules to current style conventions when there is no ambiguity.

### Summary of Comments

The comments regarding the proposed amendments to Rule 5(d) are summarized at pp. 4-7 of the Summary of Public Comments, which is found behind Tab 6 A-v.

Generally those who commented supported the change, in part because it brought the national rule into coordination with local practices in many places. E.g., American College of Trial Lawyers Fed. Cts. Comm. (98-CV-090), Federal Magistrate Judges Ass’n Rules Committee (98-CV-268), and Philadelphia Bar Ass’n (98-CV-193). Some raised questions about public access to discovery materials. The Public Citizen Litigation Group (98-CV-181) urged that the amendment would restrict public access to discovery

materials too much, and counseled a number of changes, including return to the language originally proposed by the Advisory Committee — that a party “need not” file discovery materials until they are used in the action (v. “must not” in the published amendments).

During its Oregon meeting, the Advisory Committee discussed some of these points. It considered whether to urge the Standing Committee to shift back to a “need not” formulation in the rule, but concluded that this change would not be productive. It also discussed possible Note language concerning retention of discovery materials. On that subject, Rule 30(f)(1) already has provisions regarding retention of depositions. Committee members felt that there are sufficient provisions regarding retention of such materials so that creating the appearance that the Committee Note imposes additional obligations would not be a desirable undertaking. The Committee voted against adding language to the Note concerning retention of discovery materials.

### **GAP Report**

The Advisory Committee recommends no changes to either the amendments to Rule 5(d) or the Committee Note as published.

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

- 1           **(a) Required Disclosures; Methods to Discover**
- 2           **Additional Matter.**

3           **(1) Initial Disclosures.** Except in categories of  
4           proceedings specified in Rule 26(a)(1)(E), or to the extent  
5           otherwise stipulated or directed by order ~~or local rule~~, a  
6           party ~~shall~~ must, without awaiting a discovery request,  
7           provide to other parties:

8                   (A) the name and, if known, the address and  
9                   telephone number of each individual likely to have  
10                  discoverable information that the disclosing party may  
11                  use to support its claims or defenses, unless solely for  
12                  impeachment relevant to disputed facts alleged with  
13                  particularity in the pleadings, identifying the subjects  
14                  of the information;

15                  (B) a copy of, or a description by category and  
16                  location of, all documents, data compilations, and  
17                  tangible things that are in the possession, custody, or  
18                  control of the party and that the disclosing party may

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19 use to support its claims or defenses, unless solely for  
20 impeachment that are relevant to disputed facts  
21 alleged with particularity in the pleadings;

22 (C) a computation of any category of damages  
23 claimed by the disclosing party, making available for  
24 inspection and copying as under Rule 34 the  
25 documents or other evidentiary material, not  
26 privileged or protected from disclosure, on which  
27 such computation is based, including materials  
28 bearing on the nature and extent of injuries suffered;  
29 and

30 (D) for inspection and copying as under Rule 34  
31 any insurance agreement under which any person  
32 carrying on an insurance business may be liable to  
33 satisfy part or all of a judgment which may be entered  
34 in the action or to indemnify or reimburse for  
35 payments made to satisfy the judgment.

36           (E) The following categories of proceedings are  
37           exempt from initial disclosure under Rule 26(a)(1):

38           (i) an action for review on an administrative  
39           record:

40           (ii) a petition for habeas corpus or other  
41           proceeding to challenge a criminal conviction or  
42           sentence:

43           (iii) an action brought without counsel by a  
44           person in custody of the United States, a state, or  
45           a state subdivision:

46           (iv) an action to enforce or quash an  
47           administrative summons or subpoena:

48           (v) an action by the United States to recover  
49           benefit payments:

50           (vi) an action by the United States to collect  
51           on a student loan guaranteed by the United States:



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52 (vii) a proceeding ancillary to proceedings in  
53 other courts; and

54 (viii) an action to enforce an arbitration award.

55 ~~Unless otherwise stipulated or directed by the court,~~

56 ~~These disclosures must shall be made at or within 14 10~~

57 ~~days after the Rule 26(f) conference meeting of the parties~~

58 ~~under subdivision (f). unless a different time is set by~~

59 ~~stipulation or court order, or unless a party objects during~~

60 ~~the conference that initial disclosures are not appropriate~~

61 ~~in the circumstances of the action and states the objection~~

62 ~~in the Rule 26(f) discovery plan. In ruling on the~~

63 ~~objection, the court must determine what disclosures —~~

64 ~~if any — are to be made, and set the time for disclosure.~~

65 ~~Any party first served or otherwise joined after the Rule~~

66 ~~26(f) conference must make these disclosures within 30~~

67 ~~days after being served or joined unless a different time is~~

68 ~~set by stipulation or court order. A party must shall make~~

69 its initial disclosures based on the information then  
70 reasonably available to it and is not excused from making  
71 its disclosures because it has not fully completed its  
72 investigation of the case or because it challenges the  
73 sufficiency of another party's disclosures or because  
74 another party has not made its disclosures.

75 \* \* \* \* \*

76 **(3) Pretrial Disclosures.** In addition to the  
77 disclosures required by Rule 26(a)(1) and (2) in the  
78 preceding paragraphs, a party ~~shall~~ must provide to other  
79 parties and promptly file with the court the following  
80 information regarding the evidence that it may present at  
81 trial other than solely for impeachment purposes:

82 (A) the name and, if not previously provided, the  
83 address and telephone number of each witness,  
84 separately identifying those whom the party expects to

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85 present and those whom the party may call if the need  
86 arises;

87 (B) the designation of those witnesses whose  
88 testimony is expected to be presented by means of a  
89 deposition and, if not taken stenographically, a  
90 transcript of the pertinent portions of the deposition  
91 testimony; and

92 (C) an appropriate identification of each document  
93 or other exhibit, including summaries of other  
94 evidence, separately identifying those which the party  
95 expects to offer and those which the party may offer  
96 if the need arises.

97 Unless otherwise directed by the court, these disclosures  
98 ~~shall~~ must be made at least 30 days before trial. Within  
99 14 days thereafter, unless a different time is specified by  
100 the court, a party may serve and promptly file a list  
101 disclosing (i) any objections to the use under Rule 32(a)

102 of a deposition designated by another party under  
103 ~~subparagraph (B) Rule 26(a)(3)(B)~~, and (ii) any objection,  
104 together with the grounds therefor, that may be made to  
105 the admissibility of materials identified under  
106 ~~subparagraph (C) Rule 26(a)(3)(C)~~. Objections not so  
107 disclosed, other than objections under Rules 402 and 403  
108 of the Federal Rules of Evidence, ~~shall be deemed~~ are  
109 waived unless excused by the court for good cause ~~shown~~.

110 **(4) Form of Disclosures; Filing.** Unless the court  
111 orders otherwise ~~directed by order or local rule~~, all  
112 disclosures under ~~paragraphs~~ Rules 26(a)(1) through (3)  
113 must ~~shall~~ be made in writing, signed, and served, ~~and~~  
114 ~~promptly filed with the court.~~

115 \* \* \* \* \*

**Committee Note**

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice.

The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the “opt out” provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that — partly in response to the first publication in 1991 of a proposed disclosure rule — many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, Implementation of Disclosure in United States District Courts. With Specific Attention to Courts’ Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference,

Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. See T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. Discovery and Disclosure Practice, supra, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal “standing” orders of an individual judge or court that purport to create exemptions from — or limit or expand — the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. “Use” includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if — in the language of Rule 26(a)(3) — “the need arises.”

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the complaint. Subdivision (e)(1),

which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to "claims and defenses," and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of



subdivision (f). Subdivision (a)(1)(E) refers to categories of “proceedings” rather than categories of “actions” because some might not properly be labeled “actions.” Case designations made by the parties or the clerk’s office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties — and, when needed, the courts — with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an “appeal” based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under

Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or "standing" orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures — if any — should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant

suspending some disclosure obligations, others — such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D) — may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is “first served or otherwise joined” after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court’s need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they — and any objections — should be filed “promptly.”

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures

under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

“Shall” is replaced by “must” under the program to conform amended rules to current style conventions when there is no ambiguity.

### **Summary of Comments**

The comments concerning amendments proposed for Rule 26(a)(1) are found at pp. 9-70 of the Summary of Public Comments (Tab 6 A-v). The effort here will be to identify certain issues that the Advisory Committee focused upon as it reviewed the public commentary to the published proposed amendments to this subdivision. The Advisory Committee's proposed changes to Rule 26(a)(1) were designed to serve as part of an effort to restore national uniformity in discovery practice by requiring nationally uniform disclosure. In keeping with that goal, the amendments neither imposed the present strong form of disclosure nor abolished it altogether.

The proposed changes to Rule 26(a) generated a substantial amount of commentary, both favorable and unfavorable. As set forth in the GAP Note, the Advisory Committee has recommended making some changes to the published proposed amendments to the rule and to the Note, in part in response to issues raised in the public commentary. Other comments were found not to justify proposing changes in either the rule or the Note. This memorandum will try to identify and summarize the reaction to a variety of recurrent comments. The Summary of Public Comments recounts more fully the various views expressed.

National uniformity and the opt-out power: There was a great deal of commentary about national uniformity. See pp. 9-36 of the Summary of Public Comments. A substantial number of judges opposed elimination of the authority for their districts to opt out of disclosure. Some lawyers, generally from a few districts, also opposed elimination of the opt-out. The very great majority of the organized bar, and the great majority of individual lawyers and law professors who provided comments, favored restoring uniformity. Bar organizations that support uniformity include the New York State Bar Assoc. Commercial and Federal Litigation Section (98-CV-012), the Association of the Bar of the City of New York (98-CV-039), the ABA Section of Litigation (98-CV-050), the American College of Trial Lawyers Fed. Cts. Comm. (98-CV-090), the National Assoc. of Consumer Advocates (98-CV-120), the Chicago Council of Lawyers Federal Courts Comm. (98-CV-152), the Seventh Circuit Bar Assoc. (98-CV-154), the Philadelphia Bar Assoc. (98-CV-193), and the Washington Legal Foundation (98-CV-201). The Federal Magistrate Judges' Assoc. Rules Comm. also supports uniformity (98-CV-268).

The Advisory Committee continues to favor uniformity, and there was no proposal to reconsider the adoption of a nationally uniform disclosure provision.

Narrowing of the disclosure obligation: There was also substantial comment on whether the national standard for initial disclosure should be narrower than the standard in current Rule 26(a)(1). See pp. 37-57 of the Summary of Public Comments. Some who favored uniformity continued to oppose disclosure and to urge its abolition. E.g., New York St. Bar Assoc. Comm. & Fed. Lit. Sec. (98-CV-012); Maryland Defense Counsel (98-CV-018). Many lawyers and bar organizations favored the narrowing of the disclosure obligation because the published change removes possible tensions

with the attorney-client relationship and the work-product doctrine. E.g., Association of the Bar of the City of New York, 98-CV-039); ABA Section of Litigation (98-CV-050); Fed. Practice Section, Conn. Bar Assoc. (98-CV-157); Penn. Trial Lawyers Assoc. (98-CV-159). Some lawyers expressed misgivings that the change might expand the disclosure obligations of defendants in some instances because disclosure is no longer tied to particularity in pleading. E.g., Linda A. Willett (98-CV-038). Others opposed the change on the ground that disclosure should not be narrowed. E.g., E.D.N.Y. Comm. on Civil Lit. (98-CV-077); National Assoc. of Consumer Advocates (98-CV-120); Trial Lawyers Assoc. of Metropolitan Washington, D.C. (98-CV-180); Assoc. of Trial Lawyers of America (98-CV-183); Michigan Protection & Advocacy Serv., Inc. (98-CV-184); Trial Lawyers for Public Justice (98-CV-201). Some urged that numerical limits on discovery events should be lifted if disclosure were narrowed. E.g., Lawyers' Committee for Civil Rights Under Law (98-CV-198). In addition, some questioned excluding impeachment material from the initial disclosure obligation. E.g., National Assoc. of Consumer Advocates (98-CV-120); Hon. David L. Piester (D. Neb.) (98-CV-124); Federal Magistrate Judges' Assoc. Rules Comm. (98-CV-268).

The Discovery Subcommittee considered the role of narrowing the scope of disclosure in making disclosure nationally mandatory, and it did not recommend changing the orientation of the amendments, which narrow initial disclosure. The Advisory Committee does not recommend retaining the present scope of initial disclosure as part of a nationwide rule.

The standard for initial disclosure: In the published proposed amendments, the Advisory Committee included an alternative — limiting disclosure to materials that the disclosing party “may use to

support” its position in the action — to the standard embodied in the published proposed amendment. There were few comments addressed to the question which should be preferred. See Summary of Public Comments at pp. 58-59. The ABA Section of Litigation (98-CV-050) favored the version published as the proposed amendment — “supporting its claims or defenses” — but the Chair of that Section, who had drafted a provision like the “may use” version for his district, favored the “may use” version. (See testimony of H. Thomas Wells in San Francisco.)

The Discovery Subcommittee submitted the question to the full Advisory Committee, which debated the merits of the two versions, as reflected in the minutes (behind Tab 6 D, at pp. 10-11). Eventually the Advisory Committee decided with only one dissent to recommend adoption of the “may use to support” rule language. This language would connect more directly to the exclusion provisions of Rule 37(c)(1), and would avoid the need to “scour the earth” to find all supporting material even though a party would never consider using it in the case, and would similarly avoid the need to disclose voluminous and duplicative supporting materials. It would also address the problem of material and witnesses that both support and hurt a party’s case, permitting the party to decide not to disclose that which, on balance, it would decide not to use.

Handling of “low end” excluded categories of proceedings: Proposed Rule 26(a)(1)(E) would exempt from disclosure eight categories of proceedings. There were some comments favoring expansion or narrowing of these categories. See Summary of Public Comments at pp. 60-64. For example, the E.D.N.Y. Comm. on Civil Lit. (98-CV-056) would require the government to make disclosure in pro se prisoner cases, but not the plaintiff. The Attorney General of Oregon (98-CV-146) favored exempting all pro se actions. The

Department of Justice (98-CV-266) favored exempting any action by the United States to recover on a loan, not just student loans, while the National Assoc. of Consumer Advocates (98-CV-120) opposed exempting any such cases on the ground that "[t]he government is holding all the cards, and it may be bluffing."

The Advisory Committee discussed these various ideas. It was noted that some judges on the Committee had found that pro se disclosure proceedings were beneficial. It was also observed that the committee was not aware of any reason for suspecting that student loan or other loan cases brought by the United States lack a proper foundation, but that actions involving Small Business Administration or other loans did not seem suitable for exclusion from disclosure in the same way as student loans. Eventually, no change in the exclusions of Rule 26(a)(1)(E) mustered Advisory Committee support.

The Committee did determine that additional Note language should be provided to address concerns raised in the commentary. The Public Citizen Litigation Group (98-CV-181) and the Department of Justice (98-CV-266) raised concerns about whether the first exempted category, actions for review on an administrative record, is ambiguous. The Advisory Committee decided unanimously to add language to the Note to clarify when this exclusion should apply. Bankruptcy Judge Louise De Carl Adler (98-CV-208) raised questions about how the exemptions would apply to adversary proceedings in bankruptcy. The Committee unanimously decided to add language to the Note (suggested by the Reporter of the Bankruptcy Rules Committee) to address that concern and make it clear that the main source of direction for bankruptcy cases must be found in the Bankruptcy Rules.



“High end” exclusion: The proposed amendments allow the parties to agree to forgo disclosure. They also permit any party to object to disclosure even though another party wants it, and to submit the question to the court in the discovery plan required under Rule 26(f).

This provision prompted a number of comments. See Summary of Public Comments at pp. 65-68. Some supported the objection provision as an essential method for bringing the question to the judge’s attention in cases in which initial disclosure would be wasteful. E.g., ABA Section of Litigation (98-CV-050); Federal Practice Section, Conn. Bar Assoc. (98-CV-157); Philadelphia Bar Assoc. (98-CV-193). Others opposed the change on the ground that it would delay disclosure or permit unilateral efforts to escape its effects. E.g., Public Citizen Lit. Group (98-CV-181).

The Discovery Subcommittee did not propose any change in the rule regarding objections to disclosure.

Other comments urged that discussion of the right to object in the Note be expanded. Some contended that “complex” cases should routinely be excluded on objection. E.g., Maryland Defense Counsel (98-CV-018); Stephen Valen (San Francisco hearing); Michael G. Briggs (Gen. Counsel, Houston Indus., Inc.) (San Francisco hearing); Douglas S. Grandstaff (Senior Lit. Counsel, Caterpillar, Inc.) (Chicago hearing).

At its Oregon meeting, the Advisory Committee considered additional Note language concerning circumstances that might justify forgoing disclosure. See Minutes (Tab 6 D) at pp. 12. Eventually, the difficulties outweighed the advantages. For example, to say that a dispositive motion might be a reason to defer disclosure could

induce parties to file such motions. The Committee voted not to propose including such Note language.

Added parties: Rule 26(a) does not now provide for initial disclosure by parties added later in the suit. The proposed amendments address this omission by providing that such additional parties must make disclosure within 30 days of being added to the case unless a different time is set by agreement or by the court. Some commentators expressed misgivings about whether 30 days was a long enough time. E.g., Frederick C. Kentz, III (Gen. Counsel, Roche) (98-CV-173); U.S. Dep't of Justice (98-CV-266); see Summary of Public Comments at pp. 69-70. The Discovery Subcommittee did not propose any change in the 30-day period for disclosure by added parties.

#### **GAP Report**

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party "may use to support" its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

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

\* \* \* \* \*

1  
2           **(b) Discovery Scope and Limits.** Unless otherwise  
3 limited by order of the court in accordance with these rules,  
4 the scope of discovery is as follows:

5           **(1) In General.** Parties may obtain discovery  
6 regarding any matter, not privileged, that which is  
7 relevant to ~~the subject matter involved in the pending~~  
8 ~~action, whether it relates to the claim or defense of the~~  
9 ~~party seeking discovery or to the claim or defense of any~~  
10 other party, including the existence, description, nature,  
11 custody, condition, and location of any books, documents,  
12 or other tangible things and the identity and location of  
13 persons having knowledge of any discoverable matter.  
14 For good cause, the court may order discovery of any  
15 matter relevant to the subject matter involved in the

16 action. Relevant ~~The information sought~~ need not be  
17 admissible at the trial if the discovery ~~information sought~~  
18 appears reasonably calculated to lead to the discovery of  
19 admissible evidence. All discovery is subject to the  
20 limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

21 \* \* \* \* \*

**Committee Note**

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the “subject matter” language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the “subject matter” language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. Discovery and Disclosure Practice, *supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the “subject matter” involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be

discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of

discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See* 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S. Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly”).

Rule 26(b)(2) is amended to provide explicitly that a court may condition discovery that exceeds the limitations of subdivisions (b)(2)(i), (ii), or (iii) on payment of part or all of the reasonable expenses incurred by the responding party. If the court expands discovery beyond matters relevant to the claims or defenses on a showing of good cause, that conclusion would normally indicate that the proposed discovery is consistent with the limitations of subdivision (b)(2); ordinarily a scope expansion would not justify a cost-bearing order. Nonetheless, as is true of discovery relevant to the claims or defenses, such broader discovery is subject to the limitations of subdivision (b)(2), and it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be denied or subject to a cost-bearing order. In any event, a party cannot automatically expand the scope of discovery by agreeing to pay the reasonable expenses of responding.

### Summary of Comments

The proposed changes to Rule 26(b)(1) prompted a large number of comments. See Summary of Public Comments (Tab 6 A-v) at pp. 71-116. This memorandum will highlight certain issues.

A scope revision was originally proposed by the ABA Section of Litigation more than 20 years ago. It has been revived a number of times since then, most recently by the American College of Trial Lawyers.

The published revision of the scope of attorney-managed discovery excited a great deal of commentary. This included opposition from some bar organizations as well as support from others. See Summary of Public Comments at 71-104. Much of the commentary supported the change, some urging that it was necessary to focus the courts and the parties on the matters actually involved in the suit rather than the more amorphous concept of "subject matter" involved in the action. Some proponents of the change argued that overbroad discovery imposed vast litigation expense with no meaningful production of useful information. The "subject matter" language of the current rule was said to provide no meaningful limitation on discovery, and to discourage judges from trying to contain it within sensible bounds.

Other comments vigorously opposed the change. It was contended that the current standard is well known, and that any change would invite abundant litigation about the meaning of the new terms. In addition, many argued that the change would erode notice pleading as litigants felt obliged to expand their complaints or answers to ensure that they could obtain broader discovery, perhaps sometimes nearing the limits of permissible pleading under Rule 11.



At the same time, other means are said to exist to resolve these problems.

During its Oregon meeting, the Advisory Committee considered a motion to delete the division of scope between attorney-managed and court-managed discovery from the package recommended to the Standing Committee. There was extensive debate (see Minutes at pp. 26-32). Many of the above points were made by Advisory Committee members. After debate, the Advisory Committee voted 9-4 not to recommend any change in the basic proposal.

But the Committee did conclude that one change should be made in the proposed amendment as published to avoid any risk of misunderstanding. Specifically, the present rule allows discovery of any "matter" relevant to the subject matter involved in the pending action, but the proposed sentence authorizing the court to expand to the former limits speaks of "information" relevant to the subject matter involved in the action. Certainly there was no intention to provide a different standard, and the Advisory Committee therefore voted unanimously to recommend changing "information" to "matter" in that sentence.

The Advisory Committee also decided that additional Note material should be provided to address issues that emerged during the public comment period. One set of concerns focuses on information about such things as organizational arrangements, other or similar incidents, or possible impeachment. Some commentary suggested that some advocates might contend that the amendment to the rule adopts a categorical rule regarding the availability of discovery about such matters absent a court order. Because that was not intended, the Committee voted to add explanatory language to the Note stating that

the determination whether such information is discoverable requires a case-by-case determination.

Another concern that emerged in the public comment process is that the court's authority to expand the scope of discovery to the subject matter involved in the action might be found directly linked to the cost-bearing provision now proposed to be included in Rule 26(b)(2). A significant number of witnesses who favored the scope revision said that they expected that any expansion beyond attorney-managed discovery would result in a cost-bearing order even though it was premised on a showing of good cause. Some who opposed the change to subdivision (b)(1) did so in part because they feared this cost-bearing consequence was meant. But the two proposals have independent origins, and were not intended to operate in tandem in this manner. Accordingly, the Committee voted to recommend the addition of Note language explaining that ordinarily a scope expansion would not justify a cost-bearing order.

Finally, there was some concern in public comment about what exactly was meant by the change to the last sentence of current Rule 26(b)(1) indicating that only "relevant" information was discoverable although not admissible. This might be taken to mean that relevance should be measured in terms set forth in the Federal Rules of Evidence. The Advisory Committee voted to recommend adding a sentence to the Note explaining that, as used in that sentence of the rule, relevant means within the scope of discovery defined in this subdivision, including information relevant to the subject matter of the action if the court has so expanded the scope on a showing of good cause.

**GAP Report**

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any “matter” — not “information” — relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of “relevant” in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarification of language changes have been proposed for the Committee Note.

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

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**(b) Discovery and Limits.**

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**(2) Limitations.** By order ~~or by local rule~~, the court

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may alter the limits in these rules on the number of

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depositions and interrogatories; ~~or and may also limit the~~

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length of depositions under Rule 30, and By order or local

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rule, the court may also limit the number of requests

9 under Rule 36. The court shall limit the frequency or  
10 extent of use of the discovery methods otherwise  
11 permitted under these rules and by any local rule ~~shall be~~  
12 limited by the court, or require a party seeking discovery  
13 to pay part or all of the reasonable expenses incurred by  
14 the responding party, if it determines that: (i) the  
15 discovery sought is unreasonably cumulative or  
16 duplicative, or is obtainable from some other source that  
17 is more convenient, less burdensome, or less expensive;  
18 (ii) the party seeking discovery has had ample opportunity  
19 by discovery in the action to obtain the information  
20 sought; or (iii) the burden or expense of the proposed  
21 discovery outweighs its likely benefit, taking into account  
22 the needs of the case, the amount in controversy, the  
23 parties' resources, the importance of the issues at stake in  
24 the litigation, and the importance of the proposed  
25 discovery in resolving the issues. The court may act upon

26 its own initiative after reasonable notice or pursuant to a  
27 motion under subdivision Rule 26(c).

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**Committee Note**

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but “standing” orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

The amended rule also makes explicit the authority that the Committee believes already exists under subdivision (b)(2) to condition marginal discovery on cost-bearing — to offer a party that has sought discovery beyond the limitations of subdivision (b)(2)(i), (ii), or (iii) the alternative of bearing part or all of the cost of that peripheral discovery rather than to forbid it altogether. The authority to order cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this

cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might only occur in certain types of cases. The limits of (i), (ii), and (iii) can be violated even in "ordinary" litigation. It may be that discovery requests exceeding the limitations of subdivision (b)(2) occur most frequently in connection with document requests under Rule 34, *cf.* Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena), and Rule 34 now calls attention to the provisions of Rule 26(b)(2) for that reason. But the limitations also apply to discovery by other means.

In any situation in which discovery requests are challenged as exceeding the limitations of subdivision (b)(2), the court may fashion an appropriate order including cost-bearing. Where appropriate it could, for example, order that some discovery requests be fully satisfied because they are not disproportionate, direct that certain requests not be answered at all, and condition responses to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In determining whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by limitation (iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the discovery request or in a Rule 26(c) motion, or in response to a request under subdivision (b)(1) that the court authorize discovery beyond matters

relevant to the claims or defenses. Alternatively, the court may act on its own initiative.

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

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**(d) Timing and Sequence of Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, ~~shall~~ does not operate to delay any other party's discovery.

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15           (f) Conference Meeting of Parties; Planning for  
16 **Discovery.** Except in categories of proceedings actions  
17 exempted from initial disclosure under Rule 26(a)(1)(E) by  
18 ~~local rule~~ or when otherwise ordered, the parties ~~shall~~ must,  
19 as soon as practicable and in any event at least 21 ~~14~~ days  
20 before a scheduling conference is held or a scheduling order  
21 is due under Rule 16(b), ~~confer meet to consider~~ discuss the  
22 nature and basis of their claims and defenses and the  
23 possibilities for a prompt settlement or resolution of the case,  
24 to make or arrange for the disclosures required by ~~subdivision~~  
25 Rule 26(a)(1), and to develop a proposed discovery plan. ~~The~~  
26 ~~plan shall~~ that indicates the parties' views and proposals  
27 concerning:

28                   (1) what changes should be made in the timing, form,  
29                   or requirement for disclosures under ~~subdivision~~ Rule  
30                   26(a) ~~or local rule~~, including a statement as to when



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31 disclosures under ~~subdivision~~ Rule 26(a)(1) were made or  
32 will be made;

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

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

40 (4) any other orders that should be entered by the  
41 court under subdivision Rule 26(c) or under Rule 16(b)  
42 and (c).

43 The attorneys of record and all unrepresented parties that have  
44 appeared in the case are jointly responsible for arranging the  
45 conference ~~and being present or represented at the meeting,~~  
46 for attempting in good faith to agree on the proposed  
47 discovery plan, and for submitting to the court within 14~~10~~

48 days after the conference meeting a written report outlining  
49 the plan. A court may order that the parties or attorneys  
50 attend the conference in person. If necessary to comply with  
51 its expedited schedule for Rule 16(b) conferences, a court  
52 may by local rule (i) require that the conference between the  
53 parties occur fewer than 21 days before the scheduling  
54 conference is held or a scheduling order is due under Rule  
55 16(b), and (ii) require that the written report outlining the  
56 discovery plan be filed fewer than 14 days after the  
57 conference between the parties, or excuse the parties from  
58 submitting a written report and permit them to report orally  
59 on their discovery plan at the Rule 16(b) conference.

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**Committee Note**

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard

the moratorium where it applies, and the court may so order in a case, but “standing” orders altering the moratorium are not authorized.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). “Standing” orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a “conference” of the parties, rather than a “meeting.” There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but “standing” orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

“Shall” is replaced by “must,” “does,” or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

#### **Summary of Comments**

The comments on the published proposed amendments to Rules 26(d) and 26(f) are found at pp.119-124 of the Summary of Public Comments (Tab 6.A-v). Certain concerns will be addressed here.

As with the published proposals to eliminate the right to opt out in subdivisions (a)(1) and (b)(2), the elimination of the authority to opt out by local rule from the discovery conference and discovery moratorium provisions prompted some opposition from judges. Some were concerned that these provisions would delay proceedings in their districts. In addition, objections were made to the moratorium on the ground that limitations proposed to the scope of initial disclosure under subdivision (a)(1) undercut the continued justification for the moratorium. Some also objected that there were no indications in the Note about when relief from the moratorium should be granted by the court. Others supported the creation of

national uniformity, and also supported the sequence of activities prescribed under these subdivisions. Most who commented supported the elimination of the requirement for a face-to-face meeting, and some opposed authorizing local rules to impose such a requirement.

The Advisory Committee voted to recommend adding a sentence to the end of Rule 26(f) to deal with the problems that might be created in districts that begin case management very rapidly if that rapid initiation of case management would be delayed by the rule's provision that the Rule 26(f) conference occur at least 21 days before the Rule 16(b) scheduling conference, or by the requirement that a written report to the court be filed within 14 days after the Rule 26(f) conference. The proposed rule provision would authorize a local rule provision shortening these times if necessary, and excusing the written report if an oral report is made to the court during the Rule 16(b) conference. It decided not to recommend adding explanatory material to the Committee Note to subdivision (d) regarding the circumstances in which a court might grant relief from the discovery moratorium.

### **GAP Report**

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

**Rule 30. Depositions Upon Oral Examination**

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**(d) Schedule and Duration; Motion to Terminate or Limit Examination.**

(1) Any objection ~~to evidence~~ during a deposition ~~shall~~ must be stated concisely and in a non-argumentative and non-suggestive manner. A person party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~on evidence~~ directed by the court, or to present a motion under paragraph Rule 30(d)(43).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. ~~By order or local rule, t~~The court may ~~limit the time permitted for the conduct of a deposition,~~ but ~~shall~~ must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent

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17 or if the deponent or another person party, or other  
18 circumstance, impedes or delays the examination.

19 (3) If the court finds that any such an impediment,  
20 delay, or other conduct that has frustrated the fair  
21 examination of the deponent, it may impose upon the  
22 persons responsible an appropriate sanction, including the  
23 reasonable costs and attorney's fees incurred by any  
24 parties as a result thereof.

25 (4) At any time during a deposition, on motion of a  
26 party or of the deponent and upon a showing that the  
27 examination is being conducted in bad faith or in such  
28 manner as unreasonably to annoy, embarrass, or oppress  
29 the deponent or party, the court in which the action is  
30 pending or the court in the district where the deposition is  
31 being taken may order the officer conducting the  
32 examination to cease forthwith from taking the  
33 deposition, or may limit the scope and manner of the

34 taking of the deposition as provided in Rule 26(c). If the  
35 order made terminates the examination, it ~~shall~~ may be  
36 resumed thereafter only upon the order of the court in  
37 which the action is pending. Upon demand of the  
38 objecting party or deponent, the taking of the deposition  
39 ~~shall~~ must be suspended for the time necessary to make a  
40 motion for an order. The provisions of Rule 37(a)(4)  
41 apply to the award of expenses incurred in relation to the  
42 motion.

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44 **(f) Certification and Delivery Filing by Officer;**  
45 **Exhibits; Copies; ~~Notice of Filing.~~**

46 (1) The officer ~~shall~~ must certify that the witness was  
47 duly sworn by the officer and that the deposition is a true  
48 record of the testimony given by the witness. This  
49 certificate ~~shall~~ must be in writing and accompany the  
50 record of the deposition. Unless otherwise ordered by the



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51 court, the officer ~~shall~~ must securely seal the deposition in  
52 an envelope or package indorsed with the title of the  
53 action and marked "Deposition of [here insert name of  
54 witness]" and ~~shall~~ must promptly ~~file it with the court in~~  
55 ~~which the action is pending~~ or send it to the attorney who  
56 arranged for the transcript or recording, who ~~shall~~ must  
57 store it under conditions that will protect it against loss,  
58 destruction, tampering, or deterioration. Documents and  
59 things produced for inspection during the examination of  
60 the witness, ~~shall~~ must, upon the request of a party, be  
61 marked for identification and annexed to the deposition  
62 and may be inspected and copied by any party, except that  
63 if the person producing the materials desires to retain  
64 them the person may (A) offer copies to be marked for  
65 identification and annexed to the deposition and to serve  
66 thereafter as originals if the person affords to all parties  
67 fair opportunity to verify the copies by comparison with

68 the originals, or (B) offer the originals to be marked for  
69 identification, after giving to each party an opportunity to  
70 inspect and copy them, in which event the materials may  
71 then be used in the same manner as if annexed to the  
72 deposition. Any party may move for an order that the  
73 original be annexed to and returned with the deposition to  
74 the court, pending final disposition of the case.

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COMMITTEE NOTE

Subdivision (d). Paragraph (1) has been amended to clarify the terms regarding behavior during depositions. The references to objections “to evidence” and limitations “on evidence” have been removed to avoid disputes about what is “evidence” and whether an objection is to, or a limitation is on, discovery instead. It is intended that the rule apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition, which might relate to duration or other matters.

The current rule places limitations on instructions that a witness not answer only when the instruction is made by a “party.” Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person. The

amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

Parties considering extending the time for a deposition — and courts asked to order an extension — might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not

produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time. Finally, with regard to expert witnesses, there may more often be a need for additional time — even after the submission of the report required by Rule 26(a)(2) — for full exploration of the theories upon which the witness relies.

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court. The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

The rule directs the court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. In addition, if the deponent or another person impedes or delays the examination, the court must authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by an “other circumstance,” which might include a power outage, a health emergency, or other event.

In keeping with the amendment to Rule 26(b)(2), the provision added in 1993 granting authority to adopt a local rule limiting the time permitted for depositions has been removed. The court may enter a case-specific order directing shorter depositions for all

depositions in a case or with regard to a specific witness. The court may also order that a deposition be taken for limited periods on several days.

Paragraph (3) includes sanctions provisions formerly included in paragraph (2). It authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent. This could include the deponent, any party, or any other person involved in the deposition. If the impediment or delay results from an "other circumstance" under paragraph (2), ordinarily no sanction would be appropriate.

Former paragraph (3) has been renumbered (4) but is otherwise unchanged.

Subdivision (f)(1): This subdivision is amended because Rule 5(d) has been amended to direct that discovery materials, including depositions, ordinarily should not be filed. The rule already has provisions directing that the lawyer who arranged for the transcript or recording preserve the deposition. Rule 5(d) provides that, once the deposition is used in the proceeding, the attorney must file it with the court.

"Shall" is replaced by "must" or "may" under the program to conform amended rules to current style conventions when there is no ambiguity.

### **Summary of Comments**

The comments received on Rule 30 are found at pp. 125-148 of the Summary of Public Comments (Tab 6 A-v). An effort will be made herein to identify and discuss several recurrent comments.

Most comments were about the deposition duration limitation the published amendment proposals would add to Rule 30(d)(2). The "deponent veto" provision, requiring consent of the deponent to extend the deposition beyond one day of seven hours, was criticized by many (including many who supported the amendment to impose a durational limitation) as likely to create problems. See pp. 144-146 of the Summary of Public Comments. The Advisory Committee voted unanimously to recommend that the requirement of the deponent's consent be deleted from the proposed amendment, and that the Committee Note be accordingly revised.

Other comments raised questions about how the limitation should be applied. Several questioned whether the intention was to permit breaks for lunch, for example. In addition, many questioned how the limitation would work in a situation under Rule 30(b)(6) in which the responding party designates more than one person to testify. The Advisory Committee unanimously recommends that two sentences be added to the Committee Note to provide guidance on these matters, indicating that reasonable breaks are expected and not counted against the seven-hour limitation, and that each person designated under Rule 30(b)(6) should be considered a separate witness for purposes of the one-day limitation.

Many who commented raised specific concerns about situations in which there might be good reason for the deposition to extend beyond one day. Under the published proposal, the parties may agree to extend the time, and the court may so order for good cause. The Advisory Committee considered a variety of specific examples that might be included in the Committee Note to provide direction on these topics to parties considering extending the time, and to courts asked to do so. It decided to recommend additional Note language

describing seven situations as examples that might warrant extending the deposition.

Much commentary opposed the entire concept of a rule limiting the length of depositions. There were many objections to the one-day limitation as arbitrary or micromanagement. Some said that most depositions that extend longer than one day do so for good reasons, and some who commented urged a limit of two days rather than one. Others favored the published proposal. A number of witnesses who have practiced under the three-hour limitation that applies in Illinois state courts thought that this limitation has worked. The Advisory Committee proposes no change to the durational limitation of one day of seven hours.

The published proposed amendments to Rule 30(d)(1) were generally applauded. See pp. 125-148 of the Summary of Public Comments. The Federal Magistrate Judges Association (98-CV-268) objected, however, that the published amendment might be read to empower nonparties to instruct a deponent not to answer a question. The Advisory Committee voted to recommend additional language in the Committee Note explaining that the amendment confers no new authority to make such instructions, but makes it clear that anyone who purports to make such an instruction is subject to the limitations imposed by the rule.

The need for a conforming change to another part of Rule 30 also emerged. Specifically, Rule 30(f)(1) currently instructs the court reporter, once the deposition transcript is completed, to "file it with the court in which the action is pending or send it to the attorney who arranged for the transcript or recording." The published amendment to Rule 5(d), however, directs that depositions not be filed until used in the action. Accordingly, the Advisory Committee voted

unanimously to recommend that Rule 30(f)(1) be amended to delete the directive that the recorder file the deposition and leave the directive that the recorder send it to the attorney who arranged for the transcript or recording. Because this is only a conforming amendment, it is believed that there is no need that it be published for public comment.

**GAP Report**

The Advisory Committee recommends deleting the requirement in the published proposed amendments that the deponent consent to extending a deposition beyond one day, and adding an amendment to Rule 30(f)(1) to conform to the published amendment to Rule 5(d) regarding filing of depositions. It also recommends conforming the Committee Note with regard to the deponent veto, and adding material to the Note to provide direction on computation of the durational limitation on depositions, to provide examples of situations in which the parties might agree — or the court order — that a deposition be extended, and to make clear that no new authority to instruct a witness is conferred by the amendment. One minor wording improvement in the Note is also suggested.

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

1  
2  
3  
4

\* \* \* \* \*

(b) Procedure. The request shall must set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall



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5. must specify a reasonable time, place, and manner of making  
6 the inspection and performing the related acts. Without leave  
7 of court or written stipulation, a request may not be served  
8 before the time specified in Rule 26(d).

9 The party upon whom the request is served ~~shall~~ must  
10 serve a written response within 30 days after the service of the  
11 request. A shorter or longer time may be directed by the court  
12 or, in the absence of such an order, agreed to in writing by the  
13 parties, subject to Rule 29. The response ~~shall~~ must state,  
14 with respect to each item or category, that inspection and  
15 related activities will be permitted as requested, unless the  
16 request is objected to, in which event the reasons for the  
17 objection ~~shall~~ must be stated. If objection is made to part of  
18 an item or category, the part ~~shall~~ must be specified and  
19 inspection permitted of the remaining parts.

20 The party submitting the request may move for an order  
21 under Rule 37(a) with respect to any objection to or other  
22 failure to respond to the request or any part thereof, or any  
23 failure to permit inspection as requested. Such an order, or an  
24 order under Rule 26(c), is subject to the limitations of Rule  
25 26(b)(2)(i), (ii), and (iii).

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

30 \* \* \* \* \*

#### Committee Note

Subdivision (b). The amendment calls attention to the provisions of Rule 26(b)(2)(i), (ii), and (iii). In 1998, the Committee published a proposal to amend Rule 34(b) to include explicit authority for the court to require the party seeking discovery to pay part or all of the cost of responding if the discovery sought exceeded the limitations of Rule 26(b)(2)(i), (ii), or (iii). See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 19, 64-68 (1998). After public comment and further

deliberation, the Committee decided that the cost-bearing provision more appropriately should be included in Rule 26(b)(2), and it has been added there. Because cost-bearing concerns often arise in connection with discovery pursuant to Rule 34, however, a change to Rule 34(b) appeared warranted to call attention to the availability of that device in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

“Shall” is replaced by “must,” or deleted to avoid unnecessary repetition, under the program to conform amended rules to current style conventions when there is no ambiguity.

### **Summary of Comments**

The published proposal to amend Rule 34(b) involved cost-bearing authority. The Advisory Committee has recommended that this subject be included in Rule 26(b)(2) instead, as discussed above. The public comments on cost-bearing were discussed in connection with that provision.

### **GAP Report**

The Advisory Committee recommends amending the published proposals to remove the rule change and Note material explicitly authorizing cost-bearing and to include cost-bearing in Rule 26(b)(2) instead. However, because excessive cost is often a concern in connection with Rule 34 discovery, the Committee also unanimously recommends amendment of Rule 34(b) to include a sentence calling attention to the limitations of Rule 26(b)(2). In conjunction with that addition to the rule, it also recommends Note material describing the

initial publication of the initial proposal to amend Rule 34(b), and the shift of the provision to Rule 26(b)(2). Because this amendment merely calls attention to the addition of cost-bearing to Rule 26(b)(2), as was included in the published amendment proposals, the Committee does not believe republication is needed.

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

\* \* \* \* \*

**(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.**

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), ~~shall~~ is not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to

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13 requiring payment of reasonable expenses, including  
14 attorney's fees, caused by the failure, these sanctions may  
15 include any of the actions authorized under subparagraphs  
16 Rule 37(b)(2)(A), (B), and (C) ~~of subdivision (b)(2) of~~  
17 ~~this rule~~ and may include informing the jury of the failure  
18 to make the disclosure.

19 \* \* \* \* \*

#### COMMITTEE NOTE

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), *see* 8 Federal Practice & Procedure § 2050 at 607-09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification." Even if the failure was not substantially

justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

“Shall” is replaced by “is” under the program to conform amended rules to current style conventions when there is no ambiguity.

### **Summary of Comments**

The comments on the published proposed amendment are found at pp. 169-170 of the Summary of Public Comments (Tab 6 A-v). Eleven commentators and two witnesses expressed support for the change. There was no expressed opposition.

The wording of the proposed rule amendment, however, needs to be changed. The published proposal adds failure to supplement as required by Rule 26(e)(2) as an occasion for application of the exclusion sanction provided in Rule 37(c)(1). But as worded it refers to failure “to disclose information,” while Rule 26(e)(2) deals with failure to amend a prior response to discovery. Accordingly, the Advisory Committee unanimously recommends that the language be revised to make clear that it applies to a failure to amend a discovery response. This change is purely formal and no republication should be needed. Indeed, there is not even any need to change the Note due to the clarification of the rule.

### **GAP Report**

The Advisory Committee recommends that the published amendment proposal be modified to state that the exclusion sanction can apply to failure “to amend a prior response to discovery as required by Rule 26(e)(2).” In addition, one minor phrasing change is recommended for the Committee Note.

SUMMARY OF PUBLIC COMMENTS  
PRELIMINARY DRAFT OF PROPOSED AMENDMENTS  
CIVIL RULES REGARDING DISCOVERY  
1998-99

This memorandum attempts to collect and summarize the various comments received regarding the proposed discovery rule amendments contained in the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence published in August, 1998. In part because these are summaries, there will inevitably be some omissions of points made. Because several made similar points, there will also be some repetition. As noted below, this recapitulation attempts to pigeon-hole the comments in relation to specific rules. In doing so, it may obscure the overall thrust of some in favor of or against the package as a whole. Some effort will be made at the end to capture these overall reactions of some who commented.

At the outset, it is important to emphasize that this commentary reflects enormous effort and attention from wide sectors of the bench and bar. Beginning with the Advisory Committee's conferences and related events in 1997, this effort has proved of great value to the process of rule amendment.

The following summary reflects some editorial judgment. It separates written comments from testimony at the hearings held by the Advisory Committee. As to testimony, it attempts to note points made in written testimony as well as those provided orally (which sometimes dealt with different topics). Every effort has been made to ensure accuracy, but there have undoubtedly been mistakes in the process.

For the ease of the reader, the following is the intended arrangement of the comments, organized in the sequence of the rules affected:

1. Rule 5(d)
  - (a) General desirability of abolishing filing requirement
  - (b) Requiring retention of unfiled discovery materials
2. Rule 26(a)(1)

- (a) National uniformity
  - (b) Narrowing the disclosure obligation to supporting material
  - (c) Articulation of the standard for narrowing the obligation
  - (d) Handling and listing of "low end" excluded categories
  - (e) Handling of "high end" cases
  - (f) Added parties
3. Rule 26(b)(1)
- (a) Deletion of "subject matter" language describing the scope of discovery
  - (b) Authorization for expansion to "subject matter" limit on showing of good cause to court
  - (c) Revision of last sentence of current Rule 26(b)(1) to state that only "relevant" material is discoverable
  - (d) Explicit invocation of Rule 26(b)(2) in Rule 26(b)(1)
4. Rule 26(b)(2)
5. Rule 26(d)
6. Rule 26(f)
7. Rule 30(d)
- (a) Deposition duration
  - (b) Deponent veto
  - (c) Other deposition changes (Rules 30(d)(1) and (3))



8. Rule 34(b)
  - (a) General desirability
  - (b) Placement of provision
9. Rule 37(c)
10. Comments not limited to specific proposed changes
  - (a) General observations about package
  - (b) Additional suggested amendments

1. Rule 5(d)(a) General desirability of abolishing filing requirement

## Comments

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090:

Supports the change. This completes the cycle rationalizing and validating the local practices and should be fully supported. It will not only reduce costs and expenses for the clerk's office, but also reduce filing and copy expenses of the parties.

Michelle A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) The proposed change is unclear on the use of materials that are used in the case. Suggests that the change be further modified to read that "the following discovery requests and responses must not be filed until and to the extent that they are used in the proceeding . . ."

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Supports the proposal. This district previously implemented this procedure and found it successful.

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Supports the change.

Hon. David L. Piester (D. Neb.), 98-CV-124: Questions decision to require filing of Rule 26(a)(3) disclosures. These disclosures are repeated in the final pretrial order. If there is no objection, there is no need for either the pretrial conference judge or, if different, the trial judge, to see the disclosures twice. Also notes that the 1980 amendments to Rule 5(d) met with opposition from certain senators on the ground that the court's business is the public's business, particularly in products liability cases. Although that argument did not prevail in the Senate, it may be good to address it. His district has a local rule that provides:

Upon request of a member of the public made to the Clerk's office, non-filed documents shall be made available by the parties for inspection, subject to the power of the court to enter protective orders under the Federal Rules of Civil

Procedure and other applicable provisions of law.

Even if there were no requests from the public, the inclusion of such a provision would serve a valuable purpose in keeping the court from being used as a tool for secrecy. In addition, the phrase "used in the proceeding" should be clarified to show that it means "needed for trial or resolution of a motion or on order of the court." Otherwise, there will be all sorts of "uses" cropping up and there will be unnecessary filings.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: The purely stylistic change from "shall" to "must" causes confusion because both appear in various places in the rules. The two words mean the same thing, and either one or the other should be used.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the change.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorsed. This is consistent with the local rules of the D. Conn.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports amendment for the salutary purpose of easing the administrative burden put on the court in handling large volumes of paper.

Public Citizen Litigation Group, 98-CV-181: Opposes the amendment. It would reverse the policy decision made by the rule drafters in 1978-80 when they rejected a similar amendment and decided that the determination whether to file discovery material should be made on a case-by-case basis. The courts have recognized that Rule 5(d) establishes a substantive policy that gives the public a presumptive right of access to discovery materials unless good cause is shown to justify confidentiality. Even though the national rule's mandate has been eroded by widespread adoption of local rules that discovery materials not be filed, many of these local rules recognize the public interest in access to discovery materials by including provisions stating that nonparties may request that discovery materials be filed based on a minimal showing. The proposed rule goes too far in reversing the presumption of access. If it is adopted, it should

be modified in four ways: (1) Class actions under Rule 23 and shareholder derivative actions under Rule 23.1 should be excluded, as should actions involving hazards to public health; (2) The phrase "must not be filed" should be replaced with the phrase "need not be filed" that the Advisory Committee originally suggested; (3) The rule should say that the court may order that discovery materials be filed with the court because of the interest of nonparties or the public in the litigation. The following sentence could be added:

Any party or nonparty that believes that discovery materials should be filed may request that the court order that discovery materials be filed with the court. In response to such a request, or on its own motion, the court shall order that such materials be filed to the extent that filing serves the interests of nonparties or the general public.

(4) Rule 16(c) should be amended to add filing of discovery materials to the list of issues to be discussed at pretrial scheduling conferences.

Philadelphia Bar Assoc., 98-CV-193: Supports the change, which makes practices on filing national and uniform. The amendment reconciles the courts' generally limited storage space with their need to be informed of certain key information.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change with regard to initial disclosures. Filing full disclosures is an efficient method of informing the trial court about the basic facts and structure of the case.

F.B.I., 98-CV-214: Supports the change because it will eliminate inconsistencies provided by local rules.

National Assoc. of Independent Insurers, 98-CV-227: Supports the change. It should assist the parties, on both sides, in their control of expenses.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with the proposed rule change. However, it suggests that the Committee make clear that this house-keeping change is not intended to change the principle in the current Federal Rules that discovery materials

should be available to the public when the public interest in access outweighs any countervailing privacy or other interest.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268:

Supports this change. The amendment is a progression of changes that have occurred since 1990 with a recognition of the costs imposed on parties as well as the court by the required filing of discovery materials that are never used in the action.

(b) Requiring retention of unfiled discovery materials

## Testimony

## Baltimore Hearing

Brian F. Spector, prepared stmt. and Tr. 64-80: Now that the national rules will not direct routine filing of discovery, there should be provision for the retention of the originals of discovery documents by counsel for possible future use in the case. Accordingly, the following could be added to amended Rule 5(d): "The attorney responsible for service of the discovery request shall retain, and become custodian of, the original discovery request and the response. The original of a deposition upon oral examination shall be retained by the attorney who arranged for the transcript or recording. All discovery materials shall be stored under conditions that will protect against loss, destruction, tampering, or deterioration." In addition, because filing is no longer allowed, Rule 30(f)(1) should be changed to remove the language now in that rule permitting the court reporter either to "file [the deposition] with the court in which the action is pending or" send it to the attorney who arranged for the transcript or recording.

2. Rule 26(a)(1)(a) National uniformity

## Comments

Prof. Edward W. Cavanaugh, 98-CV-002: "I support the elimination of local options on discovery rules and strongly support the concept that the Federal Rules should be national rules with a minimum of local variation."

Hon. Avern Cohn (E.D. Mich.), 98-CV-005: Opposes eliminating opt outs. "The Eastern District of Michigan opted out of Rule 26(a). We are getting along just fine as far as I know." It is easy to determine local procedures, and clients who are baffled by differences between districts "are generally represented by bad lawyers who fail to explain the complexities of a case to their clients." Baffled clients are not a reason to write national rules.

James F. Brockman, 98-CV-009: Because initial disclosure creates more of a burden than a benefit, courts should retain the ability to opt out.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: The Section agrees with the goal of reestablishing uniformity. In the majority of cases there is no need for disclosure. It is particularly ineffective in the very type of cases that create discovery problems--contentious, complex cases. "Because the mandatory initial disclosure regime is such a radical departure from our traditional adversary system, the burden of demonstrating why it should be adopted uniformly should rest with the Advisory Committee. The Advisory Committee has not met this burden, and the objective of establishing uniformity is itself an insufficient justification."

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "There is an absolute need for uniformity. Trial lawyers and their clients should be able to go into any federal trial court and know what the rules are and not have to waste their money doing 'fifty state surveys' of things as simple as discovery rules."

John R. Dent, 98-CV-036: In the C.D. Cal, general orders are sometimes used to promulgate procedural rules of general applicability. These are a serious trap for the unwary and a source of frustration for the bar. By allowing opting out "by order," the amended rule may be read to authorize such district-wide action by general order. In the Federal Rules of Appellate Procedure, this problem is solved by referring to an "order in a particular case." See Fed. R. App. P. 5(c). There is a risk that a district court might interpret the failure to use the same term in the Civil Rules as inviting (or at least allowing) such use of general orders. This would be undesirable.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Supports uniformity. The opt-out rules might have produced useful results if districts had only chosen from a limited few alternatives when fashioning their rules. This did not happen, however, and the wide disparities in practice that have resulted have had a harmful impact on the judicial system. Balkanization of the legal profession is undesirable, and also favors local practitioners over national practitioners. There are no differences between districts that justify different rules on discovery.

James A. Grutz, 98-CV-040: The W.D. Wash. opted out of the initial disclosure requirement and this has worked well. The disclosure requirement would be wasteful in many cases.

ABA Section of Litigation, 98-CV-050: The variety of discovery rules among the federal judicial districts as a result of the 1993 amendments has been troublesome for practitioners and is inconsistent with the philosophy of a single, uniform federal judicial system. The discovery rules should be the same in all federal courts, subject to Rule 83's provisions for local rules. Therefore, supports the proposed change in mandatory disclosure primarily because it establishes national uniformity. Although some in the Section still oppose mandatory disclosure, they view lack of uniformity among the districts to be even more undesirable. The Antitrust Section supports the amendment because it establishes uniformity, even though it opposes mandatory disclosure.

Charles F. Preuss, 98-CV-060: The elimination of local power to opt out is sound. Uniformity of discovery procedures in all



federal jurisdictions will produce efficiencies and reduce confusion. In the mass tort area, this will be particularly helpful in easing the present burden of having to respond to disparate local disclosure requirements for cases in which the same contentions are made.

Gennaro A. Filice, III, 98-CV-071: Joins with others in strongly supporting greater uniformity procedures in all federal jurisdictions. Uniformity is needed in today's legal environment, where not only the parties, but also counsel, appear in various districts around the country.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Favors elimination of the opt-out provisions regarding disclosure. Variations in practice from district to district spawned by a proliferation of local rules have produced uncertainty and confusion, but have not generated any significant efficiencies within the federal system.

Kelby D. Fletcher, 98-CV-078: Opposes deletion of opt-out. In W.D. Wash. the CJRA Committee concluded that disclosure would not be helpful. Those who practice in this court would oppose this amendment.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: There is no substantial policy reason for different discovery rules in different districts. The time has come for experimentation under the 1993 amendments to end. Therefore strongly recommends elimination of the opt-out provisions.

Frank Stainback, 98-CV-093: Uniformity in the federal system is a must.

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) Opposes making disclosure mandatory nationwide. Her district opted out across the board. Having reviewed the materials published in connection with the current package of proposed amendments, the W.D. Wash. FBA leadership respectfully disagrees with the mandatory approach proposed by the Advisory Committee. The opt-out approach has been valuable and successful in this district. The district's use of differential case-management techniques has allowed individual judges to implement various approaches that have allowed continuing improvement in judicial administration. Making all districts use a disclosure

provision that has engendered broad opposition raises substantial doubts. This district has manifestly benefitted from the latitude for innovation afforded by the opt-out provisions. Permitting districts to serve as laboratories for experimentation is desirable.

Hon. Lacy H. Thornburg (M.D.N.C.), 98-CV-108: Seriously objects to making the requirements of Rule 26 mandatory. Rule 26(a) disclosure would tend to slow the judicial process.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Expresses concern about the proposed elimination of the ability to modify the requirements of disclosure by local rule.

Hon. Frederic N. Smalkin (D. Md.), 98-CV-110: Strenuously opposes making disclosure mandatory. "[T]he entire tenor of the Advisory Committee's report on this amendment reminds one of a parent's rebuke of a wayward child. It is insulting to the district courts and was put forth in support of a change that has no justification except to serve the end of uniformity in and for itself."

Hon. Richard L. Williams (E.D. Va.), 98-CV-111: Opposes eliminating opt out authority. In 18 years on the federal bench, has never seen a disclosure problem.

Hon. William W. Caldwell (M.D. Pa.), 98-CV-112: Strongly opposed to requiring mandatory initial disclosure in all cases. "[D]istrict courts should be accorded the discretion and flexibility that exists under the present rule." The variations adopted in some districts are important.

Hon. Robert H. Whaley (E.D. Wash.), 98-CV-113: Disclosure has worked very well in the E.D. Wash., and has helped avoid many discovery problems. "As a practitioner in the federal courts of this district prior to coming on the bench, I worked under the rule and found it very beneficial."

Hon. Richard L. Voorhees (W.D.N.C.), 98-CV-114: Opposes mandatory initial disclosure. District courts should at least be able to opt out, as his district has done successfully.

Hon. Milton I. Shadur (N.D. Ill.), 98-CV-115: Believes that opt

out power should remain. His district opted out, and has operated with great success. It would be unfortunate to impose a dramatically different rule from the current national one on the strength of what appear to be a minority of inadequately supported personal preferences. "Although I (and the large majority of the judges on our District Court) have strong views on the subject . . . I would not push for a repeal of the Rule 26(a)(1) provision to override their beliefs. It seems to me that the rulemakers ought to have equal respect for the views of those of us who differ with them."

Hon. David A. Katz (N.D. Ohio), 98-CV-116: Just reviewed letter from Judge Owen Panner. N.D. Ohio has opted in, and in at least 90% of his cases he orders initial disclosure. "To deprive the individual judge of discretion to order or not to order initial disclosure in selected cases is to deprive the individual closest to the case of the right to determine whether initial disclosures are warranted."

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Particularly pleased to see elimination of opt out by local rule, although he predicts that there will still be significant numbers of individual judges ordering opt outs.

National Assoc. of Consumer Advocates, 98-CV-120: "The current proposal to eliminate local opting out of Rule 26(a)(1) disclosures is an excellent one that will foster both efficiency and uniformity."

Hon. H. Franklin Waters (W.D. Ark), 98-CV-123: Agrees with Judge Panner that individual courts should have some discretion in determining what is best for their particular court. "I recognize this as just the latest attempt to make us all alike, in my strongly held view very unwisely. . . . Fayetteville, Harrison, Fort Smith, Hot Springs, Texarkana and El Dorado, Arkansas, just aren't like Detroit, Chicago, Philadelphia, Pittsburgh, Boston, New York City, etc., etc., etc." This district has been near the head of the list in terms of efficiency by minimizing red tape; what we now have works well for us.

Hon. David L. Piester (D. Neb.), 98-CV-124: "In small districts such as Nebraska, we often feel that the rules are crafted to the

exclusive needs of the large, metropolitan districts, and I suppose these may be met with similar comments, but on the whole, I personally favor them. I laud the objectives of specificity and national uniformity in these respects, in spite of the inevitable cries of micro-management. I think the bar, particularly those lawyers who practice in several districts, will, too. Local rule peculiarities allow for lawyers to be 'home towned' too much, particularly in areas such as Nebraska, where the 'national firms' don't practice much."

Hon. Jackson L. Kiser (W.D. Va.), 98-CV-125: Opposes making disclosure mandatory nationally. In his district, the overwhelming response was that disclosure would add another layer of controversy. His first preference would be to eliminate disclosure nationwide. His second preference is to make the disclosure requirement optional.

Hon. Andrew W. Bogue (D.S.D), 98-CV-126: Asked by Owen Panner to advise Committee of his feelings. "Succinctly put, I detest the initial disclosure provided by Rule 26 and I believe that it has adversely affected our cases here in South Dakota." He does not believe that there is any present consensus supporting imposition of a national standard.

Hon. G. Thomas Eisele (E.D. Ark.), 98-CV-127: Strongly endorses views of Judge Waters (comment no. 123) and of Judge Panner. In his district they have operated successfully by opting out, and he believes that the Committee's proposal will have serious negative effects on the efficient disposition of civil cases.

Hon. Shelby Highsmith (S.D. Fla.), 98-CV-128: His district opted out, and he believes that the present system, allowing local discretion in configuring discovery parameters, is preferable. "Indeed, at a time when the federal government is promoting decentralization, this change from local option to a national standard in the federal courts appears to be an anachronism."

Hon. Jack T. Camp (N.D. Ga.), 98-CV-129: He is the Chairman of the local rules committee in his court. It adopted a rule that requires broader disclosure than proposed Rule 26(a)(1). This local provision has been in effect for almost five years and has worked very well, resulting in little additional litigation. "The benefit from putting the burden upon the litigants to

disclose relevant information has far outweighed any of the criticisms of the mandatory disclosures." He sees no reason to adopt a "one size fits all" approach, however. The present rule allows each court to craft a procedure suited to the practice and customs of its bar, and thus allows creativity and experimentation.

Hon. Charles B. Kornmann (D.S.D.), 98-CV-130: Although his district has required initial disclosures, he is opposed to a national rule so requiring. His district may later decide the experiment was a mistake. "Judicial districts do not need solutions imposed from Washington. Judges in the field know best what works in their District. Lawyers simply do not practice in rural areas (where they almost always know personally the opposing lawyer) the way lawyers practice in metropolitan areas."

Hon. Susan Webber Wright (E. and W. D. Ark.), 98-CV-131: At their regularly scheduled meeting, the judges and magistrate judges in attendance unanimously endorse the views of their colleagues H. Franklin Waters (comment no. 123) and G. Thomas Eisele (comment no. 127).

Hon. Gilberto Gierbolini (D.P.R.), 98-CV-132: Opposes the proposal. It fails to take into consideration the idiosyncracies of each local bar and court docket. It also strips district courts of the flexibility needed to handle the discovery process.

Hon. John Feikens (E.D. Mich.), 98-CV-133: Writes in response to memorandum sent by Judge Panner. "The proposed amendment, providing for mandatory initial disclosure, simply makes no sense."

Hon. James P. Jones (W.D. Va.), 98-CV-134: Initial disclosure is not helpful in most cases. Although uniformity is an important object in the federal rules, so is a set of rules that have wide acceptance among lawyers and judges. Mandatory initial disclosure would not have that acceptance.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) This district opted out in 1993. But given the narrowing of the disclosure requirement, the committee does not have the concerns that it had in 1993. Indeed, the disclosure requirement seems to be essentially the same as, if

not more limited than, what might be compelled pursuant to an initial set of interrogatories.

Hon. Sol Blatt, Jr. (D.S.C.), 98-CV-137: Joins with Judge Panner in opposing elimination of opt-outs, and believes that the majority of district judges in the district also oppose the change.

Hon. Barefoot Sanders (N.D. Tex.), 98-CV-138: Opposes mandatory use of disclosure. He was one of the judges who tried to use the rule when it first appeared, but found that it was creating disputes where none previously existed. "While national uniformity may be theoretically desirable (to assist a relatively small number of attorneys with a 'national' practice), most lawsuits -- at least in this district, and I think we are representative -- are filed and tried by attorneys of the local bar."

Hon. Bruce M. Van Sickle (D.N.D.), 98-CV-139: Opposes national requirement of disclosure. Routine small cases come up where disclosure is simply meaningless. To require it could make litigation too expensive to maintain. "Please get the bureaucracy out of the way and let us hear the cases."

Deborah A. Elvins, 98-CV-141: (on behalf of Civil Justice Reform Act Advisory Group of W.D. Wash.) This group joins in comments of the Trustees of the Federal Bar Association of W.D. Wash. (comment no. 102) Working with lawyers in this community, the judges in the W.D. Wash. have implemented local rules and standing orders to encourage earlier resolution of cases and efficient cost-effective discovery. Strict adherence to the goal of national uniformity may sacrifice gains made in this and other districts without a corresponding benefit or real consensus on what the national rules should be.

Hon. Robert G. Doumar (E.D. Va.), 98-CV-142: These proposals, if imposed on this district, will cause further delays. Several years ago, civil cases in the district were handled within a five-month period from filing to trial. Now it is at a seven-month period, and if the changes that are proposed are adopted, he guesses that this will rise to nine months. "Clearly, an initial conference and preparation of a discovery plan is merely another layer placed on litigation." As layers are added to

litigation, middle America is prevented from using the federal courts.

Board of Judges of S.D.N.Y., 98-CV-143: Removing the ability to opt out will result in "an exponential increase in discovery disputes requiring judicial intervention." This district draws a disproportionate share of complex and contentious cases, and these are precisely the kinds of cases in which mandatory disclosure will only increase delay and expense in litigation. Even if disclosure did proceed smoothly in those cases, it would do nothing to advance them because there would undoubtedly be at least as much formal discovery. But experience teaches that disclosure will not proceed smoothly, and instead will require repeated efforts by the court to advance the cases. Parties will not stipulate to suspend in these contentious cases, but will zealously press for whatever advantage they can garner. The express availability of fee-shifting under Rule 37(a)(1) will provide parties in these cases with a litigation incentive they cannot refuse.

Hon. J. Frederick Motz (D. Md.), 98-CV-144: At a recent bench meeting, the judges of the court discussed the question and decided unanimously that they agree with the views previously expressed by Judge Smalkin (comment no. 110). After reading the correspondence between Judge Panner and Judges Levi, Rosenthal and Doty, the judges of this district adhere to their previous views in a an addendum. They see a risk of losing the virtue of adaptation to local legal culture that local deviation permits. "Its success should not be sacrificed in pursuit of the illusory goal of national uniformity sought by a small segment of the bar who characterize themselves as 'national practitioners.' In the long run there will be far greater respect and adherence to the Federal Rules if they tolerate a reasonable degree of diversity in their application among those of us laboring in the field."

Hon. Sarah Evans Barker (S.D. Ind.), 98-CV-145: Opt-out authority should be retained. This district opted out of Rule 26(a)(1). There is no need for disclosure in this district, in which the traditional method of adversarial discovery has done well. Although the goal of uniformity may appear laudable, in practice there are significant variations of type, number, and complexity of cases in districts. "We respectfully submit that we are best situated to assess practice and procedure in our

district."

Hardy Myers, 98-CV-146: (Attorney General of Oregon) The local rules of the District of Oregon provide effective regulation of the discovery process, and opt out of Rule 26(a)(1). This is especially suited to the efficient resolution of the large number of cases handled by the Oregon Department of Justice, which are decided on motions before initiation of discovery.

Stephen J. Fearon, 98-CV-148: Opposes end to opting out. It is too soon to require mandatory disclosure nationwide, and districts that want it can use it under the current system.

Hon. Albert V. Bryan (E.D. Va.), 98-CV-150: Opposes a nationwide requirement. If there is an outcry from the bar about lack of uniformity, he hasn't heard it. Nor has he seen any case in which disclosure would have permitted the case to have been resolved in a more inexpensive and efficient way. In most cases, it just adds to the volume of paperwork and expense of litigation.

Hon. Harry Lee Hudspeth (W.D. Tex.), 98-CV-151: Opposes mandatory initial disclosure. The CJRA plan adopted in his district has worked well, and it is far superior to the concept of initial disclosure embodied in the proposed amendments. "Our District would be much better off continuing to operate under our Plan rather than under your Rule."

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: Favors elimination of local option to opt out of the rules in order to foster national uniformity in federal practice.

Seventh Circuit Bar Association, 98-CV-154: "[W]e agree that it is time to bring uniformity to the initial disclosure provisions mandated by Rule 26(a)(1). At present, district courts within our Circuit have a 'striking array of local regimes,' which make discovery practice both within courts in the same district as well as in nearby districts unduly complicated and confusing. We support the need for uniformity in the initial disclosure process."

National Assoc. of Railroad Trial Counsel, 98-CV-155: Believes that the opt-out language should remain. Reports from members



that practice in opt-out districts indicate that the old system of discovery works well in those districts. Leaving the opt-out option available would allow the Committee to monitor the two systems to determine which is the better procedure.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Opposes the change. Although there is a minority view within the Chicago Chapter that opting out should not be available to a court by rule, a majority of the Chapter believes that courts should be free to enact rules waiving compliance with Rule 26(a)(1).

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports changes to achieve uniformity.

Hon. Terence P. Kemp (S.D. Ohio), 98-CV-161: This district opted out, and there has been no adverse result. The Local Rules Advisory Committee has recommended that the district continue to opt out. Local courts are many times in the best position to judge what procedures work best in their particular district.

Richard C. Miller, 98-CV-162: "I whole heartedly agree with the proposal to standardize Rule 26. As you well know, the proliferation of both the amount and type of local rules make it practically impossible for an attorney handling a case outside his normal jurisdiction to avoid some procedural mistake during the course of litigation."

Philip A. Lacovara, 98-CV-163: This change will go a substantial way toward reducing the balkanization of federal practice that has evolved in recent years. There is still a risk that individual judges will institute their own regimes via "standing" or "chambers" orders. In large, multi-judge districts, these rival the Federal Rules themselves in length and present practitioners with a dizzying array of idiosyncratic demands.

Hon. J. Garvan Murtha (D. Vt.), 98-CV-164: Opposes eliminating the opt-out, evidently on behalf of the judges of the district. After consulting with its advisory committee, the court found there was strong sentiment for continuing to encourage the spirit of cooperation without additional discovery rules that would result in added expense. "We are a small, rural district, and most of the attorneys who practice in our courts know each other and exchange information in a cooperative and prompt manner."

Oregon Trial Lawyers Ass'n, 98-CV-166: Opposes the elimination of the opt out provision and endorses the position of the Local Rules Advisory Committee in favor of retaining the opt-out.

Hon. Jerome B. Friedman (E.D. Va.), 98-CV-168: There is no reason efficient courts should be penalized with this change in the rules. Leave the opt-out provision in the rules.

Hon. Henry Coke Morgan, Jr. (E.D. Va), 98-CV-169: Objects to elimination of opt-out provision. "[I]t seems apparent that there is a movement to eliminate the local rules entirely. It is clearly the objective of large multi-state law firms to create a single set of national rules. This proposed change is a step in the direction of ceding the control of the court's docket from the judge to the attorneys." Each district has different problems and should be given the latitude of opting out of Rule 26 "and similar discovery rules."

Hon. Richard A. Enslin (W.D. Mich.), 98-CV-170: Writes to relay the unanimous opposition of the judges in his district to the abolition of the opt-out. The proposed amendment would interfere with this district's differentiated case management practices. The practices were developed when the district was a demonstration district under the CJRA, and obviously Congress intended that the rulesmakers pay attention to the demonstration districts in fashioning future approaches to case management. But the proposed amendments don't show any effort to do so, and instead would impede this court's practices. A principal rationale for uniformity is concern for practitioners who appear in more than one district. We consider this concern to be exaggerated. The 1995 amendment to Rule 83 requires that local rules be numbered in a consistent way, so the outsider can find pertinent provisions without difficulty.

Hon. Claude M. Hilton (E.D. Va.), 98-CV-171: Writes to express the views of the judges and bar of the E.D. Va. None of the judges favors a change that would eliminate the opt-out provisions.

Prof. Ettie Ward, 98-CV-172: Fully supports the changes which reduce the opportunity for nonuniformity in the federal rules. With the sunset of the CJRA, there is no longer a need to defer to local variations. Moreover, the fact that some districts

opted out of provisions that did not permit that local variation shows there is a need for action. This change would return to the original vision of the Federal Rules.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) The proposals will reduce confusion arising out of varying local court practices.

Gary M. Berne, 98-CV-175: The empirical data gathered by the FJC do not support the Advisory Committee's statement that adopting a uniform national rule has "widespread support." Although that was the second most desired change, even the most desired change received the support of only 18% of respondents.

Hon. Robert E. Payne (E.D. Va.), 98-CV-176: Abolishing the opt-out provision would strip Rule 26(a)(1) of the only legitimacy which it enjoys because the opt-out is the only reason it was approved by the Supreme Court and Congress. Given these circumstances, it is a "fundamental distortion of the record to argue . . . that the initial disclosure provision is imbued with the mantle of uniformity which attends the promulgation of most federal rules." Moreover, the empirical data do not support the proposal to eliminate the opt-out provision, because a study based on the responses of only 1,000 lawyers "is a statistically insignificant basis upon which to reach any valid conclusions because it represents such an insignificant fraction of the lawyers in practice in federal court." The FJC study is also defective because it asks about "concerns" about disclosure without defining "concern." A significant impetus for abolition of the opt-out provisions is the desire of large law firms to avoid the need to learn, and to conform with, local disclosure rules. Certainly, it is not asking too much of lawyers who desire to practice in different courts to learn and obey the rules of those courts. If litigants don't understand why the rules are different in different places, "[i]t is the responsibility of lawyers to explain that relatively simple proposition to their clients and, if that task is not performed successfully, it is the fault of the lawyers, not of any provisions of the rules of procedure."

Hon. Leonie M. Brinkema (E.D. Va.), 98-CV-177: Opposes the change because it would slow the district's civil docket. The local bar was so concerned about this prospect that it sent a

representative to testify at one of the Committee's hearings. Slowing down the E.D. Va. docket runs counter to the Congressional goals of reducing delay and expense. This "one size fits all" view is a serious mistake. Our federal judicial system is strengthened by the ability of individual districts to experiment with new ways of conducting business.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: The proposed elimination of the opt-out ignores the fact that different courts need different rules for their respective cases.

Greg Jones, 98-CV-179: Opposes elimination of opt-out power. W.D. Ark. has opted out. Mandatory disclosure originated in the seedbed of discovery abuse, and the lawyers who practice there now want to export their remedial steps to areas of the country that have no such culture. The concern about familiarity with varying local practices seems a silly ground for removing the ability to opt out. The concern that clients are bewildered is farcical. He has never met a client who would oppose economizing on discovery costs.

Public Citizen Litigation Group, 98-CV-181: Although we generally support uniformity in the discovery rules, Rule 26(a)(1) is still relatively new and there has not been sufficient experience with it to evaluate whether requiring initial disclosures is preferable to permitting the use of traditional discovery devices from the outset of litigation. Therefore oppose making it mandatory at this time. Requiring all districts to implement the same disclosure scheme will make it more difficult to evaluate whether requiring initial disclosures is beneficial because there will be no opportunity to compare the experience of districts that have one version with those that have another. The 1993 amendments reflected a deliberate decision to permit this sort of experimentation, and that should not be reversed until there is more evidence about whether it reduces the cost. Regarding requests for admissions, however, the Group opposes continuing the authority to adopt local rules limiting these matters. They are underutilized and are not readily susceptible to abuse. Moreover, if national uniformity is a goal these should be treated the same in all districts.

Michigan Protection & Advocacy Service, Inc., 98-CV-184:

Supports deleting the opt out provisions, insuring uniform application of Rule 26(a)(1) throughout the country.

Federal Practice Committee, Oregon State Bar, 98-CV-185:

Endorses the opposition of the Local Rules Advisory Committee to abrogating the opt-out provisions (attached).

New Hampshire Trial Lawyers Assoc., 98-CV-186: D.N.H. opted out, and that decision was well founded and supported. Disclosure has not been an unqualified success, and the original criticisms remain valid. Opposes the change.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposes the change. Most lawyers do not like disclosure.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: "The current rule seems to be working well. The fact that a large number of districts have opted out of the mandatory disclosure requirement is evidence that in many districts such a requirement is not necessary and may in fact be counterproductive."

Philadelphia Bar Assoc., 98-CV-193: Supports uniformity. The differences among the districts have made a national practice difficult. In their astonishing proliferation and variety, these local differences have become dangerous traps for the innocently uninformed or, at least, an unnecessarily cumbersome burden for multi-district practitioners.

Washington Legal Foundation, 98-CV-200: Agrees that it is crucial to eliminate the balkanization of discovery rules that has developed since the 1993 amendments. Presently, litigators who practice in more than one district are largely confused regarding the disclosure requirements imposed on them in any given case. This confusion has led to considerably less disclosure than would have occurred under any reasonable, uniform system. It is less important what particular disclosure requirement is ultimately adopted than that the requirement apply nationally.

Trial Lawyers for Public Justice, 98-CV-201: Currently there is inordinate procedural diversity on disclosure in the district courts. The sheer diversity of procedures has sadly balkanized the federal system. In some parts of the country, parties take

the responsibility to disclose seriously, but in others they do not.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Removing the opt out provision and applying disclosure nationwide is a step forward.

Hon. Stanwood R. Duval, Jr. (E.D. La.), 98-Cv-206: Districts should retain the right to opt out. Disclosure is superfluous since interrogatories and requests for production will be propounded anyway.

Hon. Marvin E. Aspen (N.D. Ill.), 98-CV-207: Opposes removal of opt-put authority. This district's experience without disclosure has been a happy one, for attorneys can ask for initial disclosure if they want it, and the court can so order. More generally, the court is not anxious to provide contentious litigants with another area to dispute. Discovery presently works well in the district, which has the shortest average case disposition time of any major metropolitan district.

Hon. T.S. Ellis, III (E.D. Va.), 98-CV-209: Strenuously objects to removal of opt-out authority. His service on the Standing Committee made him aware that rule changes are carefully and thoroughly considered. But there is absolutely no showing that elimination of the opt out provision will yield benefits. "I continue to be puzzled by the mindless advocacy of national uniformity in all rule-making details and minutiae. Insistence on blanket uniformity ignores the positive aspects and characteristics of local legal cultures, which surely exist." In an addendum Judge Ellis concurs in the views of Judge Payne (comment no. 176) and of Judge Panner.

Hon. Lawrence P. Zatkoff (E.D. Mich.), 98-CV-212: On behalf of all the judges of the district, opposes mandatory initial disclosure without the ability of the district to opt out. This district opted out, and believes the change would be both unwarranted and unnecessary. If mandatory disclosure is imposed, it may undermine discovery cooperation and lead to many more discovery disputes.

Federal Courts and Practice Committee of the Ohio State Bar Assoc., 98-CV-213: Uniformity for its own sake is a hollow

principle, and the reasons for eliminating opt out authority are not persuasive. Although the two districts in Ohio took different approaches, the bar has not suffered from this lack of uniformity. After all, Ohio has 88 different counties with their own local courts, and their practices vary. The suggestion that clients can be bewildered by conflicting obligations in different districts is farfetched.

F.B.I., 98-CV-214: Opposes the change because it will have a negative impact on cases affecting the FBI and its employees, the majority of which are dismissed on the basis of procedural motions before discovery.

Exec. Comm., Federal Bar Assoc., W.D. Mich., 98-CV-215: Opposes elimination of opt out. These proposed rules would negate a case management program in this district that has worked well for litigants.

Michigan Trial Lawyers Assoc., 98-CV-217: Supports the change toward greater uniformity in discovery rules.

Comm. on the Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218: Opposes elimination of opt-out. The S.D.N.Y. judges concern has been borne out by anecdotal experience by Committee members with automatic disclosure in other districts. But the Committee does support threshold disclosure of "witness lists and damages computations."

Fed. Practice Comm., U.S. Dist. Ct., N.D. Iowa, 98-CV-219: The overwhelming majority of attorneys practicing in the federal courts in this state oppose the proposal to eliminate the opt-out provision. The discovery process presently works as it should in this state's district courts.

Helen C. Adams, 98-CV-220: Concurs in comments of Federal Practice Comm. for N.D. Iowa (comment no. 219). "We subscribe to the adage that 'if its not broken, don't fix it.' Litigation in our federal courts has proceeded smoothly without the mandatory disclosure requirement."

Hon. Stephen M. McNamee (D. Az.), 98-CV-221: Supports making initial disclosures mandatory. He actively manages a large civil docket and enforces the current rule. He has not found that it

is onerous or misplaced. He has found that there is little gamesmanship and few disputes because the rule is clear. Moreover, it forces the parties to look at the case realistically.

Hon. James L. Graham (S.D. Ohio), 98-CV-222: Strongly feels that mandatory initial disclosure complicates the discovery process and breeds unnecessary discovery disputes. Therefore opposes eliminating opt out rights.

Michael E. Kunz, Clerk of Court, E.D. Pa., 98-CV-224: Believes that the best course of action is adoption of nationwide rules of discovery that no court or judicial officer can opt out of. In his court, the court as a whole opted out, but four individual judges opted back in. Discussion at Advisory Group meetings leads him to the position that uniformity is necessary in order for counsel to act with total confidence in litigating in the federal courts.

National Assoc. of Independent Insurers, 98-CV-227: Supports the change. The general elimination of local rules standardizes the federal court system, which provides consistency to the parties litigating there.

Jon Comstok, 98-CV-228: Supports the change. The proliferation of local rules and individual judges' "standing orders" has contributed greatly to the cost of litigation.

Edward D. Robertson, 98-CV-230: "Executive Branch bureaucrats have long tried to write one-size-fits-all rules without success in most cases; the federal judiciary ought to learn from that experience and allow district judges to manage the cases as needed."

Martha K. Wivell, 98-CV-236: Supports the recommendation for uniformity.

Hon. James C. Cacheris (E.D. Va.), 98-CV-245: Joins other judges in opposing the requirement for disclosure without opt-out provision. This district has operated efficiently without disclosure, and it is difficult to have a "one size fits all" rule. Local conditions ought be permitted to control.



Hon. Gerald Bruce Lee (E.D. Va.): Opposes elimination of the opt-out provision because it would result in negative consequences in his district. Districts that have successful delay reduction programs should be allowed to opt out.

Hon. Rebecca Beach Smith (E.D. Va.): Joins her colleagues in strongly opposing elimination of the opt-out authority. These proposals would only delay the docket in her district.

Standing Comm. on U.S. Courts of State Bar of Mich., 98-CV-250: At a regularly scheduled meeting of the committee, members present voted unanimously to oppose elimination of the power to opt out of disclosure. Disclosure would add to the litigation burden and result in motion practice.

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) The elimination of the opt out power is a welcome change.

Hon. Ernest C. Torres (D.R.I.), 98-CV-252: On behalf of all the judges of the court, expresses opinion that the proposed requirement of mandatory disclosure would be undesirable. It results in needless disclosure of information that may not be of interest to the parties. It also creates another layer of contentious litigation.

Hon. Jerry Buchmeyer (N.D. Tex.), 98-CV-259: Opposes the amendment. In his district disclosure has not worked. Agrees with Judge Barefoot Sanders (comment no. 138).

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) Navistar supports uniformity of discovery procedures in all federal jurisdictions. Otherwise the committee's efforts to curb discovery abuse could be too easily thwarted.

Hon. Raymond A. Jackson (E.D. Va.), 98-CV-263: Opposes elimination of the opt-out provision and agrees with Judge Owen Panner and other judges of his own district. Elimination of the opt-out provision will undermine the effective management of dockets in districts such as E.D. Va., where the courts have adopted reasonable discovery procedures to decrease case processing time.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment in terms of a nationally uniform approach to the mandatory implementation of Rule 26.

### Testimony

#### Baltimore Hearing

Gregory Arneson, Tr. 30-45: (Representing New York State Bar Assoc. Commercial and Federal Litigation Section) Opposes expanding application of disclosure. The problem cases are the high stakes, complex commercial litigations, and in those cases disclosure does not work. Not sure that the opportunity to stipulate out or object will solve the problem. (Tr. 41-44)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Although he appreciates the need for uniformity, he would have preferred a rule abolishing disclosure altogether. In the Maryland state courts, the question whether to adopt disclosure like the current proposal was debated a few years ago, and there was unanimity among defense and plaintiffs' counsel that it should not be adopted. So he would prefer a uniform rule of no disclosure. (Tr. 53-54)

C. Torrence Armstrong, prepared stmt. and Tr. 106-17: The three chapters of the Federal Bar Assoc. of Norfolk/Newport News, Richmond, and Norther Virginia uniformly oppose the proposal to eliminate the opt-out feature of Rule 26(a)(1) and the parallel features in Rules 26(b)(2) and 26(d) and (f). These changes will have a negative impact on the operation of the E.D. Va., which has "the most effective docket management system in the United States." The district's local rules and scheduling orders do not permit delay, and the proposed changes would add delay. Disclosures would not go forward until two weeks after a conference, and perhaps also a hearing on objections. Therefore a case could remain in suspense for an extended period. In the E.D. Va. this does not happen, and judges frame their scheduling orders in accord with what will work best. Formalistic rules of the sort proposed are needed only to address the concerns caused by irresponsible lawyers or courts that do not manage their dockets efficiently. Most of the other changes proposed are probably salutary, but they seem to be essentially the same as

already followed in the practice of the E.D. Va. Indeed, the sort of disclosure required under the proposed amendment corresponds to the sort of things that discovery covers now in the district. The aggregate effect would add one to two months to the district's ordinary progress in a case. But there has been no formal study of the effectiveness of the Rocket Docket, which was not included as a pilot district under the CJRA. The whole thing depends on the credibility of the system, and these changes would impinge on it. You can't develop a rule that makes judges accessible, but they are in the E.D. Va.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26:

Endorses national uniformity and favors eliminating the opt-out authorizations from Rule 26(a)(1) and Rule 26(b)(2). But he senses that opposition to mandatory automatic disclosure remains firm and deeply rooted. Thus, although the proposed amendment limiting disclosure to supporting material is a positive step, it may be time to jettison the disclosure concept altogether. Fundamentally, the bar has not accepted the idea captured in the 1993 disclosure provisions. It has great theoretical appeal, but does not work in the adversarial system. The shift to disclosure only of supporting material is a step in the right direction. But the episode has been very painful for the bar, and it might well be better to scrap the idea altogether. Even in the E.D.N.Y, which started out with the 1991 version, disclosure was down-sized and didn't work the way they wanted it to work.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Strongly supports the effort to achieve greater uniformity in discovery procedures in all federal jurisdictions. Removing the opt-out authorizations can reduce confusion now resulting from diverse local standards, and reduce the burden imposed on counsel.

San Francisco Hearing

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) Lack of uniformity is a trap for the unwary, and is expensive. LCJ supports restoring uniformity to the federal judicial system.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell strongly supports national uniformity of discovery rules as proposed with respect to Rules 26(a)(1),

(b) (2) and (d). The current patchwork of varying rules leads to confusion, disparate results in similar cases, and potential traps, even for the vigilant. Such uniformity is desirable so long as the initial disclosure requirement is modified as proposed in the amendments. He is in the position of being both a lawyer and a client, in that he works in house. The problem is not just what lawyers have to face from district to district, but also that the parties themselves face these traps of trying to deal with broad differences among districts. This has proved quite difficult to handle.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Supports uniformity. The experiment with local rules regarding basic discovery and disclosure has been difficult to deal with for the practicing bar. Even in a state such as Alabama, there are three different federal districts, and three different local rules regarding discovery and/or disclosure. Multiplied by the myriad options among the districts nationwide, this shows that the ideal of one set of procedural rules for all federal courts has been dealt a serious setback. This effect runs counter to the promise of Rule 1 that the rules be construed and administered to achieve the just, speedy, and inexpensive determination of every action.

Charles F. Preuss, Tr. 60-67: This is a marvelous proposal to save time, expense and money for everybody. In the mass tort area, it is very frustrating to have to get everything straight in every district. It really streamlines litigation if lawyers can know that they are dealing with the same set of rules in all districts.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: Opposes making disclosure mandatory nationwide. The rules should not be changed for all cases based upon problems in exceptional cases. His district (D. Ore.) opted out of disclosure and has found this decision wise. Requiring adherence to the schedule prescribed in Rules 26(a)(1), 26(d) and 26(f) will delay litigation in his court and make it more costly. The proposals to require national uniformity are not based upon sufficient study. If the Committee can come up with a good rule, district judges will support it even if it isn't exactly what they might prefer for themselves. Right now, only about 50% of the courts have tried disclosure, and 83% of lawyers surveyed said that they didn't think that it saved money. As a result, district judges

are not satisfied that disclosure is the right answer. What lawyers want is access to judges, not disclosure. Rule 16 conferences should be earlier. We try to do that in Oregon, and we don't have any problem in our district. This disclosure requirement will delay things. Getting lawyers together, even on telephone conferences, will take added time. If one side objects to disclosure, there will be additional delay to resolve that dispute. There are no standards to tell the judge how to resolve objections to disclosure. Meanwhile, discovery is stopped, even if there is an urgent matter like a motion for a preliminary injunction. Even though there are as many reliefs as can be included, there's nothing to get the parties into court until there is a Rule 26(f) conference. At the conference, lawyers will have great difficulty determining what to disclose due to notice pleading. Determining what is impeachment evidence, for example, may be quite difficult. Anyone who makes a mistake and omits something from disclosure faces the risk of serious sanctions later in the case. In his district, they try to get the initial scheduling order in place as soon as possible, and he is concerned about delaying that process. The idea is for the judge to set up a telephone conference with the lawyers as soon as there is a response to the complaint by the defendant. Under the proposal, it won't be possible to get uniformity because there will be differences among judges about when to sustain objections to disclosure. In trying to get uniformity, we are rushing to judgment.

James Hiller, Tr. 87-97: (President of Oregon Chapter of Federal Bar Assoc.) Wants to emphasize how things are handled in his district. When a case is filed, they get an initial scheduling order that says discovery is to be completed in 120 days. Under the disclosure requirement, it would probably be 120 days before they even had their conference. Often the 120 days for discovery has to be extended, but there is a firm push right from the start to get to it and move the case. He can almost always get a motion scheduled in seven days. If he has a problem in the middle of a deposition, he can usually get an answer in about seven minutes. There is a local rule that encourages lawyers to make telephonic contact with the court about problems in depositions, and it has worked quite well. They have had pretrial disclosures like Rule 26(a)(3) for years and years. Most cases get to trial within 12 months. When the automatic disclosure system arrived in 1993, almost everyone thought it was

a bad idea. All the lawyers in Oregon could envision was another layer of discovery. Everyone would stipulate around the rule now proposed. He would object to an interrogatory asking him for all the witnesses that support his denials on the ground that it is overbroad. He sees no uniformity issue regarding traps for the unwary because his district is saying you don't have to do something, not that you do. The solution is to insist on two choices, no disclosure at all or the national rule regarding disclosure, and then there wouldn't be any problem of traps for the unwary.

Prof. Lisa Kloppenberg, Tr. 97-99: She has a lot of sympathy for seeking uniformity, but with discovery that doesn't seem such a big issue given that there are not discovery problems in most cases. The concern is delay and expense. We need better studies comparing districts that are doing disclosure with those that are not.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Supports the efforts to create national uniformity by eliminating the ability of individual district courts to opt out of the mandatory disclosure requirements by local rule.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) It is important that we have a national rule on discovery, not a rule of confederate states. The legal tender is one that should be understood by everybody so we don't engage in forum shopping or other games like that. Moreover, disclosure seems to be gaining currency in many places. In D. Mass., for example, after the district decided to opt out it developed its own rule that is even broader. (Tr. 127-28) We have reached a place where there has been sufficient experimentation.

Anthony L. Rafel, Tr. 130-40: (President of Fed. Bar Assoc. for W.D. Wash., and appearing on its behalf) Opposes elimination of local option. His district opted out, and has found that current practices work very well there. It has had an experience much like that in the D. Ore. The judges use differential case management to make things efficient. There is early alternative dispute resolution. There is already active case management, and no significant problems of cost or delay to be addressed in this district. The E.D. Wash. did not opt out, but there have not

been problems of confusion among lawyers in Washington as a result. To insist on uniform local rules will force individual judicial preferences underground, not end them. In that way, it will make it harder to find out what rules will be enforced in the court where you are appearing. The disclosure rule is highly controversial at the moment, and there is not sufficient empirical data to justify enforcing it where it is opposed.

Weldon S. Wood, Tr. 140-46: Uniform application of the rules across the country is essential. Lawyers should know what is required of them regardless of venue. When the rules are in harmony nationwide, it is possible to develop a nationwide body of precedent interpreting these uniform rules.

Gregory C. Reed, Tr. 146-55: Having national uniformity is very important. Otherwise people will forum shop for a court with discovery rules they like.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. counsel of Houston Indus., Inc.) Supports eliminating opt out authority. HII manages its litigation out of its Houston offices, so uniform national discovery rules will be beneficial.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (General Counsel, BASF Corp.) Strongly supports national uniformity. Heard statements of others about disclosure slowing cases down. He found that surprising since it seems to him to speed cases up. He has been particularly pleased with what he has seen in Dallas. (Tr. 172)

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: His preference would be to eliminate disclosure altogether, but imposing national uniformity and limiting disclosure to information supporting the claims and defenses is likely to eliminate the most troublesome aspects of disclosure, given the safety valves of stipulation and objection.

#### Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: Thinks that with regard to disclosure, there must be at least 50 variations. She had a handy pocket guide to the opt-in and opt-out districts for her nomadic practice. The goal of uniformity that is embedded in the

current proposal is very important and necessary because there is confusion. As a result, the rules that actually obtain in day-to-day litigation are really written down nowhere in any district. Courts and counsel tend to do what works, and to the extent that the rules are written to correspond to what works that will be a positive thing.

Paul L. Price, Tr. 16-25: (on behalf of Federation of Insurance and Corporate Counsel) Favors uniformity. The members of the organization find themselves conducting state surveys every time they come into this jurisdiction as opposed to that jurisdiction. All of this adds to the cost of litigation.

Daniel F. Gallagher, Tr. 39-47: If polled, lawyers in the N.D. Ill. would not favor disclosure, but he expects that some form of disclosure will be imposed on the district. The fact that the rules are not uniform does drive up the cost of litigation from the standpoint of the learning curve that lawyers must undergo. Clients can be prejudiced by running afoul of local rules in districts that are different from other districts. The non-uniformity has too often placed lawyers in situations where they risk being guilty of malpractice for unawareness of a local rule.

Andrew Kopon, Jr., prepared stmt. and Tr. 94-98: Here in Chicago things work well without automatic disclosure because the court tailors the discovery to the case.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: He is pleased that courts may not opt out of the initial disclosure requirements under the proposed amendments. National uniformity in discovery practice is a worthy goal and will add to existing mechanisms to discourage forum shopping.

Edwin J. Wesely, Tr. 101-05: (Chair of Comm. on Civ. Lit. in E.D.N.Y.) Commends the Advisory Committee for trying to assure that the Federal Rules of Civil Procedure are in fact national rules. Even with respect to successful local practices developed under the CJRA, his district elected to go with the national rules. The lawyers and judges in the E.D.N.Y were strongly of the view that mandatory disclosure had a positive effect on reducing cost and delay. They put the 1991 proposal into effect in their district. This strong version of disclosure caused parties to communicate with each other earlier than otherwise,



reduced contentiousness and thus reduced the need for judicial intervention in discovery. It also facilitated settlement discussions. On this score, nationwide, the FJC study is more useful than the RAND study in assessing disclosure because it was done more recently.

Gary D. McCallister, prepared stmt. and Tr. 109-13: Supports uniformity as to disclosure. In Kansas, the mandatory disclosure requirements worked well, and the cases were ready for trial in a year. Here in Chicago, he would ask for disclosure and would get virtually nothing.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) Opposes ending the opt-out because things work well in the N.D. Ill. This would result in further controversies, and some judges in the district are already having trouble keeping up with their calendars and ruling on all the motions. This will dump a lot of new requirements into the case. The N.D. Ill. has a very fine website for out-of-town lawyers to learn how it does things, so this should not present a problem.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Fully supports eliminating the opt-out provisions.

John H. Beisner, prepared stmt. and Tr. 147-54: In many ways the discovery practices of the different districts are all over the map. We may be reaching the point where the discovery/disclosure practices in state courts around the country are more predictable than those in federal courts.

Laurence Janssen, prepared stmt. and Tr. 154-60: Supports uniformity because he's worried about getting trapped in some jurisdiction he's not entirely familiar with.

Clinton Krislov, prepared stmt. and Tr. 171-77: In the N.D. Ill., the judges vary a great deal from one to another about how they handle discovery. One thing is true -- in this opt-out district a plaintiff has to fight to get any discovery. If somebody from Chicago goes to another part of the country that employs disclosure, there's a staggering difference. There is a rule that says defendant has to produce this stuff. Here in Chicago, defense attorneys who don't obstruct discovery get fired and replaced by lawyers who do obstruct. Unless there is an

overall rule in all the federal courts that this stuff has to be produced it won't be produced.

Daniel Fermeiler, Tr. 188-93): He has found that the activism in managing cases in the N.D. Ill. has been effective in dealing with discovery problems. Nevertheless, for a practicing lawyer, uniformity has its benefits. If one appears in jurisdictions that one does not ordinarily appear in, uniformity gives some refuge on knowing how to practice. Uniformity also alleviates forum shopping, or at least the perception of forum shopping.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Favours uniformity. Nowhere has the proliferation of local rules had a more pronounced impact, or a more negative one, than in mass tort litigation. The vast number of filings in different jurisdictions with different discovery rules translate into exorbitant and uncontrollable discovery costs. Squibb has to retain local counsel in every jurisdiction because of local differences. "The crazy-quilt of local rules and standing orders greatly increases discovery costs by confronting litigants with a Hobson's choice: either pay national counsel to spend significant time navigating the rules peculiar to each district, or hire local counsel in every venue in which an action is filed."

Chris Langone, Tr. 251-259: (appearing on behalf of Nat. Assoc. of Consumer Advocates) NACA strongly supports eliminating the local opt-out.

Kevin E. Condron, Tr. 259-67: National uniformity should reduce costs to corporate litigants, particularly in conjunction with the narrowed disclosure rule.

Rex K. Linder, prepared stmt.: Reestablishing national uniformity of discovery rules is welcome. It lessens the burden imposed on counsel to vary disclosure practices depending upon local rule. This will reduce confusion and acknowledges the recognition that lawyers are increasingly involved with litigation in multiple districts.

(b) Narrowing the disclosure obligation to supporting material

Comments

Alfred W. Cortese, 98-CV-001: (These comments--which reappear in regard to other topics--were submitted on behalf of the Chemical Manufacturers Assoc., the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Assoc. of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers and the Product Liability Advisory Council. This listing will not be repeated each time this comment is cited.) These groups' strong preference would be the elimination of prediscovery disclosure altogether and replacement with a sequenced core discovery process. They agree that, at a minimum, disclosure should be required only of material that will support a party's own position, and that the proposed change eliminates the dilemma that confronts counsel under the current rule.

Edward D. Cavanaugh, 98-CV-002: This change is to be commended. Mandatory automatic disclosure makes sense in the abstract, but has encountered too much resistance in practice to be effective. The amendment "may salvage whatever is worth keeping" in disclosure.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: The change does not solve the problem. "In order to determine which documents support its position, a party will likely have to review the same documents that it would review if it were producing documents 'relevant to disputed facts alleged with particularity.'" This review has to be performed when the case is in its infancy, and will likely lead to overproduction. Moreover, if "defense" means denial of plaintiff's allegations, disclosure under the proposed rule could be even broader than under the current version, which is limited to disputed facts alleged with particularity. This effort still resembles doing the job of opposing counsel. The Section is also opposed to Rule 26(a)(1)(C) (to which no amendment is proposed) because it is too difficult to make the required computations early in complex litigation. Finally, it also opposes production of insurance agreements as prescribed by present Rule 26(a)(1)(D). As was formerly the case, this should await a discovery request.

Maryland Defense Counsel, Inc., 98-CV-018: Would have strongly preferred a national rule abolishing disclosure. In Maryland, both the plaintiffs' and defendants' bar opposed disclosure. Admits that the revised rule is in some respects better than the current rule, but fears the removal of the particularity requirement. Strongly urges the committee to reinject into the rule or the Note the concept that a defendant's capacity to make disclosure is in direct proportion to the specificity of plaintiff's allegations.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "There is absolutely no need or logic in the attempt to force disclosure of anything that might be relevant to not just a party's claims or defenses, but the other side's claims."

Linda A. Willett, 98-CV-038: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Favors sequenced disclosure in which plaintiff would have to provide defendant with disclosure before defendant would have to provide anything. Concerned that current change could actually expand the disclosure requirements on defendants in some instances, and that elimination of particularity requirement would worsen the situation for a defendant. Therefore favors a phased disclosure process, but does not see that the current proposals implement that approach.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Supports the narrowing of disclosure. The present rule jeopardizes the attorney-client relationship because it requires the lawyer to reveal what is discovered about the client regardless of whether it is good or bad. The narrowed language would avoid this problem.

James A. Grutz, 98-CV-040: "[T]he whole idea of 'discovery' is destroyed with this proposal, and harmful information can be hidden."

Thomas J. Conlin, 98-CV-041: The change would gut the benefit of the disclosure rule. If there is to be mandatory disclosure, it should not be so lopsided in favor of producing party.

Scott B. Elkind, 98-CV-042: The change will lead to abuse. The process of litigation should not be a game of "hide and seek,"

where documents are submerged and produced only upon special request. The current version of disclosure should be given full effect, backed by sanctions.

John Borman, 98-CV-043: "[T]his rule change is ludicrous, because the proposed narrowing of the rule runs counter to the entire purpose of the mandatory disclosure rule, and will make it even less productive, informative, and useful than it already is." It will free defendants from a significant portion of their mandatory disclosure obligations.

Donald A. Shapiro, 98-CV-044: Mandatory disclosure should require disclosure of all relevant information. How otherwise is the opponent to obtain information? Moreover, the change would make the responding party the arbiter of what constitutes discoverable material. Mandatory disclosure should remain as it is.

Michael J. Miller, 98-CV-047: The change would be harmful to any individual seeking redress from the federal courts. The entire purpose of discovery is to require full disclosure.

ABA Section of Litigation, 98-CV-050: Views the proposal to be a substantial improvement over the 1993 version because it eliminates the need to disclose information supporting an adversary's claims or defenses without an appropriate discovery request. This was a major objection to the 1993 version.

Ellen Hammill Ellison, 98-CV-054: Opposes the change. In some cases it would cripple the plaintiff's ability to discover vital evidence usually withheld until court orders force production.

Richard J. Thomas, 98-CV-057: (On behalf of Minn. Defense Lawyers Ass'n): Strongly supports narrowing the scope of disclosure. The current rules create an unsolvable conflict of interest for counsel who are required to disclose adverse information.

Laurence F. Janssen, 98-CV-058: This amendment is good as far as it goes, but he questions whether disclosure really narrows issues or saves time and money. Phased discovery is more efficient and less costly.

Charles F. Preuss, 98-CV-060: This change will eliminate one of the most fundamental objections to the present rule and should be adopted. A party should not be required to make the adversary's case or to speculate as to the meaning of the adversary's pleading. He urges the Committee to go beyond the present recommendation to consider a sequenced discovery process.

Lawyers' Club of San Francisco, 98-CV-61: Opposes the change. This revision would constitute a step backward. There does not appear to be any strong justification to alter the existing disclosure obligation. Allowing parties to withhold damaging information from the initial disclosure would impede early resolution of litigation and increase the burdens and costs of discovery.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes narrowing the disclosure rule. Disclosure has worked well in this district, and can work well in others. Judges in this district were strongly of the view that the current version of disclosure has had a positive effect. Lawyers had a more mixed view. The district's rule tracked the language in the 1991 Advisory Committee proposal, and was broader than the one adopted nationally in 1993.

Michael S. Allred, 98-CV-081: Opposes the change. "The idea that in an initial disclosure a defendant is not required to disclose information which he deems to be harmful to his position is grotesque."

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the revision of the scope of disclosure as a good balance between competing arguments in favor of the broadest disclosure provisions and against disclosure altogether.

Frank Stainback, 98-CV-093: Limiting the scope of disclosure is a welcome change. The present rule requires counsel to practice his or her adversary's case, a concept that runs counter to our system of jurisprudence.

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) The amendment replaces terms that are well understood in practice and the case law--"relevant to disputed facts"--with a potentially problematic new term that is not

easily susceptible to interpretation. The new standard will require judicial construction and clarification, and will place undue emphasis on the pleadings, which can be drafted in an expansive or restrictive manner to suit a party's interests.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Supports the change, which would avoid the concerns of the bar.

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Pleased to see the narrowing of the disclosure obligation.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. The experience of NACA members with the current rule is that it is virtually impossible to obtain inculpatory information without a discovery fight. Accordingly, concerns about misbehavior by defendants prompt fights about disclosure. In these cases, the cost of formal discovery for information helpful to plaintiffs may be too great, so retaining the disclosure requirement as to that information is important. Limiting the obligation to supporting information makes it unimportant since a party always has an incentive to disclose its supporting information. But even there the proposal has a gap for impeachment information, and that exception should be deleted. The fact that impeachment information is exempted from pretrial disclosures under Rule 26(a)(3) is inapposite, because that is limited to what the party intends to use at trial. No similar reason exists for cloaking otherwise-discoverable impeachment information as exempt from disclosure.

Hon. David L. Piester (D. Neb.), 98-CV-124: Expresses concern about the exemption of "impeachment" materials from disclosure. He has found that lawyers will try to excuse their failure to disclose on the argument that the information is to be used in the rebuttal case. In his district, the court adopted a definition to deal with the problem: "'Impeachment' shall mean only (1) to attack or support the credibility of a witness or (2) to attack or support the validity of or the weight to be given to the contents of a document or other thing used solely to attack or support the credibility of a witness. It does not include evidence which merely contradicts other evidence."

Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article

Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals, 52 SMU L. Rev. 229 (1999), which contains observations about the proposals) Although this change is politically understandable given the vehement opposition of the defense bar to automatic disclosure, it is also apt to result in the disclosure of less information, both initially and after formal discovery. By eliminating the tie to pleading with particularity, however, the amendment may work in favor of plaintiffs by broadening subjects on which defendants are required to make disclosure. More significantly, this change partly undoes a tradeoff of 1993, which tied numerical limits on discovery events to the introduction of disclosure.

Walt Auvil, 98-CV-140: There seems no logical reason to support a requirement that disclosure be limited to positive information. One of the prime goals of discovery should be to encourage all parties to realistically evaluate the case and thereby improve the chances of settlement.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: Tightening the scope of the disclosure obligation to items supporting a party's claims or defenses mends a serious infirmity in the present version of Rule 26(a)(1).

Seventh Circuit Bar Association, 98-CV-154: Concurs in the proposal to narrow the scope of disclosure to include only information that supports a party's position.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Favors the change to limit disclosure to supporting information. (Note that the Association also favors retaining the opt-out provision.)

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: The initial disclosure amendments are highly desirable. The Chapter endorses these changes. (Note that it also favors retaining the opt-out provision.)

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorses the change. It addresses the most serious objection to the present rule, from which the D. Conn. opted out, because a lawyer is no longer required to turn over the "smoking gun." (The Section did, however, state its opposition to Rule 26(a)(1)(C).)



Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the change as an improvement on the existing rule. What is relevant to opposing counsel is best left for determination by that counsel and reliance on opposing counsel for full and complete disclosure often results in counsel being misled.

Richard C. Miller, 98-CV-162: Opposes the change. Defendants do not disclose what they are supposed to provide under the current rule. But to change the rule to solve this problem in effect eliminates the rights of the party who needs the material. "If you are going to change Rule 26 to require the production of only favorable documents you might as well eliminate voluntary disclosure entirely."

Philip A. Lacovara, 98-CV-163: Favors the change. It is fair and practical, and reflects the proper balance in the adversary system, leaving it to each side's counsel to decide what evidence supports that party's case.

William C. Hopkins, 98-CV-165: Opposes the change. If plaintiff uses "notice" pleading and pleads no specific facts, there is little burden on the defense; the defendant simply supplies information on those facts that are clear. The change suggests that stonewalling will again be countenanced. Moreover, it is not always possible to determine what is helpful and what is harmful.

Timothy W. Monsees, 98-CV-165: He had strenuous objections to disclosure when first adopted, but it has been fairly innocuous to plaintiffs. He can't think of any situation in which a party really complied with the requirement to supply harmful information. "My overwhelming reaction is a big yawn."

Mary Beth Clune, 98-CV-165: The change is not necessary. "We never have the luxury of a defense attorney 'doing our work' as stated in the advisory committee report." There is never a problem with the defendant supplying the documents that support its position.

Prof. Ettie Ward, 98-CV-172: Believes that we are moving too quickly, and for the wrong reasons, in modifying the disclosure requirements. The experience with the 1993 provisions is actually quite small, and all we can conclude is that disclosure

is neither as bad as its critics feared nor as helpful as its proponents hoped. The proposed changes do address some concerns with the 1993 rule, but water it down so much as to raise serious questions as to whether any discovery would be eliminated or discovery costs reduced. If these effects don't happen, the rule may actually increase costs.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) The disclosure requirements should be conditioned on the specificity of the allegations in the complaint.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: Opposes the change. If disclosure is a good idea (an open question), the change would reduce the usefulness of mandatory disclosure. RAND found that disclosure reduced attorney work hours only when it required revelation of harmful as well as helpful information. Moreover, the disclosing party would still have to sift through the information to select items subject to disclosure, and then make the further determination not only whether it was relevant but also whether it was supporting information.

Trial Lawyers Association of Metropolitan Washington, D.C., 98-CV-180: Opposes the change. Supporting information is going to come out sooner or later anyway. This change encourages the attitude that a party is allowed to hide harmful discoverable information and give it up only grudgingly after an exhausting war of attrition.

Public Citizen Litigation Group, 98-CV-181: Although the Group was among those who opposed adoption of disclosure in 1992, we believe that these amendments are premature and likely to make the rule worse rather than better. The scope of disclosure should not be curtailed. In 1993 numerical limitations were imposed on interrogatories in the expectation that disclosure would provide a substitute source of information, but to date disclosure has not reduced the need for interrogatories. The narrowing of disclosure will exacerbate this problem. In addition, it favors sophisticated litigants with superior control over witnesses and documents, and endorses a "hide the ball" approach to litigation that is inconsistent with the Rules' objective of promoting the resolution of disputes based on the merits rather than the skill of the lawyers.

Association of Trial Lawyers of America, 98-CV-183: Opposes narrowing disclosure. This would mean that further discovery would be needed every time the pleadings are amended.

Michigan Protection & Advocacy Service, Inc., 98-CV-184: Opposes narrowing the scope of disclosure. Efficient and economical discovery is best promoted when full and complete disclosure is made at the earliest stage of the case. To narrow disclosure weakens the position of the party with the burden of proof.

James B. Ragan, 98-CV-188: "By limiting Rule 26 to only positive information the rule becomes useless. . . [S]imply abolish Rule 26, since with your rule change it becomes meaningless."

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This is anathema to the rules of discovery.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: Although abolishing mandatory disclosure is preferable, if disclosure is to be mandated, then why should it be limited to supporting information only? This will only generate more discovery disputes and motions.

Philadelphia Bar Assoc., 98-CV-193: Takes no position. Many members agreed with the revision as properly eliminating an intrusion upon attorney-client matters, but others believed that disclosure would not serve a useful purpose if limited to helpful materials, which most litigants disclose happily anyway.

James C. Sturdevant, 98-CV-194: "This revision would constitute a significant step backward. There does not appear to be any strong justification to alter the existing disclosure obligation. . . . [T]he proposed amendment is very likely to lead to increased game playing and abuse in the discovery process."

Maryland Trial Lawyers Assoc., 98-CV-195: Opposes the change. Ultimately the harmful information will be disclosed through the ordinary course of discovery. It seems wasteful to permit a party to conceal such evidence until uncovered through the use of the various discovery tools when the information is otherwise discoverable.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no.

196 and is not separately summarized) . This is one of the all-time bad ideas in American jurisprudence. Very little discovery is needed to support a party's position. What is always needed through discovery is information that is damaging to your opponent's position.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198:

Opposes narrowing the disclosure obligation, noting that in 1993 the numerical limitations on certain discovery activities were tied to the introduction of disclosure and that curtailing disclosure calls for lifting those limitations. But those limitations are now to be imposed nationally at the same time that disclosure is narrowed. Views the new standard as narrower because it looks to claims and defenses rather than factual disputes at issue in the case. In civil rights cases, the new form of disclosure would yield little information from defendants. The current rule works well where it has been implemented, and there is no basis for shrinking from national application of the current rule nationwide. The change overtly benefits the party who understands the litigation better, who will be the defendant in most civil rights cases.

Arizona Trial Lawyers Assoc., 98-CV-199: This change would significantly hamper discovery by the party who does not control the documents. In product liability and bad faith cases, most information is controlled by the defendant; in discrimination cases and other types of personal injury cases, most of the harmful information is controlled by the plaintiffs. In Arizona state court harmful information must be produced, and this has proved effective. The narrowing of disclosure will encourage litigation about additional discovery.

Washington Legal Foundation, 98-CV-200: The change adopts the proper level of disclosure. Under the present rule, litigants adopt wildly different interpretations regarding what needs to be disclosed, which has resulted in unfairness to parties who have been conscientious in following disclosure.

Trial Lawyers for Public Justice, 98-CV-201: This will eviscerate the usefulness of disclosure. TLPJ supports disclosure, but all too often the rule produces little real disclosure. If the proposed amendment is adopted, responding parties could easily provide next to no meaningful information.

Moreover, the change "is arguably an endorsement of the stonewalling ethos."

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Narrowing the scope of disclosure makes sense. This more relaxed rule, plus half a decade of good experience with required disclosures in districts such as D. Minn., will prompt a move toward similar disclosure in state courts.

Sharon J. Arkin, 98-CV-204: This essentially renders the initial disclosure meaningless. In the context of insurance bad faith law, for example, the "supportive" documentation will consist of the insurer's self-serving letters to the insured and "expert" reports or letters which support the insurer's denial. Those documents are generally received by the insured from the insurer before litigation is filed. At a minimum, the insured needs the entire claim file, the underwriting file, the claims manual and, in some cases, the underwriting manuals. Since that information is often withheld in response to basic discovery requests, it is not reasonable to believe that the complete universe of those documents will be voluntarily disclosed at the initial disclosure. If they are not, the disclosure is pointless.

Nicholas Wittner, 98-CV-205: (on behalf of Nissan North America) This will not streamline discovery and will likely spawn ancillary sanctions motions and needless expense. The committee has unhooked the automatic disclosure requirement from the mooring of "facts alleged with particularity in the pleadings."

Montana Trial Lawyers Assoc., 98-CV-216: Opposes the change. The initial disclosure requirement reduces the time, effort, and expense involved in conducting discovery. The amendment will do nothing to reduce the overall cost of discovery. It will have the opposite effect, for discovery will be necessary for information that is now disclosed.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the change. It would undermine the utility of the mandatory disclosure rule and send a harmful signal.

Stuart A. Ollanik, 98-CV-226: Opposes the change. The results of disclosure have been positive, as they were in states that

tried this approach before 1993. But those who opposed the 1993 amendments are back, with no supporting data, and with the same arguments previously rejected not only in 1993, but in 1937 as well.

National Assoc. of Independent Insurers, 98-CV-227: Favors the change. It will eliminate needless inquiry to information that has no bearing on the claims or defenses.

Jon B. Comstok, 98-CV-228: Strongly supports the change. The 1993 rule always seemed contrary to the premise of our adversary system. Asking a party to simply produce "supporting" material is not offensive, whereas the current rule is offensive. Thinks an unanticipated upside is that attorneys will work harder at full compliance, whereas his experience in over ten jurisdictions is that most attorneys in commercial litigation simply see the current rule as a paper hoop they have to jump through.

Edward D. Robertson, 98-CV-230: This is short-sighted in view of the narrowing of discovery. He finds the changes nearly comical, for it is clear to those who regularly join battle with big industry that it is nearly impossible to get defendants to reveal harmful information even with well-focused discovery.

Martha K. Wivell, 98-CV-236: This change would defeat the concept of mandatory disclosure.

Jeffrey P. Foote, 98-CV-237: "I see no legitimate purpose in limiting the initial disclosure to those documents that support the parties' claims or defenses. That is not meaningful discovery at all."

Matthew B. Weber, 98-CV-238: Eliminating initial disclosures except for that material which supports the disclosing party's position simply allows a party to hide damaging materials until the other side specifically asks for them.

Anthony Z. Roisman, 98-CV-240: There is no reason, except preventing disclosure of the true facts, for failing to require that all relevant information be produced. "Imagine how much less time and expense would have had to be expended in discovery had the tobacco companies been subject to and had they complied with the current Rule 26(a)(1)(B) when they were first sued for

damages by a smoker."

Norman E. Harned, 98-CV-241: The change is beneficial and should be adopted.

Eastman Chem. Corp., 98-CV-244: Supports the proposal. This is necessary to bring some rationality to the initial disclosure concept.

NAACP Legal Defense Fund, 98-CV-248: Opposes narrowing the disclosure duty. In the tactical context of litigation today, this will encourage defense counsel to read the plaintiff's claims as narrowly as possible, and to furnish information about its defenses as narrowly as possible also. The broader disclosure required by the current rule does not require a party to do its adversary's work. Rather, disclosure moves away from the concept of litigation as a sporting contest and levels the playing field for both sides.

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: Worries about exempting material that casts doubt on a claim or defense and exempting impeaching material. Some evidence, after all, both supports and undercuts claims and defenses, but the rule makes no provision for that. (Note that when contacted by the Special Reporter about a different matter, Magistrate Judge Eliason brought up the revision of Rule 26(a)(1) and, after discussing it, related that his misgivings were satisfied on the basis that it was not a limitation on the right to do formal discovery but only an initial disclosure obligation.)

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) The proposal wisely eliminates the controversial requirement of punishing a client for hiring a diligent attorney who ferrets out material helpful to his adversary without even a request for such information by the adverse party.

Warren F. Fitzgerald, 98-CV-254: Narrowing the scope of discovery will encourage parties to make selective determinations about what they regard to support their respective claims and defenses. This will result in less fairness in the application of initial disclosure.

Anthony Tarricone, 98-CV-255: This change will make it easier for parties and their counsel to decide unilaterally that documents and data are not discoverable, and opposing parties will consequently never see the relevant evidence.

Annette Gonthier Kiely, 98-CV-256: Opposes the change. It will provide a further shield for defendants to legitimately withhold and fail to identify witnesses and evidence which are most relevant and germane to the claims brought by the plaintiff. The current requirement of disclosure regarding disputed facts alleged with particularity is the core of the disclosure rule. Narrowing the disclosure requirement will guarantee that there must be more costly, protracted discovery.

David Dwork, 98-CV-257: Opposes the change. It will have the undesirable effect of limiting the ability to obtain valuable documents and data that may be critical and are often in the opposing party's exclusive control

William P. Lightfoot, 98-CV-260: Opposes the proposal. Supporting information will come out sooner or later anyway. This proposal is at best unnecessary, and at worst encourages the attitude that it is all right to hide harmful information.

New Mexico Trial Lawyers Ass'n, 98-CV-261: If mandatory disclosures are to provide the benefit of streamlining the discovery process, disclosure of harmful material must be retained.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The change may improve disclosure, but Navistar doubts that the idea is useful. Navistar strongly urges that sequenced core and expert discovery be substituted.

U.S. Dep't of Justice, 98-CV-266: If initial disclosure is retained, the Department supports the proposed change for the reasons offered by the Advisory Committee. But it thinks that disclosure has often resulted in unnecessary, duplicative disclosure, especially when there are dispositive motions on jurisdictional, constitutional or statutory grounds that do not require disclosure to resolve. The Department would support a presumption that there be no disclosure until a specific period, such as 30 days, after an answer is filed. Certainly 14 days



after the Rule 26(f) conference is too soon in some complex cases.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section believes that the proposed standard might present complications. Whether a particular document or witness generally helps or hurts a party's case may not be clear at the outset. Whether the witness or document has information relevant to a disputed fact pled with particularity is a more objective standard. In addition, the proposed standard would broaden the scope of disclosure in some circumstances. The change would not narrow the scope of formal discovery, moreover.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee is concerned that the standard is different in Rule 26(a)(1) and (b)(1). Suggests that both should say that the scope is "relevant to the claims or defenses plead by any party." The Committee opposes excluding impeachment material from the scope of disclosure. Those members of the Committee who have experience with disclosure are concerned about limiting disclosure to supporting information because that might rob the requirement of its ability to reduce discovery disputes later on. The reason for opposing the impeachment exclusion is that impeachment material is subject to discovery, and is highly effective in bringing cases to an early settlement.

### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI's strong preference would have been to eliminate initial disclosure and replace it with sequential disclosures, but it agrees with limiting such disclosure to supporting documents. This should reduce costs while not sacrificing the attorney-client privilege or work product protection.

Allen D. Black, prepared stmt. and Tr. 18-30: Thinks that the current proposal is fine (Tr. 21).

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense

Counsel) Concerned about the abolition of the particularity requirement. Offers example of accident involving an RV driven by "a couple from the Orient" who had never been in this country before, and who set the vehicle on automatic cruise control to have tea, resulting in an accident. If the complaint contains none of this information, and only alleges that the vehicle was unreasonably defective, should defendant have to provide disclosure even of "supporting information?" (Tr. 56-58)

Brian F. Spector, prepared stmt. and Tr. 64-80: Finds that a witness list without some detail about the subjects of the witness's knowledge not to be sufficiently helpful, particularly in an era with numerical limits on depositions and interrogatories. It would be good to require that the substance of the knowledge be included, not just the subjects. (Tr. 76-77) His district has had mandatory disclosure of supporting information for 15 years, and there has not been a problem distinguishing supporting information from other information for purposes of this local rule. (Tr. 79)

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the change as a first step. At a minimum, disclosure should be required only of materials that support the disclosing party's case. But the changes should go further and require sequenced disclosure. Setting forth the supporting materials at the outset sets a bull's eye for the case that can help focus later efforts.

#### San Francisco Hearing

Maxwell Blecher, Tr. 5-14: Endorses the change to disclosure, which brings those requirements into accord with actual practice. That is constructive. (Tr. 5)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) Supports the change. The current "relevant to disputed facts alleged with particularity" standard is too vague. It also requires a defense attorney who knows the weaknesses of the defense case better than anyone else to disclose information supporting those weaknesses. He does not think that sticking to the old standard for witness disclosure would be desirable, because that would still require a very great effort to identify witnesses in order to find if some have information that helps the other side. There might be some need

to interview widely under the current proposal to determine who has supporting information, but at least the incentives line up. He desperately will want to make sure that every good document and favorable witness is identified because otherwise there may be trouble later on for his client. But he probably will get an interrogatory asking for the identity of all persons with information about a particular subject, but usually that is limited to "most knowledgeable" people, so it is more manageable. (Tr. 21-23)

Diane R. Crowley, prepared stmt. and Tr. 36-47: The change will have a desirable effect in limiting the information subject to disclosure. In a trademark case handled by her firm, the breadth of the current requirement resulted in a very long list of people with knowledge of relevant information, and her firm felt obliged therefore to notice the depositions of these people. Had she been sending an interrogatory, she would only have asked for the "most knowledgeable persons" and would not have received such a long list. (Tr. 30-31) The result of the overlong list was beneficial in her case because the judge ordered that all the listed individuals be produced for deposition in San Francisco, but the case illustrates that the current requirement is too broad. But she has not found that her pleading has changed due to the adoption of disclosure; she is not trying to expand the allegations or specificity of them.

G. Edward Pickle, prepared stmt and Tr. 47-60: (Gen. counsel, Shell Oil Co.) Limiting disclosures to supporting materials is a substantial advance in the right direction, though this can still prove difficult in complex cases. In those cases, it is difficult to anticipate the issues at the initial stage of litigation.

H. Thomas Wells, prepared stmt. and Tr. 74-87: The proposal is an improvement on the current provisions in Rule 26(a)(1). The current rule infringes counsel's obligation of zealous representation. The limitation to supporting information overcomes this major criticism of the current rule. It might be desirable to make the disclosure provision broader with regard to witnesses than documents. Often that is requested in an interrogatory anyway, so doing this might complement the limit on the number of interrogatories. (Tr. 51-53)

Charles F. Preuss, Tr. 60-67: Narrowing the scope of disclosures is good. It avoids the dilemma of risking prejudice to your client's case in disclosure.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: Favors narrowing of disclosure; if we have to have disclosure, let's put it that way. (Tr. 80)

Larry R. Veselka, Tr. 99-108: The current rule works well. You don't get everything, but everyone learns more than would be the case under disclosure limited to supporting information. The current rule allows people to start quicker.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. The existing obligation to disclose harmful information serves useful purposes and should not be eliminated.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) Clearly favors the change in disclosure.

Gregory C. Reed, Tr. 146-55: Supports the change. This prevents parties from being required to go to work to do the other side's preparation. It also prevents the production of huge amounts of material that are not relevant. For example, in a case on which he worked recently the initial production of documents involved more than 40,000 pages of material, but maybe 100 have been referred to in the depositions that have followed. This was a huge waste of time for his client in gathering together all these documents, and a waste for the other parties in going through them. Usually he has produced rather than identifying the disclosed documents, because identifying would be an additional effort and would lead to a request to produce. The narrowing of disclosure should have the side effect of focusing the formal discovery that follows. With regard to plaintiff's disclosure, that will help the defendant and the court determine what the plaintiff's real claims are. But it would be helpful if the Note were clearer on the dividing line between claims and defenses and subject matter. Presently judges often seem loath to get involved in the specifics of these problems, and it would be desirable if these changes could prompt more of that activity. A prime area of dispute in products liability cases is the breadth of discovery involving products plaintiff claims are similar.

Even if the changes can't put into words the difference in result, the disclosure provisions may permit a more focused approach to it. Sometimes the court will need to be involved to determine whether the similarity is sufficient to justify the discovery.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. counsel of Houston Indus., Inc.) HII generally supports this change, although it does believe that disclosure should be eliminated in its entirety. It notes that this change is identical to new Texas Rule 194.2(c), which goes on to state that "the responding party need not marshal all evidence that may be offered at trial." HII believes it would be desirable to add that a defendant can only respond to allegations by the plaintiff which are stated with particularity.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen. counsel, BASF Corp.) Supports uniform national requirements limited to supporting information. The Dallas federal courts employ a similar rule now, and disclosure there has clearly facilitated the process of identifying witnesses and documents and helped reduce costs. Applauds idea of coupling disclosure to claims and defenses asserted, as opposed to broad subject matter. Initial disclosures can move the case along and get the parties to a place where they can discuss settlement. He was struck by the statements of opponents of disclosure, for he believes that the probably don't speak from his point of view as a client, for he wants cost-effective litigation.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Concerned about elimination of the particularity requirement. Perhaps the Committee Note should specifically acknowledge that in cases where claims are not particularized, a defendant cannot provide meaningful initial information relating to its denials or defenses if it does not know what the claims are. Sequenced disclosure would be a better way.

#### Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: Opposed to narrowing the disclosure requirement, particularly if the moratorium in Rule 26(d) is retained. The problems in convening a Rule 26(f) conference have delayed cases on which she has worked. The bar's

familiarity with the 1993 changes is still limited, and narrowing them would be counterproductive.

Daniel F. Gallagher, Tr. 39-47: The disclosure in the 1993 rule was far too broad, and the current proposal is far preferable. A party should not be required to flesh out the other side's case. He also applauds taking out the particularized pleading provision, which is inconsistent with the general federal approach to pleading.

Andrew Kopon, Jr., prepared stmt. and Tr. 94-98: If Chicago is required to adopt disclosure, he thinks the proposed rule is better than the 1993 version now in the federal rules. It is better to have parties respond to direct requests for information than to require them to search around for material that hurts their position. If this jump-starts the litigation and causes the parties to come together, that is desirable.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: In the C.D. Ill., where he practices, the current disclosure rule has been enforced. It has produced problems for defendants, and even persistent counsel have difficulties getting clients to assemble the information that is called for. He believes the narrowing disclosure as the Advisory Committee has proposed is a really good idea. Having the broader obligation now in the rule does not cause plaintiffs to forgo discovery; they still want just as much as they would without any disclosure.

Gary D. McCallister, prepared stmt. and Tr. 109-13: Narrowing disclosure will narrow and inhibit the development of the case. The need to disclose this material triggers the plaintiff's ability to get the documents. In Chicago, however (compared to Kansas), he has not seen much disclosure. To require only supporting information will certainly result in limiting the ability of litigants to obtain proof. The obligation to disclose unfavorable information at the outset makes it more likely that this material will see the light of day.

Laurence Janssen, prepared stmt. and Tr. 154-60: Supports the change.

Clinton Krislov, prepared stmt. and Tr. 171-77: Opposes narrowing disclosure. You need a rule that forces defendants to

produce the harmful material too, or it won't come out. Defendants will fight everything so this has to be the rule. All relevant documents should be subject to mandatory disclosure.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Favors retaining the pleading with particularity provision in the amended disclosure rule. Focusing disclosure on defenses is a salutary change, often claims are stated at a high level of generality and, without a particularity limitation, responding parties will be at a disadvantage.

Michael E. Oldham, prepared stmt. and Tr. 235-45: From defendant's perspective, if the particularity requirement is eliminated the disclosure requirement for denials is difficult to accept.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar would have preferred that disclosure be eliminated altogether, the proposed amendment saves a defendant from having to guess, at its peril, the nature and substance of a plaintiff's inarticulately pled claim. The Note should say, however, that the defendant's obligation to provide disclosure is limited to cases in which the claim is pled with particularity.

Kevin E. Condron, Tr. 259-67: Supports the change because it should help reduce the cost of litigation.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) This compromise is a way to reestablish national uniformity. It relieves attorneys of conflicts they may experience under the 1993 version of the rule.

(c) Articulation of the standard for narrowing the obligation

Comments

ABA Section of Litigation, 98-CV-050: Favors the majority's language, which makes clear that the disclosing party must disclose all of the information that it believes supports its position, rather than what appears to be a more permissive standard of information a party "may use" to support its position.

Testimony

San Francisco Hearing

H. Thomas Wells, prepared stmt. and Tr. 47-60: The minority proposal for wording of the narrowed obligation under Rule 26(a)(1) is remarkably like the local rule in the Northern District of Alabama, which was drafted by that district's CJRA Advisory Committee (chaired by Wells). Experience in that district has revealed few, if any, problems with this formulation. He would therefore support the minority position on the drafting of this provision.

Chicago Hearing

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The ABA supports the majority version -- "supporting claims and defenses" -- for three reasons. First, "supporting" seems to be a more inclusive term. It makes sense to use a more inclusive term if you want to achieve efficiencies through disclosure. Second, "may be used to support" is subjective. That may encourage gamesmanship. Finally, the minority view might raise questions of admissibility, and that should not be pertinent to initial disclosure. This could lead to disclosure with regard of large amounts of information in some cases, but that is desirable in the eyes of the Section of Litigation.

Michael E. Oldham, prepared stmt. and Tr. 235-45: For him, the "may use" formulation would be preferable because the particularity requirement has been removed and he wouldn't know



exactly how to respond for defendant in some cases that are pled very generally. But his problem might well be solved in the Rule 26(f) conference, where there will be a chance to discuss the specific assertions of the plaintiff before disclosure is required.

(d) Handling and listing of "low end" excluded categories

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports excluding low end cases.

E.D.N.Y. Comm. on Civil Lit, 98-CV-056: Endorses low end exclusions, but proposes that the Government be required to provide disclosure in pro se prisoner cases rather than exempted.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: This is a sensible exemption.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Expresses concern that additional categories the district has exempted are not included. Examples include Freedom of Information Act suits, deportation actions, forfeiture actions and condemnation actions. They urge that the court retain discretion to augment the list by local rule.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes exemption of actions by the United States to recover benefits and to recover student loan payments. NACA members often represent consumer debtors, and have found that initial disclosures are important in those cases. Many of these cases involve debtors appearing without counsel, so it is essential that the U.S. provide these pro se defendants discovery related to its claim. In student loan cases, the information is often in the exclusive possession of the U.S. Department of Education, and often in significant disarray. "[T]he government is holding all the cards, but it may be bluffing." Unless the goal of the rules is to give the government an unfair advantage, these exemptions should be eliminated.

Hon. David L. Piester (D. Neb.), 98-CV-124: Suggests adding the following categories of actions to the exempt list: Actions to enforce a civil fine or penalty, or the forfeiture of property; bankruptcy appeals; proceedings to enforce postjudgment civil remedies; proceedings under the Freedom of Information Act; and proceedings to compel testimony or production of documents relative to perpetuation of testimony for use in any court. He

also notes that the practice in his district has been to include prisoner civil rights cases in the disclosure requirements, and that this has not caused problems. On this point, however, he accedes in the interest of national uniformity. He asks, however, whether such a case is later returned to the disclosure fold if counsel is appointed.

Hardy Myers, 98-CV-146: (Attorney General of Oregon) Under this proposed rule, Assistant Attorneys General would be required to confer and begin discovery in many cases now exempt from such requirements, such as non-prisoner pro se actions, which is not now true in this opt-out district. This would considerably and unnecessarily increase litigation expense. (It seems that these are often decided on motion before initiation of discovery.)

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: These exemptions make sense and are recommended. However, not every action to enforce an arbitration award would be appropriate for an exemption, and some flexibility (e.g., by starting the provision "Except as a court may otherwise order . . .") would be desirable.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the exclusion of certain categories of cases like those listed.

Public Citizen Litigation Group, 98-CV-181: Thinks that three aspects of the proposed exclusions should be reconsidered. (1) The exemption for actions for review of an administrative record should be clarified because the issue of whether there is an administrative record that provides a basis for review is often in dispute. (2) The exemption for an action to collect on a student loan should be deleted. These actions involve the same issues as any other action on a promissory note. (3) The rule should allow local rules providing exemptions for other categories of actions, because such cases may be prevalent in a certain district, but not sufficiently prevalent nationwide to justify a nationwide exemption.

Philadelphia Bar Assoc., 98-CV-193: The exempted categories seem inappropriate for mandatory initial disclosures and, for that reason, are properly excluded.

Hon. Louise De Carl Adler (S.D. Ca.), 98-CV-208: On behalf of the Conference of Chief Bankruptcy Judges of the Ninth Circuit, questions the application of the new disclosure provisions to proceedings in bankruptcy court. Many bankruptcy courts have not previously been required to comply with disclosure provisions because the district courts opted out. It is not clear from Rule 26(a)(1)(E) whether bankruptcy court litigation is exempt from the requirement. Is it "ancillary to proceedings in other courts?" If a bankruptcy judge declares a motion or other adversarial dispute not subject to an adversary proceeding (for example, a claim objection), a "contested matter," does disclosure then apply? If these are not exempt, the Conference has grave concerns that the revisions will produce disproportionate costs in matters that usually involve less than \$10,000. Perhaps there should be an option to excuse disclosure on a case-by-case basis. In the future, the Conference suggests that the Committee solicit input from bankruptcy practitioners and judges in addition to that obtained from other federal civil practitioners before promulgating proposed amendments.

Timothy W. Terrell, 98-CV-211: Concerned that the exemption in the proposed rule is not broad enough with regard to prisoner actions because it only excludes actions brought without counsel by current prisoners. There is no reason to have disclosure where the prisoner is represented by counsel either. In addition, disclosure should not apply if the plaintiff was a prisoner when the events occurred but has since been released. The exemption should apply whenever there is a suit brought by a prisoner about prison conditions or experiences of the prisoner while in custody. Based on his experience (in the State of Alaska Department of Law), this will cause a lot of unnecessary work for busy state attorneys, particularly since these suits often wind up being dismissed as frivolous.

F.B.I., 98-CV-214: If the opt out is removed, the FBI would urge additional exemptions for all Bivens type cases, or that the time for complying with disclosure be deferred until after an answer is filed. Favors the exemption for cases brought without counsel by a person in custody.

U.S. Dep't of Justice, 98-CV-266: The Department agrees that the eight listed categories should be exempted. It requests, however, that additional categories be exempted, including

foreclosures, Social Security disability appeals, writs of mandamus, motions to quash subpoenas, Freedom of Information Act cases, and facial constitutional challenges to statutes, for all of these are usually decided without needing discovery. In addition, the Department believes that Bivens actions should be added to the list. Further, it requests that the exclusion for student loan cases be expanded to include "actions by the United States to recover benefit and loan payments." This change would include other federal loan cases, such as those involving the Small Business Administration. Finally, the Department is concerned about ambiguity due to the use of the word "action" in the category "action for review on an administrative record." Cases under CERCLA may not be considered such, but may involve a challenge to the government's selected remedy. The Department believes that "proceedings" would be preferable.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the list of exceptions.

### Testimony

#### Baltimore Hearing

Brian F. Spector, prepared stmt. and Tr. 64-80: Based on the local rules of the S.D. Fla., recommends that the following be added to Rule 26(a)(1)(E): "(ix) bankruptcy proceedings, including appeals and adversary proceedings; (x) land condemnation cases; (xii) default proceedings; (xiii) Truth-in-Lending Act cases not brought as class actions; (xiv) Labor Management Relations Act cases; (xv) letters rogatory; (xvi) registrations of foreign judgments; and (xvii) upon motion of any party or the Court, any other case expressly exempted by Court order." The witness explains that these exclusions have worked well in his district. (Tr. 78-79)

C. Torrence Armstrong, prepared stmt. and Tr. 106-16: Sees no reason to exempt actions to enforce arbitration awards since these disclosures would be relatively simple. Likewise, actions for review of an administrative record should not be exempted. But he does not think these matters are important, and simply believes that including them in disclosure would not present difficulties. (Tr. 116)

Chicago Hearing

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Fully supports the exemption of these eight categories.

(e) Handling of "high end" cases

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports excluding high end cases.

Maryland Defense Counsel, Inc., 98-CV-018: Urges that the Note more forcefully convey the point that as a general rule in complex cases initial disclosure should be waived in favor of developing a thoughtfully tailored discovery plan.

ABA Section of Litigation, 98-CV-050: The proposal provides flexibility to exempt appropriate cases, such as highly complex cases involving voluminous discovery, and it ensures court supervision of discovery in cases that are likely to pose discovery problems and that are unsuited to mandatory disclosure.

Charles F. Preuss, 98-CV-060: The "high end" proposal should be adopted. The ability to obtain early judicial intervention in the more complex cases where initial disclosure is inappropriate should ensure that the initial disclosures, if any, fit the case.

Gennaro A. Filice, III, 98-CV-071: The automatic disclosure requirement would be useful in factually straightforward litigation. However, in complex toxic tort or environmental litigation, early definition of the issues is key to streamlining discovery and reducing attendant costs and burdens. For this reason, it is critical that the parties are able to petition the court at the initial disclosure stage to seek relief from this requirement. But the Committee Note should emphasize in more detail than at present that complex cases should be presumed inappropriate for initial disclosure, and that a court-managed discovery order ought to be implemented.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorses the opportunity to object.

Public Citizen Litigation Group, 98-CV-181: Opposes the provision. It would allow litigants to interpose objections in ordinary litigation, and thereby to delay disclosure without imposing any burden to justify the objection, for the rule does not specify any standard for objecting. This may provide a tool

for litigants routinely to frustrate mandatory disclosure. If the opportunity is retained, it should specify that the burden is on the objector to justify the objection and explain the court's approach as follows:

In ruling on the objection, the court may determine that all or part of the initial disclosures need not be made if the objecting party or parties demonstrates that such disclosures would be burdensome and would not facilitate discovery or resolution of the merits. If the objection is rejected in whole or in part, the court shall set the time for making disclosures.

Philadelphia Bar Assoc., 98-CV-193: Supports the party-objection procedure as an essential component of these reforms. This procedure best balances the responding party's desire to avoid unnecessary burdens and the federal courts' desire for non opt-out uniformity.

Jon B. Comstok, 98-CV-228: Strongly supports the change. The parties need to have a recognized mechanism by which they can assert that disclosure is not appropriate in the particular existing circumstances. He proposes adding that: "Any objection shall be promptly resolved by the court."

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee opposes this change. It would support an amendment putting the burden on the objecting party to seek an order exempting it from disclosure before the meet and confer process. It would be counterproductive for the conference to be convened with someone anticipating making an objection to disclosure. The better practice would be to require that to be resolved before the conference.

#### Testimony

#### San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The proposal to allow discretionary exemption from disclosure is crucial to fairness and due process in complex cases. Shell strongly urges that the Committee Note stress that exemption is the preferred course in such cases.



Charles F. Preuss, Tr. 60-67: Likes the flexibility of the rule provision that allows either a stipulation to dispense with disclosure, or an objection that brings the matter to the court if there is no agreement on this subject.

Stephen Valen, Tr. 67-74: In more complex cases, the disclosure requirement does not usually work. There should be a presumption or recommendation in the Note that gives the courts and the parties guidance on how to handle those cases. In those cases there should be more active judicial involvement in managing the cases. In some cases, what needs to be done is for discovery to be phased, with some issues addressed and possibly resolved early in the case. Perhaps an objection that the court considered justified would be a signal that more active management of discovery should be considered early on. He wants some expansion of the Note regarding the kinds of cases in which disclosure should be excused.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) The opportunity to object to disclosure appears to offer some relief in complex cases. HII supports it, and encourages the Committee to emphasize in the Note that this is one of the purposes of the opportunity to object.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Initial disclosure in massive document cases is problematic, but the provision for automatic deferral should allow those issues to be worked out on a case-by-case basis. Suggests that the listed exemptions from initial disclosure include class actions where the J.P.M.L. may transfer cases for consolidated pretrial proceedings. The idea is to arrange for a single uniform event of disclosure rather than multiple and "competing" disclosure occasions.

#### Chicago Hearing

Laurence Janssen, prepared stmt. and Tr. 154-60: Believes that the Note should say that complex cases should usually be exempted, and that phased discovery is preferable for those.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Urges the Committee to use its Note to stress that initial disclosures may not be appropriate

for large and/or complex cases. In such cases, discovery plans are preferable.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.)  
The ability to object is crucial to making disclosure work. Urges that the Note be strengthened to forcefully emphasize that disclosure in high-end cases is often a wasteful exercise that should be waived. In addition, the Note could suggest other ways in which the judge can become profitably engaged in such cases. For example, discovery in purported class actions can be limited initially to class certification issues. Similarly, in cases where there are serious jurisdictional problems activity should focus on those questions.

(f) Added parties

## Comments

Thomas J. Conlin, 98-CV-041: Favors disclosure requirement applicable to later added parties in the same way as to original parties.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: The treatment of later-added parties omits an important feature because it contains no provision for disclosure by the original parties to the newly-added party. Probably this should be at the same time as the disclosure required by added parties.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Thinks that the new party should be given more time since the case would generally have been pending for a period of time and the original named parties would have received more than 30 days for their disclosures.

Trial Lawyers for Public Justice, 98-CV-201: TLPJ supports the addition of language requiring added parties to make disclosure.

U.S. Dep't of Justice, 98-CV-266: The Department is concerned that 30 days is not enough time for a late-added party. This rule would have the effect of requiring disclosure by the United States before its answer is due. Also, any late-added party might find that disclosures are due before a ruling is had on any jurisdictional or similar challenges it might have to the complaint.

## Testimony

## Baltimore Hearing

Kevin M. Murphy, Tr. 80-89: Concerned about requiring disclosure by newly-added parties within 30 days. In his experience in a case in the E.D. Va., where added parties came in after discovery had been under way, it would have been very hard for them to make disclosure in 30 days. These were corporate defendants, and they had to search down their former employees to gather information. A longer time would be better.

## San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell has some concern about the timing of disclosure regarding newly-added parties. Thirty days is likely to be insufficient in a case of any complexity or magnitude. Shell urges that 60 days be allowed for such parties to analyze the case and marshal responsive materials.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) HII believes that 30 days is not enough time for newly added parties to respond.

## Chicago Hearing

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Fully supports the requirement that late-added parties provide disclosure.

3. Rule 26(b)(1)(a) Deletion of "subject matter" language describing the scope of discovery

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Agrees with deletion of "subject matter" language.

Edward D. Cavanaugh, 98-CV-002: Opposes the change. This change will generate disputes. The courts have a well-understood, consistent, and reasonably predictable construction of the scope of discovery under the present rule, and the amendment "would throw this sixty years' experience out the window."

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: Favors the change, which it proposed to the Advisory Committee in 1989. It finds that there is a significant distinction between relevancy to the issues raised by claims and defenses and relevancy to the subject matter of the action. It disputes the statement in the Committee Note that the dividing line between material relevant to the claims and defenses and that relevant to the subject matter of the action cannot be defined with precision. Although the Note does indicate that judicial involvement is desired, little further guidance is given. Reviewing current practice at some length (see pp. 11-16) it concludes that further specifics could be provided and that some caselaw shows that there is a substantial distinction between the two formulations. At least, the courts that grant broad discovery tend to use the "subject matter" language more often, while the ones that restrict discovery tend to emphasize relevance to the claims and defenses. When Mississippi deleted the "subject matter" provision from its rule, it did so to favor limitations, rather than expansions, of discovery. The New York standard also seems similar to the proposed amendment rather than to the current federal rule. The Section does note that the revised standard may have an impact on pleading and finds it surprising that the Committee Note says nothing about this potential effect. "[T]here certainly will be a strong incentive to put more detail in the complaint."

Maryland Defense Counsel, Inc., 98-CV-018: Supports the

amendment as "at least a directionally correct step" towards reducing unnecessarily burdensome and costly pursuit of information.

Prof. Peter Lushing, 98-CV-020: "Suppose I were the Devil and wanted to increase procedure litigation unnecessarily. I would propose a distinction for discovery purposes between 'claim or defense' and the 'subject matter of the action.' Since nobody would know what I was talking about, I would create endless fodder for commentators, lawyers, courts, and professors."

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) Supports the change. It provides not only a bright line standard, but also some common sense to the discovery process.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Opposes the change. There likely will be no distinction in practice between the old standard and the new standard. If the goal is to "send a message" to the bar, there are better ways than using such imprecise language. Increased judicial intervention in cases of discovery abuse, not a rule-based effort to narrow discovery, is the proper vehicle.

James A. Grutz, 98-CV-040: Opposes the change. "Parties should still be allowed to discover any matter relevant or likely to lead to relevant information concerning the lawsuit."

Thomas J. Coffin, 98-CV-041: Opposes changes that narrow the exchange of information. The biggest problem with discovery is withholding of information. There is nothing wrong with the subject matter scope.

M. Robert Blanchard, 98-CV-048: This change will unfairly limit the scope of discovery. There will be more objections from civil defendants. Plaintiffs will have to decide whether to plead a number of issues for which discovery will be required to provide a basis, risking Rule 11 sanctions, or simply resign themselves to never getting to the bottom of meritorious claims....

ABA Section of Litigation, 98-CV-050: The Litigation Section and the Antitrust Section support this proposal because, in the ordinary case, it prohibits use of discovery to develop new

claims and defenses and restricts discovery to the basic issues.

Richard L. Duncan, 98-CV-053: Opposes the change. This will increase the amount of procedural jousting by attorneys who are paid by the hour.

Laurence F. Janssen, 98-CV-058: Strongly supports the proposed revision.

Charles F. Preuss, 98-CV-060: Supports the change. Given the "subject matter" language of the present rule, even courts that have the stomach for supervising discovery have difficulty restricting discovery to the confines of the actual claims being asserted. Without reasonable limits on the scope of discovery, there is little likelihood that meaningful discovery reform can be achieved.

Lawyers' Club of San Francisco, 98-CV-061: Opposes the change. It would interfere with the ability of parties to fully investigate and develop their claims. At the inception of litigation, plaintiffs frequently lack specific and detailed information about the activities of a defendant. In view of the constraints of Rule 11, they would be unable to allege matters they were unsure about. But the change would preclude their pursuing discovery either. Given the breadth of res judicata, this foreclosure of investigation to the scope of the subject matter of the litigation puts parties in an unfair bind.

Jay H. Tressler, 98-CV-076: Approves of the change. The subject matter scope becomes burdensome unless policed by the court under a good cause standard. Moreover, plaintiffs' lawyers try to use defendant's failure to produce some document they already have as a method to turn cases into fights over discovery compliance.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the change. It is a well-intentioned invitation to judges to involve themselves early in the discovery process. But insufficient reasons exist for making such a significant change, and it could adversely affect the procedural system as a whole. The present standard has been in place for 60 years, and has produced a well-defined, predictable, and workable standard that is relied on by lawyers and judges alike. Because discovery abuse is limited to a few cases, changing this is an overreaction. Making the change will

produce satellite litigation, and it is likely to undermine notice pleading. That, in turn, may in some instances immunize parties in exclusive control of evidence. In a similar vein, the amendment would create perverse incentives for plaintiffs to plead broadly.

Michael S. Allred, 98-CV-081: Opposes the change. It is important that the scope of discovery remain wide.

Amer. Coll. of Trial Lawyers, 98-CV-090: The College's federal courts committee proposed this change, and the College's Board of Regents endorsed it. By letter dated Nov. 30, 1998 (98-CV-122), the president of the College informed the Advisory Committee that it supports the proposed amendment.

Frank Stainback, 98-CV-093: Believes that the limitations on attorney managed discovery and requirement for a showing of good cause before embarking on discovery related to the "subject matter" will be positive changes.

Steven H. Howard, 98-CV-095: Opposes the change. it will limit a party's rights to conduct full and open discovery and allow parties to hide the ball.

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) This change is unnecessary and counterproductive. The existing rules permit the court to regulate the scope of discovery, and case law confirms that power.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will cause defendants to resist legitimate discovery. Under the current rules, defendants often resist discovery that is in fact relevant to claims and defenses because they do not wish to provide the plaintiff with any means by which to prove the claims asserted. They should not be encouraged to provide even less information. Usually in their cases, the plaintiff has virtually no information and all the information is in the possession of the defendant. Narrowing discovery will prompt defendants to hide information. It will also foster litigation about the meaning of the changes. Indeed, "it is probable that plaintiffs, aware that defendants may be hiding something, will seek more discovery than would otherwise be requested, in an effort to turn over the right stones."



Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals, 52 SMU L. Rev. 229 (1999), which contains observations about the proposals) Although the change looks minor on its face, it is likely that, together with the other proposed changes, it will send a strong message to district judges that the rulemakers want judges to exercise their discretion to restrict discovery. Products liability defendants will now have an added reason to read requests narrowly.

Walt Auvil, 98-CV-140: Opposes the change. Narrowing the scope of discovery is a backward step.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: Opposes the change. There will be satellite litigation over a hair-splitting difference, and the change is at tension with Rule 8's pleading provisions. Unsettling the standard now used for scope will reward mulishness and raise transaction costs in connection with discovery.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Opposes the change. There is no need for this revision.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Opposes the change. It is inconsistent with the notion of notice pleading that lies at the heart of the Federal Rules because parties may feel they must expand their pleadings to justify broad discovery.

Penn. Trial Lawyers Ass'n, 98-CV-159: Opposes the change. The line between matters relevant to the claim of a party and those relevant to the subject matter is too fine, and motion practice will greatly increase as lawyers seek broader information.

Richard C. Miller, 98-CV-162: Opposes the change. It will permit parties to base their response on their own subjective interpretation of the other side's pleadings, This will create loopholes, and another step in the pleading process, because the defense will argue it cannot begin to respond to discovery until plaintiff's pleadings are made more definite.

Philip A. Lacovara, 98-CV-163: Supports the change. Only in a rare case does it make sense to impose on the parties the burden

and expense of discovery to the amorphous "subject matter" limit.

William C. Hopkins, 98-CV-165: Opposes the change. The amendment dramatically narrows the scope of discovery. It is the most grave threat to plaintiff's lawyers because with broad discovery they can always try to force the production of information through standard interrogatory and document production practice.

Mary Beth Clune, 98-CV-165: This change will only lead to more objections by defense attorneys, and will require plaintiff's counsel to get more court intervention in order to obtain discovery.

Prof. Ettie Ward, 98-CV-172: The current scope is not overly broad, and it ought not be changed. The "subject matter" standard has been tested over time, and is generally understood by the bench and bar.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Strongly supports the change. The development of a drug can take 15 years and result in creation of hundreds of thousands of pages of documents. Many of these relate to indications of adverse events unrelated to plaintiff's claim. These documents are then fodder for discovery battles. This results in an enormous expenditure of time and money on matters that do not further the litigation.

Nebraska Assoc. of Trial Attorneys, 98-CV-174: Opposes this dramatic revision of the scope of discovery. Under notice pleading, the real defenses do not appear until the discovery is completed and the parties are in a pretrial conference. The plaintiff begins with little information and must divine the real direction in which the defense will go. Subject-matter discovery is familiar and well understood by the bench and bar.

Gary M. Berne, 98-CV-175: This change is not supported by the FJC survey, which showed only 31% in favor of narrowing the scope of discovery. Therefore, 69% did not believe this change would generally reduce expenses without harming the quality of results.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: The proposed amendment reflects a salutary intent to focus

on the specific claims and defenses, and probably should have been adopted years ago. But in 1999, with several decades of experience under the current version, the Committee does not believe the change is justified. The difference between the current formulation and the amended one is not necessarily clear. A very narrow reading of "claims or defenses" could exclude matters that probably should be discoverable, such as certain background information on facts and witnesses. Disputes about the meaning of the changed language will lead to unproductive motion practice. The change could also prompt parties to assert broader claims and defenses as well.

Trial Lawyers Association of Metropolitan Washington, D.C., 98-CV-180: Opposes the change. The main problem with discovery is evasion and gamesmanship. Cost is not a primary problem. This change will encourage more gamesmanship, for one of the few weapons plaintiffs have left is the broad definition of discovery in Rule 26(b)(1). Evasion occurs nevertheless. "The only preventative measure against such evasion is a definition of discoverable information that is so broad that it is not subject to disagreement between the parties."

Public Citizen Litigation Group, 98-CV-181: Opposes the change. It would create new problems by requiring parties to obtain court approval to obtain discovery that is not abusive and is important, such as information to test an opponent's claim that certain conversations or documents are privileged. It is not targeted at cases where discovery abuse is prevalent. The courts have already held that discovery is not permitted simply to develop new claims, so the change is not needed to accomplish that objective. The new standard is not more objective or clear than the current one, and the parties will have a higher incentive to litigate discovery disputes.

Association of Trial Lawyers of America, 98-CV-183: Opposes the change. It would work a de facto abolition of notice pleading, and lead to highly fact-specific pleadings. It would provide an opening for improper resistance and evasion of discovery. For example, in auto crashworthiness cases, it is typical for plaintiffs to request discovery regarding other similar incidents, but defendants have engaged in de facto narrowing of discovery. Under the current proposal plaintiffs would receive data only related to accidents involving the plaintiff's

particular model and year of automobile in virtually identical incidents under identical road conditions. For an example of this problem, consider *Baine v. General Motors Co.*, 141 F.R.D. 328 (M.D. Ala. 1991), in which Judge John Carroll refused to allow defendant to do this sort of thing. If the rule were changed, the plaintiff might never be able to overcome such tactics.

New Hampshire Trial Lawyers Assoc., 98-CV-186: Does not believe the proposed change clarifies or improves the operation of the rule. Encourages the Committee not to base rule changes that affect the whole of federal practice on the problems of a small category of cases.

James B. Ragan, 98-CV-188: Opposes the change. Lawyers cannot foresee the future when they draft initial pleadings. A lawsuit changes over time, and discovery should not be limited to the original pleadings.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This would inhibit the plaintiff from developing other causes of action and prevent a defendant from developing a counterclaim. It would also increase the involvement of the court in discovery.

Michael W. Day, 98-CV-191: This change would increase the burden on individual litigants and cause them to abandon litigation that would otherwise vindicate important individual rights.

Philadelphia Bar Assoc., 98-CV-193: Opposes the change. The amendment could make discovery even more contentious, and the Committee Note does not make it clear how the new standard should be applied. Litigants will craft pleadings in a way that permits the broadest attorney-managed discovery, and the amendment would complicate and delay, rather than facilitate, discovery.

James C. Sturdevant, 98-CV-194: The amendment would interfere with the ability of parties to investigate fully and develop their claims. Plaintiffs frequently lack specific and detailed information about the activities of the defendant when they file suit. Under Rule 11, they cannot assert claims unless they are sure about them, and this change would prevent them from pursuing discovery about claims they couldn't allege in their complaints.

Maryland Trial Lawyers Assoc., 98-CV-195: This would preclude developing new claims or defenses through discovery, and will promote more motions practice. Under Rule 11, a party cannot file a claim without a basis, and the proposed changes would prevent the parties from developing the information needed to file the claim.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) Although this does not rise to the level of foolishness of the proposal regarding Rule 26(a)1), it is not a good idea. It reflects the understandable frustration of judges with those few parties who abuse the rules, but is not the correct solution. The current standard has been with us for many years and has, generally, worked well.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: This change is not supported by empirical research. Constricting discovery will have an impact on substantive rights. Experience has shown that shifting from attorney-controlled to court-controlled discovery has worked to the detriment of a just resolution in cases such as civil rights cases in which one party has significantly less access to the relevant facts than the other parties. It is improper for the discovery rules to curtail discovery of unpled theories, because the defendant does not advertise the specifics of its wrongdoing.

Trial Lawyers for Public Justice, 98-CV-201: Opposes the change. It will encourage stonewalling, and prevent many parties with valid claims from receiving justice. Discovery will be tied to the specific allegations set out in the complaint or answer, and therefore one can obtain access to information only after one has enough information to write a complaint. But presently many individuals initiate a lawsuit with limited access to information, or have details only about one of many potential claims. This proposal will lead to motions battles about the proper interpretation of the pleadings, and encourage a renewed emphasis on formality and gameplaying.

Sharon J. Arkin, 98-CV-204: This will impose unreasonable burdens on consumers in their actions against corporate entities. Corporate defendants are extraordinarily resistant to providing clearly-appropriate discovery.

Hon. Stanwood R. Duval, Jr. (E.D. La.), 98-Cv-206: Parties will spend more time trying to understand the fine distinction between "issues clearly raised by the language of the pleadings" and the "subject matter" of the case. This will cause more problems than it will solve.

Faith Seidenberg, 98-CV-210: Opposes the change. Even under the present rules, it is extremely hard for an individual plaintiff to pry loose from a large corporation any material that it thinks might aid the plaintiff. Under the change, stonewalling will be greatly enhanced.

Federal Courts and Practice Committee of the Ohio State Bar Assoc., 98-CV-213: The Committee urges that action be deferred pending significant further study on the possibly far-reaching change, which would radically alter a key provision of the Civil Rules. This change will engender interpretive litigation in federal court and skew the balance in favor of defendants. Many types of cases in federal court require broad discovery, and the amendment would totally distort the pretrial discovery system and eliminate a key feature of it.

F.B.I., 98-CV-214: Supports the change because it would favor the FBI. In the majority of cases brought against it, the FBI would seek little if any affirmative discovery from its opponent. In contrast, the FBI is very often the recipient of overly broad and unnecessarily intrusive discovery requests which go far beyond the issues which should be dispositive of the case.

Montana Trial Lawyers Assoc., 98-CV-216: Opposes the change. It will increase cost and delay. The present structure of the rules provides an effective means by which discovery disputes can be presented to the court.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. It will increase discovery abuse by encouraging stonewalling. Many plaintiffs will be prevented from obtaining relief. If the scope of discovery is tied to specific statements in the pleadings this will lead to a series of motion battles which in turn will encourage a renewed emphasis on formality and game playing.

Comm. on the Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218:

Opposes the change. The current standard has been thoroughly reviewed and defined by the courts for decades, and is thus a predictable standard.

George Chandler, 98-CV-223: Narrowing the scope of discovery would greatly increase the cost burden on individual litigants and inevitably lead some to abandon litigation that would otherwise be pursued.

Stuart A. Ollanik, 98-CV-226: This proposal would abandon the mainstay of the discovery rules. It is hard to specify what information that is discoverable currently without special leave of court will fall outside the new limits. This is because it would abandon a well-understood and long-applied standard and replace it with a new, vague one. This will result in untold litigation, and years of uncertainty regarding obligations. We will be giving up 60 years of jurisprudence that make it clear that all parties are entitled to access to the relevant evidence.

Jon Comstok, 98-CV-228: Very much endorses the change, which he considers to be dramatic. In almost instance in which he has encountered overbroad discovery, the trial judge has refused to be involved because the current rules foster a spirit of "anything goes." Judges seem to believe their authority to control discovery has been usurped by the broad current wording of the rules.

Tony Laizure, 98-CV-229: This change simply will not work. It will result in standard responses from defendants who will simply claim that the material requested is not relevant. This will drastically increase discovery disputes. It will also put the judge in the position of making the relevance determinations prematurely.

Edward D. Robertson, Jr., 98-CV-230: The proposed rules place the cart before the horse, requiring the plaintiff to plead his or her case as though fully informed at a time when full information is not available.

Karl Prottil, 98-CV-231: Opposes the change. What does "relevant" mean? The fact of the matter is that the victim is often poor and has no records. The defendant has all the records and no incentive to provide them. Write rules to assist in the

search for the truth.

Martha K. Wivell, 98-CV-236: Opposes the change. The most widespread problem in discovery is stonewalling. Narrowing the scope will encourage this behavior. There is not sufficient evidence that discovery imposes excessive costs to justify narrowing its scope. This will also encourage litigation about the scope of discovery, and undermine notice pleading.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This would effectively eliminate notice pleading. "By narrowing the scope of discovery, the plaintiff is effectively precluded from learning information that would be helpful to his or her case." Automobile manufacturers, for example, regularly refuse to provide information about other incidents unless the circumstance is practically identical.

Anthony Z. Roisman, 98-CV-240: This change will open Pandora's box of litigation problems by displacing a familiar standard. It seeks to draw an impossible line between material relevant to the subject matter in the litigation and that relevant to the claims and defenses. There is no evidence that this will solve any serious problems, although it surely will create some. The real problem with discovery is failure to produce what is required under the rules, not over-discovery by plaintiffs.

Norman E. Harned, 98-CV-241: The change is not advisable. Parties will simply make pleadings far more specific and detailed. In addition, the narrowing may allow parties to prevent disclosure of evidence adverse to the producing party's position.

Darrell W. Aherin, 98-CV-243: Opposes the change. This will increase the burden on individual plaintiffs because a bifurcated system will lead to additional costs.

Eastman Chem. Corp., 98-CV-244: Supports this "pivotal" change narrowing the appropriate discovery. Coupled with Rule 11, this change will appropriately focus the activities of the litigation on the actual dispute between the parties.

NAACP Legal Defense Fund, 98-CV-248: Like the narrowing of disclosure, this change is undesirable. Defense counsel will



take a very narrow approach to plaintiff's claims and try to confine discovery accordingly. Inevitably there will be meritorious claims and defenses that are not aired. At the same time, there will be considerable litigation about the new terminology and its meaning. This will lead to the type of hairsplitting that the Federal Rules were intended to prevent.

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) The change is useful, coupled with the protection to permit broader discovery if the court determines it to be proper.

R. Gary Stephens, 98-CV-253: Narrowing the scope of discovery works only for the benefit of the defendant.

Warren F. Fitzgerald, 98-CV-254: This change will impede the free flow of information in most civil actions.

Anthony Tarricone, 98-CV-255: This change will make it easier for parties and their counsel to decide unilaterally that documents and data are not discoverable, and opposing parties will consequently never see the relevant evidence.

Annette Gonthier Kiely, 98-CV-256: Opposes the change. It will provide a further shield for defendants to legitimately withhold and fail to identify witnesses and evidence which are most relevant and germane to the claims brought by the plaintiff.

David Dwork, 98-CV-257: Opposes the change. It will have the undesirable effect of limiting the ability to obtain valuable documents and data that may be critical and are often in the opposing party's exclusive control.

William P. Lightfoot, 98-CV-260: Opposes the change. The main problem with discovery is that parties resort to evasive tactics to withhold information. "The only preventive measure against such evasion is a definition of discoverable information that is so broad that it is not subject to disagreement between the parties."

New Mexico Trial Lawyers Ass'n, 98-CV-261: Opposes the change. It is counter to the entire concept of notice pleading and encourages unnecessarily detailed pleadings. The current scope

limitation sufficiently curtails unjustified inquiries. The change would foment discovery disputes where they don't happen now.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l, Inc.) Supports the change because there are rarely any reasoned limitations on discovery. This has had a negative effect on Navistar's business.

U.S. Dep't of Justice, 98-CV-266: The Department does not support bifurcating discovery between attorney-managed and court-managed discovery. The Committee's proposal is, at best, an indirect method for encouraging judicial involvement with discovery, and such a broad and systematic change is not warranted by extant evaluations of how discovery is now working. Making this change is likely to lead to unintended consequences and disputes about the meaning of the change. It seems that the problems that occupy the Committee exist in particular types of cases -- large, complex, contentious, and high-stakes litigation -- and a solution should focus on those types of cases. A discrete problem calls for a targeted response. The distinction created by the proposal is, at best, ambiguous, and it would provide a recalcitrant party with ammunition for obstructing access to relevant information. The experience with Rule 11 should offer a warning about the possibility of additional litigation from such a change. The Department offers several examples of types of situations in which the change might lead to problems. (See pp. 7-8) There is often a serious imbalance of information regarding access to relevant facts at the pleading stage, and this change would worsen that problem and might be inconsistent with notice pleading. To limit discovery to claims pled could make discovery a game of pleading skill.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: Does not support the change. The change is not justified by the empirical information available. Although it might force judges to become more involved with discovery, it is hard to believe that it will do so with judges who don't want to become involved. But the effect is likely to be increased litigation about the meaning and application of the new standard and to make it harder to settle cases.

Thomas E. Willging (Federal Judicial Center), 98-CV-269: Writes

to clarify data presented by FJC survey and to caution against inferring more than the data will support. He notes that several commentators opposing this change to the handling of discovery scope referred to tables in the FJC report and drew conclusions or even added "data" concerning numbers or proportions of respondents who assertedly did not believe that proposed change would decrease the expenses of discovery. In particular, some assert that the FJC survey shows 69% of respondents to believe that narrowing the scope of discovery would not decrease the cost of discovery, and that only 12% of respondents believe that narrowing the scope of discovery would reduce the costs of discovery. Given those contentions, Willging clarifies what the survey results actually show: (1) Readers should not assume that failure to endorse a proposal means disagreement with it. Thus, the 69% who did not predict favorable consequences for narrowing the scope of discovery might have selected other choices had they been included on the questionnaire, such as that they disagreed with the proposal as a matter of principle, that they don't know, that they didn't want to say, or that they had no opinion on the matter. (2) Regarding the assertion that only 12% believed that reducing the scope of discovery would reduce expenses, he notes that this use of the data fails to take account of whether the expenses in the given case were reported to be high, about right, or low. If that is taken into account, one finds that 24% of the attorneys who said that the expenses were high in the case believed that reducing the scope of discovery would reduce expense, 12% of those who said that expenses were about right thought the change would have this effect, and 7% of the attorneys who said discovery expenses were low thought narrowing the scope would have this effect.

#### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI would have preferred an overall narrowing of discovery scope, but views proposed change as a significant step in the right direction. He is unable, however, to provide an example of a case in which the change in the rule would make a difference in discoverable information.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change as a "serious mistake." A prime problem with discovery is that lawyers contrive beyond any proper bounds to avoid giving words their plain English meaning. This change will encourage undesirable activity of this sort, and send a powerful message to both lawyers and clients, encouraging them to interpret their discovery obligations even more narrowly than they do now. The change is supported only by the anecdotal grouching of a relatively small group of lawyers who tend to handle very large cases. Certainly the Committee would not want to establish the principle that a powerful segment of the bar can secure changes to the Rules simply through perseverance. This change will cause substantial increased litigation over discovery disputes. It will also put pressure on lawyers to assert thin or borderline frivolous claims or defenses. Asked to offer an example of a case in which the difference would matter, he suggests a contract case where the plaintiff feels that there has been fraud. Under the current rules plaintiff would file a breach of contract suit and take discovery about the possibility of fraud. Under the amended rule, one is pushing the plaintiff's lawyer into treading close to the Rule 11 line to file a fraud claim as a predicate for discovery. There will be a monumental message to the profession that discovery should be cut back. At present, there is already a culture that it is o.k. to read requests as narrowly as one can, and requesting parties therefore write their requests as broadly as they can. If the rule is narrowed, this will become more of a problem. (Tr. 24-26)

Gregory Arneson, Tr. 30-45: (Representing New York State Bar Assoc. Commercial and Federal Litigation Section) Favors narrowing scope of discovery. His organization has urged narrowing the scope since 1989. It is made up of both defense and plaintiffs' lawyers, usually those involved in complicated commercial litigation. It believes that the proposed amendment will change the standard. As an example of a case in which the standard would make a difference, he offers an antitrust case involving a certain market, and the question is whether plaintiff can have discovery about defendants' behavior in other markets. This is similar to the question in an employment discrimination case whether defendant has engaged in discriminatory conduct at other locations in addition to the one where plaintiff worked. Then under the new standard it would be up to the plaintiff to demonstrate some reason why information about other locations

would have a bearing on the case before the court. (Tr. 34-36) It is true that it will take some time to get used to the new standard. Although there is a tension with Rule 11, the place to deal with that is at the Rule 16(b) conference and establish clear parameters for discovery in the case. There will probably be a little more Rule 11 litigation as a result of this change.

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) The two-tiered approach, shifting the line for attorney-managed discovery, is the correct direction for change. Frankly, would have preferred to close off discovery to the subject matter limitation altogether. Offers examples from a state court of cases in which the change would make a difference. In one asbestos case, plaintiff asked defendant to produce all documents about the operation of the company from 1920 to the time of the suit, including all organizational charts, minutes of meetings, etc. Whether or not the change in language on its own strength alters the result in such cases, it is important to send a message that it is no longer appropriate to adopt an anything goes philosophy. Even if this philosophy does not exist in federal courts, there are state courts that seem to have embraced it. But the domino effect of the federal rules on practice in state court means that this change can alter that behavior.

Kevin M. Murphy, Tr. 80-89: In his experience, the currently-broad provisions regarding the scope of discovery have led to abuses and some scorched earth discovery tactics. Often judges restrain abuses, but sometimes they do not. This has happened in state court and federal court. It is only human nature for one side to want to discover everything that is allowed. In this environment, the shift to "claims and defenses" does make a significant improvement in giving at least some guideposts to both counsel and judges. Counsel will moderate their behavior somewhat. As an example, offers a case in a state court in which he represented a defendant in a suit that resulted from a contractor hitting a gas line, thereby causing a substantial explosion. One of the defendants decided to extend its exploratory discovery to whether the gas line had been mismarked, in the first place, even though no witness had indicated this was so. This defendant dragged everyone else through six or seven depositions devoted to this question, and there was no way to put a stop to this. But had there been a mismarking, that would have been relevant to the claims and defenses in the case, so it is

not clear that the wording of the scope rule would bear heavily on this problem. Eventually, this defendant was sanctioned for pursuing this fruitless line of inquiry, but this happened only after a tremendous amount of expense had been incurred.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The empirical evidence does not show that over-discovery is a serious problem, but there is a problem with discovery resistance. If the goal is to send a signal, the signal should address the problem that the empirical evidence shows is real. But only a relatively small number of respondents in the FJC survey said that requests for excessive documents had occurred, and that proportion corresponds to the figures in the 1960s study done for the Advisory Committee before the 1970 amendments to the discovery rules. But the signal will be that judges should be skeptical about discovery requests being too broad, and people won't get the material that is relevant to their claims and defenses. The "claim or defense" focus puts too much emphasis on the pleadings. It will also produce Rule 11 litigation. Some plaintiffs will have valid claims but not evidence sufficient to plead them.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26:

Opposes the change. It would throw out 60 years of experience under the current scope provision, and invite costly satellite litigation. Even though discovery abuse does exist, it is not pervasive, and this "solution" is disproportionate to the problem. Judges will be inundated with applications to extend discovery to the subject matter limit. The courts already have the power to limit discovery in a case, and this change won't add anything of substantial value. But the change will likely undermine notice pleading because parties would be forced to plead claims or defenses they would otherwise not include in order to provide a basis for discovery. There will also be a tendency to push the limits of Rule 11, and motions to dismiss for failure to state a claim will also likely proliferate. The change will also produce undesirable distributional effects where evidence is in the exclusive possession of a defendant. Actually, the subject matter standard is great, and very important to furthering the Federal Rules' attitude toward specificity of pleadings. This change will destabilize this settled area.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the change. There has been "scope creep" in federal courts under the current standard. Limiting discovery to material relevant to claims and defenses is clearly preferable to discovery relevant to the "subject matter" of the case. The "subject matter" definition, combined with the "leading to discovery of admissible evidence" criterion, has left no real limitation on the scope of discovery, and this has contributed to the scope creep that has occurred. Over the past 25 years, we have come to a situation in which there is effectively open discovery without regard to cost of anything a party asks for. He offers examples from his own experience. In one, the case involved an injury in which there was a rear-seat shoulder harness. The claim was that there should have been a three-point harness in the back seat rather than a two-point belt. On behalf of defendant, he produced documents about the rear-seat seat belt. The plaintiff took the position that the subject matter of the case was seat belts, and that discovery should include anything about seat belts in defendant's files, including cars manufactured in the 1920s and 1930's. In addition, the defendant manufactured airplanes, and plaintiff sought discovery about airplane seat belts even though those are of a completely different design. The court rejected the argument about airplane seat belts, but did require production going back to the 1920's on car seat belts. The cost of doing that production was \$342,000. Under the proposed standard, he is convinced that he would have gotten a different result, because the argument that prevailed was that the subject matter of the case was seat belts. The real problem is not the abstract question whether a certain set of words seems to be more confining, but that the evolutionary impact of litigation is that with the current rules there is no effective restraint for the judge to invoke. Coupled with the narrowed disclosure required under the Committee's proposed amendments, this change will allow the judge to focus on what the case is really about and get a handle on the proper scope of party-controlled discovery.

#### San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Opposes the change. It will encourage defendants to resist discovery that is now recognized as routine. In antitrust cases, discovery is the lifeblood on which plaintiffs rely. The change will therefore

undercut the private antitrust remedy. It will also encourage more expansive pleading. In real life, defendants can always justify the most expansive discovery, relying on causation and scope of damages. That justifies inquiry into almost every aspect of the plaintiff's business, and this would be true under the new formulation as well as under current law. But the message to judges is to restrict plaintiffs' discovery. Even if the plaintiff is found entitled to broader discovery on a good cause showing, the back-up suggestion is that the plaintiff should pay for it, which will discourage the process of litigating. As an example, consider an antitrust case about monopolizing oranges in which plaintiff wants to ask about grapefruits; that would probably be found not to relate to the claims or defenses. But it would relate to the subject matter of how defendant conducts its business. There will be disputes about scope in every case, where now these disputes are very rare. Plaintiff will routinely be arguing for expansion to the subject matter limit. There will also be more pleading disputes, as defendants focus on what is actually already in the complaint and plaintiffs seek to expand them. Right now there is little dispute, and the only things taking up the court's time are disputes about privilege. This will expand the areas for dispute. There is a slight judicial tilt in favor of defendants today, but given the subject matter language in the rule this is not too problematical. This change will encourage judges to become too restrictive. But plaintiffs don't want to pose expansive discovery requests in antitrust cases. They prefer to go with the rifle rather than the shotgun. Spending time and money on discovery is wasteful from the plaintiff's perspective. (Tr. 10-14)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) Supports the change. The reason there are few disputes about scope of discovery today is that, in effect, there are no limits under the current rule. The current situation is an invitation to the broadest of discovery. In tobacco litigation, for example, there are already warehouses full of documents that have been produced, but plaintiffs' lawyers want more without ever having looked at those already produced. The current proposals will work wonders in terms of changing the method of doing litigation. The rich plaintiffs' lawyers are getting richer, and they can afford huge amounts of discovery. Because they can spend whatever it takes, the absence



of limits in the rules has become quite difficult to endure. He does not accept the idea that the change in the scope will prompt plaintiffs to write broader complaints, because in his experience there could not be broader complaints than there are currently.

Diane R. Crowley, prepared stmt. and Tr. 23-36: The change is precisely what is needed by most parties most of the time. In California, the state-court discovery rule was drawn in the same broad way as the current federal rule, and every California lawyer can relate tales of litigants who have simply given up due to excessive discovery and settled because they could not afford to continue the discovery battle.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The present scope of permissible discovery is an invitation to overbreadth and abuse. The proposed amendment is sorely needed. In particular, it is important to curtail massive, unjustifiable fishing expeditions in complex cases. Shell regards this change as one of the most significant and needed amendments. He has not seen many plaintiff attorneys who use rifle-shot discovery. Instead, in almost every case the cost of discovery is far too high, and for material that has little prospect of being useful in the case. In many jurisdictions, the judges will regulate discovery in a sensible way, but there are other jurisdictions in which that does not happen. There needs to be an appreciation that, with a company like his, asking for all information on a given subject is a huge request that is bound to produce a lot of entirely irrelevant material. This problem comes up in almost every significant case, and there is a tremendous amount of lawyer and judge time involved in addressing these issues under the current rules. Under the committee's proposal, that should not occur. As Mr. Blecher said, under the current rules, costs are very rarely shifted, so the supposed limits on disproportionate discovery don't do anything in most cases. Usually the subject matter provision trumps all before it. He views this as a change in philosophy, and hopes that Rule 11 will keep plaintiffs from fraudulently trying to plead their way around it. This change in philosophy is needed even if the judge is involved early on (although that is certainly desirable) since under the subject matter approach the judge's involvement won't solve the problem since the problem is in the rule.

H. Thomas Wells, prepared stmt. and Tr. 47-60: The change is an

improvement on the current rule, which has, in practice, encouraged fishing expeditions virtually without limits. This is a tremendous improvement in terms of the philosophy of the rules and in terms of the message that the Committee is sending. The actual determination in a given case will depend on the circumstances presented. In a police brutality case, for example, the court will have to have that in mind in determining whether something is relevant to the claims or defenses. The change in the rule should not have a harmful impact on such cases. (Tr. 54-55) Right now, the practicing bar sees fishing expeditions as routine and, in fact, expected. The need to show good cause to justify going to the subject matter limit will give pause to some of the fishermen. They will feel uneasy about going into court and trying to articulate why they need this. Right now, even with a good burden argument, he finds that it is very hard to fight a motion to compel because of the subject matter language. The proposed change shifts the playing field a good bit, but right now it is tilted too far in favor of broad discovery.

Charles F. Preuss, Tr. 60-67: Changing to claims and defenses is good in terms of the initial disclosure and attorney-managed discovery. The subject matter limitation, in operation, has meant that everything has to be produced, and it has prevented him from persuading judges to focus on the claims actually being made by his adversaries. This would not mean as a blanket rule that in products liability cases there could never be discovery about other incidents without a court order. Rather, the point is to focus on the actual defect raised by the plaintiff. He doesn't think this will change pleadings all that much. At the initial scheduling conference, this new focus will enable the judge to ask the plaintiffs' lawyers what they are really getting at in the case and thereby focus the case. To date, he has had little success with getting even federal judges to control the scope of discovery.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: Satisfied that the change to scope of discovery will help psychologically, if for no other reason.

Larry R. Veselka, Tr. 99-108: Some litigants will use the change in scope as an excuse or stimulus to stonewall. Then access to court will really be a problem. The shift to showing good cause

to go to the subject matter limit is a shift of burden of justification from the opponent to the proponent of discovery.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. The current standard does not cause any problems that warrant an amendment. This will lead to an "everything but the kitchen sink" pleading approach. This is not happening now with ordinary cases even though it is probably happening in big cases. This change will make the huge complaint more common. That will lead to fights over pleadings. The fact that it is difficult to offer examples in which the change makes a difference does not mean it makes no difference, but underscores the fact that we don't know what difference it will make. It will lead to litigation about what the new standard is. Nobody can tell for sure right now what the effect of these amendments will be. The courts now have sufficient authority to limit discovery. There are individual differences in how much judges are involved. Judges who are not now involved will not welcome fights about discovery that result from these changes.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) This is only the second time the College itself has taken a stand on a proposed amendment to a federal rule. The first time was the change to Rule 11 from mandatory sanctions to discretionary ones. The College submitted a report to the Advisory Committee in support of the narrowing of the scope of discovery. That report was carefully worked up by a number of prominent lawyers from around the nation. The report shows that the courts have interpreted the term "subject matter" differently from "claims and defenses." It also offered examples based on real-life cases. The current reality under the current rule is that there are really no limits. The new standard will permit production of all documents having any importance. The College believes that the time has come to make this change.

Anthony L. Rafel, Tr. 130-40: (President of Fed. Bar Assoc. for W.D. Wash., and appearing on its behalf) Opposes the change. It will alter pleading practices, and encourage people to plead more broadly. It will create a new layer of objections and motions. It will increase expense rather than reduce it. There are better ways to encourage judges to get involved in discovery.

Weldon S. Wood, Tr. 140-46: Supports limiting lawyer-managed

discovery to material relevant to the claims and defenses. If the lawyers can't agree, the court gets involved.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Supports the proposal. This is a welcome and much needed reining in of the unfettered discovery of the past, with its many and manifest abuses.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Strongly favors changing to narrow the scope of discovery without court involvement. BASF frequently sees attempts in personal injury cases to argue that the "subject matter" test legitimizes open-ended access to every fact about all chemical products, not just the particular substance that the plaintiff seeks to place at issue in the litigation. In addition, it frequently faces attempts by terminated employees to coerce settlements by seeking compensation or disciplinary records of former colleagues or others for the sole purpose of developing information that may be embarrassing or useful for other purposes. This revision would be a clear change in direction that will assist in rebutting widespread opinion outside the United States that our system of justice is too unrestrained.

#### Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: This is her central concern about the current proposals. In an ideal world the focus on claims and defenses ought not to cause any problem. In the real world, however, this change will place an emphasis on the hypertechnical interpretation of pleadings, which are already a good deal longer than one might expect if they are supposed to be short and plain. There has been a "balanced tension" between Rule 8 and Rule 26, but this change might break it. Until now, there has been a reduction of pleadings motions, and more and more defendants are filing answers. But that could change under this proposal because it will put a premium on knocking out allegations at the pleading stage. This sends a signal to litigators that the way to preclude discovery is to hammer away at the complaint.

Paul L. Price, Tr. 16-25: (on behalf of Federation of Insurance and Corporate Counsel) The scope has to be narrowed. Plaintiff's lawyers continue to develop new strategies to search

warehouses, computers, etc. in order to develop documentation over years and years. Massive corporate sweeps are justified under the current rules. If the focus is narrower, that will improve the discovery process. Trials will become faster and simpler. The current standard is too vague. As an example, his firm had a case involving one machine. The discovery request was for documents about a lot of other types of machines, but magistrate said that the subject matter of the case was machines and the discovery had to be provided. None of the documents about other machines ever got used at trial.

Daniel F. Gallagher, Tr. 25-39: He does not see any incentive for a defense lawyer to file a Rule 12(b)(6) motion because the discovery standard has been changed. Similarly, he does not see a bare-bones complaint enabling a defendant to avoid discovery because it is bare-bones.

David E. Romine, prepared stmt. and Tr. 36-46: Opposes the change. It is not supported by the empirical information gathered for the Advisory Committee. There has not been a "disciplined inquiry" that supports this change. It will increase the expense of discovery in several ways. It will increase motion practice in all types of cases. It will lead to different standards of discovery in different judicial districts, undermining uniformity. It will force the judge to make trial relevance determinations at an early stage. Routine cases in which there are no problems now will mushroom into discovery disputes across a variety of topics. It will prevent inquiry into the witness's background at a deposition, which is now a customary and necessary thing. There are already adequate rules for dealing with problems in discovery that this will not solve. He suggests that there be a comparison between districts operating under different relevance rules to see what effect they have. This could be the "disciplined study" he says is needed.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) The heart of the problem is that there are no objective standards as to scope, and as a result judges naturally are less inclined to address the issue in the first place. Procter finds itself on both the plaintiff and defendant sides of litigation, so he isn't talking just as a defendant. Moreover, he agrees that corporate parties can be among the biggest problems in relation to discovery. Finally, Procter is involved in litigation in many

countries, and he has learned the value of having discovery, which is much fairer than not having it. But with document discovery in the U.S. you have one of those rare processes in which virtually all of the benefits are received by the requesting party, and virtually all the costs are borne by the other side. As a result, there are no economic checks that would naturally lead to reasonable controls. He analyzed the costs of document discovery for Procter and found that of some \$30 million in litigation costs per year Procter spends 8% on the ministerial part of document production (copying, stamping and optically scanning the documents turned over to the other side). This is roughly the same for cases in which Procter is the plaintiff or defendant. This doesn't include attorneys' fees. Each of the documents has to be reviewed by a lawyer or paralegal. With those included, document discovery comes to cost about 48% of Procter's litigation budget -- an average of \$14 million per year. The costs of in-house attorneys are not included, so the actual costs are higher. Some part of this is due to the lax standard of relevance. For example, in a case involving a baby who was scratched by a piece of glass embedded in a diaper, Procter could determine from the box exactly when and where that diaper was manufactured. Even though this should have focused the case on that time and place, plaintiff asked for far-reaching discovery. Since the subject matter of the case was diapers and the manufacturing of them, plaintiff demanded all documents related to any complaints about diapers or to the entire diaper manufacturing process. This took 200 internal man-hours to produce. In that case, Procter settled rather than go through the discovery, and did not try to get relief from the court because it was told there was not chance of getting relief.

Jeffrey J. Jackson, prepared stmt. and Tr. 63-73: (V.P.-Counsel, State Farm Mut. Auto. Ins.) State Farm has been seeing increased discovery costs since he joined it two years ago, largely due to bad faith litigation. He is not aware of any connection between these increases and discovery rule provisions. The source of the problem in part is the subject matter scope of discovery. In each case, plaintiffs say that the subject matter of the case is insurance, so almost anything State Farm has might relate to that. Primarily the problems are in state court cases. In general State Farm has a better shot of convincing a federal court to limit overbroad discovery. He believes not only that motions to limit discovery would not be granted, but that making

them would be used against State Farm as evidence that it is stonewalling. The state courts look to the federal courts for guidance on rules, so changing the federal rule will probably have an effect on state court activity also. In bad faith cases, the question whether State Farm's practices in other locations would be relevant can't be answered universally but should be examined in light of the issues in the case. (Tr. 68-69) Some state courts have the claim and defense standard, but they don't do a better job than the federal courts, which operate under the subject matter standard.

Robert T. Biskup, prepared stmt. and Tr. 73-84: (Ford Motor Co.) Document discovery imposes huge costs on companies like Ford, and the scope of discovery is one reason why this is so. Ford handles almost all its document discovery in-house, and he therefore offers a unique insight into what that really means. So far as he can tell, the stated scope of discovery is virtually the same in all states as in the federal courts. In federal court there is a better chance of up-front involvement of the judge. The amorphous subject matter standard is being used a lot for tactical advantage. For example, in a 1996 case a teenager drove his car into a ditch on the way home from a bar. The driver claimed that he lost control of the car because the two air bags deployed spontaneously. The state court ordered discovery on all reports of defective air bags ever received by Ford without any temporal limitation or limitation as to type of vehicle. The suit was for \$9,000, and Ford settled rather than incur the cost of discovery. This is an example of the use of scope for tactical purposes. There are more examples. The problem is not limited to complex cases, and it has given birth to a roll-the-dice mentality on the part of plaintiffs' counsel. Ford regularly finds itself in the same boat, and in part because judges feel handcuffed by the current rules. That's why the change that has been proposed is needed.

Kevin J. Conway, prepared stmt. and Tr. 84-93: Opposes the change, which will benefit people with documents. Personal injury plaintiffs often can offer no more than a bare-bones outline of a negligence case. Discovery to the "subject matter" allows the plaintiff to discover what defendants knew about the products involved. Without that scope of discovery, plaintiffs' access to proof of defendants' knowledge will be limited. As discovery proceeds, prior injuries resulting from the same

product are often revealed, allowing the plaintiff to amend his cause of action to include improper design, failure to warn, etc. Without broad discovery, the plaintiff, the court and the jury may never know how the product became unsafe. Changing this rule will encourage stonewalling. Plaintiffs will no longer risk short and plain complaints for fear of sacrificing full discovery. In the Illinois state courts, owing to strict pleading requirements, plaintiffs who would file an eight to fifteen page complaint in federal court will file one of 200 to 300 pages. This change is not supported by the empirical data, and there is no reason to shift the burden of justifying discovery to the proponent. We already have court supervision without a change in the rule, because the judges often impose limitations. Lawyers already work these things out, including expense, without a change in the rules. The truth is that product liability defendants know what the plaintiffs are really looking for, and they are trying to avoid having to turn that harmful information over. From the perspective of plaintiff's lawyer, there is no desire to inspect useless documents, so they will try to be reasonable about what they insist on seeing. In one case involving a Johns Manville plant in Waukegan, Ill., defendant lied about documents showing that it was guilty of medical fraud.

Andrew Kopon, Jr., prepared stmt. and Tr. 94-98: Supports the change. This should help reduce costs in discovery, which presently is too broad and often imposes an inappropriate burden on the defendant. This is especially true in employment discrimination litigation. For an example of overbroad discovery, he offers a product liability case involving a coffee maker in which there was a problem with the thermostat. But the discovery was not limited to thermostat problems; it included all complaints about the coffee maker. Defendant was unable to get the judge to limit the discovery to problems with the thermostat.

Peter J. Ausili, Tr. 105-09: (Member, E.D.N.Y. Civ. Lit. Comm.) The committee opposes the amendment. The current standard is well understood in the district.

Gary D. McCallister, prepared stmt. and Tr. 109-13: Opposes the change. In most cases discovery is working well, so change is not needed. It will impede discovery by plaintiffs in products liability litigation. The burden should remain on the opponent



to discovery to justify stopping it, rather than on the proponent, who would have to justify doing it.

David C. Wise, Tr. 113-19: Disagrees with the change. This will put plaintiff at a horrible disadvantage because plaintiff goes into some of these cases a little bit blind. As a result, plaintiff can't set forth all the claims at the outset. Right now there is little problem disputing the scope of discovery, but this change will produce disputes. This will open the opportunity for defendants to avoid having to turn over documents. Plaintiffs find things in discovery that lead in new directions. The Committee Note seems to be directed at discouraging amendment of pleadings to add new claims.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. Already defendants stonewall at first and then dump lots of stuff at the end. This will make things worse. To get anything one has to go to court, and judges give half a loaf. This will mean the loaf is smaller. The reality nowadays is not what one might guess from looking at the wording of Rule 26(b)(1); there really is a narrower approach in the courts already. If the claims and defenses standard is adopted, there will be a whole category of documents that plaintiffs aren't going to see.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) These changes have been justified by exaggerated tales of woe. The problems don't warrant across-the-board changes of this extent. There is, moreover, a longstanding practice of stonewalling by defendants. These changes will assist that activity. In addition, there will be a de facto move away from notice pleading. To some extent the concern may be a perception because people haven't practiced under the new proposed formulation. The perception is that this will be much narrower than the current standard. It would be helpful if the comments made it clear that this was not to be a substantial narrowing. There will be more litigation about scope of discovery with this narrowing. He doubts that the ability to extend to the subject matter limit on good cause will make up for this, and is concerned that there is a natural tendency to try to limit discovery, which may come into play at that point.

John H. Beisner, prepared stmt. and Tr. 147-54: Favors the

change. It should get judges more involved in discovery issues. The idea behind the current regime was that discovery would narrow issues, but that didn't happen. It has become the great procrastinator's provision, for it allows parties to put off having to decide what the case is really about. In the E.D. Va., for example, the court's insistence on moving the case forces the lawyers to define the issues. There will be more motions, but that is not necessarily a bad thing because the focus of them will be different. Right now we don't have a meaningful limitation on discovery, but with this change there will actually be something for the judge to do on such a motion. Although courts do say they don't authorize fishing expeditions, the reality is that they will consider burden as bearing on which ones to authorize. A scope limitation wouldn't have to turn on burden, because it would set some limits that go to the content of the discovery rather than the effort involved in providing it. Actually, judges are a lot better equipped to address scope than burden, because that is a legal rather than an economic concept. These changes should not have that much effect on pleading practice, for people plead what they can already. Complaints may be more specific, but that is not necessarily bad. He sees no connection between the changes and abuses like stonewalling.

Laurence Janssen, prepared stmt. and Tr. 154-60: Favors the change. The current scope allows plaintiffs to increase the cost of defense as a tactic. There is a mind set that everything should be produced through discovery if somebody wants it. At least with this change there will be a framework for addressing the real need for proposed discovery.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: Urges that a decision on this be deferred. The anecdotes from defense lawyers about costs of discovery could be matched by anecdotes from plaintiff lawyers about improper discovery resistance. The task of searching for information is undergoing a transformation due to computers, and it does not make sense to alter the scope of discovery due to search burdens that are likely to disappear soon. All this change would do is to substitute one set of ambiguities, which will need to be clarified by the courts, for the ambiguities of the current rule, which at least have received the attention of the courts for a long time. In antitrust cases, with which he is familiar, this change would prompt defendants to try to throttle potentially fruitful and valid lines of inquiry.

Sanford N. Berland, prepared stmt. and Tr. 165-71: Strongly supports the change. This is a positive step toward reining in uncontrolled discovery and the abuses that it causes. There will be a period of time during which the understanding of the new rule will have to take shape, and some additional motion practice. But some of this happens already in the context of motions for protective orders and the like. To the extent this might lead to differences between districts in interpretation of the scope of discovery, that should be no more than the differences among districts that exist at present under the current rule.

Pamela Menaker, Tr. 177-82: (Reading prepared statement of Robert A. Clifford, chair-elect of ABA Section of Litigation. Prepared stmt. of Clifford appears below) Opposes the narrowing of discovery. He is aware that the ABA Section of Litigation favors the change, but he is opposed in his individual capacity. He thinks that the scope of discovery is essential to fair disposition of cases. Defendants will take additional advantage of the discovery process. The Advisory Committee should focus on the abuses by defendants, not change the scope of discovery.

Thomas E. Rice, Tr. 183-88: The current standard is too subjective, and the claims and defenses standard would be more objective. Using it, judges will be able to make sensible decisions. Presently, in airplane liability litigation, no matter what the problem involved, plaintiffs will want to inquire into any problems of any type related to the aircraft in question. You end up with a mini trial on every prior accident, and you have to produce thousands of documents and witnesses from everywhere involved in those other accidents. But none of these are ever used at trial, because for use at trial you have to have similarity of accident. Discovery disputes become the animating force behind settlements, and sometimes the focus of the case becomes discovery instead of the event that originally prompted the suit.

Daniel Fermeiler, Tr. 188-93): Favors the proposed change. It will be workable. The claims and defenses standard can set boundaries for experienced litigators and the trial bench. It should not add anything to what we now deal with under Rule 9(b), where one must plead with specificity.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) She expects that it will continue to be hard for judges to say no to discovery under the revised standard. In some ways, it's easy for a judge to say yes to discovery because in a sense there's no harm done, and you are not keeping anything from anyone. Under the new rules, judges are not suddenly going to embrace denying important discovery to litigants. She cannot agree with Robert Clifford (see above) on these issues.

Peter Brandt, Tr. 208-11: (representing Ill. Assoc. of Defense Trial Counsel) He has seen instances of overdiscovery by plaintiffs. The court would not restrict discovery in advance or impose costs later. The proposed amendment at least gives courts some guidance about the type of situation in which plaintiff's counsel wants all every item of information about a type of product.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Offers example of jeep rollover case in which plaintiff noticed depositions of 24 people across the country who had been involved in other rollover accidents, and the court refused to limit that. Had the new rule been in place, he believes the judge would have taken a different tack. The alleged defects in the other cases were different. The change will prompt court involvement, and that of itself will be a good thing.

Linda A. Willett, prepared stmt. and Tr. 211-17: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Under the broad current language, litigants use discovery as a vehicle to explore additional claims and as a way to investigate unknown but potentially available theories of liability. The Committee Note should make it clearer that parties have no entitlement to discovery to develop claims or defenses not already identified in their pleadings.

Michael J. Freed, prepared stmt. and Tr. 226-35: This change will result in a change from notice pleading, which would not be a positive development. Plaintiffs' lawyers will provide particularity where they do not now in order to provide a basis for broad discovery. But there will still be disputes on whether given discovery efforts come within the claims and defenses. The changed rule will deter compromise regarding discovery and lead

to more disputes coming before the court.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Caterpillar strongly supports the narrowing of the scope of discovery presumptively available. Personal injury claimants frequently use the "subject matter" test to seek unrestricted access to information regarding each and every piece of machinery that Caterpillar manufacturers, rather than focusing on the piece of machinery at issue in the case. This amendment deters this discovery run amok. This is needed now, for in the last ten years the amount of discovery has grown even as the number of cases has shrunk. It has proved hard to get a judge to pay attention to these issues, and when they do they usually seem to think that since Caterpillar is a big company there's no reason to be concerned about the burden of what they order.

Chris Langone, Tr. 251-259: (appearing on behalf of Nat. Assoc. of Consumer Advocates) NACA believes that the proposal will increase the cost of discovery on behalf of consumers because it will encourage parties to raise more improper objections to discovery requests. Right now, defendants resist discovery that is clearly appropriate, and this change will embolden them. These cases are document driven, so defendants have a strong incentive to resist producing documents because that will leave plaintiffs without anything on which to base their claims. For example, in a Truth in Lending Act case, he found an odometer violation. But with the narrowed discovery he might not be able to do discovery that would reveal that violation because his original claim was for violation of the Truth in Lending Act. Both Rule 15(a) and rules of claim preclusion argue for permitting the broadest discovery of other claims in the initial litigation. In any event, the defendant will still have to review all the documents to weed out the ones that are not about this claim, so it doesn't really save the defendant any money. It only means that the plaintiff won't get those inculpatory documents because they supposedly go beyond the narrowed scope of discovery.

Robert A. Clifford, prepared stmt.: Opposes narrowing discovery. This will interfere with the benefits of notice pleading. The present scope of discovery contributes to the early settlement of cases, while the narrowed scope will mean that a great many

consumers and victims with strong claims will be denied justice. The fundamental fact is that in many cases plaintiffs lack information, while defendants have information and do not want to give it up. This leads to stonewalling, which is endemic. Even when they are ordered to produce relevant documents, defendants produce some scant documents in an attempt to feign good faith. If the Committee is really concerned about problems with discovery, stonewalling is where its attention should focus.

Thomas Demetrio, prepared stmt.: Narrowing the scope will cause an unending volume of litigation about the allegations of the parties' pleadings and the interplay of those allegations with the individual discovery requests. Judicial rulings on these issues will take time, but will not produce a body of law that will provide guidance for other cases.

(b) Authorization for expansion to "subject matter"  
limit on showing of good cause

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) This will undermine the limitation of discovery to material relevant to claims and defenses.

Prof. Edward D. Cavanaugh, 98-CV-002: The amendments will generate costly satellite litigation by prompting motions for discovery available as a matter of right under the current rule. The courts will be involved in discovery disputes more often.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: Opposes this authorization. It notes that there is no definition of "good cause," and that the good cause requirement provided in Rule 34 with regard to document discovery until 1970 was deleted in that year as uncertain and erratic in application. The Section found no precedent for the two-tier standard proposed by the Advisory Committee. This is likely to promote satellite litigation, particularly since there is no guidance about what constitutes good cause. The claims and defenses test, standing alone, should provide sufficient flexibility. As a bottom line matter, "on balance, we believe that the amendment, if enacted, can have an important salutary effect on the parties' and the courts' approach to discovery problems."

Maryland Defense Counsel, Inc., 98-CV-018: Expresses concern that trial judges numbed by years of tolerance of scorched earth discovery requests will fail to actively manage discovery under the proposed amendments, so that the intended benefits will not occur. Therefore urges that the Note stress that any discovery beyond attorney-managed discovery be treated as suspect.

Prof. Peter Lushing, 98-CV-020: Suggests that removal of the "subject matter" language is what the Devil would do (see above). "But I would not stop there. I would permit discovery of the 'subject matter' upon motion. Now, assuming anybody understood the above distinction, I would assure endless litigation as lawyers who bill by the hour found yet another way of running up fees."

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The trial court can always look at discovery requests under a good cause standard. The parties can be protected by the trial court if they can establish good cause for reasonable discovery requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: The two-tiered structure has problems. It creates a distinction so fine as to lack practical value. The current rule uses both criteria, but suggests that the latter is a different way of saying the former. The leave of court option invites increased discovery motion practice. The Committee opposes any kind of leave-of-court process for determining the scope of discovery.

ABA Section of Litigation, 98-CV-050: Supports the proposal. It strikes a good balance by giving the court flexibility to permit broader discovery when warranted in an individual case. The proposal also encourages the court to supervise cases involving extensive discovery.

Laurence F. Janssen, 98-CV-058: Urges that the Note emphasize that any party's request to expand the scope be carefully examined and that there be a presumption against expansion.

Charles F. Preuss, 98-CV-060: Elimination of the "subject matter" standard entirely would facilitate more consistency and predictability in the discovery process. If the expansion is to be retained, more guidance, perhaps in the Committee Note, should be given on what constitutes good cause.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: "We anticipate that judges will be inundated with applications to extend discovery to the 'subject matter' of the action, and that these applications will be routinely granted. Judges would indeed be involved in discovery disputes, but not in a way that would expedite litigation but rather in a way that would be tedious, time-consuming, and inefficient."

Amer. Coll. of Trial Lawyers, 98-CV-090: While supporting the deletion of the subject matter requirement, the College believes that an order authorizing discovery to that limit should "be permitted only in a very unusual case." "Unless the 'subject matter' exception is left to the rare or unusual case, the



proposed amendment could be meaningless." (The foregoing is in a Nov. 30, 1998, letter from E. Osborne Ayscue, Jr., President of the College, to the Committee, 98-CV-122.)

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) The amendment will create a new category of "standard" discovery motions--motions to expand discovery for good cause. Judges do not wish to become more actively involved in managing the discovery conducted in complex cases, and an increase in discovery motions will cause further delay while parties await decision by busy federal judges.

Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals, 52 SMU L. Rev. 229 (1999), which contains observations about the proposals) "What, exactly, is good cause to go beyond whatever its 'claims and defenses' are? These decisions are likely to be highly discretionary and extremely case-specific. . . . This non-standard layers uncertainty on top of uncertainty and is begging to be repeatedly litigated."

Board of Judges of S.D.N.Y., 98-CV-143: In complex or contentious cases, one or the other party will, without exception, seek to demonstrate "good cause" for the broader scope of discovery. This will lead to further delay and expense, particularly if the expansion is authorized.

William C. Hopkins, 98-CV-165: From the plaintiffs' perspective, the expansion possibility is a crumb. To expect the judges to get involved is unrealistic, and the provision to expand to the subject matter limit is illusory.

Prof. Ettie Ward, 98-CV-172: The proposed two-tier system is likely to generate a great deal of satellite litigation, and there are also likely to be undesirable effects on pleadings designed to justify broader discovery.

Nebraska Assoc. of Trial Attorneys, 98-CV-174: The good cause expansion is bound to place further stress on the judicial system, and will lead to more discovery arguments.

Association of Trial Lawyers of America, 98-CV-183: This will generate satellite litigation. ATLA doubts that the distinct

courts can realistically handle the resulting disputes.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: This will lead to more discovery disputes and motions over the question whether the trial judge should or should not "broaden" discovery in a particular case.

Michael W. Day, 98-CV-191: This will lead to satellite litigation and increase the cost for litigants.

James C. Sturdevant, 98-CV-194: "The availability of judicial relief from the reduced discovery of the proposed amendments offers scant benefit to most practitioners. The delays and costs involved in pursuing any discovery motion will serve as an effective deterrent to seeking more expansive discovery."

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: The expansion possibility is a Catch-22 because it won't be of any use to parties who lack the information necessary to justify expansion.

Trial Lawyers for Public Justice, 98-CV-201: This will not solve the problems caused by narrowing the scope of discovery. It is already very hard to get judges to hear discovery motions, and if courts heed the Committee Note they are very unlikely to grant expanded discovery. It will be hard for requesting parties to establish specific good cause to get discovery, because they need discovery to do that.

Michigan Trial Lawyers Assoc., 98-CV-217: Takes little solace in this opportunity. It will be hard for requesting parties to get information through this procedure because it will be difficult to come forward with evidence to establish good cause to get discovery of materials which could not be specifically identified in advance.

Donald Specter, 98-CV-235: The good cause requirement is tantamount to a prohibition on discovery since it will be nearly impossible to establish good cause. A litigant cannot establish good cause to demand information if the litigant does not know the information exists.

NAACP Legal Defense Fund, 98-CV-248: There will be considerable

collateral litigation about expanding discovery.

R. Gary Stephens, 98-CV-253: The bifurcated system of court-managed discovery serves only to increase the cost of litigation, thereby denying the right of trial by jury to the citizens of the United States.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) Navistar is concerned this will too easily present a back door route to returning discovery to the monstrosity that the proposed changes are designed to eradicate.

#### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI would favor greater specificity in the Committee Note concerning the good cause showing necessary to obtain information that is not relevant to the claims or defenses. It would prefer to limit discovery to claims and defenses without any authority to expand on court order, and it hopes that the courts will exercise a lot of discretion in expanding.

Gregory Arneson, Tr. 30-45: (Representing New York State Bar Assoc. Commercial and Federal Litigation Section) Opposes the expansion possibility. Having two levels in the rule is just going to confuse things, particularly since the Committee Note makes it unclear where the line is between the two of them. If there were only one standard, then everyone would have to run with that. Moreover, the good cause standard was rejected in Rule 34 back in 1970. (Tr. 37-38)

Kevin M. Murphy, Tr. 80-89: He does not see a boom in discovery litigation due to the existence of expansion to the subject matter limit on court order. From his experience, counsel are reluctant to go before the judge on a discovery dispute, unless it is really significant. In general, people will moderate their behavior. (Tr. 86-87)

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) The good cause expansion possibility helps offset the

negative consequences of narrowing the scope of discovery, but it is a fairly modest change in the original proposal to narrow discovery. It is very difficult for courts to hold hearings on discovery issues in a timely way. Moreover, this is a Catch-22 solution, since a party can't make the needed showing without access to the materials in question. Case law on protective orders, which also turn on "good cause," shows that substantial amount of specificity must be shown. As a consequence, this escape valve is going to have very small practical effect in real litigation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Concerned that the overall discovery obligation remains vague so long as the court may order discovery to the "subject matter" limit, even though that is judicially supervised. At the very least, the Committee Note should acknowledge precisely what is necessary before the discovering party is permitted to "dig deeper."

#### San Francisco Hearing

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) The concept of restricting "subject matter" discovery until good cause is shown is valuable.

Diane R. Crowley, prepared stmt. and Tr. 23-36: Appreciates the value of giving the court power to expand discovery, but is worried that in some places discretion is used too often to do so.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell is concerned that the amendment of the scope of discovery might be undermined by the allowance of broader discovery on court order for good cause shown. If this option is retained, the Committee Note should stress that any request outside the scope of attorney-managed discovery should be examined with the closest scrutiny, and be permitted only on a particularized showing of necessity or palpable bad faith of the responding party. Absent such caveats, the history of free-roaming, overly burdensome and irrelevant discovery will be very difficult to overcome. Frankly, Shell has difficulty conceiving what would justify application of the exception absent bad faith.

H. Thomas Wells, prepared stmt. and Tr. 47-60: The requirement that a litigant seek a court order on good cause should at least give pause to the discovery "fishermen," and hopefully reasonably restrict such requests.

Charles F. Preuss, Tr. 60-67: Thinks that the scheduling conference will focus on the question of scope of discovery, in response to question about whether the ability to expand to scope will prompt more discovery motions. So the parties should know almost from the start whether the judge will authorize that. In addition, the judge can indicate what good cause would be in the given case. Good cause is where this whole scheme is going to stand or fall. To the extent the Committee can help explain what that is, it will assist the judges and the lawyers operating under the new approach. Probably plaintiffs will come to the Rule 16 conference and say that they want to go to the subject matter limits, and the issue will be addressed then. (Tr. 65-67)

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) The College doesn't really like the proposed right to seek expansion to subject matter on a showing of good cause. It would prefer to see the second tier eliminated. At least it would hope that the exception does not become the rule. It does not, however, think that the court will have to hear good cause motions in every case. If lawyers are before the court, that is likely to be due to disputes about the attorney-managed scope. One example for proper expansion might be a case where a plaintiff has one kind of claim and wants to see if there is a basis for adding another type of claim.

Gregory C. Reed, Tr. 146-55: Does not expect that having the possibility of expanding scope for good cause will cause more disputes to be taken before the court. There will be occasions when there are disputes about whether proposed discovery is within the claims or defenses. (Tr. 153-54)

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Views the addition of the ability to go to court to expand discovery as unfortunate. Urges the Committee to state clearly in the Note that this should be limited to situations clearly involving good cause, for otherwise this option may overwhelm the rule and the discovery abuses remain unaddressed.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: If the amended scope of discovery works as seems intended, it would be an ingenious compromise. However, perhaps there should be further explanation in the Note of the need to establish good cause for information related to the "subject matter" of the case. One way would be to use sequencing of discovery. He does not foresee, however, that there will be much more court involvement.

#### Chicago Hearing

Paul L. Price, Tr. 16-25: (on behalf of Federation of Insurance and Corporate Counsel) Supports the concept of the two-tier, good cause, approach. There are situations where the initial exchange requires additional supplementation. The good-cause standard should be used. Having to come to court with those disputes would be a good thing. One example would be the one in the Illinois courts -- the prima facie case. You can't pursue a punitive damage claim without making such a showing.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Sees the good cause burden as a serious impediment to plaintiffs. If they don't have access to the documents, they can't make the showing. How do you prove there's something good out there if you don't know what is out there? In everyday practice of law people don't do what they are supposed to do, so plaintiffs have to file Rule 37 motions.

Sanford N. Berland, prepared stmt. and Tr. 165-71: The Note should say that courts ought to look with skepticism on requests to expand the scope of discovery. If they do so, they should do so with regard to specific requests rather than as an abstract pronouncement. In the absence of these cautions, the salutary effects of the narrowing amendment may be lost.

Michael J. Freed, prepared stmt. and Tr. 226-35: This change will prompt increased discovery motion practice. Requiring judicial involvement will result in micro-management.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Urges that Note stress that broader discovery be used sparingly and in a staged fashion, so that this exception does not eat the rule.

Dean Barnhard, prepared stmt. and Tr. 267-76: Strongly urges that the Note say that discovery should be expanded only if that is justified by something far more palpable than idle curiosity or the desire to engage in a fishing expedition. The case that goes beyond the claims and defenses limit should be the exception, not the rule. In this regard, the cost-benefit considerations of Rule 26(b)(2) are entitled to considerable weight.

Robert A. Clifford, prepared stmt.: In practice, this expansion procedure would prove totally ineffective and it borders on the unreasonable. Federal judges have a great deal to do without ruling on motions to expand discovery. He doubts that most judges would see this provision as reducing court involvement. To the contrary, it could have the opposite impact.

Rex K. Linder, prepared stmt.: It would be helpful if there were more guidance in the Note on what types of situations would satisfy the good cause requirement to expand discovery.

- (c) Revision of last sentence of current Rule 26(b)(1) to state that only "relevant" material is discoverable

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) They propose a different change to the last sentence: "The information sought need not be admissible at the trial if the information sought ~~appears reasonably calculated to lead to the discovery of admissible evidence~~ is relevant to the claim or defense of any party."

Prof. John Leubsdorf, 98-CV-008: Although finding the package generally to be a "desirable overhaul of Rule 26," he is concerned about this change as creating problems. The change seems to exclude discovery of information that, although not relevant and admissible at trial, nevertheless is needed to obtain important and admissible material. For example, in a complex case discovery may begin with a deposition of an opposing party's custodian of records. Similarly, a party might request the names of all persons working in a given department in order to notice their depositions later. Assuming the objective is not to preclude these sorts of discovery, the solution is to see the change in this sentence as invoking "relevant" as used previously in Rule 26(b)(1), but this is not made clear. If that is the goal, it is not clear why any change is needed, and if it is one could change the sentence to read: "Information within the scope of discovery, as set forth in the two previous sentences, need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Jay H. Tressler, 98-CV-076: The amendment is warranted. Discovery should depend on whether there will be admissible evidence if it is allowed.

Philadelphia Bar Assoc., 98-CV-193: Supports the change. This change eliminates the current language that suggests that anything is a legitimate discovery object so long as it is reasonably calculated to lead to discovery of admissible evidence.



## Testimony

## San Francisco Hearing

H. Thomas Wells, prepared stmt. and Tr. 47-60: The clarification that Rule 26(b)(1)'s allowance of discovery "reasonably calculated to lead to the discovery of admissible evidence" is not a relevance test is an improvement on the current rule as interpreted, and is a reasonable restriction on the scope of attorney-managed discovery.

(d) Explicit invocation of Rule 26(b)(2) in Rule 26(b)(1)

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) They commend the addition of the reference to Rule 26(b)(2).

Charles F. Preuss, 98-CV-060: The addition of the final sentence invoking Rule 26(b)(2) is a useful reminder against the allowance of excessive discovery.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: The change does not mark any substantive change, but probably serves as a helpful reminder that the factors in 26(b)(2) should be brought into play more frequently.

Gary M. Berne, 98-CV-175: The proposed addition to Rule 26(b)(1) is redundant, unnecessary, and insulting. Courts already have sufficient powers, and all discovery is already subject to (b)(2).

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: Supports the change. This is the only amendment that has been proposed that should be adopted. It will help clarify that the scope of permissible discovery depends on the factors delineated in Rule 26(b)(2). It would be helpful if the Committee Note stressed that this cross-reference modifies the scope of discovery otherwise available under Rule 26(b)(1) and requires courts to make case-by-case assessments to avoid discovery abuse and delay.

Testimony

Baltimore Hearing

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Strongly supports Committee's reemphasis on proportionality of discovery. Explicit invocation of this limitation is certainly needed to underscore those provisions, which are so often overlooked or misapplied.

4. Rule 26(b)(2)

[Note that comments regarding uniformity under Rule 26(a)(1) may relate to these provisions as well]

## Comments

Marvin H. Kleinberg, 98-CV-010: Decries the erosion of use of requests for admissions, and feels that any authority to limit these by local rule should not be retained.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Supports the elimination of opt-out provisions for numerical limitations on interrogatories and depositions.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Endorses the changes. The goals of Rule 1 are best served by national rules. Notes, however, that the proposed amendment makes no provision for limitations on interrogatories or depositions by the consent of the parties. Recommends that the parties should be permitted to limit the number of interrogatories or depositions and the length of depositions by consent. Further, recommends deleting authority for a district court to limit the number of requests for admissions by local rule.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Expresses concern with the elimination of the ability of the district to set the number of interrogatories or requests for admissions by local rule.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes "new" authority for local rules limiting the number of requests for admissions. Urges that all numerical limitations on discovery activities, whether in the national or local rules, be eliminated.

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: The provision eliminating the power to set local limits on the number of depositions or interrogatories would eliminate his district's ability to use a differentiated case management plan by local rule. This plan provides a framework for the parties to facilitate agreement on a discovery plan.

U.S. Dep't of Justice, 98-CV-266: Opposes the "change" authorizing local rules to limit the number of requests for admissions.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: Questions the "change" to authorize local rules limiting the number of requests for admissions.

#### Testimony

##### Baltimore Hearing

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: A court in a particular case should be empowered to limit the number of interrogatories or depositions and the length of depositions. But the proposed rule makes no provision for these limitations by consent of the parties. The parties should be allowed to limit the number of interrogatories or depositions and the length of depositions.

##### San Francisco Hearing

Diane R. Crowley, prepared stmt. and Tr. 23-36: In areas like San Francisco, where attorneys routinely appear in several different district courts, limitations on local rules in order to increase uniformity will be most welcome.

5. Rule 26(d)

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Retention of the moratorium is welcome.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Concurs in the proposal, and agrees that authorization to lift the moratorium by local rule should be eliminated.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Strenuous objection to elimination of opt-out provisions. This causes a delay in the initiation of discovery and is unnecessary. Urges Committee to consider reinstating authority to provide by local rule that discovery can begin immediately.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) The committee has concerns about the moratorium because it may create problems in cases in which immediate discovery is essential, such as cases in which a preliminary injunction is sought or a motion to dismiss for lack of personal jurisdiction is noticed.

Public Citizen Litigation Group, 98-CV-181: Supports the proposal, but believes that there are additional categories of discovery that should be exempt from the moratorium. In class actions, discovery should be allowed on the propriety of class certification. Similarly, a plaintiff seeking a preliminary injunction should be allowed to proceed with discovery. The rule might also say that courts may grant motions to commence discovery before the Rule 26(f) conference where that is in the interest of justice.

New Hampshire Trial Lawyers Assoc., 98-CV-186: Opposes removing the authority of districts to opt out. This is exactly the type of procedural matter that is appropriate to deal with at the local level.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the retention of the moratorium. It interferes with the just, speedy, and efficient resolution of cases. Able counsel

can operate responsibly without the rule-based requirement that they confer before starting formal discovery. "We understand that the provision is based on the fact that there are some counsel on both sides with marginal abilities to represent their clients, and that guiding them through each step of the process will assist their clients. We submit, however, that the problem of marginally-competent counsel should be addressed in another manner."

Jon B. Comstok, 98-CV-228: Concerned that objections to disclosure might be taken to mean that the moratorium is extended. Rather than leaving this unsettled, he would recommend the following: "Following such conference, any party may initiate discovery irrespective of whether the party has objected to initial disclosures as required by (a)(1)."

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: Expresses concern that in cases exempted from the moratorium pursuant to (a)(1)(E) there may be abusive discovery in cases in which court approval should be required before discovery occurs.

U.S. Dep't of Justice, 98-CV-266: The Department suggests that the proposal be altered to provide that the moratorium applies even to cases exempted by (a)(1)(E) "unless the court orders otherwise." The Department believes that in cases in which disclosure is inappropriate other discovery would also be inappropriate unless a court so orders.

#### Testimony

##### San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell strongly endorses the retention of the prohibition against discovery until after the Rule 26(f) conference. This permits the court to have a more visible and necessary role in discovery sequencing and planning.

##### Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: If disclosures are restricted to helpful information, the moratorium should not be continued.

Already, the delay until the Rule 26(f) meeting for formal discovery is impeding activity by plaintiffs, who would otherwise be filing interrogatories to get discovery started. There seems to be something of a dance to put off the Rule 26(f) conference as long as possible. The idea of a discovery plan is a wonderful idea, but the reality is that this is not happening frequently or easily enough and the narrowing of disclosure will be a harmful development if the moratorium is retained.

Michael E. Oldham, prepared stmt. and Tr. 235-45: The decision to keep the moratorium on discovery until after the attorneys' conference is sound.

6. Rule 26(f)

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports amendment to require a conference instead of a meeting because it is not always possible for litigants to meet physically. Also supports changes in timing to meeting 21 days before the scheduling conference.

James F. Brockman, 98-CV-009: Supports amendment permitting conference to occur by telephone.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Supports elimination of requirement that parties hold face-to-face meetings. Also supports timing changes (moving meeting to 21 days before pretrial conference).

Amer. Coll. of Trial Lawyers, 98-CV-090: The proposed timing changes are rationally arranged and should be adopted.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) The committee has concerns about the timing of the Rule 26(f) and Rule 16(b) conferences. For one thing, they could be used by a plaintiff to disadvantage defendants added to the litigation after it has commenced, and particularly after a discovery plan has been set. In this district, the district judges vary in when they do these things, and a later-added defendant might be disadvantaged in a case assigned to a judge who acts early as compared to a case assigned to a judge who does not act so promptly. The U.S. Attorney's Office, in particular, has found that it is difficult to get agencies to provide information by the time needed for those judges who act earlier in the litigation. The whole idea of adopting a discovery plan at the Rule 16(b) conference causes the committee concern. At this early stage of the litigation, the parties and the judge have very little appreciation of the issues and the evidence. Moreover, there could be problems in this district because most discovery matters are assigned to magistrate judges. If the discovery plan is entered by the district judge, the magistrate judges may feel that they cannot change anything.



National Assoc. of Railroad Trial Counsel, 98-CV-155: Opposes authorization for local rules that require face-to-face meetings. "We do not believe that an in-person meeting is necessarily required for preparation of a discovery report."

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Supports the change to require conference 21 days before the scheduling conference.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorses minor amendments in rule to secure uniformity.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the change. Elimination of the face-to-face requirement, particularly in a large district, saves time and money.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports this change because it logically orders the planning and disclosure process. It also eliminates the requirement of a face to face meeting.

Philadelphia Bar Assoc., 98-CV-193: Supports the change. Applying the rule nationwide is commendable, and exempting the categories of cases excluded from disclosure is wise. It is appropriate to leave the question of requiring a face-to-face meeting to local option.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Supports the change allowing the parties to confer without the need for a personal meeting.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: This change is long overdue, and probably describes what most attorneys actually do under the current rule.

Comm. on the Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218: Supports the change to permit parties to "confer" rather than meet under Rule 26(f).

Jon B. Comstok, 98-CV-228: Insisting on face-to-face meetings has imposed an unnecessary expense. The proposed amendment amply handles situations where a local court may require personal conference. But he would suggest deleting the authorization for

a local rule so requiring in any and all cases. Judges should be required to do it on a case-specific basis.

Testimony

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The proposed amendments to Rule 26(f) create a more logical sequence of events and time schedule in developing a discovery and case management plan. The present "face to face" requirement is generally unnecessary, and has appropriately been dispensed with.

Chicago Hearing

Michael E. Oldham, prepared stmt. and Tr. 235-45: The decision to allow a "conference" in lieu of a "meeting" is very well advised.

7. Rule 30(d)(a) Deposition duration

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) These organizations were unable to reach a consensus on this amendment.

Thomas E. McCutchen, 98-CV-006: Seven hours may be too little time, and it may be difficult to obtain extensions or other relief. If a witness doesn't answer or gives evasive answers, one may learn little in one day.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: Opposes the one-day limit. This is unnecessary in the normal case, and unworkable in the complex case. The FJC survey says that there is no reliable evidence that such limits have achieved their intended effects, and it found more disputes about duration in those districts that have such limitations. In high-stakes complex litigation the limit would increase the gamesmanship that would occur. "Court reporters will routinely time restroom breaks and lunch recesses; will they also time colloquies, objections and pauses before answering?"

Maryland Defense Counsel, Inc., 98-CV-018: Supports the amendment, but would exclude expert witnesses. Since the party taking the deposition typically pays the expert's fee, that financial disincentive should serve as a sufficient curb on overlong depositions.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Opposes the proposal. The change is unnecessary because the vast majority of cases do not have any depositions exceeding seven hours according to the FJC study. Moreover, seven hours is arbitrary.

Thomas J. Conlin, 98-CV-041: Opposes the change. "In my experience, over 90% of the depositions which last more than one day last that long for a good reason." There is sufficient protection already in the rules.

ABA Section of Litigation, 98-CV-050: Supports the proposal

because it establishes a uniform national practice, limits excessive discovery where appropriate, and encourages judicial supervision of cases where more extensive discovery is sought. Believes that seven hours is sufficient and often generous for a single deposition in the vast majority of cases. However, more time may be required for some witnesses in some cases, for example in highly complex cases involving issues spanning many years. The Antitrust Section, in particular, was concerned that seven hours often is not sufficient for depositions in antitrust cases and that, as a result, the proposal could result in significant additional motion practice. Suggests that language be added to the comment recognizing that the seven-hour rule may be inappropriate in complex litigation matters and encouraging courts to exempt those cases as permitted by the proposed rule. In addition, recommends that the Note be clarified to indicate that the seven-hour period does not include lunch or another substantial break.

Ellen Hammill Ellison, 98-CV-054: Opposes the change. It will cripple plaintiffs' ability to discover vital information in some cases.

Laurence F. Janssen, 98-CV-058: Recommends exempting expert witnesses. As the court's role as gatekeeper in cases involving expert opinion testimony has expanded, it is unrealistic to expect that necessary inquiry as to both scientific methodology and the substance of an expert's opinions can be accomplished within seven hours. This is especially true in mass tort cases. Nor should the agreement of an expert witness be necessary to effect a stipulation to extend.

Lawyers' Club of San Francisco, 98-CV-061: This change is unwise and arbitrary. It will impede the ability of parties to adequately conduct discovery and prepare their cases for trial. Attorneys should not be required to make a showing of good cause in order to conduct an examination in excess of the seven hour time limit.

Gennaro A. Filice, III, 98-CV-071: Although the rationale for limiting depositions is a sound one, in the vast majority of complex litigation there is a real need for longer examinations. Accordingly, the limitation should not apply automatically in complex cases. Rather, the need for, and scope of, limitations

on deposition testimony should be one of the subjects for consideration in the judicial supervision of the action. The scientific and technical issues in such complex litigation almost invariably call for more active management and discretion in permitting or limiting depositions. The better course is for the Note to reflect a preference for a case-by-case analysis of the matter and time limitations to be applied as the circumstances dictate.

E.D.N.Y. Comm. on Civil Lit., 98-CV-077: Opposes the change. It is unnecessary, because the courts have sufficient power to enter such orders. The one-day limit is simply not practicable in complex cases, which are typically document-intensive and time-consuming even for the most skilled and cooperative counsel. Moreover, the amendment will create perverse incentives to be uncooperative.

Lee Applebaum, 98-CV-086: Urges that the rule should contain some guidance about how the ground rules of depositions should be handled under the time limitation. Attaches a copy of a forthcoming article urging counsel to prepare carefully to make effective use of time. Suggests that both sides should agree about whether breaks, objections or disputes that go to the judge count against the seven hours. "Ideally, professional counsel will work out a fair set of ground rules."

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Opposes the change. The time limit is arbitrary, and does not allow for the variable dictates of each case and each witness. It would also encourage gamesmanship. This is "an overly ambitious attempt at fine-tuning and tinkering with the discovery process."

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Pleased to see the time limitation on length of depositions.

National Assoc. of Consumer Advocates, 98-CV-120: The change is positive; all parties can benefit from a limitation on the time for depositions. Time spent in depositions is the single greatest cost of virtually any civil lawsuit. But the rule should be clarified to say that no single party can exceed the time limit. Often both sides wish to depose the witness to obtain testimony for use at trial rather than call the person as a live witness at trial. With expert witnesses, judges often

encourage this treatment. Unless the rule says that, the party who noticed the deposition might monopolize the time. In addition, the rule should state that breaks are not included. Finally, the rule should explicitly state that the seven-hour limit applies to each witness designated by a corporation or other entity pursuant to Rule 30(b)(6). Modeled on recently-adopted Tex. R. Civ. P. 199, N.A.C.A. proposes that the final sentence be changed as follows:

Unless otherwise authorized by the court or stipulated by the parties and the deponent, no side may examine or cross-examine an individual witness for more than one day of seven hours. Breaks taken during a deposition do not count against this limitation. For purposes of this limitation, each person designated under Rule 30(b)(6) is a separate individual witness.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) Opposes the proposal. A one-day limitation for a significant witness is unrealistic, and it will lead to more game-playing in litigation. Stalling will occur. There are situations where further questioning is usual and needed. For example, if the witness discloses that previously-requested documents have not been produced, or reveals additional claims or new facts, more questioning will usually be needed. In such a case, the lawyer faces a Hobson's choice whether to continue questioning until the time limit arrives or immediately seek leave to question longer. Also, where there are multiple parties the party who noticed the deposition may use up all the time. Further problems will arise where an interpreter is needed. Presently the burden is on the party who wants a limitation to seek judicial relief, and it should remain there. Under the proposal, there will be more motions in court, particularly since the witness can veto additional time even if the lawyers agree to it. If there is to be a limit, it should take account of the type of case. One idea would be to vary the length in terms of the A.O. weighting scale for cases. Another was to require that the limit be set at the Rule 16(b) conference. If a "one size fits all" approach is used, the committee at least suggests that it be two days of 14 hours, at least for parties, experts, and cases in which multiple sides are represented.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152:

There are ambiguities in the proposal. In cases involving multiple parties, does each party have seven hours? How does the rule work if the deponent is designated under Rule 30(b)(6)? Do the parties get only seven hours even if several people are designated? Perhaps these issues will have to be dealt with on a case-by-case basis, but the rule gives little guidance at present and it might do more.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Opposes the change in its present form. The goal of reducing deposition time may be admirable, but the blanket rule is arbitrary and unworkable (much as the Illinois state court rule is unworkable). The rule does not deal with the problem of the multi-party deposition, fails to advise how break time is to be handled, and fails to address numerous other subjects on which attorneys can dispute.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Opposed. Experience in the D. Conn. shows that such a limitation is not needed. In those relatively rare instances in which depositions have been unduly extended, the court has been available to provide relief.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the proposed amendment as written. The one-day deposition of seven hours in the great majority of cases is more than sufficient. In complex cases, the court can permit longer depositions if needed.

Libel Defense Resource Center, 98-CV-160: Strongly opposes the limit. It is unnecessary and overbroad. The length of a deposition is a function of a variety of factors that don't indicate abuse. Placing a limit will give the uncooperative witness an incentive to be difficult. Moreover, a time limit will foster trials by forcing counsel to curtail some lines of inquiry. In defamation cases, the limitation may harm First Amendment rights since those are protected by summary judgment motions that depend upon full inquiry during depositions.

Philip A. Lacovara, 98-CV-163: Supports the change. In 1992, he suggested adopting a limitation "in the eight to twelve hour range," but he is relatively comfortable with the Committee's proposal. But the rule might have the perverse effect of fostering filibustering. At least the rule should be changed to

deal with the right of the other parties (including the deponent's own counsel) to cross-examine, if they wish to do so. The rule should not imply that the deposing party has a right to seven hours of testimony and that nobody else has any right to examine. He would therefore support adding the following at line 17, p. 60 of the Committee's draft:

The court . . . shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent, including examination by parties other than the deposing party, or if the deponent or another person . . . or other circumstance, impedes or delays the examination.

William C. Hopkins, 98-CV-165: Opposes any "presumptive" limitations on discovery. Due to the difficulty of getting the attention of a federal judge, this is too unworkable, and it targets plaintiffs.

Prof. Ettie Ward, 98-CV-172: Opposes the change. Seven hours is an arbitrary limit. Not all lengthy depositions are abusive, and the existence of a seven-hour "standard" might prompt some depositions to be longer than they would be without the rule.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the limit.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: Opposes the limit. A one-size-fits-all approach is too rigid. Witnesses vary in speed and responsiveness.

Trial Lawyers Association of Metropolitan Washington, D.C., 98-CV-180: Supports this proposal. This support (compared to opposition to several other proposed changes) underscores the lack of interest in the plaintiff's bar in running up time and costs unnecessarily. Most plaintiff's lawyers rarely or never conduct a deposition of more than seven hours. Defense lawyers, on the other hand, frequently take multi-day depositions which could have been concluded far more efficiently and quickly.

Public Citizen Litigation Group, 98-CV-181: Does not support. Although seven hours is sufficient for most depositions, it will not be for a substantial minority of depositions. Imposing an arbitrary limit is likely to increase the need for judicial



intervention. If the rules are to establish a presumptive limit, submits that it would be better to adopt a limit on the total number of hours that may be taken by plaintiffs, defendants, or third-party defendants in the case. For example, each group could be allocated seventy hours of deposition time.

New Hampshire Trial Lawyers Assoc., 98-CV-186: Favors adoption of the limit. Very often depositions are too lengthy, and the proposed amendment incorporates substantial flexibility and opportunity to modify the limit by agreement or motion.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This change may make it difficult to obtain necessary information, and the limit could increase the burdens on the court.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: This simply invites increased discovery motions over whether the limits should be extended or not in a given case.

Philadelphia Bar Assoc., 98-CV-193: Takes no position. Many members welcomed the limit, but others believed that gamesmanship and motion practice would be more prevalent if the rule were adopted.

James C. Sturdevant, 98-CV-194: Limiting the time of each deposition to an arbitrary number of hours will further constrict available discovery and the ability of plaintiffs to prepare adequate for trial.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the limitation as a simplistic "one size fits all" measure. There is a substantial problem of abusively long depositions of plaintiffs, and therefore the Note should say that one day of seven hours should ordinarily be sufficient for a deposition of a plaintiff or a person who is defending a claim in his or her personal capacity. Sometimes defendants use a long deposition to intimidate individual plaintiffs. But the situation is altogether different when the witness is testifying on behalf of a governmental agency, a corporation, a partnership or an unincorporated association. Then a long deposition may be required to pin down the various types of records kept by the organization.

Trial Lawyers for Public Justice, 98-CV-201: TLPJ supports this proposal. In its experience, this discovery tool has too often been abused under the current rule. Parties represented by counsel who are compensated on a billable hour basis, such as corporate defendants, often take unnecessarily lengthy depositions. Sometimes it is necessary for a deposition to take longer than seven hours, but the proposal recognizes that fact and provides protections to direct the court to extend the length of the deposition where additional time is needed.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Committee has mixed feelings, but an open mind, on the subject. It is curious to see how the new limit will work in practice.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the change. Lengthier depositions are all too often the product of less competent examiners or of lawyers whose real motive is to harass or otherwise coerce a settlement.

F.B.I., 98-CV-214: Supports the change. FBI employees and agents are often subject to depositions, and the change would make these less disruptive.

Michigan Trial Lawyers Assoc., 98-CV-217: Supports the change. Flexibility is provided under the rule for agreement of the parties, which, in all likelihood, would take place rather than resorting to the Court.

Comm. on Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218: Opposes the change. It does not work in complex commercial litigation and would lead to a proliferation of motion practice. Deponents will be evasive and stonewall.

National Assoc. of Independent Insurers, 98-CV-227: Supports the change. It will eliminate unnecessary duplication of questions and force parties to utilize the time allocated for a deposition efficiently.

Jon B. Comstok, 98-CV-228: Thinks that this simple proposal will do more than any other to cut down on unnecessary costs of litigation. Parties and deponents are routinely abused by counsel that unreasonably delay and extend depositions requiring

multiple days for a single witness. He would have preferred a shorter limit of perhaps five hours.

Donald Specter, 98-CV-235: Although there is a benefit to shortening depositions, the means chosen appear arbitrary and don't reflect the realities of litigation. Deponents are often uncooperative and attorneys are obstructive. This will reward those tactics. At least expert witnesses should be excluded.

Eastman Chem. Corp., 98-CV-244: Strongly supports limitations on depositions, both in number and duration. The proposed rule is a step in the right direction. But it is concerned that key fact witnesses and many expert witnesses cannot be properly examined with the allotted time.

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) Fears that plaintiffs who need to ferret out facts critical to their case from key witnesses may not have a full and fair opportunity to do so. Similarly, defendants may be unable to challenge the pat answers of a polished plaintiff.

Warren F. Fitzgerald, 98-CV-254: Limiting the length of depositions is a laudable goal, but the proposal is too general in its application. It would restrict some depositions too much while allowing others to be abusively long.

Anthony Tarricone, 98-CV-255: Agrees that most depositions can be completed within one seven-hour day, but opposes the proposed change as presently drafted. Some depositions cannot be completed reasonably in seven hours. Where that is due to the complexity of the case, it is unfair to place this burden on the party seeking discovery. Courts are already empowered to deal with abuses, and the current scheme is preferable.

Annette Gonthier Kiely, 98-CV-256: Opposes the change. It is based on a false presumption that there is widespread deposition abuse. The current rules provide sufficient remedies for abusive behavior in depositions. An arbitrary limitation on the length of depositions will result in parties being precluded from properly developing evidence which is crucial to their cases.

David Dwork, 98-CV-257: Opposes the change. A two hour deposition may sometimes be abusive, and a two-day deposition

need not be. The current rules are adequate to deal with these problems.

William P. Lightfoot, 98-CV-260: Supports the change. Plaintiff lawyers don't have an interest in running up expenses. Defense lawyers, on the other hand, often take multi-day depositions that could have been conducted much more efficiently and quickly.

U.S. Dep't of Justice, 98-CV-266: The Department agrees that one day is an appropriate limit for many, if not most, depositions. It believes that the rule and the Note should make clear that this is a presumptive and not a mandatory limit. In many complex cases seven hours will not be sufficient. A mandatory rule might also be problematical in cases involving numerous documents controlled by the deponent. Similarly, in cases involving complicated scientific or industrial processes the limit could be inappropriate. Even a generally appropriate presumptive limit may be inappropriate if applied so rigidly that it is effectively mandatory. A party should be discouraged from insisting that its opponent incur the cost of a motion to extend the time needed for testimony. Given these concerns, the Department's support for the limit is subject to three important qualifications: (1) expert witnesses, witnesses designated under Rule 30(b)(6), and possibly party witnesses should be excluded in the rule itself; (2) the Note should state that grounds for extending the limit be liberally construed; and (3) the deponent should not be given a veto (covered below).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports this change. It will require deposing counsel to be better prepared, more efficient, and will save on fees and costs to the parties. The Committee recommends that the Note articulate everyone's expectation that the seven hour limitation relates to "real time," and does not include breaks or other time off the record.

#### Testimony

#### Baltimore Hearing

Robert E. Scott, prepared stmt. and Tr. 8-18: DRI is not opposed to time limits on a deposition, or to the one day, seven hour

rule. It recognizes that there could be issues in some cases in which that amount of time is not sufficient. In the run-of-the-mill case, seven hours should probably be sufficient.

Allen D. Black, prepared stmt. and Tr. 18-30: Thinks the current proposal is fine. (Tr. 21)

Brian F. Spector, prepared stmt. and Tr. 64-80: The time limitation is problematic because it is difficult, or perhaps impossible, to complete a deposition within seven hours in a variety of situations. These include (a) multiple parties with disparate interests, each represented by separate counsel, (b) instances in which the examining attorney consumes virtually the entire time, leaving little or not time for cross examination; (c) witnesses who require an interpreter; (d) a Rule 30(b)(6) deposition in which there are multiple designees, each of whom must be examined to establish competence to testify on the designated subjects. Moreover, it is not unusual to require multiple sessions with a deponent, particularly where examination reveals the existence of documents not yet produced, or where issues in discovery have been bifurcated (as with staging of class and merits discovery in a class action). Interrogatories might take up some of the slack, but the 25 interrogatories limitation gets in the way of that solution. There is also a potential problem with Rule 30(b)(6) designations since that could be treated as one witness or several. That problem can exist with regard to the ten-deposition limit and also with regard to the one-day limit. The current Advisory Committee Note says that this is one deposition for purposes of the ten-deposition limit. Should that be the same for the one-day limit? Amendments to Rule 16 calling more specifically for discussion of these matters at the initial scheduling conference would be helpful. Although there is nothing to keep the judge from addressing these matters now, it would help to impress on judges the need to take them seriously. Too often, judges simply say that they don't want to worry about these issues unless a dispute arises.

Kevin M. Murphy, Tr. 80-89: Although he doesn't have personal experience with deposition time limits, he would favor them. He thinks, however, that there needs to be guidance on exactly how this would work where there are several lawyers questioning and obviously the questioning will go on more than seven hours.

Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: The change is unwise. There may be reason to limit the length of depositions in certain types of litigation, particularly where the stakes are lower or the litigation is not complex. But an across-the-board limitation should not be adopted. The rule is unnecessary, for the courts already have ample power to limit deposition length. In complex cases, the one-day limit is not realistic. Particularly when a witness needs to review documents during the deposition, the seven hour limit will not work. Similarly, the limit won't work if the witness has poor language skills. The limit will also give the witness perverse incentives to be uncooperative or obdurate. The issue is best handled on a case-by-case basis.

San Francisco Hearing

Diane R. Crowley, prepared stmt. and Tr. 23-36: Cannot support the change. In far too many of the actions handled by her firm, depositions must of necessity be longer than seven hours because the cases are complex. This is especially true if there are a number of attorneys taking part in the questioning. Seeking a stipulation to continue beyond seven hours is absolutely unworkable in her experience, and will create a need for yet more court appearances. If there are twelve attorneys around the deposition table, each will want to question the witness and protect his client's interests. Even if the limit were raised to two days, there would still be problems. Leave out time limits. People don't stay there to run up their bills. They want to get out, but need to ask the questions to protect their clients' interests.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell suggests emphasizing in the Committee Note that motions to extend expert depositions, particularly in complex or multi-party cases, be viewed with favor by the court. So long as the Note makes explicitly clear that complex or large cases require tailored treatment, we believe the proffered amendments will function well and reduce cost and burden.

H. Thomas Wells, prepared stmt. and Tr. 47-60: The establishment of a national standard is useful. It is likely that the deposition length limit will generate the most controversy of the current proposals. Nevertheless, his personal experience in a wide variety of litigation is that it is the extraordinary case

in which more than seven hours of testimonial time (excluding breaks, counsel colloquy, and other extraneous matters) is necessary. He personally doubts that any serious difficulty will be encountered even in those cases, whether dealt with by stipulation or court order. Having a uniform standard nationwide will be desirable. But perhaps expert witnesses should be treated differently, for in a significant number of instances seven hours is not enough time for these people. This could be dealt with either in the rule or the commentary. This witness, after all, is being paid to sit there and answer questions, and usually it is the examining party who is paying for that time. But in his experience expert depositions are also too long. (Tr. 58-60)

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: He likes the seven hour rule, and thinks the Committee should stay with it. He urges resistance to the "California culture" and can't imagine going on for days and days in a deposition. A lawyer should have to explain when he wants to go beyond seven hours. In Oregon, they just don't have the kind of long depositions that occur in California. With experts, they don't allow the deposition until after the expert has given a detailed report, and that doesn't leave a lot of room for spending two or three days on qualifications and the like. He thinks that proposal is great. There should be exceptions on occasion, but you ought to ask the court to make them. (Tr. 85)

Larry R. Veselka, Tr. 99-108: This limit is fine. If you have a serious problem with seven hours, you can go to the court. (Tr. 107)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. The limit is arbitrary, and is bound to engender numerous disputes over deposition tactics and the need for more extensive testimony in particular cases. If a limit must be imposed, would suggest no less than two seven-hour days. Here again this will generate fights the district courts won't want to hear, and they will say the parties should work it out, but they won't. The numerical limitations on depositions work right now, but this limit should not be added.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) This is micromanagement. It will

promote gamesmanship. Usually a deposition should not be more than seven hours, but this rule should not be adopted. You can't measure justice with a stop watch.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Notes that the presumptive limit is similar to recent amendments to Texas Rule 199, which allows a six hour limit per witness. HII has some concern that the limit may be far too restrictive, and he is a little concerned about the seven-hour rule proposed for the federal courts. It may be problematical if there is no provision guaranteeing each side a chance to question if it so desires. Also, in the case of experts seven hours might not be enough, although a good report is helpful to avoid a long deposition. The Texas rule allows six hours per side, and has a fairly elastic definition of side. Nonetheless, he is fairly confident that the seven-hour limit will generally work reasonably well.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Based on his own experience with endless depositions, he strongly favors the proposed change. Believes that the one-day or seven-hour limitation can work. He acknowledges, however, that in expressing these views he is in the minority among the outside lawyers hired by BASF. To some extent, the lawyers are at fault for long depositions. A lot of the explanation has to do with which lawyer you send to the deposition. If you send a second year associate who has never taken a deposition, you are going to have a 20-hour deposition. On the other hand, with an experienced lawyer who is organized, the proposed limit should work even with an important deposition. With experts, the key is having the report first, and that saves a lot of time, particularly on qualifications. (Tr. 167-68)

#### Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: As one who does complex litigation, she thinks she can live with the one-day deposition in most cases. She finds this change in the rules refreshing. Most depositions take longer than one day because counsel do not prepare and organize their questions. Many depositions do nothing more than waste the time of opposing counsel and harass witnesses. They should not be a free-form, indeterminate exercise in indulging counsel who are trying to figure what their



case is about. There is a duty to prepare cross examination before a deposition so that it can be completed in a reasonable time. Even experts need not take longer. It's a rare deposition that needs to take multiple days. She is sure that if you need more time for a particular deposition, you will get more time. Sending out the documents in advance can be very helpful. In some complex cases there is a pretrial order very early that requires the documents that are going to be used or may be used to be exchanged in advance so that the witness can become familiar with them. They are pre-labeled. Very little time is wasted shuffling through the exhibits or identifying or reading them.

Paul L. Price, Tr. 16-25: (on behalf of Federation of Insurance and Corporate Counsel) Does not favor the limit. This is not because defense lawyers want to churn the billable hours. There are already solutions to the abuses. If the lawyers can agree to suspend the limit, that may be a good solution, but there are times when the lawyers cannot agree. Few actually follow the three-hour limitation in the Illinois state courts, but the fact there is a limit probably has some effect to the way lawyers approach the length of depositions. He does not disagree with sending a message to lawyers that there ought to be an end to a deposition at some point.

Daniel F. Gallagher, Tr. 39-47: Limiting the length of depositions is a good rule. It prevents abuses by lawyers of all stripes and saves clients time and money. Seven hours is also a considerable amount of time. Let's hope the seven-hour ceiling does not become a floor. In his experience, there is no problem in the state courts in Illinois, which have a three-hour rule, with multi-party cases. The lawyers agree on how to handle the situation, and it works. Usually from the defense side somebody takes the laboring oar in multi-party situations, and others don't try to reinvent the wheel by asking the same questions again.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: This is a good presumptive rule. The existence of the rule will probably shorten depositions significantly. In cases where more than seven hours is needed, the lawyers are going to agree because they need to continue to deal with each other.

Peter J. Ausili, Tr. 105-09: (Member, E.D.N.Y. Civ. Lit. Comm.) The committee does not support this proposal. The amendment is unnecessary given the court's existing power to limit depositions, and to sanction misconduct. Actually, there are few motions to limit depositions. The creation of a discovery plan for the case with the court is preferable.

Gary D. McCallister, prepared stmt. and Tr. 109-13: Favors the limitation. It will cut across most of the cases. If there is a need to come back to the court for more time, that will be done. The three-hour rule in the state courts in Illinois does not work particularly well, and there are accommodations in most cases. He can finish experts in three to five hours in some cases, so he does not see a need to exclude them as a category.

David C. Wise, Tr. 113-19: The seven hour rule is a pretty good rule.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The Committee supports the seven-hour deposition limitation. Generally, among its members the defense bar opposed the proposal and the plaintiffs' lawyers favored it. But the Chicago Bar Assoc. Board of Managers voted to endorse this based on the experience in Illinois with the three-hour rule. They believe that rule is working well. He himself has had a number of employment cases where plaintiffs were deposed for three days and he thought it could be done in one. I would welcome this rule. They would like to see something assuring that all parties who want to examine will be able to do so if the deposition will be used in lieu of live testimony at trial. He can imagine that in contentious cases the lawyer who noticed the deposition may say "This is my deposition" and use up all the time. The current Illinois rule does not say anything about this, however.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: He has taken or defended about 300 depositions since the Illinois rule went into effect, and this has involved three that went over three hours. He supports the seven-hour proposal. This is not a problem. His cases are serious cases involving a lot of money. The seven-hour rule may be too long. There have been no problems with experts either. Where more time is needed, the lawyers work it out. Where there are multiple parties, they have to work it out.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) He is from Illinois, and agrees with everyone on the Illinois matter. ATLA did not take a position on that, however. His personal experience is that it has worked out with the three-hour rule. He guesses ATLA would be with him on limiting depositions.

Laurence Janssen, prepared stmt. and Tr. 154-60: Recommends exempting expert witnesses from the limit. In the toxic tort litigation he does, he can't cover all the things he needs to do with experts in seven hours. Even with a good report this is not enough time because there are some "regulars" in toxic tort litigation whose reports all sound the same. But he concedes that the rule addresses the problem with 95% of the depositions.

Daniel Fermeiler, Tr. 188-93): When the Illinois rule was adopted, he was president of the defense bar and spoke against the adoption of the rule. But now he has lived under it and can report that it has worked. For the most part, the state-court three-hour limit has worked. This has worked for party depositions, witness depositions, fact-based depositions. Expert witnesses in complex cases may present problems, but this can be handled in a carefully crafted case management order. In multi-party cases, they operate under the convention that the three-hour limit is a per-side limitation. Before the rule came in, there was a practice of witness-churning, in which multiple questions are asked about the same topic by different parties. This has been substantially reduced since the rule came into effect. In most multi-defendant cases defendants are able to work it out to allocate time knowing what the overall limit will be. Actually, nobody insists on ultimate termination times so long as the deposition is moving along.

Jack Riley, Tr. 202-08: (representing Illinois Assoc. of Defense Trial Counsel) The three-hour rule in the Illinois state courts has really not caused a problem for either side. Probably that's because there has been a sort of balance of terror, with each side afraid that if it imposes the limit the other side will too. What has happened primarily is that the parties have reached stipulations. Where it's reasonable for the deposition to exceed three hours, they have done so. Very rarely has there been occasion to file a motion. In 99% of cases it has been worked out informally. The goal of the Illinois rule was to prevent

unnecessarily long depositions, which are often caused by inexperienced lawyers getting their training in a deposition. I think that the rule has worked, and that the thrust of the change has been accepted by both sides. Even where there are multiple defendants, they agree on who will be the primary questioner. Frankly, many questions were repetitive before in multiple party situations. So it does force you to work with co-defendants. It has shortened the length of depositions even where they go beyond three hours because lawyers realize that this is "borrowed time." His experience is that the three-hour rule is overall, not per side, and it has forced defendants to make some decisions about who is the best questioner. Usually the plaintiff's lawyer has no questions in tort cases.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Her company has experienced first-hand the effect of abusively lengthy depositions. In the breast implant litigation, an 80-year-old company witness was deposed for nine consecutive days while his ailing wife was left home alone. The proposal made by the Committee is sound in most cases. But there are categories of witnesses for whom the seven hour limit will not be sufficient. The example that springs most readily to mind is expert witnesses. A better compromise would be to limit depositions to two seven-hour days.

Michael E. Oldham, prepared stmt. and Tr. 235-45: Agrees wholeheartedly with the presumptive limit of one day of seven hours. In multi-defendant cases, usually there is one lead defense lawyer who asks 80% to 90% of the questions, and the others only ask follow-up questions. It's generally not a problem for depositions to be limited, and the rule allows for those odd situations where it does cause difficulty.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) This is a good proposal, but it could be improved. It should recognize explicitly that one day is usually not enough for an expert witness in a complex case.

Chris Langone, Tr. 251-259: (appearing on behalf of Nat. Assoc. of Consumer Advocates) NACA thinks the limit is a good idea, but suggests three clarifying amendments. First, the rules should say that no side may exceed the seven-hour limitation. Second, it should state that breaks are not included. Third, it should

explicitly say that the limit applies to each witness designated by a corporation under Rule 30(b)(6).

Kevin E. Condron, Tr. 259-67: He loves the idea of a seven hour deposition. Except in extremely technical cases, this should work.

Dean Barnhard, prepared stmt. and Tr. 267-76: Strongly urges the Committee to make an express exception to the rule for expert witnesses. Under Daubert, there is a need to create a full record for a pretrial hearing that could be compromised by the time limit. It is true that a district that has embraced Rule 26(a)(2) can shorten the deposition, but that is not true everywhere. His own experience is that there are often situations in which the minimum amount of time required for a deposition is considerably longer.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) Concerned that the time limitation would be too short for experts in "toxic tort" cases. In those cases, the theories offered by plaintiffs' experts are often "creative," and probing them takes time.

(b) Deponent veto

## Comments

ABA Section of Litigation, 98-CV-050: Notes the provision for a deponent veto. Urges the Committee to clarify in the rule or Note that when the deponent is an employee or other representative of an entity, rather than an individual deponent, the entity would be the appropriate party to stipulate to the extension.

Norman C. Hile, 98-CV-135: (on behalf of Judicial Advisory Committee, E.D. Ca.) Because the witness can veto additional time even if the lawyers agree to it, there will be additional motions in court.

Libel Defense Resource Center, 98-CV-160: Allowing the nonparty witness to veto an extension the lawyers find reasonable will breed problems. Most witnesses find depositions uncomfortable experiences, and counsel would be hamstrung by the requirement of obtaining the agreement of the witness.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the deponent veto. "Giving a witness the power to veto otherwise proper discovery is unprecedented, and too likely to result in mischief."

Eastman Chem. Corp., 98-CV-244: Although it supports the durational limitation, Eastman believes it is not wise to require the agreement of the deponent to lengthen the deposition by stipulation. Many witnesses, particularly nonparty witnesses, would likely refuse.

Annette Gonthier Kiely, 98-CV-256: Opposes the veto. Often it is the deponent's evasiveness that has prolonged the deposition, and such a person is unlikely to forfeit the protection this rule affords.

U.S. Dep't of Justice, 98-CV-266: Opposes the deponent veto. If that were adopted, deposition practice would increasingly require court involvement because the deponent could prevent the parties from agreeing to a reasonable period for examination. The deponent may quite naturally want to conclude the examination,

but that's not a reason to give him or her an absolute veto. The parties are in a better position to determine the needs of the litigation.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: Members were divided on the deponent veto. Some agree that nonparty deponents should have this right. Others believe it will inject yet another complication into the deposition process.

### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt and Tr. 8-18: Concerned about requiring deponent agreement to extend deposition beyond the seven hours. In some situations, particularly with experts, seven hours is not sufficient. In those situations, having to ask the deponent's permission to continue could create problems.

#### San Francisco

Diane Crowley, Tr. 23-36: The idea of a stipulation will never work to extend the time if the deponent is involved in the picture. He is tired and wants to go home. Even if the lawyers will stipulate, the deponent won't.

Anthony L. Rafael, Tr. 130-40: (President of Fed. Bar Assoc. for W.D. Wash., and appearing on its behalf) Strongly opposes the deponent veto. Whether or not justice so requires, the witness is likely to oppose continuing.

#### Chicago Hearing

Daniel F. Gallagher, Tr. 39-47: Giving the witness the right to refuse to continue is letting the tail wag the dog. If you do that, you are going to have a real problem. That will also give lawyers who want to be difficult a perfect explanation -- I'd love to go along, but my client won't. Don't give people that out; make the lawyers the ones to agree to the extensions.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: Although having a presumptive limit on deposition length is a good idea, requiring the deponent to consent to exceed that limit is a bad idea. This will cause problems.

Gary D. McCallister, prepared stmt. and Tr. 109-13: Although he favors the deposition limitation, he would be very concerned about the deponent veto. He would oppose that.

Jack Riley, Tr. 202-08: (representing Illinois Assoc. of Defense Trial Counsel) He has come to favor the limit on depositions from his experience in Illinois, but the deponent veto could raise problems. At least with nonparty witnesses there might be a justification, but not with a party or an expert. It would get a little unwieldy. Judges are fairly accommodating to nonparty witnesses if there seems to be overbearing behavior, so this deponent veto would not be needed for them.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Opposes the requirement for the agreement of the witness to extend the deposition. Non-party witnesses often appear reluctantly, and requiring their agreement will add an unnecessary and counterproductive obstacle.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Making an extension by agreement depend on assent by the witness is likely to frustrate proper discovery and allow the witness to evade full questioning.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) Recommends against requiring that the witness agree to extend the time for a deposition beyond the limit. This would be particularly undesirable with experts, for the fate of the parties' discovery efforts should not be in the hands of an expert with an agenda.



(c) Other deposition changes (Rules 30(d)(1) and (3))

## Comments

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They should help eliminate "speaking objections" and make clear that a witness can be instructed not to answer only to invoke a privilege.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the changes with one reservation. The rule should be clarified to permit instruction not to answer on the condition that a motion to support the objection is filed within a specified period of time, and that it may include legally sufficient reasons other than those set forth in Rule 30(d)(3).

F.B.I., 98-CV-214: Supports the changes. Eliminating excessive objections during depositions should narrow discovery abuses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee is concerned that the changes empower someone outside the scope of the litigation to instruct a witness not to answer. Also, current paragraph (3) says that a "party" can seek relief from an abusive deposition; it is not clear why this should not also be changed.

## Testimony

## San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The effort of the Committee in Rules 30(d)(1) and (d)(3) to return civility and professionalism to deposition taking is very welcome. In addition to the grounds for instructing a witness not to answer a question, we suggest a fourth basis: "to present a motion for a protective order to cease or prevent deposition conduct by a party, deponent, or counsel intended to be abusive, harassing oppressive, embarrassing, unduly repetitive, or otherwise improper." Shell is concerned that the proposal, as currently drafted, removes the court from correcting conduct during the course of a deposition, short of a motion to terminate the deposition entirely.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) These changes are very similar to Texas Rule 199.5(d)-(h), which requires depositions to be conducted as if in open court, and prohibit most private conferences between witness and attorney. The Texas rule goes on to provide that if a deposition is "being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling." HII suggests that the Note to Rule 30(d)(1) make clear that violations are cause for relief under Rule 30(d)(3).

8. Rule 34(b)(a) General desirability

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports the addition of explicit cost-bearing provisions.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: This change is unnecessary and misleading. The authority to shift costs already exists under Rule 26(b)(2). Thus, there is no real change. The Section disagrees with the assertion that Rule 26(b)(2) has rarely been applied, citing four cases. The FJC Study found that document requests generated the largest number of discovery problems, but these were not generally in the overproduction area. Thus, if there were a change it would not address the problems identified. The FJC Survey does not show that the cost of document production is a problem; even in the high-stakes cases in which such costs are relatively high, they are commensurate with the stakes involved. Moreover, the proposed amendment is unclear on what costs may be shifted. If attorneys' fees, client overhead and the like are included, the proposal involves funding an adversary's case.

Maryland Defense Counsel, Inc., 98-CV-018: Supports the proposed amendment. Document production is not only the most expensive, but also the most institutionally disruptive aspect of discovery for the clients represented by this organization's lawyers. Suggests that the Note stress that an outright bar on proposed discovery often may be preferable to simply shifting its overtly quantifiable costs.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The burden of the cost of production of documents should be on the party initiating the request. That burden will make 'discovery initiators' think before making abusive document requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: Endorses the change, so long as either the rule itself or the Committee Note makes it clear that the power granted should be applied only in

the unusual or exceptional case. This is consistent with the general trend of making discovery more efficient. It would give the party requesting discovery an incentive to limit requests and lessen the financial burden on the producing party. But the provision should be used only in the unusual or exceptional case. Liberal application of the proposed rule would unfairly tilt the playing field in favor of litigants with larger financial resources.

James A. Grutz, 98-CV-040: Opposes the change. If costs become onerous, a litigant can request the court's aid. The provision is unnecessary.

Thomas J. Conlin, 98-CV-041: Opposes the change. If a document request is excessive, it should be limited in accordance with the current rules. The court already can protect parties against excessive expenses, and it should not be permitting or requiring a response to excessive requests even if the requesting party has to pay some of the cost.

John Borman, 98-CV-043: Opposes the change. It deters parties seeking discovery from being aggressive in pursuing information, and it will encourage responding parties to employ this new device to resist. It places the burden of proving that the benefit of the discovery sought outweighs its burden or expense on the party who does not even know what is in the material.

Michael J. Miller, 98-CV-047: This proposal will be used as a weapon by corporations who seek to prevent the discovery of relevant information under the guise of cost.

ABA Section of Litigation, 98-CV-050: Supports the proposal because it encourages courts to overcome their reluctance to apply existing limitations on excessive discovery, and it offers courts an alternative when they view a complete denial of excessive discovery as too harsh. The cost-bearing proposal will not deter legitimate discovery because, by definition, it applies only when a document demand exceeds the limitations of Rule 26. The court's power to shift these costs is already implicit in Rule 26(c). The Antitrust Section opposes this proposal because it believes that it could create a new standard for discovery that is dependent on a party's financial ability to pay for discovery as opposed to the current standard based on relevance,

etc. Because of this important concern, the Litigation Section suggests that the Note urge that the courts be particularly sensitive to this issue.

Richard L. Duncan, 98-CV-053: Opposes this proposal. It will create more litigation.

Charles F. Preuss, 98-CV-060: Supports this explicit authorization to impose part or all of the costs of document discovery that exceeds the limits of Rule 26(b)(2).

Lawyers' Club of San Francisco, 98-CV-061: The probable impact of the proposed amendment would be to increase the prevalence of cost-bearing orders. Doing so would increase financial disincentives for individuals to conduct litigation against corporate and institutional defendants. As such, it would impede and restrict discovery unnecessarily by individual claimants.

Jay H. Tressler, 98-CV-076: Applauds this proposal.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the proposal. The provision is unnecessary, because the courts already have the power to do this. At the same time, cost-bearing is not to be applied routinely. Given these two propositions, the Committee can't comprehend the benefit of the amendment. More generally, the Committee would favor a direct limitation on discovery as opposed to cost-shifting, which may favor deep-pocket litigants. It might even further use of discovery to harass.

Michael S. Allred, 98-CV-081: Opposes the change. This is biased in favor of not making discovery, but gives no remedy if discovery is unjustifiably refused.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change. Document production is where the most serious problems currently are found. It is appropriate that if a party wishes to pursue broad and unlimited forms of document production, it should pay the reasonable expenses that result.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will lead to additional delay, ancillary litigation, and increased costs. Objections by defendants that document production costs too much are full of sound and fury but not

based on valid concerns. Usually the parties can reach an equitable solution to the costs of document production. If that doesn't happen, the current rules provide adequate tools for the problem. Since this is a power the courts already have under Rule 26(c) and 26(b)(2), the change is not needed. It may cause judges to cast an especially jaundiced eye on requests for documents, above and beyond the limits that already exist. Because defendants have most of the documents in the cases handled by N.A.C.A. members, this change will have a disparate impact on plaintiffs.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They will assist the trial court in controlling discovery abuses in document production.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change. Courts already have the power to do this, but there is no harm in saying so expressly.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Endorses the rule, understanding it to say that everything beyond the "claims and defenses" scope would be allowed only on payment of costs.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the amendment as written because it permits the court to reasonably limit discovery and gives the judge discretion to extend the limits on a good cause showing, providing that the cost is to be borne by the party seeking discovery.

Richard C. Miller, 98-CV-162: Opposes the change. It "strikes at the heart of our juridical system by eliminating access to justice." Defendants already have an incentive to draw things out and increase expense to defeat claims. This change will magnify that tendency.

William C. Hopkins, 98-CV-165: The cost shifting proposal means that plaintiffs will face a price tag on the first discovery request. This is not desirable.

Timothy W. Monsees, 98-CV-165: He is afraid this will extend to more than simple copying costs, which no one has a problem with paying. He envisions getting a bill for a couple of thousand

dollars for defendants to hire people to search their records. Why should a party have to pay for production of relevant material?

Mary Beth Clune, 98-CV-165: This change would be very unfair to plaintiffs. In employment cases, the defendant has all the documents, and such defendants often produce files of meaningless documents in an effort to bury the relevant documents. Requiring the plaintiff to finance the "reasonable expenses" of discovery will likely lead to abuse by defendants.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the change. In pharmaceutical litigation, plaintiffs routinely seek discovery of all reported adverse events, clinical trials and other documents not relevant to the core issues in the case. It would be preferable if the discovery of these materials were not permitted. The company strongly opposes cost shifting with respect to depositions. The appropriate cost control measure there is to limit the duration of the deposition.

Gary M. Berne, 98-CV-175: The change is unnecessary, for courts already have the authority to take needed measures. The FJC report shows that the main problem is not overproduction, but failure to produce, which the amendments don't address.

Public Citizen Litigation Group, 98-CV-181: Does not support. The rule provision is not needed, and may lead to the incorrect negative inference that cost-bearing is only authorized in connection with document discovery.

Association of Trial Lawyers of America, 98-CV-183: Opposes the change. ATLA generally opposes proposals to institute cost-shifting measures as leading to abrogation of the American Rule that parties bear their own costs of litigation. Even if the proposal only makes explicit authority that was already in the rules, it appears a move in the wrong direction.

James B. Ragan, 98-CV-188: Concerned about the proposed change. It purports to shift the burden to the party seeking discovery in some instances. In fact, this should be a situation that never occurs. Rule 26(b)(2) directs the court to limit excessive discovery, so the circumstance identified in the proposed

amendment should not happen.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This is not needed, since the court already has the power under Rule 37 to impose this sanction.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: Although the Committee Note says that this cost-shifting should not be a routine matter, this will certainly result in additional motions to determine in any particular case whether or not the costs should be shifted to the requesting party.

Philadelphia Bar Assoc., 98-CV-193: Supports the amendment. Placing an explicit cost-bearing provision in Rule 34 might clarify and reinforce the judge's ability to condition discovery on payment of costs. This might encourage more negotiation and cooperation in cases where large document productions are involved.

James C. Sturdevant, 98-CV-194: The Committee does not say that this authority is only to be used in "extraordinary" cases or "massive discovery cases." There is a very real potential that it will be invoked in many cases to support cost-bearing, which would be undesirable. The courts already have adequate authority to deal with abuse.

Maryland Trial Lawyers Assoc., 98-CV-195: Urges rejection. Often the injured party is at an economic disadvantage to the opposing entity, which is usually insured. Coupled with the limitation of disclosure to supporting information, this change will work a harsh result. It is unnecessary and unduly restrictive.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) This will have the effect of harming victims, consumers, and other plaintiffs.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change. This will establish what some judges will view as a presumption that documents should only be produced on payment of the other party's costs of production. It would also establish a two-track system of justice based on wealth.



Trial Lawyers for Public Justice, 98-CV-201: Courts already have this power, and the proposal is therefore redundant. But the signal to judges is obviously that they should impose sanctions more frequently against parties who ask for too much information, and that they have not imposed such sanctions with sufficient regularity in the past. This will strengthen the hands of defendants and encourage stonewalling.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Supports the change.

Sharon J. Arkin, 98-CV-204: Opposes the change. The defense deliberately engages in dump truck tactics. If this change is adopted, the rules will impose on the consumer the obligation to pay for the costs of such productions, and they will be further victimized by corporate defendants.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the proposal. It will reduce needless discovery requests and related expense.

F.B.I., 98-CV-214: Supports the change.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. Courts already have the power to impose this sanction. But making it explicit in the rules will send a signal to judges to impose sanctions more frequently. This will encourage responding parties to stonewall.

Stuart A. Ollanik, 98-CV-226: A general rule promoting cost-shifting is an invitation to evidence suppression. It will be in the responding party's best interests to exaggerate the cost of production, in order to make access to relevant information prohibitively expensive. It will be one more tool for hiding the facts.

Jon B. Comstok, 98-CV-228: This is an excellent idea. He realizes it is somewhat redundant because the authority already exists in Rule 26. But it is laudable to make modifications that will somehow get the judge to become more involved in discovery.

Edward D. Robertson, 98-CV-230: Opposes the proposal. It is a first, and ill-advised, step by the representatives of corporate

America toward the English system that requires losers to pay. Defendants are the primary violators of reasonable discovery and the chief advocates of discovery limitation. If the proposed rule is adopted defendants will file for costs to pay for their excessive responses to reasonable discovery requests.

Martha K. Wivell, 98-CV-236: The rule is unnecessary because there is already authority to do this. Nonetheless, defendants will seek to shift costs in almost every products liability case, for they always say the costs are too high. Then the proof of the benefit of discovery is placed on the party who does not even know what there is to be discovered.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This will simply lead to further litigation.

Eastman Chem. Corp., 98-CV-244: Strongly favors the amendment. It notes, however, that a better course would be forbidding discovery altogether.

Anthony Tarricone, 98-CV-255: Opposes the change. There is no need to revise the rule in this manner.

New Mexico Trial Lawyers Ass'n, 98-CV-261: Finds the change troublesome. It appears to be an invitation to increased litigation about what constitutes an excessive request.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The cost-bearing provision will hopefully encourage a litigant to think twice before requesting every conceivable document, no matter how attenuated its relevancy. Navistar has been an easy target for burdensome discovery about information remote in time from the events in suit.

U.S. Dep't of Justice, 98-CV-266: Because this proposal reinforces the proposed amendment to Rule 26(b)(1) limiting access to information relevant to the "subject matter of the litigation," it is subject to the same concerns the Department presented about that change. The Department would be less concerned about the proposed change to Rule 34 if the "subject matter" standard of current Rule 26(b)(1) were retained. Thus, if the current Rule 26(b)(1) is retained, and if the proposed amendment retains its reference to Rule 26(b)(2)(i)-(iii), the

Department supports this proposal.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with this proposal. The Committee should make it clear, however, that the change is not intended to change the standard that judges should apply in deciding whether to condition discovery on payment of reasonable expenses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment. It is apparent that the court already has this power, but the amendment makes the authority clear. Perhaps even more beneficial is the Committee Note, which provides considerable guidance to everyone as to when and how these costs may be assessed.

Thomas E. Willging (Fed. Jud. Ctr.), 98-CV-270: Based on a further review of the data collected in the FJC survey, prompted by concerns about the potential impact of cost-bearing on civil rights and employment discrimination litigation, this comment reports the results of the further examination of the FJC survey data. It includes tables providing the relevant data in more detail, and generally provides more detail than can easily be included in a summary of this sort. The study found "few meaningful differences between civil rights cases and non-civil rights cases" that might bear on the operation of proposed Rule 34(b). Discovery problems and expenses related to those problems differed little between the two groups of cases, and the percentage of document production expenses deemed unnecessary, and document production expenses as a proportion of stakes, were comparable in both sets of cases (civil rights and non-civil rights). The differences that were observed included that defendants in non-employment civil rights cases were more likely to attribute discovery problems to pursuit of discovery disproportionate to the needs of the case; civil rights cases had a modestly higher proportion of litigation expenses devoted to discovery; nonmonetary stakes were more likely to be of concern to clients in civil rights cases; and total litigation expenses were a higher proportion of stakes in civil rights cases (but stakes were considerably lower in such cases). Complex cases have higher expenses than non-complex cases, but for complex civil rights cases the dollar amounts of discovery expenses, especially for document production, were far lower than in

complex non-civil rights cases. Overall, the report offers the following observations: "First, because discovery and particularly document production expenses are relatively low in complex civil rights cases, defendants would have less room to argue that a judge should impose cost-bearing or cost-sharing remedies on the plaintiff. Second, our finding that total litigation expenses were a higher proportion of litigation stakes in civil rights cases may give defendants some basis for arguing that discovery requests are disproportionate to the stakes in the case and that cost-bearing or cost-sharing should be ordered. On the other hand, our finding that nonmonetary stakes are more likely to be of concern in civil rights cases may give plaintiffs a counterargument in some cases. Third, one might read our finding that defendants are more likely to attribute discovery problems to pursuit of disproportionate discovery as suggesting that defendants' attorneys will look for opportunities to act on that attribution by moving for cost-bearing remedies."

#### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) This is a positive step, giving litigants the opportunity to obtain items to which they are not entitled by right under Rule 26(b)(2) by paying the costs of production. This will not shift the costs of document discovery related to the core allegations of the case, but recognizes that the court should not allow expansive discovery on tangential matters without consideration of reallocating the costs and burdens involved in ordering production.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change. This will favor well-heeled litigants, whether plaintiffs or defendants. It thus runs against the basic democratic underpinnings of the American judicial system. It will also add a new layer of litigation to a substantial number of cases--to determine who should pay what portion of the costs of document production. Yet the proposal provides no standards whatsoever to guide the court's decision about whether and how to shift these discovery costs. The invocation of Rule 26(b)(2) aggravates the problem because it contains no objective standard

and instead asks the court to make an impossible prediction concerning the potential value of the proposed discovery. Virtually every producing party will argue vehemently that the burdens and costs outweigh the possible benefit of the proposed discovery. Should the court take evidence on the likely cost of discovery to decide these disputes? Even if it could do that, how could it determine the "likely benefit" of proposed discovery? This will produce a whole new layer of litigation about who will pay and how much. (Tr. 25-26)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Supports the change. The policy of proportionality has been overlooked, and this should re-awaken the parties to the existence of this limitation on discovery. Notes that document discovery is the only type of discovery that cannot have numerical limitations. Interrogatories and depositions do in the national rules, and requests for admissions can be limited by local rule, but not document requests.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The authority already exists without the change. The goal, then, is again to send a signal that the problem judges should address is over-discovery even though the evidence does not support that concern.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Opposes the change. Courts already have this power, and the Committee Note acknowledges that the power is not to be used routinely. He would favor a direct limitation on discovery as opposed to a cost-shifting limitation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the proposal. Believes that emphasis on the proportionality provisions is essential since they have been overlooked or misapplied in the past. Believes that the impecunious plaintiff argument is specious. In his entire career as a defendant's lawyer, he has never encountered a case in which a plaintiff in a personal injury case reimbursed counsel for costs in an unsuccessful case. The real issue is that this is an investment decision for counsel for plaintiffs, and this is not a violation of professional responsibility rules. This might be different in other sorts of cases -- employment discrimination, for example, with pro se plaintiffs. But in those cases the proposed change

allows the judge to take the ability of the plaintiff's side to bear the expense into account. His own experience, however, has been limited to cases involving plaintiffs with lawyers who took the case on a contingency fee basis.

San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Together with the proposed change to Rule 26(b)(1), this is pernicious and gives a collective message that there should be less discovery to plaintiff at increased cost. The standards set forth in Rule 26(b)(2) are so vague that the court can't sensibly apply them. Moreover, if costs are shifted and the documents contain a "silver bullet" there should be another hearing to seek reimbursement. This is not worth it. The basic message is that even if plaintiff manages to persuade the judge to expand discovery to the subject matter scope, plaintiff must pay for the additional discovery to that point. He has nothing against making plaintiff pay if the specific discovery foray is unduly expensive. For example, if defendant usually has e-mail messages deleted upon receipt and plaintiff wants to require a hugely expensive effort to locate these deleted messages, there is nothing wrong with presenting plaintiff with the option of paying for that material. But that is different from institutionalizing the process of shifting costs every time plaintiff goes beyond a claim or defense. This is how he reads the current proposal. He feels that the judge could both find that there is good cause and that the plaintiff has to pay for the added discovery. In the real world, judges will be likely to link the two and think that as soon as plaintiff gets beyond claims and defenses it's pay as you go. At present, the limitations of Rule 26(b)(2) are only applied in the most exceptional cases, where a party does a huge and marginal search, such as reconstructing electronic data. But the rule will encourage the same sort of thing in many cases. This will institutionalize a process that is already available today. It will up the stakes in antitrust litigation, which is already very expensive. (Tr. 7-10)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) This change can work in tandem with the revision of Rule 26(b)(1), and the court could shift costs if it found good cause to allow discovery to the subject matter limit. But courts should be admonished not to assume that a

party is automatically entitled to discovery it will pay for. There are now plaintiffs' law firms which are as wealthy as small corporations, and their willingness to pay should not control whether irrelevant discovery is allowed. The rich plaintiffs' lawyers won't hesitate to put up the money for such discovery forays, so their willingness to pay should not be determinative. They will continue going after the same stuff whether or not they have to pay.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell emphatically endorses the proposed change. Document production abuses are at the core of most discovery problems, particularly in larger or more complex matters. Shell strongly urges that the rule or the Note state that "court-managed" discovery on a good cause showing under Rule 26(b)(1) presumptively be subject to cost shifting, absent a showing of bad faith on the part of the responding party.

H. Thomas Wells, prepared stmt. and Tr. 47-60: This change is more of a clarification of the existing rule's intent than a new rule change. The authority has always been present in the existing rule, and the problem is that it was rarely invoked in the manner originally intended. The proposed change adequately recognizes the original intent of the provisions.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: In every speech he makes to young lawyers or bars, he talks about Rule 26(b)(2) and seldom gets anyone to bring such concerns to him. He likes this change to encourage attention to this. Notes that he had Shell in his court and did not hear from it on this score. (See testimony of G. Edward Pickle, above.)

Larry R. Veselka, Tr. 99-108: Does not see this change as a particular problem. That's the way to solve problems about costs. (Tr. 107-08)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. It would encourage further resistance to discovery, result in extensive litigation over cost-bearing issues, and inhibit plaintiffs from adequately investigating their claims.

Weldon S. Wood, Tr. 140-46: Supports the change. Document production is where the problems are found. Most discovery is

reasonable. It is the exceptional case that causes the problems.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Because of the enormous cost that litigants can impose on adversaries, it is essential that the rules recognize the power to require a party seeking non-essential, discretionary discovery to bear the cost of it. At the same time, there should be a limit on a party's ability to impose discovery on an adversary just because it is willing to pay the cost of the discovery.

#### Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: She fears that this change may lead to a repeat of the kind of collateral litigation that occurred under Rule 11, where every motion was accompanied with a motion for sanctions. The courts already have authority to shift costs in cases where it's truly necessary. She believes there is not a large volume of unnecessary discovery, so that this "solution" may be more of a problem than the problem it seeks to solve. She doesn't think that what we now know about discovery of electronic materials shows that some power like this is needed for that sort of discovery. The problem is that too often what's permissive becomes mandatory.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) To date he has not found the existing cost-bearing possibilities helpful to Procter because when judges find out that it is a multi-billion dollar company they don't have any interest in shifting any of its substantial costs of document preparation. (For details on these, see supra section 3(a).) This is at the heart of the unevenness of cost between the discovering party and the producing party. This sort of activity takes place even when both sides are large entities with considerable documents to produce. (Tr. 57-58) He suggests that the Note to this rule suggest cost-bearing as an effective tool for discovery management.

Robert T. Biskup, prepared stmt. and Tr. 73-84: This is integrally linked with the proposed Rule 26 scope change because it calls for an ex ante determination about the proper allocation of costs. This would avoid the risk of a new brand of satellite litigation, as with Rule 11. If it works the way Ford thinks it should, the fee shifting issue would be before the court at the



time that the issue of expanding to the subject matter limit is also before the court.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: He agrees with the cost-bearing provision. Documentary discovery requests are among the most costly and time-consuming efforts for defendants. For peripheral materials, courts should have explicit authority to condition discovery on cost-bearing.

David C. Wise, Tr. 113-19: There is already a mechanism in place to deal with these problems when they arise. What this change would do would be to send a message to the defendants to make plaintiffs pay for their discovery. And plaintiffs simply can't pay. Companies like Ford aren't paying anything for their document production; they are simply passing the cost along to the consumer. If there were no link to expanding discovery beyond the claims and defenses, suggesting that if expansion occurs the plaintiff must pay, his opposition to the proposed amendment would be less vigorous.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objections to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. This will result in motion practice and satellite litigation. The court already has sufficient authority to deal with problems.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Opposes the change. This is another proposal to impose costs on individuals, and ATLA is opposed to that.

John H. Beisner, prepared stmt. and Tr. 147-54: Without doubt, this is a positive change. But the Note does not go far enough in stressing that there may be circumstances in which a court should say "no" to proposed discovery. The Note should stress that there should be no presumption that the court should authorize discovery that the propounding party wants, even if it will pay for it.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: This change will disadvantage plaintiffs and could restrict the types of

cases lawyers in small firms like his could undertake. The existing rules provide adequate protections for defendants. There is no reason to provide more.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Favors the change. This will not be a sword to be held over the plaintiffs' heads or a shield for defendants. The Note is perfectly clear that this is to happen only in extreme cases, where the discovery is essentially tenuous.

Michael J. Freed, prepared stmt. and Tr. 226-35: The proposal will favor litigants, whether plaintiffs or defendants, that have significant financial resources, over other litigants. It will create a new layer of litigation in a significant number of cases. The reference to the standards in Rule 26(b)(2) really provides no guidance on when this authority should be used.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar believes that use of Rule 26(b)(2) to bar excessive discovery altogether would be preferable, this change should give judges a tool to put a quick end to incrementally escalating discovery abuses. However, the Note's statement that the court should take account of the parties' relative resources is at odds with the goal of limiting unnecessary and irrelevant discovery. This comment suggests that a party with few resources is entitled to demand discovery beyond the limitations set by Rule 26 at no cost.

Kevin E. Condron, Tr. 259-67: This may be the most meritorious of the proposals. Document discovery is where the cost is, and it should be curtailed if there is no reason for it.

Robert A. Clifford, prepared stmt.: Opposes the change. The court already has powers to deal with abuse, and it is unnecessary to amend the rule in this way.

Thomas Demetrio, prepared stmt.: This is nothing more than a surreptitious attempt to push the cost of litigation so high that individual citizens will not be able to exercise their rights or seek redress for wrongdoing. "Business builds the 'cost' of legal defense into the 'cost of doing business.' That cost is passed on to the consumer. We already bear our share of the

burden of defense costs. By requiring individual litigants to bear the cost again, industry gets not only a free ride but a windfall."

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.)

This change is well worth making, but it is important to recognize that many plaintiffs will only be able to pay a fraction, if any, of the attendant financial costs in any event. Accordingly, the Note should stress that the primary goal should be for the judge to carefully scrutinize any discovery beyond the initial disclosure, and that the presumption should be toward barring that discovery.

(b) Placement of provision

## Comments

ABA Section of Litigation, 98-CV-050: The Litigation Section favors including the cost-bearing proposal in Rule 26(b)(2) rather than Rule 34. This would avoid the negative implication that cost shifting is not available for all forms of discovery. It would also avoid an otherwise seeming inconsistency with Rule 26(b)(2), which merely permits courts to "limit" discovery, without mentioning the court's power to shift the cost of discovery.

Philip A. Lacovara, 98-CV-163: Supports the change, but would go further. He believes that the change should be in Rule 26 because document discovery is not the only place where problems exist that should be remedied by this method. Even though the Note says that inclusion in Rule 34 does not take away the power to make such an order in relation to other sorts of discovery, there is a significant risk that it will be so read. But he thinks it should be in Rule 26(b)(1), not Rule 26(b)(2), and that it should go hand in hand with decisions to expand to the "subject matter" limit. As the proposals presently read, it would not seem that a court could find good cause to expand, but then conclude that Rule 26(b)(2) is violated. He would therefore add the following to Rule 26(b)(1):

If the court finds good cause for ordering discovery of information relevant to the subject matter of the action, the court may require the party seeking this discovery to pay part or all of the reasonable expenses incurred by the responding party.

This kind of provision would protect plaintiffs as well as defendants, for plaintiffs are often burdened by excessive depositions. Unless there is some further provision on recovery of these costs, it would seem that some of them might be taxable under 28 U.S.C. § 1920; in that sense, the discovering party's willingness to press forward is a measure of that party's confidence in the merits of its case as well as the value of the discovery.

Prof. Ettie Ward, 98-CV-172: For the reasons expressed in Judge

Niemeyer's transmittal memorandum, suggests that any reference to cost-bearing should be in Rule 26(b)(2) rather than Rule 34(b). That placement is more evenhanded, and it fits better as a drafting matter. Including it in Rule 34 appears to favor defendants and deep-pocket litigants. In addition, the standards for shifting costs are not as clear as they would be if the provision were in Rule 26(b)(2).

Public Citizen Litigation Group, 98-CV-181: Does not support. But if additional language is to be added, favors the alternative proposal to amend Rule 26(b)(2).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee recommends that the cost-bearing provision be included in Rule 26(b)(2) rather than in Rule 34(b). This would make it explicit that the authority applies to all types of discovery, including depositions. Additionally, placement in Rule 26(b)(2) eliminates the possibility of a negative implication about the power of a court to enter a similar order with regard to other types of discovery, notwithstanding the Committee Note that tries to defuse that implication.

#### Testimony

##### Baltimore Hearing

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Moving the provision to Rule 26(b)(2) would not be desirable, because that would stress the same message. If that would make the message even broader, it would be worse.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: This provision should be in Rule 34 because that's the only type of discovery that creates the serious problem of disproportionate costs. Both sides do depositions, roughly in equal numbers, and so also with interrogatories. But in personal injury cases, one side has documents and the other does not. That's the way it is.

##### San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Placing the cost-shifting provision in Rule 34

rather than Rule 26 places the emphasis where it belongs.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Regarding placement of the provision, in his experience a provision limited to document production would reach the most abusive and expensive discovery problems, and that the rule should be so limited.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: The placement of this provision in Rule 34 is correct, as opposed to Rule 26. The real need for the provision is in Rule 34.

#### Chicago Hearing

Robert T. Biskup, prepared stmt. and Tr. 73-84: Rule 34 is the right place for this sort of provision to be, rather than Rule 26. This would avoid the risk of a new brand of satellite litigation, as with Rule 11.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Because ATLA is adamantly opposed to cost shifting, there was no discussion about whether it might be preferable to put such a provision in Rule 26(b)(2) rather than in Rule 34.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The Section of Litigation favors that the cost-bearing provision be included in Rule 26 rather than Rule 34. There is already implicit power to make such an order, and if the provision is only explicit in Rule 34 that might support the argument that it can't be used for other types of discovery.

Rex K. Linder, prepared stmt.: Suggests that the provision should be included in Rule 26(b)(2), for it should be readily applicable to all discovery and will correspond to the concept of proportionality. It implicitly exists already under Rule 26(b)(2), and there seems no logical reason not to make it express.

9. Rule 37(c)

## Comments

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090:

Supports the change as appropriate. There may be inherent jurisdiction for this purpose, but the specific incorporation of Rule 26(b)(2) removes any doubt on the subject.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the change.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorses the change.

Public Citizen Litigation Group, 98-CV-181: Supports the change. In 1992, the Group suggested expanding this provision to cover failure to supplement a discovery response, and it favors it now. A party that has failed to supplement discovery responses should not be allowed to rely on the material withheld at a hearing or trial unless there is substantial justification for its action.

Ohio Academy of Trial Lawyers, 98-CV-189: Supports the change, which could help both plaintiffs and defendants.

Philadelphia Bar Assoc., 98-CV-193: Supports the change. The court's reliance on inherent power to sanction for failure to supplement as required by Rule 26(e)(2) was an uncertain and unregulated ground for imposing sanctions. The amendment also remedies any implication that the express mention of Rule 26(a) and 26(e)(1) in Rule 37(c)(1) demonstrates an intent to exclude a litigant's failure to supplement discovery responses from the realm of sanctionable conduct.

Trial Lawyers for Public Justice, 98-CV-201: Supports the change.

F.B.I., 98-CV-214: Supports the change. By imposing a sanction for failure to seasonably amend responses to discovery, this will eliminate the risk of unfair surprise at trial and purposeful withholding of information.

Martha K. Wivell, 98-CV-236: Supports the change.

U.S. Dep't of Justice, 98-CV-266: This change would correct an omission in the 1993 amendments package, and the Department supports it. It notes that Rule 37 could be further improved by explicitly requiring a good faith effort to obtain information without court involvement before sanctions could be requested or imposed under Rule 37(c)(1).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the change. Decisions that have addressed sanctions for failure to supplement under Rule 26(e)(2) confirm the lack of any specific rule to guide courts in imposing sanctions. There would appear to be no rational reason not to apply the sanctions of Rule 37(c) to a party's failure to supplement discovery responses and incorporate the same reasoning for a court to consider a denial of sanctions where the failure to supplement was with substantial justification or harmless.

#### Testimony

#### Chicago Hearing

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objection to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Fully supports this change. This is a necessary tool to enforce proper disclosures.



10. Comments not limited to specific proposed changes(a) General observations about package

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Discovery reform is necessary, but the changes should go further toward focusing issues in litigation and adopting a sequential disclosure scheme with plaintiff going first. The broad scope of discovery presently, combined with the absence of bright-line limitations, has caused a great deal of waste. The more the rules are made objective (as by using numerical or other objective limitations) the greater the improvement in practice. In a supplemental comment, these groups add that they wish to "assure the Advisory Committee that [they] strongly support the Committee's efforts to advance changes to discovery practice that are very much needed, by promulgating the Proposed Amendments to Rules 26 and 34 as published. Even though they may not go far enough to address some of the genuine concerns of our members, the Amendments are a well balanced package that recognizes the failures of modern discovery and should set the system on a corrected course toward greater certainty, more precise standards, and a workable structure for discovery that will help correct some of the most serious problems."

Prof. Edward D. Cavanaugh, 98-CV-002: There is no need for these amendments at this time, since discovery is working well in most cases. These changes are likely to create new problems rather than solve old ones. The 1993 amendments have worked, and the rules should not be rewritten every five years. "We should stay the course with the 1993 amendments rather than go down the path charged in the proposed amendments. The federal civil justice system cannot afford yet another period of confusion and uncertainty such as it recently experienced under the now-lapsed Civil Justice Reform Act of 1990." Moreover, across-the-board changes are not indicated, and changes should be focused on the categories of cases that produce problems.

Hon. Avern Cohn (E.D. Mich.), 98-CV-005: Based on 19 years as a judge, concludes that there is no need for a change in the rules if discovery is working fine in most cases. Rule changes won't

solve the problem in cases that have gotten out of control; that's for the judge to handle. "More aggressive judging and less aggressive lawyering in a small number of cases is what is needed."

James E. Garvey, 98-CV-007: Commends and favors the proposed changes.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec., 98-CV-012: Major changes should not be made when discovery is working well in most cases. There are problem cases, but the changes do not target only those cases. The solution in the problem cases is not rule tinkering, but more effective judicial oversight.

Maryland Defense Counsel, Inc., 98-CV-028: Discovery reform is necessary. "While the Maryland Defense Counsel believes that the proposed amendments do not yet bring our Rules of Discovery to the destination where they need to be, they certainly are a far cry better than merely standing still where we are now."

Hon. Bill Wilson (E.D. Ark.), 98-CV-019: The central guidance should come from Rule 1's admonition to pursue fair, efficient results. It is not clear that the 1993 amendments do that, and making them nationally binding seems hard to justify. The up-front activity required under those amendments is overkill in the routine case, and needlessly increases expense. The way out is to set a firm trial date and make sure there is reasonably quick judicial access for problems, particularly discovery problems. Discovery hotlines may be one such solution.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "These amendments to the FRCP, while not enough and only a beginning, will do more to correct discovery abuse than any singular proposal I've seen in the last fifteen years."

ABA Section of Litigation, 98-CV-050: The Section of Litigation believes that the Advisory Committee has taken a responsible and fair approach to these issues, favoring neither defendants nor plaintiffs and recognizing the need for uniform rules and flexibility in their application to an individual case. The proposed changes should have a positive, but not a dramatic, effect on practice in the federal courts by reducing the time and

money expended in civil litigation.

Lawyers' Club of San Francisco, 98-CV-061: The availability of judicial relief with regard to the narrowing effects of the proposed amendments offers little comfort. The delays and costs involved in pursuing any discovery motion will serve as an effective deterrent to seeking more expansive discovery. It is also likely that the already overburdened district courts will be in a position to actively manage discovery.

Michael S. Allred, 98-CV-081: The biggest problem is failure to respond properly to discovery, particularly by corporate defendants. These changes don't address that, and instead give corporate defendants benefits.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Notes that the efforts of the Advisory Committee to build a full record have been exhaustive.

William A. Coates, 98-CV-096: "These proposed discovery reforms, by addressing the issues of uniform disclosure, narrowing the scope of all discovery and encouraging greater judicial supervision of the discovery process, represent real progress in bringing greater value to discovery."

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: "In short, the discovery amendments are excellent."

Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals, 52 SMU L. Rev. 229 (1999), which contains observations about the proposals) Like virtually all the changes since the 1980s, the probable impact of these changes, if adopted, will be to curtail discovery. The assumption of all these packages of amendments has seemed to be that the source of discovery abuse is over-discovery. But there is no acknowledgment that resistance to discovery is also important, and nothing to counter that tendency. Moreover, the changes cut back across the board even though the empirical information suggests that problems arise only in a small number of cases. They are likely to drain away more district judge time on disputes that would not otherwise happen, and thereby to limit the judges' ability to perform the tasks they now perform.

Michael S. Wilder, 98-CV-149: (General Counsel, The Hartford)  
"On behalf of The Hartford, I want to express my strong support for these amendments. The Advisory Committee is going in the right direction."

State Bar of Arizona, 98-CV-153: The Civil Practice and Procedure Committee of the State Bar reviewed the proposals and voted unanimously to recommend their adoption. The Board of Governors for the State Bar then considered and endorsed the Committee's view, so the State Bar "hereby advises, therefore, that it supports the adoption of the proposed amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence in the form circulated in August 1998 for comment by the Judicial Conference Advisory Committee."

Federal Bar Ass'n, Phoenix Chapter, 98-CV-158: Based on a vote of the Board of Directors, the Chapter supports adoption of the proposed amendments.

Richard C. Miller, 98-CV-162: "I view these proposed rule changes merely as an effort to eliminate individual legal rights in order to protect corporate profits."

Nebraska Assoc. of Trial Attorneys, 98-CV-174: Concerned that there has not been adequate time since the 1993 amendments went into effect to assess those changes. Each new change sweeps aside precedent pertinent to the prior version, and this happens too often.

Gary M. Berne, 98-CV-175: Besides commentary on specific changes, this submission contains a critique of the Advisory Committee's use of the empirical material gathered regarding discovery. The Committee gives heavy weight to anecdotal evidence by an "elite" group of "national" attorneys who are involved with the Committee. At the same time, it ignores hard data from multivariate analysis. The problems identified by the Committee don't appear to be serious ones in view of those data. Overall the data indicate that discovery is not too costly, and the most frequently encountered problem is obstruction of discovery or delay.

Trial Lawyers Association of Metropolitan Washington, D.C., 98-CV-180: The proposed changes seem to be premised on the idea

that in large tort litigation both sides have incentives to run up each others' discovery costs unnecessarily. From the plaintiff's perspective, this is simply untrue.

Public Citizen Litigation Group, 98-CV-181: The focus on discovery abuse in the proposals appears to ignore the evidence that the rules function well in the vast majority of cases. Overuse of discovery is rare, and amendments that impose restrictions on discovery in all types of cases are therefore unwarranted. Amendments that might be desirable in a few cases should not be adopted if they would burden the discovery process in ordinary cases. Moreover, focusing judicial management more on those ordinary cases will deflect it from the complex cases where it is most valuable.

Association of Trial Lawyers of America, 98-CV-183: Out of an undifferentiated concern about expense and other matters whose significance has been unduly exaggerated, the Committee has developed proposed rules that would impair access to justice for a wide variety of plaintiffs. Although the proposals emphasize cost and delay, the changes will not improve matters in these regards, and they may increase costs for plaintiffs. Yet the greatest problem with discovery -- failure to comply with proper discovery demands -- goes unremedied.

Russell T. Golla, 98-CV-187: Strongly opposes the proposed changes. Major corporations go to great lengths to hide damaging information, and these changes will give those who seek to frustrate the search for truth additional ammunition. There is no discovery abuse that warrants these changes.

John P. Blackburn, 98-CV-192: "I represent farmers, small businesses, and injured persons. Please do not allow the rights of these persons to be diminished by making it tougher for them to establish and prove their cases. . . . The litigation process is sufficiently difficult and expensive now."

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: "The Lawyers Committee has grave concerns and opposes adoption of the proposed amendments to Rules 5(d), 26(a)(1), 26(a)(4), 26(b)(1), 26(b)(2), 26(d), 30(d)(2) and 34(b) of the Rules of Civil Procedure. . . . [It] will set forth a particularized statement of its concerns and the reasons for its opposition to the

proposed amendments promptly at the conclusion of its review process." In a later-filed 34-page amplification, it states that, overall, the amendments "would have a profoundly adverse effect on the ability of civil rights plaintiffs to prove the merits of their claims [by] transferring a large measure of control of the discovery process from counsel to the courts."

Trial Lawyers for Public Justice, 98-CV-201: The most widespread and serious form of discovery abuse is stonewalling, and this is confirmed by the FJC study. But the proposed changes don't do anything about that problem, and instead will exacerbate stonewalling problems. As a whole, then the package should not be adopted even though some proposals have merit.

Robert L. Byman, 98-CV-225: E-mail message attaching a copy of a column scheduled to be published in the National Law Journal in mid-February concerning the proposed amendments. The column is in the form of a colloquy about the proposals between Bynum and Jerold S. Solovy, in which they discuss strengths and weaknesses of the proposals. It is difficult to state what positions are to be gleaned overall. The column does say there should have been "fierce debate" about the proposals, but that there was not, and it urges readers to weigh in even though the deadline has passed. In that spirit, it adds in a footnote: "To practice what we preach, we have sent the copy for this column to the Advisory Committee."

Ken Baughman, 98-CV-232: "These changes will play into the hands of the hard ball artists and the case churners. The effect will be to raise the cost of litigation to the average citizen and limit his or her access to the court system. . . . [M]ore people will start taking the law into their own hands."

Pamela O'Dwyer, 98-CV-233: Opposes the changes to Rule 26, providing a description of difficulties she has encountered in litigation with railroads.

Jesse Farr, 98-CV-234: "Needless to say, I must oppose rule changes which make discovery more difficult and burdensome."

J. Michael Black, 98-CV-239: "In the past decade our form of government has been rapidly changing. It no longer resembles a republic. It has become a plutocracy and the proposed rule

changes, if enacted, will only act to further the control of special interests over our government."

P. James Rainey, 98-CV-242: These amendments would greatly increase the cost to citizens to bring a lawsuit and effectively deny them their day in court.

NAACP Legal Defense Fund, 98-CV-248: The proposals would work an unintentional but substantial shift in substantive advantage in favor of defendants in the discovery process, especially in suits brought under the federal civil rights statutes.

Lawrence A. Salibra, II, 98-CV-265: Urges resisting anecdotal presentations of "[a] small but disproportionately vocal section of the bar made up of large law firms with corporate clients" whose objections have fueled the movement to make these amendments. Speaking as in-house counsel to a large corporation, he has shown that corporate litigation need not be carried on in the manner these firms have adopted for their own reasons. He attaches the study of CJRA activities in the N.D. Ohio that he spearheaded because it shows that court reform efforts of this sort don't reduce expenses. The problem is in the organization of the legal profession, not in the rules adopted by courts.

### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) Doubts that the Advisory Committee has ever had the benefit of the amount of accumulated wisdom on another subject that it has on discovery. It has the input of an assembly of scholars and practitioners representing the entire spectrum of clients, as well as a massive amount of empirical research.

Allen D. Black, prepared stmt. and Tr. 18-30: The Advisory Committee should table all the proposed changes, with the possible exception of the proposal to make disclosure mandatory in all districts. There is no crying need for any of the others. But it is human nature, having invested as much energy as the Committee has in studying discovery, to feel that something

should come of it so that it is not waste. He urges the Committee to resist that temptation.

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) The implications of what the Committee does go beyond practice in the federal courts. He serves on the Maryland Rules Committee, and is confident that state practice will be affected by changes in the federal rules on discovery.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: The changes are not needed because the rules currently provide tools to deal with the problems that prompt the proposals. If there are problems today, that is because the courts are not utilizing the current tools; providing more won't remedy that problem. Discovery is working well in most cases, and it would be a mistake to rewrite the rules for the few cases that cause problems. The 1993 amendments are producing the desired effects, and further changes should not be made after a mere five years.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: The current set of proposed revisions highlights key areas in which reform is most urgently needed. Therefore strongly recommends approval, as these represent real progress in discovery reform.

George Doub, Tr. 142: The proposals are a step in the right direction. They're a small step, and there is nothing revolutionary about them. They seem very evenhanded.

#### San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: These changes are unnecessary and probably counterproductive. Discovery is not generally a problem, and where it is there is usually a "judge" problem that rule changes won't solve. There is actually very little abuse of discovery.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Discovery, particularly massive document discovery, is the deus ex machina driving litigation costs to absurd levels. Business litigants increasingly are saddled with spiraling expense and diversion of personnel inherent in producing vast volumes of material that frequently has little relevance. The Committee's proposed amendments are a substantial



step in the direction of reason and fairness. A fraction of Shell's cases account for the overwhelming percentage of its total litigation costs. The instances in which discovery is not working are so costly and egregious that remedial efforts are mandated. In some instances, less than one-hundredth of one percent of documents produced have any bearing on the actual issues.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Questions the need to revise the rules to make the changes proposed. At a minimum, further empirical studies should be conducted to demonstrate that a compelling need exists to revise the discovery rules before that is done. The overall thrust of the proposed changes is to limit discovery.

Robert Campbell, Tr. 117-30: (Chair, Federal Rules Comm., Amer. Coll. of Tr. Lawyers) The Advisory Committee has given an extraordinary amount of attention to discovery issues over the last two years, including conferences and other events.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Although not necessarily endorsing every proposed change equally, HII goes on record to urge that the proposals be adopted in their entirety.

#### Chicago Hearing

John H. Beisner, prepared stmt. and Tr. 147-54: This package is a masterful compromise. On the one hand, it takes proper account of plaintiff's legitimate need to gather information. On the other hand, it constitutes a measured step toward arresting the use of discovery as a litigation "end game."

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: There is no evidence supporting aggressive across-the-board changes. Discovery is working well in most cases. Active judicial management can work in the few cases where informational sprawl is a real problem. Moreover, the current changes appear one-sided, and are likely to narrow the amount of information made available through discovery.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) One of the most important features of this package

is that every feature has a provision that allows for judicial discretion. Although the rules try moderately to contract the scope of disclosure and discovery, there is an exception in every case so that a judge can exercise discretion and alter the provisions. A lot of the reaction to the rules from lawyers is due to fear that federal judges won't use that authority sensibly, but there is no reason to assume that and no reason to write rules that assume that. Therefore, the Note material might be modified to emphasize that judges may modify these provisions as needed given the circumstances in a specific case.

Kevin E. Condron, Tr. 259-67: He currently works in an international consulting firm that addresses issues of litigation cost as a corporate planning matter. Based on extensive data review, he does a projection of cost of litigation in different places, and has found that in some venues it is higher than in others. Right now, venue in Texas or Alabama has led to particularly high costs, including discovery costs. There is no real distinction between the rules for discovery in state and federal court, so the differences don't relate to the content of the rules. But he does expect that the narrowing of scope will have a dramatic impact on costs of discovery.

Dean Barnhard, prepared stmt. and Tr. 267-76: The testimony has seemed far too partisan to him. The basic point should be that this package is a package, and that the various proposals work together. Rule 11 says that a plaintiff should have a basis for the allegations in the complaint, and that a defendant should have a basis for the defenses in the answer. That being so, it is perfectly fair that both sides disclose what they have. Everybody's cards should be on the table after disclosure. This flows naturally to narrowing of discovery, for it makes sense that discovery be focused on what's really involved in the case. Then Rule 26(f) and Rule 16 call for the lawyers and the judge to figure out where the case is going and how it should get there. These changes may well provoke early motions, but that is not bad because it will allow the judge to get the case under control. The court-managed stage of discovery fits right into this scheme, and should be retained. The field has not been tilted until now, it has just been muddy.

Robert A. Clifford, prepared stmt.: These proposals are extreme and even drastic proposals to address small problems that usually

correct themselves with due diligence.

Rex K. Linder, prepared stmt.: It is obvious that the Committee has attempted to balance conflicting interests in an effort to control discovery costs without impeding a litigant's opportunity to investigate and prepare its case. The proposed rules are a step in the right direction.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) The proposed amendments are balanced and will contribute significantly to restoring order and predictability to the civil justice system.

(b) Additional suggested amendments

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports presumptive temporal limitation on document discovery in Rule 34 limiting production to "documents created no more than seven years prior to the transaction or occurrence giving rise to the action." This limitation could be expanded on order of the court.

John G. Prather, 98-CV-003: Proposes the addition of a new Rule 30(b)(8) providing: "Unless otherwise agreed by the parties, depositions shall be taken on a regular weekday, excluding holidays."

Maryland Defense Counsel, Inc., 98-CV-018: Notes that document discovery is the only area in which there is no possibility of numerical limitations by rule, and suggests that in the absence of a national rule providing such limitations there be local authority to adopt limitations by local rule.

Charles F. Preuss, 98-CV-060: Consistent with proportionality principle, would favor a provision presumptively limiting in time the scope of document discovery to a certain time before or after the specific event or transaction at issue.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: The best way to deal with discovery is to require courts to take firm and early control of discovery and tailor it to the needs of the specific cases. Accordingly, the change that should be made is to revise Rule 26 to require hands-on, early judicial oversight of discovery.

Association of Trial Lawyers of America, 98-CV-183: The better focus for the Committee would be on abusive and evasive failures to respond to discovery. In addition, the following areas deserve attention: (1) The distinctive alternative approaches to expert witnesses employed in Oregon and New York, where there are no pretrial depositions, and hence negligible problems of excessive delay and cost; (2) The rapidly expanding role played by discovery of electronic media which, on the one hand, make it easier to store and retrieve information, but, on the other hand,

tend to greatly increase the amount of material to be searched during serious litigation.

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: Suggests adopting a cutoff time prior to the end of discovery for filing discovery motions in order to ensure that all motions to compel are before the court and resolved prior to dispositive motions.

### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI believes that there should be presumptive time limits placed on discovery of documents and electronic materials. It notes that e-mail messages are more akin to telephone conversations than to written memoranda, and suggests that they should be treated as such. DRI also believes that action should be taken on the problem of preserving privilege objections as to voluminous document productions.

Allen D. Black, prepared stmt. and Tr. 18-30: The one area in which the rules desperately need attention is not included in this package of proposals -- discovery of data and information stored in electronic form. Within a few years most information will be stored in electronic form, and paper documents will be dinosaurs of the past. The current U.S. v. Microsoft trial is an example of these developments. Yet Rule 26(b)(1) still describes the scope of discovery as looking to the location of "books, documents, or other tangible things," and does not even mention information stored in electronic form. Similarly, Rule 30(b)(5) provides a means to compel a deponent to bring "documents or other tangible things" to a deposition, but makes no similar provision for electronically stored data. Rule 34 does make an awkward attempt to reach electronic information, but its language is convoluted and opaque. At the Boston conference, the problems of electronic material were repeatedly raised. Moreover, one in-house attorney for a large corporation stated that he does not consider an e-mail message to be a document because of its "transitory nature." Surely the rules should make clear that e-mail must be produced in discovery if it exists at the relevant time.

James M. Lenaghan, prepared stmt and Tr. 58-64: The rules should be amended to preclude discovery in putative class actions until the parties have exhausted available state or federal administrative or regulatory processes. Too often massive discovery is necessary in purported class actions even though there has been no determination whether the case is a proper class action. While the possibility of a rule change to deal with these issues is under study, a Committee Note could be added along the following lines: "Subdivision 26(d). In ruling on a motion pursuant to Rule 26(d) seeking to delay commencement of discovery (as to class certification or merits issues), district courts should consider whether any state or federal administrative agency has jurisdiction over the subject matter of the action and whether proceedings are pending in any such agency. District courts have a responsibility to phase or sequence discovery in the manner most likely to facilitate the most efficient disposition of the action. See *Chudasma v. Mazda Motor Co.*, 123 F.3d 1353, 1367 (11th Cir. 1997). Therefore, District Courts should not permit civil litigants to undertake extensive discovery if there is a reasonable prospect that a ruling by an administrative agency could dispose of the need for the civil action." The *Chudasma* case does not take the position that is urged by the witness, and there are cases saying that merits discovery should not be deferred pending disposition of class certification.

Brian F. Spector, prepared stmt. and Tr. 64-80: Rule 26(a)(1)(A) should also require that a summary of substance of the information possessed by the witness be included. In addition, Rule 33 should be clarified on whether the existing numerical limitation applies to each "side" of the case, as with depositions under Rule 30, or each "party," as the rule literally says. He also suggests that Rule 33 be amended to correspond to a local rule in his district (S.D. Fla.) that takes a more textured approach to numerical limitations on this discovery device. In addition, Rule 16(b) should be amended explicitly to invite use of the Manual for Complex Litigation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: The Committee should go further and impose a presumptive temporal limit on the scope of document discovery.

San Francisco Hearing

Larry R. Veselka, Tr. 99-108: Feels that there should be a focus on the problem of delays and costs in document discovery due to concerns about privilege waiver. In the state courts in Texas, the new rules say there is no waiver due to producing documents.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) HII supports an amendment to Rule 26 providing that initial discovery in purported class actions be limited to class certification issues. In addition, defendants should be allowed an immediate appeal from adverse rulings on class certification.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Urges that more explicit treatment of electronic materials be included in the rules. There has been a fundamental change in the way in which people routinely communicate. The use of transitory electronic messages provides a quick alternative to the time-consuming process of completing a telephone call. A typical BASF manager augments telephone calls each day by anywhere from 50 to more e-mails, most of which are routine and routinely deleted. Most users believe that they have accomplished something like hanging up the phone when they delete, but they are often wrong. Heroic measures can often be utilized to reconstruct electronic messages. He suggests that the Committee address this issue by endorsing a Comment to Rule 26(b)(2) and Rule 34 that the scope of discovery does not presumptively include electronic material which has, in the ordinary course, been "deleted" by the act of the originator or recipient. This would acknowledge that conscious decision of the individual, prevent the chilling effect that might otherwise affect efficient communication within the company, and be no more onerous concerning discovery than is the case with telephone calls and face-to-face communications. If there is good cause to disinter deleted e-mails, the cost-bearing features of Rule 34(b) should apply. In this way, e-mail that remains on individual computers or which is copied into hard copy would remain fair game for discovery.

Alfred Cortese, prepared stmt. and Tr. 174-82: Urges further attention to methods of reducing the burdens and delays attendant on the review of documents to avoid producing privileged materials. In addition, continues to feel that a presumptive time limit on document discovery would be desirable.

## Chicago Hearing

Daniel F. Gallagher, Tr. 39-47: Opposes any effort to put the genie of waiver back in the bottle if there has been an inadvertent waiver. The privilege should be jealously guarded and not revived after the fact.

John H. Beisner, prepared stmt. and Tr. 147-54: Proposes that in class actions there be a presumption that disclosure not occur until the class certification question has been resolved.

Sanford N. Berland, prepared stmt. and Tr. 165-71: Urges that sequenced disclosures and phased discovery be used so that defendants know what plaintiff is talking about before they have to formulate their responses. In addition, where a threshold determination will seriously affect the rest of the case, such as class certification, it would make sense to limit disclosure and discovery to that topic until it is resolved. The same sort of thing can be employed where there is an issue that might dispose of the case if addressed early. In addition, it would be desirable to preserve privilege despite the inspection by the party seeking discovery to reduce costs and delay.

Clinton Krislov, prepared stmt. and Tr. 171-77: Opposes involving judges in discovery. But the only way to keep the judges out of it is to adopt a flat rule that everything has to be disclosed. Then there is no occasion for the judges to be involved.

Michael E. Oldham, prepared stmt. and Tr. 235-45: Believes there should be a limit on the number of documents that have to be produced without a court order, and that a presumptive time limit on document production should be adopted. In the District of Colorado, numerical limits work for document production, keyed to the number of requests allowed. In addition, a party's right to amend should be limited more strictly. Furthermore, notice pleading should be eliminated. Rule 8 encourages parties to make frivolous or shallow assertions in pleadings with the expectation that broad discovery will build a case or defense and that they can then amend as needed.



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE **Agenda F-18 (Appendix B)**  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

**Rules**  
**September 1999**

**ANTHONY J. SCIRICA**  
CHAIR

**PETER G. McCABE**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**WILL L. GARWOOD**  
APPELLATE RULES

**ADRIAN G. DUPLANTIER**  
BANKRUPTCY RULES

**PAUL V. NIEMEYER**  
CIVIL RULES

**W. EUGENE DAVIS**  
CRIMINAL RULES

**FERN M. SMITH**  
EVIDENCE RULES

**TO: Honorable Anthony J. Scirica, Chair**  
**Standing Committee on Rules of Practice**  
**and Procedure**

**FROM: Honorable Fern M. Smith, Chair**  
**Advisory Committee on Evidence Rules**

**DATE: May 1, 1999**

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

## **I. Introduction**

The Advisory Committee on Evidence Rules met on April 12<sup>th</sup> and 13<sup>th</sup>, 1999, in New York City. At the meeting, the Committee approved seven proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them and forward them to the Judicial Conference. The discussion of these proposed amendments is summarized in Part II of this Report. An appendix to this Report includes the text, Committee Note, GAP report, and summary of public comment for each proposed amendment.

\* \* \* \* \*

## **II. Action Items — Recommendations to Forward Proposed Amendments to the Judicial Conference**

At its January 1998 meeting, the Standing Committee approved the publication of proposed amendments to Evidence Rules 103, 404(a), 803(6) and 902. At its June 1998 meeting,

the Standing Committee approved the publication of proposed amendments to Evidence Rules 701, 702 and 703. The public comment period for all of these rules was the same — August 1, 1998 to February 1, 1999.

The Advisory Committee on Evidence Rules conducted two public hearings on the proposed amendments, at which it heard the testimony of 18 witnesses. In addition, the Committee received written comments from 174 persons or organizations, commenting on all or some of the proposed amendments.

The Committee has considered all of these comments in detail, and has responded to many of them through revision of the text or Committee Notes of some of the proposals released for public comment. The Committee has also considered and incorporated almost all of the suggestions from the Style Subcommittee of the Standing Committee. After careful review, the Evidence Rules Committee recommends that all of the proposed amendments, as revised where necessary after publication, be approved and forwarded to the Judicial Conference.

A complete discussion of the Committee's consideration of the public comments respecting each proposed amendment can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendments.

#### **A. Action Item — Rule 103. Rulings on Evidence. [Rules App. B-10]**

Courts are currently in dispute over whether it is necessary for a party to renew an objection or offer of proof at trial, after the trial court has made an advance ruling on the admissibility of proffered evidence. Some courts hold that a renewed objection or offer of proof is always required in order to preserve a claim of error on appeal. Some cases can be found holding that a renewed objection or offer of proof is never required. Some courts hold that a renewal is not required if the advance ruling is definitive. The Evidence Rules Committee has proposed an amendment to Rule 103 that would resolve this conflict in the courts, and provide litigants with helpful guidance as to when it is necessary to renew an objection or offer of proof in order to preserve a claim of error for appeal. Under the proposed amendment, if the advance ruling is definitive, a party need not renew an objection or offer of proof at trial; otherwise renewal is required. Requiring renewal when the advance ruling is definitive leads to wasteful practice and costly litigation, and provides a trap for the unwary. Requiring renewal where the ruling is not definitive properly gives the trial judge the opportunity to revisit the admissibility question in the context of the trial.

Public comment on the proposed amendment's resolution of the renewal question was almost uniformly favorable. Some comments suggested that certain details might be treated in the Committee Note. For example, it was suggested that the Committee Note might specify that developments occurring after the advance ruling could not be the subject of an appeal unless their relevance was brought to the trial court's attention by way of motion to strike or other suitable

motion. It was also suggested that the Committee Note refer to other laws that require an appeal to the district court from nondispositive rulings of Magistrate Judges. These suggestions were incorporated into the Committee Note.

The proposed amendment to Evidence Rule 103 that was issued for public comment contained a sentence that purported to codify and extend the Supreme Court's decision in *Luce v. United States*. Under *Luce* a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. Lower courts have extended the *Luce* rule to comparable situations, holding, for example, that if the trial court rules in advance that certain evidence will be admissible if a party pursues a certain claim or defense, then the party must actually pursue that claim or defense at trial in order to preserve a claim of error on appeal. The proposal issued for public comment recognized that any codification of *Luce* would necessarily have to extend to comparable situations.

The public comment on the proposed codification and extension of *Luce* was generally negative. Substantial concerns were expressed about the problematic and largely undefinable impact of *Luce* in civil cases. The Evidence Rules Committee considered these comments and, after substantial discussion and reflection, determined that the comments had merit. The Committee therefore deleted the sentence from the published draft that codified and extended *Luce*. The Committee considered the possibility that deletion of the sentence could create an inference that the proposed amendment purported to overrule *Luce*. The Committee determined that such a construction would be unreasonable, because the proposed amendment concerns *renewal* of objections or offers of proof, but *Luce* concerns fulfillment of a condition precedent to the trial court's ruling. *Luce* does not require renewal of an objection or offer of proof; it requires the occurrence of a trial event that was a condition precedent to the admissibility of evidence. In order to quell any concerns about the effect of the proposed amendment on *Luce*, however, the Committee Note was revised to indicate that the proposed amendment is not intended to affect the rule set forth in *Luce*.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 103, as modified following publication, be approved and forwarded to the Judicial Conference.***

**B. Action Item — Rule 404(a). Character Evidence. [Rules App. B-26]**

The proposed amendment to Evidence Rule 404(a) is designed to provide a more balanced presentation of character evidence when an accused decides to attack the alleged victim's character. Under current law, an accused who attacks the alleged victim's character does not open the door to an attack on his own character. The current rule therefore permits the defendant to attack an alleged victim's character without giving the jury the opportunity to consider equally relevant evidence about the accused's own propensity to act in a certain manner.

The Evidence Rules Committee proposed the amendment in response to a provision in the Omnibus Crime Bill that would have amended Evidence Rule 404(a) directly. The Congressional proposal would have permitted the government far more leeway in attacking the accused's character in response to an attack on the alleged victim's character.

The proposed amendment as issued for public comment provided that an attack on the alleged victim's character opened the door to evidence of any of the accused's "pertinent" character traits. Public comment on this proposal suggested that the language should be narrowed to permit only an attack on the "same" character trait that the accused raised as to the victim. The Committee agreed that this modification was necessary to prevent a potentially overbroad use of character evidence. The public comment on the proposal, as so modified, was substantially positive.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a), as modified following publication, be approved and forwarded to the Judicial Conference.***

#### **C. Action Item — Rule 701. Opinion Testimony by Lay Witnesses. [Rules App. B-35]**

The proposed amendment to Evidence Rule 701 seeks to prevent parties from proffering an expert as a lay witness in an attempt to evade the gatekeeper and reliability requirements of Rule 702. As issued for public comment, the proposed amendment provided that testimony cannot be admitted under Rule 701 if it is based on "scientific, technical or other specialized knowledge." The language of the draft issued for public comment intentionally tracked the language defining expert testimony in Rule 702.

The public comment on the proposal was largely positive. Some members of the public went on record as opposing the proposal, but in fact their comments were directed at the proposed amendment to Evidence Rule 702. The major source of objection directed specifically to the proposed amendment to Rule 701 has come from the Department of Justice. DOJ argued that it is appropriate to have overlap between Rules 701 and 702, so that experts could be permitted to testify as lay witnesses. DOJ also expressed concern that exclusion under Rule 701 of all testimony based on "specialized knowledge" would result in many more witnesses having to qualify as experts — leading to deleterious consequences because the government would have to identify many of those witnesses in advance of trial under the Civil and Criminal Rules governing disclosure.

At its April meeting, the Evidence Rules Committee carefully considered the objections of the Justice Department, and decided to revise the proposed amendment to address the concern that all testimony based on any kind of specialized knowledge would have to be treated as expert

testimony. The proposed amendment, as revised, provides that testimony cannot qualify under Rule 701 if it is based on “scientific, technical or other specialized knowledge *within the scope of Rule 702.*” The Committee Note was also revised to emphasize that Rule 701 does not prohibit lay witness testimony on matters of common knowledge that traditionally have been the subject of lay opinions. The Committee believes that the proposed amendment, as revised, will help to protect against evasion of the Rule 702 reliability requirements, without requiring parties to qualify as experts those witnesses who traditionally and properly have been considered as providing lay witness testimony.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 701, as modified following publication, be approved and forwarded to the Judicial Conference.***

**D. Action Item — Rule 702. Testimony by Experts. [Rules App. B-53]**

The proposed amendment to Evidence Rule 702 is in response to the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* It attempts to address the conflict in the courts about the meaning of *Daubert* and also attempts to provide guidance for courts and litigants as to the factors to consider in determining whether an expert’s testimony is reliable. The proposal is also a response to bills proposed in Congress that purported to “codify” *Daubert*, but that, in the Committee’s view, raised more problems than they solved. The proposed amendment to Evidence Rule 702 specifically extends the trial court’s *Daubert* gatekeeping function to all expert testimony, as affirmed by the Supreme Court in *Kumho Tire Co. v. Carmichael*, requires a showing of reliable methodology and sufficient basis, and provides that the expert’s methodology must be applied properly to the facts of the case. The Committee has prepared an extensive Committee Note that will provide guidance for courts and litigants in determining whether expert testimony is sufficiently reliable to be admissible.

The public comment on the proposed amendment was mixed. Those in favor of the proposal believed that it was important to codify the *Daubert* principles by using general language such as that chosen in the proposed amendment. They noted that many courts, even after *Daubert*, had done little screening of dubious expert testimony. Those opposed to the proposed amendment argued that it would 1) permit trial judges to usurp the role of the jury; 2) lead to a proliferation of challenges to expert testimony; 3) allow judges to reject one of two competing methodologies in the same field of expertise; and 4) result in the wholesale rejection of experience-based expert testimony.

The Evidence Rules Committee considered all of these comments in detail. It determined that most of the concerns were not directed toward the proposal itself, but rather toward the case law that the proposal codifies, most importantly *Daubert* and *Kumho*. In order to allay concerns about the potential misuse of the amended Rule, however, the Committee revised the Committee

Note to clarify that the amendment was not intended to usurp the role of the jury, nor to provide an excuse to challenge every expert, nor to prohibit experience-based expert testimony. The Note was also revised to emphasize that the Rule is broad enough to permit testimony from two or more competing methodologies in the same field of expertise. Finally, in response to public comment, the text of the proposal was revised slightly to avoid a potential conflict with Rule 703, which governs the reliability of inadmissible information used as the basis of an expert's opinion.

The Supreme Court granted certiorari in *Kumho* before the Standing Committee authorized the proposed amendment to Rule 702 to be released for public comment. *Kumho* was decided shortly after the public comment period ended. At its April meeting, the Evidence Rules Committee carefully considered the impact of *Kumho* on the proposed amendment. The Committee unanimously found that the Court's analysis in *Kumho* was completely consistent with, and supportive of, the approach taken by the proposed amendment. The Court in *Kumho* held that the gatekeeper function applies to all expert testimony; that the specific *Daubert* factors might apply to non-scientific expert testimony; and that the Rule 702 reliability standard must be applied flexibly, depending on the field of expertise. The proposed amendment precisely tracks *Kumho* in all these respects. The Court in *Kumho* emphasized the same overriding standard as that set forth in the Committee Note to the proposed amendment, i.e., that an expert must employ the same degree of intellectual rigor in testifying as he would be expected to employ in his professional life. The Committee also noted that the *Kumho* Court favorably cited the Committee Note to the proposed amendment to Evidence Rule 702 as issued for public comment.

For all these reasons, the Committee decided that the Supreme Court's decision in *Kumho* provided more rather than less reason for proceeding with the proposed amendment. The Committee Note was revised to include a number of references to *Kumho*. The Committee considered whether, in light of *Kumho*'s resolution of the applicability of *Daubert* to non-scientific experts, it made sense to amend the Rule. The Committee unanimously agreed that the amendment would perform a great service even after the Court's resolution in *Kumho*. Even after *Kumho*, there are many unresolved questions about the meaning of *Daubert*, such as 1) the standard of proof to be employed by the trial judge in determining reliability; 2) whether the trial court must look at how the expert's methods are applied; and 3) the relationship between the expert's methods and the conclusions drawn by the expert. Moreover, even without any obvious conflicts on the specifics, the courts have divided more generally over how to approach a *Daubert* question. Some courts approach *Daubert* as a rigorous exercise requiring the trial court to scrutinize in detail the expert's basis, methods, and application. Other courts hold that *Daubert* requires only that the trial court assure itself that the expert's opinion is something more than unfounded speculation. The Evidence Rules Committee believes that adoption of the proposed rule change, and the Committee Note, will help to provide uniformity in the approach to *Daubert* questions. The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.

Finally, if the Rule is not amended, there is legitimate cause for concern that Congress

will act to amend Rule 702. Prior codification efforts were shelved partly because of assurances that the Rules Committee was already considering a change to Rule 702. If the Committee fails to act, these congressional efforts may be renewed.

***Recommendation.*** — *The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 702, as modified following publication, be approved and forwarded to the Judicial Conference.*

**E. Action Item — Rule 703. Bases of Opinion Testimony by Experts.  
[Rules App. B-99]**

The proposed amendment to Evidence Rule 703 would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion. Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury. Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the risk of prejudice resulting from the jury's possible misuse of the evidence.

The public comment on the proposed amendment was largely positive. Most comments agreed that under current practice, Rule 703 is all too often used as a device for evading exclusionary rules of evidence, and that the balancing test set forth in the proposal is necessary to prevent this abuse. Negative comments expressed concern that the proposal did not specify how the balancing test would apply in rebuttal, and did not mention whether a proponent might be able to introduce inadmissible information on direct examination in order to remove the sting of an anticipated attack on the expert's basis. In response to these comments, the Committee Note was revised to emphasize that the balancing test set forth in the amendment is flexible enough to accommodate each of these situations.

Other public comments suggested that the amendment clarify why inadmissible information relied upon by the expert might have probative value that would be weighed under the amendment's balancing test. In response to these comments, the Committee revised the text of the amendment to provide that the trial judge must assess the inadmissible information's "probative value in assisting the jury to evaluate the expert's opinion." Finally, the Committee adopted the suggestions of the Style Subcommittee of the Standing Committee, and made stylistic improvements to the proposal as it was released for public comment.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 703, as modified following publication, be approved and forwarded to the Judicial Conference.***

**F. Action Item — Rule 803(6). Records of Regularly Conducted Activity.  
[Rules App. B-120]**

Under current law, a foreign record of regularly conducted activity can be admitted in a criminal case without the necessity of calling a foundation witness. 18 U.S.C. § 3505 provides that foreign business records may be admitted if they are certified by a qualified witness, under circumstances in which the law of the foreign country would punish a false certification. In contrast, the foundation for all other records admissible under Evidence Rule 803(6) must be established by a testifying witness. The intent of the proposed amendment to Evidence Rule 803(6) is to provide for uniform treatment of business records, and to save the parties the expense and inconvenience of producing live witnesses for what is often perfunctory testimony. The approach taken by the proposed amendment, permitting a foundation for business records to be made through certification, is in accord with a trend in the states. The proposed amendment to Rule 803(6) is integrally related to the proposed amendment to Evidence Rule 902, discussed below.

The public comment on the proposed amendment to Evidence Rule 803(6) was almost uniformly positive. The Committee made no changes to the text or Note of the proposal that was issued for public comment.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 803(6), as issued for publication, be approved and forwarded to the Judicial Conference.***

**G. Action Item — Rule 902. Self-authentication. [Rules App. B-126]**

The Evidence Rules Committee recognized that if certification of business records is to be permitted, Evidence Rule 902 must be amended to provide a procedure for self-authentication of such records. In that sense, the proposed amendments to Rules 803(6) and 902 are part of a single package — the amendment to Rule 902 is only necessary if the amendment to Rule 803(6) is adopted, and conversely the amendment to Rule 803(6) would be a nullity if the amendment to Rule 902 were rejected.

The proposed amendment to Evidence Rule 902 sets forth the procedural requirements for preparing a declaration of a custodian or other qualified witness that will establish a sufficient foundation for the admissibility of business records. Public comment on the proposed amendment was almost uniformly positive. Some comments suggested minor changes in the



foundation for the admissibility of business records. Public comment on the proposed amendment was almost uniformly positive. Some comments suggested minor changes in the language of the text, to provide more consistency in the terms "certification" and "declaration," and to refer to independent statutes and rules governing the procedures for a proper certification. The Evidence Rules Committee has revised the proposal that was issued for public comment in response to these suggestions. The Committee also incorporated suggested changes from the Style Subcommittee of the Standing Committee.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 902, as modified following publication, be approved and forwarded to the Judicial Conference.***

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**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE\***

**Rule 103. Rulings on Evidence**

1           (a) Effect of erroneous ruling. — Error may not be  
2           predicated upon a ruling which admits or excludes evidence  
3           unless a substantial right of the party is affected, and

4           (1) Objection. — In case the ruling is one admitting  
5           evidence, a timely objection or motion to strike appears of  
6           record, stating the specific ground of objection, if the  
7           specific ground was not apparent from the context; or

8           (2) Offer of proof. — In case the ruling is one excluding  
9           evidence, the substance of the evidence was made known  
10          to the court by offer or was apparent from the context  
11          within which questions were asked.

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

2

## FEDERAL RULES OF EVIDENCE

12        Once the court makes a definitive ruling on the record  
13        admitting or excluding evidence, either at or before trial, a  
14        party need not renew an objection or offer of proof to preserve  
15        a claim of error for appeal.

16        (b) Record of offer and ruling. — The court may add any  
17        other or further statement which shows the character of the  
18        evidence, the form in which it was offered, the objection  
19        made, and the ruling thereon. It may direct the making of an  
20        offer in question and answer form.

21        (c) Hearing of jury. — In jury cases, proceedings shall be  
22        conducted, to the extent practicable, so as to prevent  
23        inadmissible evidence from being suggested to the jury by any  
24        means, such as making statements or offers of proof or asking  
25        questions in the hearing of the jury.

26        (d) Plain error. — Nothing in this rule precludes taking  
27        notice of plain errors affecting substantial rights although they  
28        were not brought to the attention of the court.

**COMMITTEE NOTE**

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat*, 78 F.3d 84 (2d Cir. 1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. *Wilson v. Williams*, \_\_\_ F.3d \_\_\_ (7th Cir. 1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof

at the time the evidence is to be offered is more a formalism than a necessity. See Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10<sup>th</sup> Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. See, e.g., *United States v. Vest*, 116 F.3d 1179, 1188 (7th Cir. 1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti*, 60 F.3d 941 (2d Cir. 1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. See, e.g., *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 520 (3d Cir. 1997) (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk*, 810 F.2d 809 (8th Cir. 1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States*, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. See *Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is

offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.”).

Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge’s nondispositive order within ten days of receiving a copy “may not thereafter assign as error a defect” in the order. 28 U.S.C. §636(b)(1) provides that any party “may serve and file written objections to such proposed findings and recommendations as provided by rules of court” within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital*, 109 F.3d 198, 200 (4<sup>th</sup> Cir. 1997)(“[i]n this circuit, as in others, a party ‘may’ file objections within ten days or he may not, as he chooses, but he ‘shall’ do so if he wishes further consideration.”). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court’s decision to admit the defendant’s prior convictions for impeachment. The *Luce* principle

has been extended by many lower courts to other situations. See *United States v. DiMatteo*, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). See also *United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994) ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. See, e.g., *United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct



examination to minimize its prejudicial effect); *Gill v. Thomas*, 83 F.3d 537, 540 (1st Cir. 1996) (“by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal”); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

#### **GAP Report — Proposed Amendment to Rule 103(a)**

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 103(a):

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.
2. The second sentence of the amended portion of the published draft was deleted, and the Committee Note was amended to reflect the fact that nothing in the amendment is intended to affect the rule of *Luce v. United States*.
3. The Committee Note was updated to include cases decided after the proposed amendment was issued for public comment.
4. The Committee Note was amended to include a reference to a Civil Rule and a statute requiring objections to certain Magistrate Judge rulings to be made to the District Court.
5. The Committee Note was revised to clarify that an advance ruling does not encompass subsequent developments at trial that might be the subject of an appeal.

**Summary of Comments on the Proposed Amendment to Evidence Rule 103(a)**

**Professor James J. Duane (98-EV-005)** states that the first sentence of the proposed amendment to Evidence Rule 103 “is an excellent proposal, and exactly the right response to a situation that is desperately in need of clarity and reform.” He argues for some changes in the Advisory Committee Note to more clearly reflect the import of the amendment. Professor Duane opposes the sentence in the proposed amendment that would codify the Supreme Court’s decision in *Luce v. United States*, 469 U.S. 38 (1984). He suggests that the *Luce* rule violates the criminal defendant’s constitutional right to testify. Professor Duane argues that if the reason for including *Luce* in the Rule is to avoid the perception that *Luce* was being overruled by negative implication, the less onerous alternative would be to mention in the Committee Note that there is no intent to overrule *Luce*.

**Professor Richard Friedman (98-EV 007)** agrees with the proposal excusing renewal of objection or offer of proof when the trial court has made a definitive advance ruling, subject to the proviso that when a party who makes the unsuccessful objection or offer of proof does not renew the matter at trial, then that party “should not be allowed to argue on appeal on the basis of information or changes of circumstances that arose after the initial objection or offer of proof.” Professor Friedman opposes the language in the proposed amendment to Evidence Rule 103 that would codify the Supreme Court’s decision in *Luce v. United States*. He argues that *Luce* is an unfair and controversial rule that should not be codified and, a fortiori, should not be extended beyond its fact situation.

**Professor Laird Kirkpatrick (98-EV 011)** agrees with the Committee's decision to excuse the requirement of a renewed objection or offer of proof when the trial court's advance ruling is definitive. He contends, however, that there will be "recurring disputes" about whether a particular advance ruling is definitive. He notes that the Advisory Committee Note is "wise" to place the burden on counsel to clarify whether the ruling is definitive, but argues that there may be a tension between how lawyers want to have a ruling characterized and how judges may want it characterized.

**James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016)** favor the proposed amendment.

**Professor Lynn McLain (98-EV-030)** supports the codification of *Luce* but opposes the first sentence of the proposed amendment to Evidence Rule 103. He argues that the proposal will create "grist for arguments as to whether a particular ruling was 'definitive'." He also states that a rule requiring renewal of objections or offers of proof at trial ensures that the trial judge, if wrong in the pretrial ruling, is given an opportunity to correct that ruling in the light of trial. Thus, Professor McLain would "far prefer" a rule that clearly required a renewal of the objection or proffer at trial.

**Hon. Edward R. Becker (98-EV-065)**, Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 103, noting that it is "extremely well justified by the Committee's accompanying commentary."

**Prentice H. Marshall, Esq. (98-EV-071)** states that "the amendment to Rule 103 encouraging the use of pre-trial evidence motions/rulings is long overdue."

**The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074)** notes the “laudable purposes” of the proposed amendment: “to clarify when and how often a party must object to evidentiary rulings to preserve them for appeal, to preclude distracting formal objections to evidence already disposed of pre-trial, and to prevent unintended waivers of objections.” The Committee does not believe, however, that “the current draft achieves the desired clarity.” It objects that the term “definitive ruling” is undefined. The Committee also concludes that the “condition precedent” language in the second sentence of the proposal released for public comment “may force litigants into untenable choices at trial.” Plaintiffs, for example, may be forced to forego a claim if an advance ruling provided that the pursuit of the claim would open the door to damaging evidence. The Committee believes that a plaintiff in such circumstances “should be allowed to attack the *in limine* ruling . . . without having to sabotage her trial.”

**The State Bar of Arizona (98-EV-075)** supports the adoption of the proposed amendment to Evidence Rule 103.

**The National Association of Railroad Trial Counsel (98-EV-077)** supports the proposed change to Evidence Rule 103. The Association concludes that the proposal “will clear up the confusion about timely objections when dealing with motions *in limine*.”

**The Chicago Chapter of the Federal Bar Association (98-EV-078)** states that the proposed change to Evidence Rule 103 “is an important and desirable amendment which would clarify a constant point of confusion and would eliminate a procedural trap.”

**The Federal Practice Section of the Connecticut Bar Association (98-EV-079)** endorses the proposed amendment to Evidence Rule 103.

**The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080)** support the proposed amendment to Evidence Rule 103.

**The Pennsylvania Trial Lawyers Association (98-EV-081)** supports the first sentence of the proposal released for public comment, "since it provides litigants and the courts with some certainties as to when and under what circumstances a party must renew an objection." The Association opposes the second sentence of the proposal released for public comment "as being confusing in its application." The Association asserts that "the second sentence as written appears to permit testimony over an objection if the proponent promises to introduce subsequent testimony establishing the propriety of the testimony to which his opponent objects." In such a case, "if the proponent does not produce such testimony, the condition precedent is not satisfied, but the objector cannot rely on his objection unless he renews it. This is contrary to the salutary purpose of the first sentence" of the proposal, and "places an unfair burden on counsel who has made a timely objection when the burden should actually be placed on the proponent of the testimony to show that he did not make a misrepresentation to the court."

**The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084)** states that the proposed amendment to Evidence Rule 103 "would be a salutary addition to the Federal Rules of Evidence for two principal reasons. First, it would clarify existing law, which . . . varies among the Circuits. Second, it has the added virtue of establishing certainty by placing lawyers on

notice of the circumstances under which it is necessary to renew pretrial objections. At present, counsel may place unwarranted reliance on a pretrial ruling, only to learn after the fact that the failure to renew an objection at trial has foreclosed appellate review.” The Committee believes that “a major benefit of the proposed addition to Rule 103(a) is that it is likely to stimulate counsel to inquire of the Court — or stimulate the Court *sua sponte* to remark — on the record whether a pretrial ruling is final.” The Committee considers this notice function of the proposal to be “quite valuable.”

**The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088)** supports the proposed amendment to Evidence Rule 103, for a number of reasons. First, “there is a substantial interest in having a uniform rule to address the effect of *in limine* motions that will be applicable in all federal courts.” Second, “the proposed amendment is a sensible resolution of the circuit split,” because the requirement imposed by some Circuits that a litigant must always renew an objection to evidence at the time of trial “has resulted in the inadvertent sacrifice of substantial rights by parties who think they have done enough by raising the issue pretrial.” Third, “the requirement that a party renew an objection or an offer of proof at the time of trial serves no real substantial purpose in those cases where the issue can be resolved pretrial and the court has made a definitive ruling. . . . Indeed, such a requirement may result in the unnecessary expenditure of resources both by the litigants and by the court.” The Committee concludes that “the Rule would eliminate the wasteful and unnecessary practice of renewing objections and offers of proof as to issues that can be and have been definitively resolved. On the other hand, the requirement that the ruling be ‘definitive’ will give the district court flexibility to provide guidance to the litigants as to its initial view with respect to the admissibility of evidence in those cases where a definitive ruling

cannot be made without depriving itself of the ability to reconsider the decision in the developed context of the trial." The Committee suggests "that the Advisory Committee consider adding some commentary further defining the term 'definitive.'"

**Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103)** reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "number of attendees" objected to the proposed amendment insofar as it would codify and extend the principles of *Luce v. United States*, 469 U.S. 38 (1984).

**Professor Myrna Raeder (98-EV-106)** opposes the second sentence of the proposed amendment to Evidence Rule 103, and argues that applying the *Luce* rule to civil cases "will have unintended consequences and provide another procedural weapon for litigators to avoid decisions on the merits."

**Russell T. Golla, Esq. (98-EV-112)** supports the proposed amendment to Evidence Rule 103.

**The Philadelphia Bar Association (98-EV-118)** supports the adoption of the first sentence of the proposed amendment to Evidence Rule 103 (concerning whether objections to advance rulings must be renewed when the evidence is to be introduced). The Association states that the proposal "seems to strike an appropriate balance between the need for a detailed factual record for the consideration of errors on appeal and the need to avoid overly formalistic procedures in the conduct of a trial." The Association objects, however, to the

second sentence of the proposed amendment, which would codify the principles of *Luce v. United States*, 469 U.S. 38 (1984). It argues that the rule could be inconsistent with the decision in *New Jersey v. Portash*, 440 U.S. 450 (1979) (refusing to override a state rule of evidence permitting a defendant to preserve a fifth amendment objection to impeachment evidence without testifying at trial). The Association observes that if the second sentence of the proposal is deleted, the Committee Note to the Rule should be amended to indicate that there is no intent to overrule *Luce*.

**The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126)** recommends the adoption of the proposed amendment to Evidence Rule 103.

**The International Academy of Trial Lawyers (98-EV-134)** is in favor of the proposed amendment to Evidence Rule 103 “insofar as it eliminates the need for further objection or offer of proof once the court has made a definitive ruling on the record admitting or excluding evidence.” The Academy is also in favor of the proposed amendment “insofar as it provides that where the court rules that there is a condition precedent to the admission or exclusion of the evidence, no claim of error may be predicated on the ruling unless the condition precedent is satisfied.” However, the Academy suggests that language be added to the proposed amendment “to make it clear that if the court rules that evidence is admissible subject to the eventual introduction by the proponent of the evidence of a foundation for the evidence, the opponent of the evidence cannot claim error based on the failure of the proponent to establish the foundation unless the opponent calls that failure to the court’s attention in a timely fashion in a motion to strike or other suitable motion.”



**Hon. Tommy E. Miller (98-EV-140)**, United States Magistrate Judge for the Eastern District of Virginia, is “in favor of the spirit of the proposed change” to Evidence Rule 103, but states that the proposal “does not take into consideration the procedures set forth in 28 U.S.C. 636(b)(1)(A) and F.R.Civ.P. 72(a) for objecting to rulings by Magistrate Judges.” Under those provisions, if a Magistrate Judge makes a nondispositive ruling in a case not tried by the Magistrate Judge pursuant to the consent of the parties, the objecting party to preserve a claim of error on appeal must file an objection to that ruling within 10 days and have the ruling considered by a District Judge. Judge Miller suggests that a cross-reference to these statutory and Rules provisions be included in Rule 103 “so that parties will be alerted to their duty to timely object.”

**The National Association of Independent Insurers (98-EV-141)** supports the proposed amendment to Evidence Rule 103.

**Jon B. Comstock, Esq. (98-EV-142)** supports the proposed change to Evidence Rule 103. He has “always found it disconcerting how the rules have allowed parties and courts to be mired in so much uncertainty on this issue when a clarifying rule, such as the proposed amendment, could provide fair guidance to all parties.”

**M.R. Smith, Esq. (98-EV-169)** supports the proposed amendment to Evidence Rule 103.

**The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172)** agrees with the proposed change to Evidence Rule 103.

**The Federal Magistrate Judges Association (98-EV-173)** supports the proposed amendment to Evidence Rule 103 as a

desirable means of establishing “a uniform practice regarding the finality of rulings on motions concerning the admissibility of evidence.”

**Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174)** support the proposed amendment to Evidence Rule 103, on the grounds that the proposal “would clarify existing law and establish certainty by placing lawyers on notice of the circumstances under which it is necessary to renew pretrial objections” and “would likely encourage counsel to inquire on the record whether a pretrial ruling is final.”

**Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

1 (a) Character evidence generally. — Evidence of a person’s  
2 character or a trait of character is not admissible for the  
3 purpose of proving action in conformity therewith on a  
4 particular occasion, except:

5 (1) Character of accused. — Evidence of a pertinent trait  
6 of character offered by an accused, or by the prosecution  
7 to rebut the same; or if evidence of a trait of character of  
8 the alleged victim of the crime is offered by an accused  
9 and admitted under Rule 404 (a)(2), evidence of the same

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10 trait of character of the accused offered by the  
11 prosecution:

12 (2) Character of alleged victim. — Evidence of a  
13 pertinent trait of character of the alleged victim of the  
14 crime offered by an accused, or by the prosecution to  
15 rebut the same, or evidence of a character trait of  
16 peacefulness of the alleged victim offered by the  
17 prosecution in a homicide case to rebut evidence that the  
18 alleged victim was the first aggressor;

19 (3) Character of witness. — Evidence of the character  
20 of a witness, as provided in rules 607, 608, and 609.

21 (b) Other crimes, wrongs, or acts. — Evidence of other  
22 crimes, wrongs, or acts is not admissible to prove the  
23 character of a person in order to show action in conformity  
24 therewith. It may, however, be admissible for other purposes,  
25 such as proof of motive, opportunity, intent, preparation, plan,  
26 knowledge, identity, or absence of mistake or accident,

27 provided that upon request by the accused, the prosecution in  
28 a criminal case shall provide reasonable notice in advance of  
29 trial, or during trial if the court excuses pretrial notice on  
30 good cause shown, of the general nature of any such evidence  
31 it intends to introduce at trial.

#### COMMITTEE NOTE

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if

evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks*, 470 F.2d 432, 434-5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

#### **GAP Report — Proposed Amendment to Rule 404(a)**

The Committee made the following changes to the published

draft of the proposed amendment to Evidence Rule 404(a):

1. The term “a pertinent trait of character” was changed to “the same trait of character,” in order to limit the scope of the government’s rebuttal. The Committee Note was revised to accord with this change in the text.

2. The word “alleged” was added before each reference in the Rule to a “victim” in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.

3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim’s character for a purpose other than to prove the alleged victim’s propensity to act in a certain manner.

**Summary of Comments on the Proposed Amendment to Evidence Rule 404(a)**

**Professor Richard Friedman (98-EV 007)** states that the proposed amendment to Evidence Rule 404(a) “makes sense, at least up to a point.” He believes that it should be “altered to make the evidence of defendant’s character admissible only to the extent necessary to rebut an implication that may be drawn from the evidence of the alleged victim’s character.” He argues that allowing the defendant’s character to be attacked is only justifiable when it is necessary to provide a balanced presentation after the defendant attacks the victim’s character. This occurs only when the case is “symmetrical in nature,” such as where there is a “mutually provocative altercation” and the defendant claims that the victim is the first aggressor.

**Professor Laird Kirkpatrick (98-EV 011)** states that a rule permitting the accused to be attacked on any “pertinent” character trait, after an attack on the victim’s character, would be “overbroad.” He argues that there is “no justification for opening the door to character traits of the defendant other than the one corresponding to the character trait of the victim about which the defendant offered evidence.” He also urges that the Committee Note should provide that “if evidence of the victim’s character is offered by the defendant for a non-propensity reason, such evidence is not being offered pursuant to FRE 404(a) and does not open the door to evidence of the defendant’s character.”

**James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016)** favor the proposed amendment.

**Hon. Edward R. Becker (98-EV-065)**, Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 404(a), noting that it is “extremely well justified by the Committee’s accompanying commentary.”

**Professor Douglas E. Beloof (98-EV-066)** supports the proposed amendment to Evidence Rule 404(a). He states that the proposal promotes the interests that victims of crime have in the pursuit of truth. He concludes that the proposal rectifies the inequity in the current rule, which “permits the defendant to savage the character of the crime victim while assuring the defendant that he has complete immunity from even the possibility that his character can be put at issue.”

**Prentice H. Marshall, Esq. (98-EV-071)** states that “the proposed amendment to Rule 404(a)(1) is reasonable.”

**The State Bar of Arizona (98-EV-075)** supports the adoption of the proposed amendment to Evidence Rule 404(a).

**The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080)** support the proposed amendment to Evidence Rule 404(a).

**The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084)** supports the proposed amendment to Evidence Rule 404(a), so long as it is limited to admitting the same character trait that the accused has raised with respect to the victim. In the Committee's view, the current rule "unfairly tilts the 'playing field' in favor of the accused" and "may lead to unjust acquittals." The Committee concludes that it is not an impingement on any fundamental right to permit the prosecution to "complete the picture of what occurred" by proving the accused's violent disposition, "particularly when it is the accused who 'opens the door' to the issue of violent character."

**The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088)** believes "that evidence of the character trait of the accused should be admitted under the proposed rule *only* if there is a logical nexus between the character evidence with respect to the victim and the character evidence with respect to the accused, i.e., that the character evidence pertaining to the defendant is relevant to rebut the character evidence offered with respect to the victim." The Committee asserts that the proposed amendment "raises constitutional problems with respect to a defendant's rights under the confrontation clause of the Sixth Amendment" because the proposal "could be construed as imposing an unwarranted penalty upon the defendant for presenting a defense and offering evidence attacking the character of the victim."



**Professor David P. Leonard (98-EV-092)** opposes the proposed amendment to Evidence Rule 404(a). He argues that the “balance” sought by the proposed amendment is “illusory” and concludes that “[t]he effort to create a kind of symmetry between the rights of the defendant to foreclose inquiry into character and the rights of the government to respond to the defendant’s choice actually upsets the delicate balance maintained by the current rule.”

**Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103)** reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that “there is no existing American Bar Association policy known to us that addresses these changes.” Nonetheless, the professors report that the “overwhelming majority of those present at the Committee meeting expressed the view that the proposed changes to Federal Rule of Evidence 404(a)(1) should not be implemented.”

**A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-104)** “respectfully urge the Standing Committee not to adopt the proposed amendment to Federal rule [sic] of Evidence 404(a)(1).”

**Russell T. Golla, Esq. (98-EV-112)** supports the proposed amendment to Evidence Rule 404(a).

**The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126)** believes that the proposed amendment to Evidence Rule 404(a), as it was released for public comment, “raises issues of constitutional fairness to the Defendant.” The Committee “would like clarification on whether the trait offered by the prosecution is limited to the same trait as offered

by the Defendant. The concern is that without such clarification, the prosecution could try to introduce evidence of a *different* trait, thus opening the door to prejudicial testimony and chilling a Defendant's trial strategy."

**The National Association of Independent Insurers (98-EV-141)** supports the proposed amendment to Evidence Rule 404(a).

**Hon. William J. Giovan (98-EV-160)** Judge for the Circuit Court for the Third Judicial Circuit of Michigan, believes that "in order to remedy the problem perceived by the Committee, it is preferable, instead of significantly expanding an exception to a favored rule of exclusion, to cut Rule 404(a)(2) back to the limited scope of the common law exception as it related to the victim of homicide."

**M.R. Smith, Esq. (98-EV-169)** supports the proposed amendment to Evidence Rule 404(a).

**The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172)** agrees with the proposed changes to Evidence Rule 404(a).

**The Federal Magistrate Judges Association (98-EV-173)** states that the proposed amendment to Evidence Rule 404(a) "would make the current practice more even handed, however, the impact of the potential to punish a defendant for pursuing highly relevant information can not be overlooked."

**Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174)** believe that the proposed amendment to Evidence Rule 404(a), as it was issued for

public comment, should be revised to permit an attack on the defendant's character only if the character trait is the same trait that the defendant raised as to the victim, and then only if the character trait is pertinent to the case.

**Rule 701. Opinion Testimony by Lay Witnesses**

1           If the witness is not testifying as an expert, the witness'  
2           testimony in the form of opinions or inferences is limited to  
3           those opinions or inferences which are (a) rationally based on  
4           the perception of the witness, and (b) helpful to a clear  
5           understanding of the witness' testimony or the determination  
6           of a fact in issue, and (c) not based on scientific, technical or  
7           other specialized knowledge within the scope of Rule 702.

**COMMITTEE NOTE**

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the

expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P.16 by simply calling an expert witness in the guise of a layperson. See Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that “there is no good reason to allow what is essentially surprise expert testimony,” and that “the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process”). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9<sup>th</sup> Cir. 1997) (law enforcement agents testifying that the defendant’s conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 “subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)”).

The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g., *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9<sup>th</sup> Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness’ testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the “prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or

darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff’s owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook*, 896 F.2d 330 (8<sup>th</sup> Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson’s personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on “special knowledge.” In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony “results from a process of reasoning familiar in everyday life”, while expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.” The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

#### **GAP Report — Proposed Amendment to Rule 701**

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words “within the scope of Rule 702” were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

**Summary of Comments on the Proposed Amendment to Evidence Rule 701**

**The Product Liability Advisory Council (98-EV-001)** supports the proposed amendment to Evidence Rule 701 as necessary to prevent “surprise expert testimony or to thwart the expert disclosure rules.” The Council concludes that “the proposed amendment is consistent with the federal courts’ interpretation of Rule 701” and that in the absence of specialized knowledge or training “no witness should be able to offer a personal opinion on scientific or technical subjects.”

**Peter B. Ellis, Esq. (98-EV-002)** strongly supports the Advisory Committee’s proposed amendment to Rule 701. He declares that the proposed amendment “has the virtue of substantially clarifying the ambiguous distinction between ‘lay’ and ‘expert’ testimony, and should tend to eliminate the markedly inconsistent rulings that have surrounded this issue . . .” He concludes that the amendment “should reduce the incidence of unfair surprise that results from both sharp practice and genuine misconception.” Mr. Ellis notes that “unexpected expert opinion from a ‘lay witness’ can place the opposing party at a substantial disadvantage” and that the remedy of a deposition during the trial imposes a substantial burden on trial counsel and is often inadequate as well, “particularly where one’s ability effectively to impeach the witness’s opinion would require substantial additional document discovery or depositions of the witness’s co-workers.” Mr. Ellis disagrees with the contention that the proposed amendment works a major change in the law. He states that the proposed amendment “merely clarifies what I have always understood to be the appropriate line of demarcation between ‘lay’ and ‘expert’ opinion. In my experience, trial judges find the interplay

between Rules 701 and 702 to be unclear and confusing, and the amendment would go a long way toward eliminating that confusion.”

**Professor Richard Friedman (98-EV 007)** argues that the proposed amendment is “likely to be counterproductive.” He contends that the proposal, as issued for public comment, draws “too sharp a dichotomy between testimony that is and is not based on specialized knowledge.” He concludes that any possibility of discovery abuse should be handled by amendment of the Civil and Criminal Rules, “not by a potentially restrictive and confusing limitation on the lay opinion rule.”

**Lawyers for Civil Justice (98-EV-009)** support the proposed amendment to Evidence Rule 701 as necessary to eliminate a “growing and very troubling prospect: that expert testimony is being ‘sneaked in’ under the guise of a lay witness because of the lower threshold standards for lay witnesses.”

**Professor Laird Kirkpatrick (98-EV 011)** opposes the proposed amendment, contending that many types of lay opinions that routinely have been admitted would be excluded under the proposal as issued for public comment — such as testimony of a lay witness that a certain substance was cocaine.

**James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016)** favor the proposed amendment to Evidence Rule 701.

**The Committee on Federal Procedure of the New York State Bar Association (98-EV-017)** supports the proposed amendment to Evidence Rule 701, as being necessary to prevent an “end run” around the requirements for expert testimony imposed by Evidence



Rule 702 and the discovery provisions of the Civil and Criminal Rules.

**The Defense Research Institute (98-EV-020)** states that the proposed amendment to Evidence Rule 701 “should help eliminate increasing attempts to present expert testimony through lay witnesses without subjecting the testimony to *Daubert* scrutiny or the disclosure requirements of Fed.R.Civ.P. 26.”

**E. Wayne Taff, Esq. (98-EV-021)** states that the proposed amendment to Rule 701 is not only beneficial, but also “critical to ensuring the integrity of testimony presented in the United States District Courts.”

**Kevin J. Dunne, Esq. (98-EV-025)** favors the proposed revision to Rule 701 because it “helps prevent expert testimony from inappropriately ‘coming in the back door.’”

**Diane R. Crowley, Esq. (98-EV-029)** states that “[t]he changes to Rule 701 will prevent subterfuge involving experts who cannot meet the reliability test of Rule 702 and attempt to bring in their opinions as a lay witness not subject to such judicial scrutiny. Without the revised Rule 701 to prevent such conduct, the benefits to be derived from the revised Rule 702 will be greatly diminished.”

**Harold Lee Schwab, Esq. (98-EV-033)** states that the Advisory Committee “properly notes the very real risk factor” that “expert witnesses might proffer opinions under the guise of lay testimony and thereby evade the reliability requirements of FRE 702 and the disclosure requirements of Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16.” He concludes that the proposed amendment “properly reinforces the original intent of [Evidence Rule] 701.”

**James A. Grutz, Esq. (98-EV-036)** opposes the proposed amendment to Evidence Rule 701.

**Thomas A. Conlin, Esq. (98-EV-037)** is in favor of the proposed amendment. He states: "Under the changes proposed by the committee, there will be a bright line between opinion testimony which is coming in as expert testimony — and must therefore meet the expert foundational requirements — and that which is coming in as a lay opinion."

**Scott B. Elkind, Esq. (98-EV-038)** opposes the proposed amendment to Evidence Rule 701, asserting that it would "impair the rights of aggrieved parties" by prohibiting lay witnesses from expressing opinions based on specialized knowledge.

**Richard L. Duncan, Esq. (98-EV-044)** is opposed to the proposed change to Evidence Rule 701.

**The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047)** support the proposed amendment to Evidence Rule 701, noting that it is "designed to prevent lay witnesses from testifying as experts and thereby circumventing the reliability requirements of Rule 702 and the disclosure requirements relating to expert witnesses" and that these "salutary purposes fully justify the Proposed Amendment insofar as it would apply in civil litigation."

**William B. Dodero, Esq. (98-EV-052)** states that the proposed amendment to Evidence Rule 701 is part of "a much-needed revision

which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence.”

**Jay H. Tressler, Esq. (98-EV-055)** favors the proposed amendment to Evidence Rule 701. He states that “all too often” a person described as a lay witness “is called upon to offer expert opinions never before disclosed under Rule 26.” He concludes that “[t]estimony of lay witnesses should not be admitted under Rule 701 if the testimony is based upon ‘scientific, technical, or other specialized knowledge.’ Lay witnesses testimony on matters of common knowledge which have been traditionally admitted can and should be allowed under Rule 701.”

**The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056)** opposes the proposed amendment, because the proposal “would not enlighten the courts on the difference between lay and expert testimony.”

**The Minnesota Defense Lawyers Association (98-EV-057)** “strongly supports” the proposed change to Evidence Rule 701. The Association has found “so-called ‘expert’ testimony routinely being offered, on both sides of the litigation, which is not based on scientific, technical, or other specialized knowledge.” The Association concludes that the evidence rules “must require proper foundation before this ‘evidence’ finds its way to a jury.”

**Charles F. Preuss, Esq. (98-EV-062)** states that the proposed amendment “would appropriately limit lay witness testimony to matters of common knowledge” and that this limitation would prevent “expert testimony from coming in the back door.”

**Professor Michael H. Graham (98-EV-063)** supports the proposed amendment to Evidence Rule 701.

**Hon. Edward R. Becker (98-EV-065)**, Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 701, noting that it is “extremely well justified by the Committee’s accompanying commentary.” Judge Becker does not believe that the term “specialized knowledge” is vague, and predicts that review of trial court rulings in this area “will be largely deferential.”

**Steven H. Howard, Esq. (98-EV-067)** opposes the proposed amendment to Evidence Rule 701.

**William A. Coates, Esq. (98-EV-068)** states that the proposed amendment to Evidence Rule 701 “appropriately” limits lay witness testimony to opinions or inferences not based on scientific, technical or other specialized knowledge. He concludes that the proposal “is consistent with the federal court’s interpretations of Rule 701 in which persons have been permitted to testify as a lay witness only if their opinions or inferences do not require any specialized knowledge and cannot be reached by any ordinary person.”

**Prentice H. Marshall, Esq. (98-EV-071)** states that the proposed amendment to Evidence Rule 701 is “appropriate.”

**The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074)** believes that the proposed amendment to Evidence Rule 701 responds to a “non-problem.” The Committee would, in any event, “expect district courts to temper the revised rule with common sense. For instance, we would not expect that every treating physician would have to be qualified as an expert witness or

that an auto mechanic who worked on a defective car would be barred from testifying about the repair record, even if the testimony is based partly on specialized knowledge.”

**The State Bar of Arizona (98-EV-075)** supports the adoption of the proposed amendment to Evidence Rule 701.

**The National Association of Railroad Trial Counsel (98-EV-077)** supports the proposed change to Evidence Rule 701. The Association concludes that the proposal would “eliminate the practice of proffering an expert as a lay witness thereby avoiding both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony.”

**The Chicago Chapter of the Federal Bar Association (98-EV-078)** supports the proposed amendment to Evidence Rule 701.

**The Federal Practice Section of the Connecticut Bar Association (98-EV-079)** endorses the proposed amendment to Evidence Rule 701, on the ground that it “would prevent the offering of expert testimony from a lay witness, which would otherwise circumvent the reliability requirements of Rule 702 and the corresponding disclosure requirements of expert testimony.”

**The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080)** support the proposed amendment to Evidence Rule 701.

**The Pennsylvania Trial Lawyers Association (98-EV-081)** supports the proposed amendment to Evidence Rule 701, “with the exception of the inclusion of the words ‘specialized knowledge’ which we contend should be eliminated.” The Association expresses

concern that the “specialized knowledge” limitation in the proposed amendment would require witnesses who would testify to the identity of handwriting or to the speed of a vehicle to be qualified as experts. The Association believes “that the words ‘scientific’ and ‘technical’ sufficiently demonstrate the type of testimony which should not be permitted by a lay witness.”

**The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084)** supports the proposed amendment to Evidence Rule 701, stating that it will help to prevent “the inappropriate admission of expert evidence under the guise of lay testimony, often to the surprise of adverse parties.”

**J. Ric Gass, Esq. (98-EV-090)** states that the proposed amendment to Evidence Rule 701 is an “important and necessary and appropriate” revision.

**J. Greg Allen, Esq. (98-EV-093)** opposes the proposed amendment to Evidence Rule 701.

**Alvin A. Wolff, Jr., Esq. (98-EV-095)** opposes the proposed amendment to Evidence Rule 701.

**Alan Voos, Esq. (98-EV-096)** opposes the proposed amendment to Evidence Rule 701. He states that “individuals with hands-on, real-life experience are quite frequently more qualified to testify on scientific, technical or other specialized matters” and that they should be allowed to do so under Rule 701.

**The Federal Bar Council Committee on Second Circuit Courts (98-EV-097)** states that “the integrity of the amendments to

FRE 702 calls likewise for the adoption of the proposed amendment to FRE 701 to avoid the possibility of 'end runs' around FRE 702."

**Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103)** reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that "[t]hose present at the meeting split evenly on the question of whether Rule 701 should be amended, particularly if Rule 702 is not changed."

**The Association of American Trial Lawyers (98-EV-108)** opposes the proposed amendment to Evidence Rule 701, on the ground that it would "extend the Rule 702 restrictions into yet another area." The Association also states that the "potential breadth of this proposal leads us to wonder if even high-school-level coursework used in developing an opinion could be excluded [sic] on the ground that it is 'specialized'!"

**The Board of Governors of the Oregon State Bar (98-EV-110)** states that the proposed amendment to Evidence Rule 701 "appropriately distinguishes lay witnesses from experts whose testimony is based on scientific, technical, or other specialized knowledge."

**The New Hampshire Trial Lawyers Association (98-EV-111)** opposes the proposed change to Evidence Rule 701 as "a further effort to unreasonably restrict and constrain the trial as a search for truth."

**Russell T. Golla, Esq. (98-EV-112)** supports the proposed amendment to Evidence Rule 701.

**James B. Ragan, Esq. (98-EV-113)** objects to the proposed amendment because “[b]y making the addition proposed almost any lay witness opinions can be excluded through careful cross-examination.”

**The Ohio Academy of Trial Lawyers (98-EV-114)** opposes the proposed amendment to Evidence Rule 701.

**Hon. Carl Barbier (98-EV-115)**, District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 701 does “not seem objectionable.”

**Michael W. Day, Esq. (98-EV-116)** opposes the proposed amendment to Evidence Rule 701.

**The Philadelphia Bar Association (98-EV-118)** supports the proposed amendment to Evidence Rule 701, but recommends that the Committee Note be revised to clarify the meaning of “specialized” knowledge “and should address directly whether the amendment would change the result in cases that have traditionally regarded certain opinions as nonexpert, even though based on knowledge that could be considered ‘specialized’ in some sense — e.g., the opinion of the owner of a business on its value or anticipated profits.” The Association states that the amendment “appears to be a beneficial change to reestablish the distinction between lay and expert opinions. It would also discourage evasion of the requirement for pretrial disclosure of expert opinions through characterizing the opinions as ‘lay’ rather than ‘expert’.”



**The Sturdevant Law Firm (98-EV-119)** opposes the proposed amendment to Evidence Rule 701.

**The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120)** opposes the proposed amendment to Evidence Rule 701.

**The Lawyers' Committee for Civil Rights Under Law (98-EV-123)** has "serious concerns" regarding the proposed amendment to Evidence Rule 701.

**The Arizona Trial Lawyers Association (98-EV-124)** opposes the proposed amendment to Evidence Rule 701.

**The Washington Legal Foundation (98-EV-125)** states that "some courts have been too lenient in permitting lay witnesses to testify on complicated, technical subjects" and that the result of admitting such testimony "is to defeat Rule 702's carefully established limitations on use of testimony on technical subjects." The Foundation "wholeheartedly supports this proposed revision, which makes explicit what should have been clear (but apparently was not) from the current text of Rule 701: parties seeking to introduce opinion testimony of a technical nature may do so *only* if they can meet the requirements of Rule 702 regarding testimony by experts."

**The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126)** is concerned "that the Rule, as drafted, may actually preclude lay testimony based upon specialized knowledge, where the testimony does not rise to the level of expert testimony."

**Nissan North America, Inc. (98-EV-130)** supports the proposed amendment to Evidence Rule 701.

**Michael A. Pohl, Esq. (98-EV-133)** opposes the proposed amendment to Evidence Rule 701.

**The International Academy of Trial Lawyers (98-EV-134)** is in favor of the proposed amendment to Evidence Rule 701, contending that there is “no justifiable reason for not requiring that testimony based on scientific, technical or other specialized knowledge should not be treated as expert opinion, subject to the requirements of Rule 702, and subject to the disclosure requirements of the Criminal and Civil Rules . . .”

**Rod D. Squires, Esq. (98-EV-136)** opposes the proposed amendment to Evidence Rule 701.

**B. C. Cornish, Esq. (98-EV-137)** opposes the proposed amendment to Evidence Rule 701.

**The National Association of Independent Insurers (98-EV-141)** supports the proposed amendment to Evidence Rule 701.

**Jon B. Comstock, Esq. (98-EV-142)** strongly supports the proposed change to Evidence Rule 701. He states that this “simple modification will have a significant and commendable effect on trial practice.”

**Ken Baughman, Esq. (98-EV-146)** opposes the proposed amendment to Evidence Rule 701.

**Pamela O'Dwyer, Esq. (98-EV-147)** opposes the proposed amendment to Evidence Rule 701.

**Matthew B. Weber, Esq. (98-EV-152)** opposes the proposed amendment to Evidence Rule 701; on the ground that it is "an unnecessary limit on the discretion of the court, which is well suited to control the presentation of this type of evidence."

**J. Michael Black, Esq. (98-EV-153)** is opposed to the proposed amendment to Evidence Rule 701.

**Norman E. Harned, Esq. (98-EV-155)** opposes the proposed change to Evidence Rule 701.

**P. James Rainey, Esq. (98-EV-156)** opposes the proposed amendment to Evidence Rule 701.

**Daniel W. Aherin, Esq. (98-EV-157)** opposes the proposed amendment to Evidence Rule 701, on the ground that it is "geared towards preventing individual litigants from presenting reasonable expert testimony."

**The Atlantic Legal Foundation (98-EV-158)** supports the proposed amendment because it favors "improving the reliability of opinion evidence generally."

**Paul T. Hoffman, Esq. (98-EV-159)** opposes the proposed amendment to Evidence Rule 701.

**Edward J. Carreiro, Jr., Esq. (98-EV-162)** opposes the proposed amendment to Evidence Rule 701.

**R. Gary Stephens, Esq. (98-EV-163)** opposes the proposed amendment to Evidence Rule 701.

**Anthony Tarricone, Esq. (98-EV-166)** opposes the proposed amendment to Evidence Rule 701.

**Annette Gonthier Kiely, Esq. (98-EV-167)** opposes the proposed amendment to Evidence Rule 701, opining that “it effectively eliminates a whole sector of our society, those whose hands-on experience has given them a superior knowledge in a technical, skilled or other specialized area from giving an opinion which is reliable, well-founded and of assistance to the trier-of-fact in determining the facts in issue.”

**M. R. Smith, Esq. (98-EV-169)** supports the proposed amendment to Evidence Rule 701.

**Navistar International Transportation Corp. (98-EV-171)** supports the proposed amendment to Evidence Rule 701, stating that it “will allow the courts to determine which testimony needs to be scrutinized under the *Daubert* guidelines, thus precluding expert testimony from so-called lay witnesses to be ‘back-doored’ without the proper scrutiny.”

**The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172)** agrees with the proposed change to Evidence Rule 701.

**The Federal Magistrate Judges Association (98-EV-173)** supports the proposed amendment to Evidence Rule 701 as a helpful “loophole-closing change.”

**Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174)** support the proposed amendment to Evidence Rule 701.

**Brian T. Stern, Esq. (98-EV-177)** opposes the proposed amendment to Evidence Rule 701, contending that the Advisory Committee “had no empirical evidence to support any claim of abuse” under the current Rule 701.

**The National Employment Lawyers Association (98-EV-179)** opposes the proposed amendment to Evidence Rule 701, contending that the Advisory Committee “had no empirical evidence to support any claim of abuse” under the current Rule 701.

#### **Rule 702. Testimony by Experts**

1           If scientific, technical, or other specialized knowledge will  
2           assist the trier of fact to understand the evidence or to  
3           determine a fact in issue, a witness qualified as an expert by  
4           knowledge, skill, experience, training, or education, may  
5           testify thereto in the form of an opinion or otherwise: if (1)  
6           the testimony is based upon sufficient facts or data, (2) the  
7           testimony is the product of reliable principles and methods.

- 8     and (3) the witness has applied the principles and methods  
9     reliably to the facts of the case.

## COMMITTEE NOTE

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. See also *Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See *Bourjaily v. United States*, 483 U.S. 171 (1987).

*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested — that is, whether the expert's theory can be challenged in some objective sense, or whether

it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon “the particular circumstances of the particular case at issue.” 119 S.Ct. at 1175.

No attempt has been made to “codify” these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, see *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int’l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert’s opinion was supported by “widely accepted scientific knowledge”). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

- (1) Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have

developed their opinions expressly for purposes of testifying.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”).

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”).

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999) (*Daubert*’s general acceptance factor does not “help show



that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5<sup>th</sup> Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6<sup>th</sup> Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. See *Kumho*, 119 S.Ct. 1167, 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. See, e.g., *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for

the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of

scientists in their field."); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1<sup>st</sup> Cir. 1998) (“*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.”).

The Court in *Daubert* declared that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” 509 U.S. at 595. Yet as the Court later recognized, “conclusions and methodology are not entirely distinct from one another.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), “any step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to

tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony “fit” the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court’s gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) (“We conclude that *Daubert*’s general holding — setting forth the trial judge’s general ‘gatekeeping’ obligation — applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”) While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert’s testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5<sup>th</sup> Cir. 1997) (“[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.”). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge, in all cases, of proffered expert

testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g., American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) (“[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the ‘knowledge and experience’ of that particular field.”).

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms “principles” and “methods” may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone — or experience in conjunction with other knowledge, skill, training or education — may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g.,*

*United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). See also *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). See also *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying “facts or data.” The term “data” is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language “facts or data” is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert’s testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert’s basis cannot be divorced from the ultimate reliability of the expert’s opinion. In contrast, the “reasonable reliance” requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information — whether admissible information or not — is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court’s gatekeeping function over expert testimony. See Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) (“Trial courts should be allowed

substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review.”). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court’s technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an “expert.” This was done to provide continuity and to minimize change. The use of the term “expert” in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an “expert.” Indeed, there is much to be said for a practice that prohibits the use of the term “expert” by both the parties and the court at trial. Such a practice “ensures that trial courts do not inadvertently put their stamp of authority” on a witness’s opinion, and protects against the jury’s being “overwhelmed by the so-called ‘experts.’” Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term “expert” in jury trials).



**GAP Report — Proposed Amendment to Rule 702**

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word “reliable” was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court’s decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

**Summary of Comments on the Proposed Amendment to Evidence Rule 702**

**The Product Liability Advisory Council (98-EV-001) supports**

the proposed amendment to Evidence Rule 702 “without reservation.” The Council states: “As set forth in the Advisory Committee Notes to this proposed rule, these amendments would ensure that before expert testimony can be presented to a trier of fact, it has met a threshold test of its reliability, which precisely expresses the intent of the Supreme Court as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 591, 594 (1993), and *General Electric Co. v. Joiner*, 118 S.Ct. 512 (1997).”

**Bert Black, Esq., and Clifton T. Hutchinson, Esq. (98-EV-003)** would prefer that no changes be made to Evidence Rule 702. To the extent the proposed amendments go forward, they suggest that the rule refer to an expert’s “reasoning” rather than “principles or methods.” They also argue that the proposal “misses what we believe is an important distinction between validity and reliability.”

**Professor Edward J. Imwinkelreid (98-EV-004)** supports the proposed amendment to Evidence Rule 702 insofar as it requires that expert testimony be the product of reliable principles and methods, and that the witness apply the principles and methods reliably to the fact of the case. He approves the proposal’s requirement of “sound procedure” which is a “fundamental guarantee of the value of scientific testimony.” Professor Imwinkelreid suggests, however, that the proposed subpart (1) of the rule be amended to require that “expert testimony is sufficiently based upon reliable case specific facts or data.”

**Professor Richard Friedman (98-EV-007)** believes that the proposed amendment to Evidence Rule 702 is unnecessary. He also fears that “requiring a non-scientific expert to speak in terms of reliable principles and methods creates too rigorous a demand.”

**James D. Bartolini, Esq. (98-EV-008)** fears that the proposed amendment “will result in expensive and protracted *Daubert* hearings before the case is reached for trial” and “will be primarily a hammer used against all claimants and all experts, however innocuous their expert opinions are.”

**Lawyers for Civil Justice (98-EV-009)** state that the “proposed revisions to Rule 702 will strengthen judicial decision making by ensuring that scientific expert testimony will have a greater degree of reliability before it is presented to the jury. By enhancing the trial court’s role as gatekeeper for the admission of expert evidence, the proposed revisions add emphasis to the principles articulated” in *Daubert* and *Joiner*. The group concludes that the proposed amendment “enforces the important principles of *Daubert*, clarifies ambiguities and conflicts in interpretations and wisely affirms the vital role of the trial judge as gatekeeper for all expert testimony.”

**The Evidence Project (98-EV-010)** agrees that Rule 702 should be amended but argues that the Advisory Committee’s proposed amendment suffers from “a number of flaws” that are “both structural and substantive in nature.” The perceived structural flaw is that Evidence Rule 702 “lumps two separate issues — qualifications of the testifying expert and the reliability of the principles underlying the testimony — under the rubric of a single rule.” The perceived substantive flaw is that the amendment “does nothing to assist judges in discerning what is meant” by reliable expert testimony.” Finally, the Evidence Project recommends that the preponderance of the evidence standard of admissibility should be placed explicitly in the Rule, rather than in the Committee Note.

**Professor Laird Kirkpatrick (98-EV-011)** states that the proposed amendment is likely to have a “problematic application”

with respect to experts who rely mainly on experience. He states that a witness's "experience may not include much in the way of 'principles and methods' but may still be helpful to the jury if based on repeated observations of similar events."

**The Association of Trial Lawyers of America (98-EV-012)** is opposed to the proposed amendment to Evidence Rule 702. The Association states that the proposal "would render inadmissible the testimony of many experts who have testified without controversy since the inception of the Federal Rules of Evidence." Also, "it would massively increase the costs to the courts and the litigants, requiring interminable Rule 702 hearings."

**Hon. Myron Bright (98-EV-013)**, Judge of the Eighth Circuit Court of Appeals, believes that the current Evidence Rule 702 is operating well and should not be amended. He argues that the proposed amendment unjustifiably shifts power from the jury to the judge, "without any true standards." The confusion in the courts over the meaning of *Daubert* should, in Judge Bright's view, be handled by adjudication rather than by rulemaking.

**James E. Garvey, Esq. and other Fellows of the American Coll. of Trial Lawyers (98-EV-016)** favor the proposed amendment.

**The Committee on Federal Procedure of the New York State Bar Association (98-EV-017)** generally supports the proposed amendment to Evidence Rule 702, stating that the standard imposed "is sufficiently particular to provide guidance over the range of expert opinion testimony . . . While sufficiently general so that it does not impose a specific test obviously inapplicable to certain forms of expertise today, much less to those that may be invented in the next ten or twenty years." However, the Committee is opposed to subpart

(1) of the proposed proviso to Rule 702 as it was issued for public comment (i.e., that the expert's testimony must be "sufficiently based on reliable facts or data"), on the ground that this standard "improperly impinges on the role of the trier of fact." The Committee concludes that "Courts addressing reliability issues should only examine the methodology and the application of the methodology to the facts, not the facts themselves."

**Charles D. Weller, Esq. (98-EV-018)** submitted an article that was useful to the Advisory Committee in its analysis of whether proposed expert testimony is the product of reliable principles and methods.

**William Petrus, Esq. (98-EV-019)** objects to the proposed amendment to Evidence Rule 702 insofar as it extends the *Daubert* analysis to mechanical engineering experts. He argues that the rule would work a particular "hardship" on plaintiffs in automobile product liability litigation because "the only people with the means to design a new car, test that new car and crush its roof to determine roof strength would be employees of automobile manufacturers."

**The Defense Research Institute (98-EV-020)** states that the proposed amendment to Evidence Rule 702 "will add greater clarity regarding the duties of the trial judge and require a greater degree of reliability before the testimony is presented to the jury." The Institute states that "proper exercise by the court of its expert witness gatekeeper function on an early and continuing basis will facilitate earlier reasonable resolution of the court action, thereby reducing cost and delay rather than increasing it."

**E. Wayne Taff, Esq. (98-EV-021)** states that the proposed amendment to Evidence Rule 702 is not only beneficial, but also

“critical to ensuring the integrity of testimony presented in the United States District Courts.” He states that the proposal “will insure that the finder of fact has a reliable basis upon which to make a determination, without resort to conjecture or speculation.”

**Hon. D. Brock Hornby (98-EV-023)**, Chief Judge of the United States District Court for the District of Maine, argues that the proposed amendment to Evidence Rule 702 will impose substantial litigation costs due to “the proliferation of motions to preclude expert testimony and *voir dire* hearing held in advance of trial that the growing elaborateness of the gatekeeping rules entails.” Judge Hornby asks: “Where is the evidence that lawyers are not able to cross-examine effectively and show whatever limitations there are on the bases for expert opinion testimony that is not scientific?”

**Professor Eileen A. Scallen (98-EV-024)**, suggests that “the Committee explicitly make the admissibility of expert testimony an issue to be determined under Fed.R.Evid. 104(b) . . . as an issue of relevancy conditioned on fact.” She argues that “[g]iving the sole power to the judge to determine reliability usurps the jury’s traditional role in evaluating the credibility of evidence.” She concludes that “text, precedent, historical and constitutional concerns, as well as pragmatic considerations, suggest that the Advisory Committee should take the opportunity of amending the expert testimony rules to clarify that the admissibility of expert testimony is to be determined under Federal Rule of Evidence 104(b).”

**Kevin J. Dunne, Esq. (98-EV-025)** supports the proposal to amend Evidence Rule 702. In his view, complaints that the proposal deprives the jury of its role in assessing the weight of the evidence are unfounded. He states: “The phrase, ‘it goes to the weight’ has become synonymous with *laissez-faire* judging and a license for admissibility

of junk science. Indeed, this . . . argument can be used to eliminate all rules of evidence . . .”

**Thomas E. Carroll, Esq. (98-EV-027)** opposes the proposed amendment insofar as it would embody the principles of *Daubert*. He contends that *Daubert* has “tripled the cost of litigation in matters involving significant issues of expert testimony.” He concludes that the proposal overlooks “the ability of juries, good lawyers who subject testimony of experts to extensive cross-examination, and the ability of judges to rules under FRE 702 as it now stands.”

**Norman W. Edmund (98-EV-028)** suggests that the proposed amendment make a more specific reference to, and explication of, the scientific method.

**Diane R. Crowley, Esq. (98-EV-029)** “wholeheartedly” supports the proposed amendment to Evidence Rule 702. She states that “[i]t is important to point out to the critics of change that the proposed version of Rule 702 does not impose the full *Daubert* criteria on every opinion offered by every expert witness. . . . The proposed change asks for nothing more than indications of reliability . . .”

**Professor Lynn McLain (98-EV-030)** opposes the proposed amendment to Evidence Rule 702. He complains that the proposal “would make the court, in every case involving expert testimony, go through a time-consuming tripartite preliminary fact-finding exercise.” He also objects that the proposal “seems to push the judge into a 104(a) role that impinges on the jury’s fact-finding.” Professor McLain claims that the sufficiency of an expert’s basis should be decided under the conditional relevance standard of Evidence Rule 104(b).

**Pamela F. Rochlin, Esq. (98-EV-032)** objects to the proposed changes to Evidence Rule 702. She declares that the proposal would “allow judges, whose decisions will be reviewable on an abuse of discretion standard only, to eliminate plaintiff’s experts and similarly dismiss plaintiff’s cases.” She also expresses concern that the proposed rule “will require a *Daubert* hearing in every case where experts are proffered” thus adding “another layer of time and expense to already crowded court dockets.”

**Harold Lee Schwab, Esq. (98-EV-033)** states that the Advisory Committee “properly decided not to codify the *Daubert* guidelines in the [text] of the rule since it is obvious that one or more of the factors articulated in that case might not apply to some other expert and his/her discipline whereas other non-enumerated factors might be relevant. The standards set forth in the amendment are broad enough to encompass one or more of the *Daubert* factors but also other factors where appropriate.” Mr. Schwab concludes that “[t]here can be no valid objection to this amendment.”

**Henry G. Miller, Esq. (98-EV-034)** opposes the proposed change to Rule 702 on the ground that it is “autocratic and less than egalitarian to so distrust the jury’s determination of which expert to believe.”

**Robert M. N. Palmer, Esq. (98-EV-035)** opposes the proposed amendment’s extension of the *Daubert* gatekeeping function to non-scientific expert testimony. He argues that application of “the *Daubert* principles to all expert opinion would work to the benefit of large corporations and to the very serious detriment of injured consumers even where the expert opinions and principles underlying them are not seriously disputed.”



**James A. Grutz, Esq. (98-EV-036)** is opposed to the proposed amendment to Evidence Rule 702 on the ground that it places “far too much discretion in the trial court’s hands” leaving the potential for “eroding away a litigant’s right to trial by jury.”

**Thomas A. Conlin, Esq. (98-EV-037)** opposes the proposed amendment to Evidence Rule 702, stating that the proposed amendatory language is “superfluous.” He declares that courts can use existing rules to “weed out testimony which is — essentially — without *foundation*.” Mr. Conlin encourages the Advisory Committee to “let cross-examination work its wonders, and let jurors, not judges, decide cases.”

**Scott B. Elkind, Esq. (98-EV-038)** opposes the proposed amendment to Evidence Rule 702, asserting that it would “impair the rights of aggrieved parties” by applying the *Daubert* principles to non-scientific experts.

**John Borman, Esq. (98-EV-039)** opposes the proposed amendment to Evidence Rule 702 as an unwarranted expansion of the trial court’s gatekeeping role. He concludes: “The proposed rule will permit trial judges to choose between opposing witnesses, exclude expert testimony where the judge disagrees, and infringe on the litigant’s constitutional right to a jury trial.”

**Donald A. Shapiro, Esq. (98-EV-040)** is opposed to the proposed amendment to Evidence Rule 702. He states that the proposal provides “too much discretion to the trial judges to exclude expert testimony” and might allow trial judges “to pick and choose which experts they dislike and to bar their testimony as opposed to letting juries decide the credibility and reliability of experts.”

**Michael J. Miller, Esq. (98-EV-042)** is opposed to the proposed amendment, on the ground that it will empower federal judges to “arbitrarily” determine the admissibility of expert testimony. He concludes that the proposal “will ultimately add an enormous amount of litigation to the courts as defendants will assert every plaintiff’s expert is outside of the perceived defense mainstream.”

**M. Robert Blanchard, Esq. (98-EV-043)** states that “the proposed change to Rule 702 will permit trial judges to simply choose which side of the case they want to win, as happens too often already, and will infringe on the litigants’ constitutional right to a jury trial.”

**Richard L. Duncan, Esq. (98-EV-044)** is opposed to the proposed change to Evidence Rule 702. He argues that the proposed amendment would “infringe a litigant’s constitutional right to a jury trial and create unequal justice” because it would “invite the wealthier litigant to raise the standards of proof to an impossibly high level which a poor litigant will be unable to afford and will encourage the tendency of hourly paid attorneys to substitute Motions in Limine for a trial on the evidence.”

**The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047)** “fully support” the proposed amendment to Rule 702, on the grounds that it “clarifies the trial court’s function as gatekeeper with respect to the admissibility of all types of expert testimony, not just scientific testimony, and sets some meaningful standards for determining the reliability and the admissibility of such testimony.” These organizations suggest, however, “that the Committee consider

adding language to the Note emphasizing the need for focus on the expert's reasoning; the need for a valid explanatory connection between the information relied upon and the conclusion reached; and the need to clarify the relationship between 'validity' and 'reliability.'"

**The National Board of the American Board of Trial Advocates (98-EV-049)** "opposes the proposed amendment to Evidence Rule 702 because it invades the province of the jury, adversely impacts and even preempts the fact-finding and decision-making powers of the jury, places an onerous burden on the judiciary, litigants and counsel and does not promote the efficient administration of justice."

**The Lawyers' Club of San Francisco (98-EV-050)** opposes the proposed amendment to Evidence Rule 702. It contends that "the proposed amendment is a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony." The Club concludes that under the amendment, the trial court could "choose between two opposing witnesses, and exclude the testimony of the witnesses with which they disagree, thereby taking away the right to a jury trial on the opinion governing the outcome of the case."

**William B. Dodero, Esq. (98-EV-052)** states that the proposed amendment to Evidence Rule 702 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence." He observes that "[t]he uniformity in having all circuits apply the same threshold requirements prior to the admission of expert testimony will ensure at least some basic level of reliability prior to the admission of expert opinion," and that the proposed amendment "will allow the courts to

embark on a simple three-part analysis prior to the admission of any expert testimony.”

**Jay H. Tressler, Esq. (98-EV-055)** is in favor of the proposed amendment to Evidence Rule 702. He states that the proposal “offers a necessary extension of the gatekeeper function” that is needed to “avoid unreliable, untested opinions which have not been predicated upon reliable methodology or subjected to adequate peer review scrutiny.”

**The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056)** opposes the proposed amendment to Evidence Rule 702, on the ground that it is “unnecessary.” The Committee states that the proposal “would not clarify the *Daubert* test; it merely changes the vocabulary that would be used.”

**Weldon S. Wood, Esq. (98-EV-058)** supports the proposed amendment to Evidence Rule 702.

**Michael S. Allred, Esq. (98-EV-059)** opposes the proposed amendment on the ground that it will “place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony.”

**Russell W. Budd, Esq. (98-EV-061)** opposes the proposed revision to Evidence Rule 702. He believes that the proposal “will license the trial judge to usurp the role of the jury.”

**Charles F. Preuss, Esq. (98-EV-062)** supports the proposed amendment and observes that the Committee Note “appropriately

acknowledges the relevance of the non-exclusive checklist of factors discussed in *Daubert* and other cases for assessing the reliability of scientific expert testimony, but no attempt is made to codify them as part of Rule 702.”

**Professor Michael H. Graham (98-EV-063)** supports the proposed amendment to Evidence Rule 702. He states that the proposal “correctly asks whether *any* expert’s explanative theory is ‘the product of reliable principles and methods.’ Thus the focus is switched from whether the explanative theory actually ‘works’ . . . to whether the explanative theory is the product of, i.e., is derived applying, reliable principles and methods . . . thereby providing the court with sufficient confidence that it ‘may work.’” Professor Graham argues that the position taken by the proposal is consistent with the position taken by “many Courts of Appeals.”

**Frank Stainback, Esq. (98-EV-064)** supports the proposed amendment to Evidence Rule 702 and states that it is “important that an attempt be made to provide a more uniform interpretation of *Daubert* in the federal courts.”

**Hon. Edward R. Becker (98-EV-065)**, Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 702, noting that it is “extremely well justified by the Committee’s accompanying commentary.”

**Steven H. Howard, Esq. (98-EV-067)** opposes the proposed amendment to Evidence Rule 702.

**William A. Coates, Esq. (98-EV-068)** supports the proposed amendment because it helps to “insure that scientific expert testimony must have some measure of reliability before it is presented to a jury.”

**William Petrus, Esq. (98-EV-070)** opposes the proposed amendment to Evidence Rule 702. He contends that the proposal imposes unnecessarily strict limitations on the admissibility of expert testimony, under which “hundreds of thousands of dollars would be required to satisfy pedantic concerns.”

**Prentice H. Marshall, Esq. (98-EV-071)** states that the proposed amendment to Evidence Rule 702 is “appropriate” although he wonders whether the proposal will “increase the proliferation of motions for summary judgment based upon a motion to strike under the *Daubert* case.”

**Trial Lawyers for Public Justice (98-EV-072)** oppose the proposed amendment to Evidence Rule 702. They argue that the rule “will pose undue restrictions on the admissibility of expert testimony”; that it would “unwisely expand trial judges’ gatekeeping role, by permitting them to substitute their judgments on reliability of expert testimony for that of the experts’ peers”; and that “the text of the rule and the Advisory Committee Note are unclear as to how courts should determine evidentiary reliability.”

**The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074)** contends that the proposed amendment “raises the bar” on such “historically probative evidence” as police and mechanics’ testimony.

**The State Bar of Arizona (98-EV-075)** supports the adoption of the proposed amendment to Evidence Rule 702.

**The Seventh Circuit Bar Association (98-EV-076)** believes that the proposed amendment to Evidence Rule 702 is “warranted” and “will bring greater rigor and uniformity to a trial judge’s application of the Supreme Court’s *Daubert* decision.

**The National Association of Railroad Trial Counsel (98-EV-077)** states that the proposed amendment to Evidence Rule 702 “would be a welcomed change considering the confusion in this area.”

**The Chicago Chapter of the Federal Bar Association (98-EV-078)** supports the proposed amendment to Evidence Rule 702.

**The Federal Practice Section of the Connecticut Bar Association (98-EV-079)** endorses the proposed amendment to Evidence Rule 702.

**The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080)** support the proposed amendment to Evidence Rule 702.

**The Pennsylvania Trial Lawyers Association (98-EV-081)** opposes the proposed amendment to Evidence Rule 702. It fears that under the proposal, “courts may feel compelled to evaluate expert testimony under a unitary, rigid standard that does not take into account the nature of the opinions being offered.”

**The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084)** states that the proposed amendment to Evidence Rule 702 “accurately and clearly states the three-pronged reliability requirement for establishing admissibility of expert evidence under *Daubert*, *General Elec. v. Joiner*, 118 S.Ct.

512 (1997), and the better reasoned opinions of the lower federal courts." The Committee also "strongly supports the proposal to make explicit that the reliability premise of *Daubert* applies to all expert evidence." The Committee notes that "a number of difficult issues have and will arise with respect to the reliability of evidence proffered by 'experts by experience,' particularly in those instances in which there is adverse expert testimony based upon apparently reliable scientific or technical knowledge." The Committee concludes, however, that "the Advisory Committee is right to leave those issues for resolution by the courts over time."

**Professor Adina Schwartz (98-EV-085)** states that "[b]y allowing admissibility to be based not on stature among scientists but on judges' own scientific views or extra-scientific biases, proposed Rule 702 licenses unjustified encroachment on the jury's role."

**Professor Victor Gold (98-EV-086)** criticizes the proposed amendment as imposing "an enormous burden on trial judges to evaluate the reliability of expert testimony in all fields of knowledge." Such a burden "may encourage judicial resort to arbitrariness and bias on issues that can be outcome determinative but usually will be rubberstamped by appellate courts under a toothless standard of harmless error."

**John R. Lanza, Esq. (98-EV-087)** states that the proposed amendment "now places the trial court not as 'a gatekeeper' but as a 'super juror.' This results in costly evidentiary hearings and in preclusion of case determinant expert testimony, based upon the trial judge's interpretation of facts."

**Dr. Michael A. Centanni (98-EV-089)** urges that the Committee Note to the proposed amendment to Rule 702 "include two basic



questions that are fundamental to determining reliable science — ‘Does the science work, and Why?’”

**J. Ric Gass, Esq. (98-EV-090)** states that the proposed amendment to Evidence Rule 702 is an “important and necessary and appropriate” revision.

**The Oregon Trial Lawyers Association (98-EV-091)** opposes the proposed amendment to Evidence Rule 702. The Association contends that “[t]his substantial change to Rule 702 would render inadmissible the testimony of many experts who have testified without controversy since the creation of the Federal Rules of Evidence.” It concludes that the proposed amendment “would result in an additional layer of litigation, more complex than a summary judgment proceeding, where the court is to determine not only whether there are material facts in dispute, but also to make a determination regarding the reliability of those facts, a task which will prove expensive and time consuming for the litigants and the court.”

**J. Greg Allen, Esq. (98-EV-093)** opposes the proposed amendment to Evidence Rule 702, arguing that “more discretion given to the trial court judges on the allowance of expert testimony” will result in “inequitable treatment.”

**Shawn W. Carey, Esq. (98-EV-094)** states that the proposed amendment “would be unduly burdensome and would prevent doctors whose diagnosis are based on years of training and experience to be second guessed unless they performed scientific experiments.”

**Alvin A. Wolff, Jr., Esq. (98-EV-095)** opposes the proposed amendment to Evidence Rule 702 on the ground that it “would

trample the rights of Plaintiffs who would be denied their day in Court.”

**Alan Voos, Esq. (98-EV-096)** opposes the proposed amendment to Evidence Rule 702. He states that “[r]ather than codifying *Daubert* the Committee should formulate a rule which does away with *Daubert* and allows new, cutting edge, but reliable scientific expert testimony to assist triers of fact in civil trials.”

**The Federal Bar Council Committee on Second Circuit Courts (98-EV-097)** states that “although the current Rule could remain ‘as is’ . . . it would be rather anomalous not to reflect the substance of the Supreme Court’s decision in the very Rule that deals with the matter raised in *Daubert*. Accordingly, the Committee supports the proposed amendment’s purpose to incorporate the gatekeeper function announced in *Daubert* into FRE 702.” The Committee asserts that the proposed amendment “correctly focuses on the reliability of the facts, the principles or methods of analysis, and the application of such principles or methods to the facts.” It believes that “it is impractical to seek more precise formulations.” The Committee also asserts that the proposed amendment’s application to non-scientific expert testimony “is highly desirable” and that the gatekeeping function announced in *Daubert* is even more important in the ‘soft’ disciplines than in the hard sciences.” The Committee notes that under *Daubert*, as under the proposed amendment, it is possible that more experienced-based expert testimony will be excluded than had previously been the case. However, where that testimony is in fact unreliable, “the exclusion of such testimony should be regarded as the desirable and intended consequence of a vigorous application of the *Daubert* principles.”

**The Montana Trial Lawyers Association (98-EV-098)** opposes the proposed amendment to Evidence Rule 702, stating that the reliability requirements set forth in the proposal “go way beyond judicial gatekeeping and usurp the fact finder and jury roles.” The Association states that “[t]he very term ‘reliability’ is inherently a credibility determination” and that the factors bearing on reliability set forth in the Committee Note should not be dispositive.

**Kelly Elswick, Esq. (98-EV-099)** objects to “the additional criteria in proposed Rule 702 as applied to non-scientific expert testimony. The problem with this rule is that a great deal of expertise, in fact most expertise, is based upon experience. . . . Therefore, there are no delineated formulas to follow.”

**The Trial Lawyers Association of Metropolitan Washington, DC (98-EV-100)** strongly opposes the proposed change to Evidence Rule 702. The Association believes that the proposal “raises the bar of admissibility on expert opinions to a height that totally usurps the jury’s traditional role as the fact-finder. By requiring that federal judges make ‘reliability’ findings about the facts and methods used by experts, the proposed rule would have judges become the real triers of fact concerning experts.” The Association asserts that the proposal is based on a factual assumption that jurors are incompetent — a reflection of “an elitist bias.” It concludes that the proposed amendment also creates “a bias against experienced-based experts by trying to measure them against standards that have no bearing on their work.”

**The Michigan Trial Lawyers Association (98-EV-101)** opines that the proposed amendment “does not adequately define ‘reliable facts or data,’ ‘reliable principles and methods,’ or the manner in which the judge is supposed to determine whether the expert has

'applied the principles and methods reliable [sic] to the facts of the case.'" The Association asserts that the "lack of clarity in the proposed amendment will spawn protracted litigation, creating a significant burden on litigants and the courts." It concludes that "[t]rial judges do not, and should not, have the authority to exclude experts merely because the expert, for example, represents the minority view in his or her field, or disagrees with the leading authority on a particular subject. The proposed amendment, however, would do just that."

**Peter S. Everett, Esq. (98-EV-102)** objects to the proposed amendment on the ground that it is "designed to apply the *Daubert* decision more broadly." Mr. Everett declares that *Daubert* is premised upon "an unhealthy disrespect for the abilities of jurors to sort out meritorious claims from those that lack merit."

**Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103)** reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that some Committee members at the meeting expressed the view that "the attempt to codify the *Daubert* decision . . . created more problems than it solved."

**A Number of Professors of Evidence and Others Interested in Evidentiary Policy (98-EV-105)** state that the "proposed changes to Federal Rule of Evidence 702 may upset settled practices and expectations, have unintended consequences and create more problems than they solve. The new rule will not increase the predictability of the outcome of challenges to the admissibility of

expert testimony. Instead, the changes in the rule may incur high costs in the form of unintended consequences and increased litigation.”

**Professor Myrna Raeder (98-EV-106)** opposes the proposed amendment as containing “amorphous language.” She suggests instead that the Committee adopt a proposal that would employ the *Frye* test as a rebuttable presumption of admissibility.

**Timothy W. Monsees, Esq. (98-EV-107)** states that the proposed amendment to Rule 702 represents “a very bad change for plaintiffs.”

**The Association of American Trial Lawyers (98-EV-108)** opposes the proposed amendment to Evidence Rule 702. It expresses concern with the factors bearing on reliability set forth in the Committee Note, and asserts that “all of them have the potential, if they are adopted by a court as a focus of expert testimony scrutiny, to become unfairly outcome-determinative.”

**Michigan Protection and Advocacy Service (98-EV-109)** opposes the proposed amendment to Evidence Rule 702, on the ground that it will “invade the province of the jury, denying parties a fair opportunity to present a complete case or defense.” The Service expresses concern that the proposal “affords greater likelihood that one party’s expert might be barred simply because the other side’s expert followed a more conventional — albeit not necessarily more reliable — method to support the opinion.”

**The Board of Governors of the Oregon State Bar (98-EV-110)** opposes the proposed change to Evidence Rule 702. The Board concludes that the proposed amendment “would result in a substantive change in the law without a sufficient analysis or justification having been demonstrated or consensus obtained to

support the amendment.” In the Board’s view, the result of the proposal “would be that more experts would be excluded under the amendment than would ever have been excluded under *Frye*, a result inapposite to the Supreme Court’s objectives when it held in favor of the proponents of the scientific evidence in *Daubert*.” The Board’s conclusion is word-for-word identical to the conclusion set forth by the Oregon Trial Lawyers Association (98-EV-071).

**The New Hampshire Trial Lawyers Association (98-EV-111)** believes that the proposed amendment to Evidence Rule 702 poses “a significant threat to the trial as a truth-finding process” and “will foster an extensive and extremely expensive practice of trying to limit or prevent outright the testimony of virtually any witness who has not submitted his or her opinions to some scientific journal or peer review.”

**Russell T. Golla, Esq. (98-EV-112)** supports the proposed amendment to Evidence Rule 702.

**James B. Ragan, Esq. (98-EV-113)** objects to the part of the proposed amendment to Evidence Rule 702 that requires the trial judge to determine that the expert reliably applied the principles and methods to the facts of the case. This question, in his view, “is more appropriately decided by the jury.”

**The Ohio Academy of Trial Lawyers (98-EV-114)** opposes the proposed amendment to Evidence Rule 702, arguing that the proposal “may extend the trial, as there will be a hearing within the trial to determine if the experts can testify.”

**Hon. Carl Barbier (98-EV-115)**, District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence

Rule 702 “would no doubt encourage litigants to file more *Daubert* motions.”

**Michael W. Day, Esq. (98-EV-116)** opposes the proposed amendment to Evidence Rule 702, arguing that it would bar “much experience-based or specialized knowledge opinion evidence by non-scientists that is currently admitted routinely in the courts.”

**John P. Blackburn, Esq. (98-EV-117)** opposes the proposed amendment to Evidence Rule 702. He is concerned that the proposal will make it more difficult for plaintiffs to “prove their cases.”

**The Sturdevant Law Firm (98-EV-119)** opposes the proposed amendment to Evidence Rule 702, arguing that it is “a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony” and that it “seriously alters the right of the litigants to a trial by jury.”

**The Board of Governors of the Maryland Trial Lawyers Association (98-EV-120)**, opposes the proposed amendment to Evidence Rule 702, on the ground that the Committee should adopt a “wait and see” attitude in light of the Supreme Court’s recent consideration of expert evidence issues. The Board also declares that “[t]estimony of experts, that has always been admissible, both before and after the adoption of Rule 702 would be excluded by the proposed changes adopting and applying the *Daubert* restrictions.”

**James B. McIver, Esq. (98-EV-121)** opposes the proposed amendment to Evidence Rule 702, arguing that it is “a change not needed and would have adverse effects on obtaining truth and justice in America.”

**Stephen M. Vaughan, Esq. (98-EV-122)** opposes the proposed amendment to Evidence Rule 702, arguing that it is “a change not needed and would have adverse effects on obtaining truth and justice in America.”

**The Lawyers’ Committee for Civil Rights Under Law (98-EV-123)** has “serious concerns” regarding the proposed amendment to Evidence Rule 702.

**The Arizona Trial Lawyers Association (98-EV-124)** opposes the proposed amendment to Evidence Rule 702 and believes that “the efforts to expand *Daubert* beyond the limits of scientific causation testimony is ill advised and contrary to the constitutional rights of citizens to a trial by *jury*.” The Association declares that under the proposed amendment, “experts testifying based on their experience or knowledge are prohibited.” It states that “perhaps” the Advisory Committee “thinks that it was appropriate that Galileo was blinded for his radical ideas.”

**The Washington Legal Foundation (98-EV-125)** “applauds the proposed amendment to Rule 702; it will make clearer that the district court’s gatekeeping function is as fully applicable to proposed nonscientific expert testimony as it is to proposed scientific expert testimony.” As to experience-based experts, the Foundation agrees with the Advisory Committee’s position that “[a]t the very least, any expert ought to be able to explain his/her methodology, such that others could attempt to follow the same path . . . .”

**The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126)** has three concerns about the proposed amendment to Evidence Rule 702. First, “the Rule needs to address more specifically, in some fashion, the expert who



is qualified through on-the-job training and experience (as opposed to formal schooling). Second, the Rule or the Committee Note should clarify that “trial testimony can include expert testimony based on contradictory principles used by different experts.” Third, the words “the product of” in proposed subpart (2) should be changed to “based upon”; the concern is that the proposed language “would seem to suggest that some empirical studies have been made to support the expert testimony when, in fact, this may not be the case with specialized knowledge expert testimony, for example.”

**The Connecticut Trial Lawyers Association (98-EV-127)** opposes the proposed amendment to Evidence Rule 702, on the ground that it would “massively expand the judge’s ‘gatekeeping’ role beyond what the Supreme Court required in *Daubert*.”

**Eliot P. Tucker, Esq. (98-EV-128)** opposes the proposed amendment to Evidence Rule 702, contending that it is “another erosion on the right to trial by jury that the federal courts seem hell-bent on fostering.”

**The Law Firm of Shernoff, Bidart, Darras & Arkin (98-EV-129)** opposes the proposed amendment to Evidence Rule 702, arguing that the proposal “will expand the already-existing danger to consumer actions arising from *Daubert* itself and inappropriately limits the jury’s power to make the very determination it was designed and intended by the framers of the Constitution to make.”

**Nissan North America, Inc. (98-EV-130)** supports the proposed amendment to Evidence Rule 702, on the ground that it “will help curtail ‘junk science’ testimony by unqualified experts.”

**Hon. Stanwood R. Duval, Jr. (98-EV-131)**, District Judge for the United States District Court of the Eastern District of Louisiana, is opposed to the proposed amendment to Evidence Rule 702. He contends that the proposal will encourage "*Daubert* motions in every case where there's an expert." Judge Duval states that "although the Advisory Committee notes are helpful, the text of the rule shall be law if passed."

**George Chandler, Esq. (98-EV-132)** believes that "the restriction of the right to call experts by making the *Daubert* case a rule of evidence would have a devastating effect on the right of a fair trial to individual claimants."

**Michael A. Pohl, Esq. (98-EV-133)** opposes the proposed amendment to Evidence Rule 702. He asserts that applying *Daubert* to the testimony of experts in cases such as those involving family physicians, securities issues or employment-related matters "would tend to stack the deck against the proponent of the evidence when issues of the credibility of the witnesses in those type cases should normally be left to the trier of fact."

**The International Academy of Trial Lawyers (98-EV-134)** is unable to reach a consensus with regard to "the wisdom of adopting the proposed amendment to Rule 702." Those in favor of the proposal assert that "it will remove any confusion over whether the principles of *Daubert* apply to all expert testimony rather than only scientific testimony" and that there is "no reason why an engineer should not be subject to the same scrutiny as an epidemiologist although not all of the *Daubert* factors may apply to a particular expert." Those opposed to the proposal point out "that a substantial number of circuits have held that *Daubert* applies only to expert testimony based on scientific principles."

**Barry J. Nace (98-EV-135)** opposes the proposed amendment to Evidence Rule 702, concluding that “if we are going to have any opportunity for a jury to decide the credibility and the weight to be given to opinion testimony, then reliability should not be something decided by the trial court.” He also asserts that the proposal’s reliability requirements are in conflict with Rule 703, which “requires only that the experts use facts or data reasonably relied upon by experts.”

**Rod D. Squires, Esq. (98-EV-136)** opposes the proposed amendment to Evidence Rule 702, on the ground that “extending *Daubert* any further will result in more injured people’s claims being adversely affected and the cost of litigation unnecessarily increasing.”

**B.C. Cornish, Esq. (98-EV-137)** opposes the proposed amendment to Evidence Rule 702, asserting that “the application of the *Daubert* ruling to all opinion testimony defies common sense.” He claims that under the proposal, professional counselors could not testify to mental anguish, and treating physicians could not testify about what caused a patient’s condition.

**Tyrone P. Bujold, Esq. (98-EV-138)** opposes the proposed amendment to Evidence Rule 702. He contends that the proposal rests on the unjustified premise that jurors “are frequently confused by charlatan experts.” He concludes that “[w]e need not fear the jury system. And we need not create pinched rules which give trial judges far more than they need, want, or is required.”

**Martin M. Meyers, Esq. (98-EV-139)** opposes the proposed amendment to Evidence Rule 702 insofar as it purports to extend *Daubert* principles to nonscientific expert testimony. He asserts that a consequence of the proposed amendment “is that run of the mill

professionals will be further discouraged from testifying because the burden upon them to justify their testimony at pre-trial *Daubert* hearings will be more that they can reasonably be expected to undertake and keep up with their other professional duties. This will drive both plaintiffs and defendants further into the hands of professional testifiers, something that the rules should discourage rather than encourage.”

**The National Association of Independent Insurers (98-EV-141)** supports the proposed amendment to Evidence Rule 702.

**Jon B. Comstock, Esq. (98-EV-142)** strongly supports the proposed change to Evidence Rule 702. He states that “Courts need uniform direction as to how to be a gatekeeper for ‘expert’ testimony.” He would go “one step further” and delete all references to “experts” in the text of the Rule.

**Tony Laizure, Esq. (98-EV-143)** opposes the proposed amendment to Evidence Rule 702, on the ground that it is “unnecessary” and “will put those challenging the status quo at a distinct disadvantage.”

**Edward D. Robinson, Jr., Esq. (98-EV-144)** “agrees with the Committee’s concern that junk science should not form the basis of expert opinion.” He opposes the proposed amendment, however, on the ground that it does not provide “sufficient guidance for a district judge to determine whether an expert with a broad experiential base (as opposed to data driven base) should be permitted to offer an opinion.”

**Karl Protil, Esq. (98-EV-145)** strongly opposes the proposed amendment to Evidence Rule 702, and states that “*Daubert* was

never intended to apply to standard of care opinions — these are not subject to the scientific method.” He concludes that the proposal usurps the role of the jury.

**Ken Baughman, Esq. (98-EV-146)** opposes the proposed amendment to Evidence Rule 702, arguing that its effect “will be to raise the cost of litigation to the average citizen and limit his or her access to the court system.”

**Pamela O’Dwyer, Esq. (98-EV-147)** opposes the proposed amendment to Evidence Rule 702, arguing that it will “increase the costs to litigants.”

**Jesse Farr, Esq. (98-EV-148)** opposes “evidentiary changes that would disallow experience based consideration and/or expert testimony.”

**The Prison Law Office (98-EV-149)** opposes the proposed amendment to Evidence Rule 702.

**Martha K. Wivell, Esq. (98-EV-150)** opposes the proposed amendment because it “gives no guidance as to how trial judges should assess the adequacy of an expert who is relying principally on experience.” She also concludes that the proposal “makes litigation in Federal courts more expensive because it would require a *Daubert* hearing in virtually every case.”

**Jeffrey P. Foote, Esq. (98-EV-151)** opposes the proposed amendment to Evidence Rule 702, and does not believe “that the gatekeeper function of *Daubert* should be extended to all expert testimony.” He also takes issue with the Committee Note’s reference to opinions developed expressly for the purposes of testifying, stating

that if this reference is strictly construed, "it will eliminate a substantial amount of helpful expert testimony."

**Matthew B. Weber, Esq. (98-EV-152)** opposes the proposed amendment to Evidence Rule 702, on the ground that it is "unnecessary, overly restrictive, and will serve to bar much opinion evidence based on specialized knowledge or experience of non-scientists."

**J. Michael Black, Esq. (98-EV-153)** is opposed to the proposed amendment to Evidence Rule 702, declaring that "our form of government . . . has become a plutocracy and the proposed rules changes, if enacted, will only act to further the control of special interests over our government."

**Anthony Z. Roisman, Esq. (98-EV-154)** states that the proposed amendment to Evidence Rule 702 is "ill-advised and will cause substantial disruption to the orderly conduct of litigation or unfairly limit the rights of litigants." He concludes that the proposal increases "the likelihood that cases will be decided on the basis of who has the most resources, not who has the most justice, on their side."

**Norman E. Harned, Esq. (98-EV-155)** opposes the proposed change to Evidence Rule 702, on the ground that its effect "is to substitute trial of the facts by judges rather than by juries."

**P. James Rainey, Esq. (98-EV-156)** opposes the proposed amendment to Evidence Rule 702. He states that a "Wood Carver should not have to met [sic] the same standards that the Chemical Engineer would have to met [sic] in order to testify about his specialties."

**Darrell W. Aherin, Esq. (98-EV-157)** states that “some federal judges at the trial level are usurping the role of the jury. The current climate appears to be so probusiness I would hope that any proposed rules won’t lead to further unfairness and deny access to the courts for individual litigants.”

**The Atlantic Legal Foundation (98-EV-158)** generally supports the proposed amendment to Evidence Rule 702. It states that the proposal will “prevent miscarriages of justice resulting from misunderstanding by lay triers of fact concerning the validity of ‘expert’ opinions.” It also notes that “[a]s *Daubert* recognized, the determination of whether expert opinion satisfies the standards for admissibility is to be decided by the judge under Rule 104(a), part of the court’s longstanding ‘gatekeeping’ function with respect to expert opinion.” The Foundation observes that while the reliability standards set forth in the proposal are “somewhat general, it probably cannot be made more detailed or explicit and still retain general applicability.” However, the Foundation believes that Subpart (1) of the proposed proviso to Evidence Rule 702 (as it was issued for public comment) “goes too far in requiring courts to determine whether expert opinion is ‘sufficiently based upon reliable facts or data.’” It states that courts addressing reliability issues “should only examine the methodology and the application of the methodology to the facts, not the facts themselves.”

**Paul T. Hoffman, Esq. (98-EV-159)** opposes the proposed amendment to Evidence Rule 702, asserting that it engrafts on non-scientific experts “the strict science-based *Daubert* rules.”

**Hon. Russell A. Eliason (98-EV-161)**, Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 702 be amended to subject expert

testimony to the following restrictions: "The courts shall consider (1) the nature of the discipline and the degree to which it is capable of rendering valid, credible, or simply accepted conclusions, (2) whether the testimony is sufficiently based upon reliable facts or data, (3) whether the testimony must be given subject to restrictions, limitations or cautions because it cannot be demonstrated to be the product of reliable principles and methods, and (4) whether the principles and methods may be reliably applied to the facts of the case."

**Edward J. Carreiro, Jr., Esq. (98-EV-162)** opposes the proposed amendment to Evidence Rule 702.

**R. Gary Stephens, Esq. (98-EV-163)** opposes the proposed amendment to Evidence Rule 702 on the ground that it imposes unnecessarily rigid requirements on experts, and will increase the cost of litigation.

**The Law Firm of Saltz, Mongeluzzi, Barrett and Bendesky (98-EV-164)** opposes the proposed amendment to Evidence Rule 702, on the ground that it "will have a negative impact on a plaintiff's practice." The Firm asserts that there are "many reasons why the defense would be compelled to challenge each and every expert" under the proposed amendment.

**Warren F. Fitzgerald, Esq. (98-EV-165)** states that the proposed amendment to Evidence Rule 702 is "unnecessary and will have a detrimental effect upon the fair evaluation of relevant opinion evidence from experts."

**Anthony Tarricone, Esq. (98-EV-166)** states that the proposed amendment to Evidence Rule 702 would "substitute the judge as



finder of fact instead of the jury by removing from the jury consideration of the weight and credibility of evidence.” He does not believe that there is “sufficient justification” for the proposed change.

**Annette Gonthier Kiely, Esq. (98-EV-167)** states that the proposed amendment to Evidence Rule 702 “threatens the traditional role of the jury as the finder of fact by empowering the judge to exclude evidence, whose weight and credibility has traditionally been and should continue to be assessed by the jury in determining the facts in issue.”

**David Dwork, Esq. (98-EV-168)** opposes the proposed amendment to Evidence Rule 702, asserting that “an extension of the *Daubert* decision could have a restrictive impact on the presentation of relevant, credible, and material evidence merely because the expert does not meet rigid criteria which do not in all cases reflect on his or her expertise.”

**M. R. Smith, Esq. (98-EV-169)** supports the proposed amendment to Evidence Rule 702.

**Douglas K. Sheff, Esq. (98-EV-170)** asserts that the proposed amendment to Evidence Rule 702 “would be an affront to the jury system and much of what the founding fathers intended when they created the finest means ever devised to determine disputes.”

**Navistar International Transportation Corp. (98-EV-171)** supports the proposed amendment to Evidence Rule 702 stating that it will “properly clarify the gatekeeper function of *Daubert* and enhance the value of expert testimony by requiring that there is real substance behind the opinions proffered.”

**The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172)** agrees with the proposed change to Evidence Rule 702.

**The Federal Magistrate Judges Association (98-EV-173)** supports the proposed changes to Evidence Rule 702 “because they address and adequately resolve two problems frequently arising before trial judges as a result of the Supreme Court’s decision in *Daubert*. First of all, it was not at all clear whether the Supreme Court intended *Daubert* to apply to only scientific testimony or should be applied to all expert testimony. . . . Second, the criteria set forth by the Supreme Court for evaluating scientific expert testimony frequently would be, either in whole or in part, inapplicable to the scientific testimony proffered in any given case. The standards set forth in the amendments are broad enough to require consideration of any or all of the specific *Daubert* factors and other relevant considerations as appropriate.” The Association concludes that the standards set forth in the proposed amendment provide “the trial court, as a gatekeeper, with greater discretion and latitude to either admit or deny proffered expert testimony while at the same time providing the trial judge with greater guidance than was provided by the Supreme Court’s limited decision in *Daubert*.”

**Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174)** support the proposed amendment to Evidence Rule 702. They suggest, however, that Subpart (3) of the proposal be revised to address the possibility that an expert might testify to general principles without attempting to apply those principles to the facts of the case.

**Merl H. Wayman, Esq. (98-EV-175)** opposes the proposed amendment to Evidence Rule 702.

**Mary J. Hoeller, Esq. (98-EV-176)** opposes the proposed amendment to Evidence Rule 702.

**Brian T. Stern, Esq. (98-EV-177)** opposes the proposed amendment to Evidence Rule 702 as “an unwarranted attempt to derive tests for non-scientific expert testimony from a Supreme Court decision concerned with scientific experts.”

**The National Employment Lawyers Association (98-EV-179)** opposes the proposed amendment to Evidence Rule 702, stating that the “vague terms in the proposed amendment invite judges to go beyond their gatekeeping function to usurp the role of the jury in determining of the credibility and probative value of an expert’s opinion.”

#### **Rule 703. Bases of Opinion Testimony by Experts**

1           The facts or data in the particular case upon which an  
2           expert bases an opinion or inference may be those perceived  
3           by or made known to the expert at or before the hearing. If of  
4           a type reasonably relied upon by experts in the particular field  
5           in forming opinions or inferences upon the subject, the facts  
6           or data need not be admissible in evidence in order for the  
7           opinion or inference to be admitted. Facts or data that are  
8           otherwise inadmissible shall not be disclosed to the jury by

9        the proponent of the opinion or inference unless the court  
10        determines that their probative value in assisting the jury to  
11        evaluate the expert's opinion substantially outweighs their  
12        prejudicial effect.

#### COMMITTEE NOTE

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), with *United States v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.*, Ronald Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating

an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference.

The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

#### **GAP Report — Proposed Amendment to Rule 703**

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 703:

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.
2. The words "in assisting the jury to evaluate the expert's opinion" were added to the text, to specify the proper purpose for offering the otherwise inadmissible information relied on by an expert. The Committee Note was revised to accord with this change in the text.

3. Stylistic changes were made to the Committee Note.

4. The Committee Note was revised to emphasize that the balancing test set forth in the proposal should be used to determine whether an expert's basis may be disclosed to the jury either (1) in rebuttal or (2) on direct examination to "remove the sting" of an opponent's anticipated attack on an expert's basis.

### **Summary of Comments on the Proposed Amendment to Evidence Rule 703**

**Professor Richard Friedman (98-EV-007)** believes that the proposed amendment to Evidence Rule 703 "is generally a good one, at least in criminal cases." He argues that the proposal should be amended, however, to make more explicit the point that otherwise inadmissible information relied upon by an expert, if admitted at all, is admitted for "the sole purpose of explaining the expert's testimony."

**Lawyers for Civil Justice (98-EV-009)** support the proposed amendment to Evidence Rule 703, "which would limit the disclosure to the jury of inadmissible information that is used as the basis of an expert's opinion." They argue, however, that the Rule or Committee Note should provide more "guidance in applying the suggested limiting instructions."

**The Evidence Project (98-EV-010)** asserts that the proposed amendment does not go far enough. The Project argues that the trial judge, in balancing under the amended Rule 703, would have to find the information highly reliable in order to allow its disclosure to the jury; if that is the case, the judicial determination of reliability "should make the evidence admissible for substantive use by the jury

as well." The Project concludes that the problems in the current rule "can be resolved only by precluding the expert from relying on inadmissible evidence or admitting the otherwise inadmissible evidence because the expert has assessed its reliability and concluded it is trustworthy."

**Professor Laird Kirkpatrick (98-EV-011)** strongly supports the proposed amendment. He argues, however, that the reference in the text of the proposal to probative value and prejudicial effect should be made more specific. He states that the Committee Note "uses more apt language than the proposed amendment itself" and suggests that the language in the Note should be transferred to the Rule (as it was issued for public comment).

**Thomas E. McCutchen, Esq. (98-EV-015)** states that the proposed amendment "may result in greater expense because of the necessity of calling additional witnesses, such as medical malpractice cases, since the proposed amendment will exclude evidence which is now disclosed to the jury."

**James E. Garvey, Esq. and other Fellows of the American Coll. of Trial Lawyers (98-EV-016)** favor the proposed amendment.

**The Committee on Federal Procedure of the New York State Bar Association (98-EV-017)** endorses the proposed amendment to Evidence Rule 703. The Committee states that "the balance in the proposed amendment appears to be right, since it is the proponent of the expert witness who has control over the information on which the expert will rely and who is most likely to be the party to try to sneak otherwise inadmissible information into evidence through an expert."

**The Defense Research Institute (98-EV-020)** urges the



Committee to revise the proposed amendment to Evidence Rule 703 to completely prohibit disclosure to the jury of inadmissible information relied upon by an expert.

**E. Wayne Taff, Esq. (98-EV-021)** strongly supports “those portions of the proposed amendment to Rule 703 which would limit disclosure to the jury of inadmissible information used as the basis for an expert’s opinion.” He states that “the simple rules of logic support the amendment.” He argues, however, that inadmissible information used as the basis of an expert’s opinion should never be disclosed to the jury.

**Hon. D. Brock Hornby (98-EV-023)**, Chief Judge of the United States District Court for the District of Maine, states that the proposed amendment to Evidence Rule 703 is “bad policy and unworkable.” He argues that the proposal “will lead to expert *ipse dixits*, or opinions with disclosure of only some of the bases for the opinion, as well as battles over what is a disclosure and whether certain data are truly inadmissible bases or not.” He also suggests that if a balancing test is to be established, “why not stick with Rule 403?”

**Kevin J. Dunne, Esq. (98-EV-025)** states that the use of inadmissible information by an expert, and the subsequent disclosure of that information to the jury in the guise of supporting the expert’s opinion, is “a game that should not be condoned, and the proposed amendments to Rule 703 should help to put a stop to it.”

**Diane R. Crowley, Esq. (98-EV-029)** states that the proposed change to Evidence Rule 703 is a “step in the right direction” but that it needs “further refinement.” She suggests that the proposed balancing test be deleted, or that “a requirement of judicial scrutiny along the lines set forth in the proposed Rule 702 be added before the

otherwise inadmissible facts may be disclosed to the jury.”

**Professor Lynn McLain (98-EV-030)** states that the proposed amendment to Evidence Rule 703, as issued for public comment, should be revised to clarify the probative value that the trial court should consider when an expert relies on inadmissible information.

**Professor Ronald L. Carlson (98-EV-031)** strongly supports the proposed amendment, stating that the current Rule 703 “might be abused by opportunistic counsel.” Professor Carlson “vigorously” agrees with the proposal’s “presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert’s opinion or inference.”

**Harold Lee Schwab, Esq. (98-EV-033)** states that the proposed amendment provides “a valid test which should preclude end run attempts by ingenious counsel to avoid the exclusionary rules.”

**Thomas J. Conlin, Esq. (98-EV-037)** believes that on balance “Rule 703 works just fine as it exists today.”

**Scott B. Elkind, Esq. (98-EV-038)** opposes the proposed amendment to Evidence Rule 703.

**The Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Defense Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council (98-EV-047)** state that the proposed amendment to Evidence Rule 703 “creates a necessary and welcome presumption” against disclosure of otherwise inadmissible information that is used as the basis of an

expert's opinion and that the proposal "should greatly assist in discouraging the admission of backdoor hearsay and other inadmissible information in the guise of reasonable, trustworthy and reliable data considered by the expert in forming an opinion." These organizations suggest, however, that the Committee Note might be revised "to provide further guidance as to whether or not otherwise inadmissible information should be disclosed to the jury." Such guidance might include criteria such as: "(1) Is the underlying data reasonable and trustworthy? (2) Is the information seriously disputed? (3) Is the data case specific? and (4) Will the opponent have a meaningful opportunity to rebut the information or is it of a type that cannot meaningfully be rebutted?"

**The National Board of the American Board of Trial Advocates (98-EV-049)** opposes the last sentence of the proposed amendment to Evidence Rule 703 "because it creates confusion in light of existing law and has significant potential for creating mischief by apparently inviting parties to proffer otherwise inadmissible evidence."

**The Lawyers' Club of San Francisco (98-EV-050)** opposes the proposed amendment to Evidence Rule 703, arguing that it "will have the effect of precluding the jury from knowing the reasons for an expert's opinion where the judge determines that the probative value of the opinion or inference does not substantially outweigh its prejudicial effect."

**William B. Doder, Esq. (98-EV-052)** states that the proposed amendment to Evidence Rule 703 is part of "a much-needed revision which will finally allow trial courts to fulfill their role as gatekeeper for the admission of expert evidence."

**Jay H. Tressler, Esq. (98-EV-055)** supports the proposed amendment, because “[a]ll too often, an expert will be fed self-serving information by counsel which would not be admissible at trial” and “the expert then gains permission to discuss the content of the otherwise inadmissible testimony.”

**The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (98-EV-056)** opposes the proposed amendment. The Committee believes “that Rule 703 is working” and is not persuaded by assertions that the Rule has been “misused to permit introduction of inadmissible evidence before the jury through the backdoor.”

**Michael S. Allred, Esq. (98-EV-059)** opposes the proposed amendment on the ground that it will “place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony.”

**Charles F. Preuss, Esq. (98-EV-062)** supports the proposed amendment to Evidence Rule 703, but argues that “a potential troubling aspect of this amendment is the lack of criteria upon which the trial court is to weigh the probative value of the underlying inadmissible information against its prejudice.” Mr. Preuss suggests that the Committee Note should “provide more guidance for the trial courts who must decide this difficult balancing process.”

**Professor Michael H. Graham (98-EV-063)** believes that the proposed amendment to Evidence Rule 703 is “ill-advised.” He argues that there is “no problem in practice worth addressing” and questions how judges are to conduct the balancing required by the proposed amendment.

**Frank Stainback, Esq. (98-EV-064)** believes that the proposed amendment to Rule 703 will be a positive change, because it “will eliminate the proponent’s ability to present otherwise inadmissible evidence to the jury under the guise of that evidence being the basis for an expert’s opinion.”

**Hon. Edward R. Becker (98-EV-065)**, Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 703, noting that it is “extremely well justified by the Committee’s accompanying commentary.”

**Steven H. Howard, Esq. (98-EV-067)** opposes the proposed amendment to Evidence Rule 703.

**The Federal Courts Committee of the Chicago Council of Lawyers (98-EV-074)** contends that the proposed amendment to Evidence Rule 703 “creates an apparent imbalance between the parties as they examine a witness.” The Committee suggests that the Rule or the Committee Note “should reflect a door-opening presumption that once inadmissible evidence has been introduced on cross-examination, on redirect a witness would ordinarily be granted latitude to respond by completing the picture with other facts that would otherwise be inadmissible (that is, but for the cross-examination).”

**The State Bar of Arizona (98-EV-075)** supports the adoption of the proposed amendment to Evidence Rule 703.

**The National Association of Railroad Trial Counsel (98-EV-077)** supports the proposed amendment to Evidence Rule 703.

**The Chicago Chapter of the Federal Bar Association (98-EV-**

078) states that the proposed amendment to Evidence Rule 703 is "an important and desirable change which clarifies another issue in dispute. The Chapter enthusiastically endorses the proposal."

**The Federal Practice Section of the Connecticut Bar Association (98-EV-079)** endorses the proposed amendment to Evidence Rule 703, noting that under the proposal the trial court "would have some discretion" to allow disclosure to the jury of inadmissible information reasonably relied upon by the expert.

**The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080)** support the proposed amendment to Evidence Rule 703.

**The Pennsylvania Trial Lawyers Association (98-EV-081)** supports the proposed amendment to Evidence Rule 703, noting that it restates the existing rule of law in "many jurisdictions." The proposal also "serves the purpose of preventing inadmissible hearsay which, in many instances, would go beyond the relevant scientific or technical information upon which the expert witness relies. It precludes the possibility of admitting irrelevant or prejudicial factual information, as well."

**Professor James P. Carey (98-EV-082)** states that the proposed amendment to Rule 703 is a "laudable attempt" to clarify the circumstances under which inadmissible information reasonably relied upon by the expert can be disclosed to the jury. He is concerned, however, about the general references in the proposal (as it was released for public comment) to probative value and prejudicial effect. Professor Carey concludes that allowing judges "to roam the fields of probativeness" creates a danger of more frequent disclosure of inadmissible underlying information. He suggests a complete

prohibition on disclosure of inadmissible information relied upon by an expert, which would place “an incentive on the proponent of expert testimony to present witnesses to establish a basis (or resort to hearsay exceptions), which in itself would go some way toward meeting the various concerns which have resulted in our making judges gatekeepers.”

**The United States District Court of Oregon and its Local Rules Advisory Committee (98-EV-083)** support the proposed amendment to Evidence Rule 703, asserting that it “will assist trial courts and parties by considering the probative value of the information and the risk of prejudice.”

**The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084)** favors the proposed amendment to Evidence Rule 703, because “there has been far too much use of the current Rule as a ‘back door’ to bring otherwise inadmissible and highly prejudicial evidence to the attention of juries, sometimes resulting in unfair verdicts. The proposed amendment should substantially rein in this practice.” The Committee concludes that the balancing test in the proposal is “an appropriate and fair process for decision-making by trial judges” and the Committee is “strongly of the view that the presumption against admissibility created by the amendment is essential to the achievement of the purpose of the revised Rule.”

**John R. Lanza, Esq. (98-EV-087)** states that because the proposed amendment does not prohibit the opponent from eliciting inadmissible information used as the basis of the expert’s testimony, the proposal is “unfair to the proponent of the expert, and the expert testimony.” He contends that the Rule will make it appear as if “the proponent purposely hid facts and data from the jury.” He also asserts

that the proposal “would interfere with the flow of the expert’s testimony and the corroboration of the expert, potentially resulting in conclusory testimony by the expert.

**J. Ric Gass, Esq. (98-EV-090)** states that the proposed amendment to Evidence Rule 703 is an “important and necessary and appropriate” revision.

**J. Greg Allen, Esq. (98-EV-093)** opposes the proposed amendment to Evidence Rule 703, arguing that “the trial court should not be given discretion in this area because they are not experts in the particular fields.”

**Alvin A. Wolff, Jr., Esq. (98-EV-095)** opposes the proposed amendment to Evidence Rule 703, on the ground that it “would deprive the jury of an opportunity to understand the basis of the expert’s opinions.”

**Alan Voos, Esq. (98-EV-096)** opposes the proposed amendment to Evidence Rule 703 on the ground that it “will make it virtually impossible to properly elicit direct testimony from experts on all points of anticipated cross-examination.”

**The Federal Bar Council Committee on Second Circuit Courts (98-EV-097)** supports the concept of the proposed amendment to Evidence Rule 703, but suggests that the version released for public comment be amended in two respects. First, the reference to “probative value” should be changed to specify that the trial judge is to assess the value of the inadmissible information in helping the jury to evaluate the expert’s opinion. Second, the “reasonable reliance” requirement that is currently in the Rule should



be deleted, since the amendment to Rule 702 (as it was released for public comment) would require that the expert have a reliable basis of knowledge.

**Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103)** reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that “there is no existing American Bar Association policy known to us that addresses these changes.” Nonetheless, the professors report that the proposed amendment “drew opposition from approximately two thirds of those present. Members who opposed the new form of the rule expressed the concern that the proposed changes will usurp the traditional role of the jury.”

**The Association of American Trial Lawyers (98-EV-108)** opposes the proposed amendment to Evidence Rule 703 for four reasons: the proposal “would add language that is surplusage”; the proposal “appears likely to lead to more satellite litigation over what parts of the expert’s basis for the opinion and the opinion itself will be admissible and which will not”; the proposal “does not take into account the common practice during trial of using expert testimony before the jury to describe and characterize documents (not yet in evidence) produced by an opponent, for the purpose of orienting the jury to the evidence that will be adduced;” and “the expert will often need to discuss the data (perhaps including inadmissible material) on which the opinion is based, lest the jury conclude that the opinion is in fact nothing more than the expert’s *ipse dixit*.”

**The New Hampshire Trial Lawyers Association (98-EV-111)** does not believe that the proposed amendment to Evidence Rule 703

“provides any significant additional guidance to trial judges in determining how the jury should be instructed with respect to the information which the expert considered or relied upon.”

**Russell T. Golla, Esq. (98-EV-112)** supports the proposed amendment to Evidence Rule 703.

**The Ohio Academy of Trial Lawyers (98-EV-114)** supports the proposed amendment to Evidence Rule 703.

**Hon. Carl Barbier (98-EV-115)**, District Judge for the Eastern District of Louisiana, states that the proposed amendment to Evidence Rule 703 does “not seem objectionable.”

**Michael W. Day, Esq. (98-EV-116)** opposes the proposed amendment to Rule 703, contending that the proposal “would often deprive the jury of an opportunity to understand the basis of the expert’s opinion.”

**The Philadelphia Bar Association (98-EV-118)** supports the proposed amendment to Evidence Rule 703, “insofar as it gives judges the power to exclude disclosure of underlying facts that would otherwise be inadmissible.” The Association is “aware of instances in which an expert witness is retained primarily for the purpose of introducing the otherwise inadmissible underlying facts, with the opinion being merely the means to that end.” The Association recommends “further study,” however, of whether “the presumption should be for or against disclosure of the underlying facts.” The Association also recommends deletion of the phrase “to the jury” and “would avoid referring to the ‘probative value’ of the underlying facts and would instead refer to ‘their value in assisting the trier of fact to understand the opinion or inference.’”

**The Sturdevant Law Firm (98-EV-119)** opposes the proposed amendment to Evidence Rule 703, on the grounds that it is too “restrictive” and that “the jury will not have the underlying facts or data that the expert relies upon, and therefore has no basis to consider the merits of the expert’s opinion.”

**The Arizona Trial Lawyers Association (98-EV-124)** is opposed to the proposed amendment to Evidence Rule 703.

**The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126)** recommends the adoption of the proposed amendment to Evidence Rule 703.

**Nissan North America, Inc. (98-EV-130)** supports the proposed amendment to Evidence Rule 703.

**The International Academy of Trial Lawyers (98-EV-134)** is unable to reach a consensus with regard to “the wisdom of adopting the proposed amendments to Rule 703.” Those in favor of the proposal point out that “Rule 703 as it presently exists represents a loop hole exception to other exclusionary rules such as hearsay” and that one “can readily envision situations where a court permits hearsay evidence to be admissible under 703, concluding that the evidence passes Rule 403 muster, although clearly the evidence should not be received.” Further, “the proposed amendment serves to better guarantee a correct judicial determination in each case and consistency throughout the circuits.” Those opposed to the proposal argue that the presumption against disclosure of inadmissible information relied upon by an expert is too “stringent” and that “[s]ufficient safeguards are now present in Rule 403.”

**B. C. Cornish, Esq. (98-EV-137)** finds the proposed amendment to Evidence Rule 703 “troublesome” and states that “[t]he attempt to correct the occasional misuse of the rule as currently written will keep juries from understanding the basis of the expert’s opinion.”

**Martin M. Meyers, Esq. (98-EV-139)** opposes the proposed amendment to Evidence Rule 703. He asserts that under the proposal, property appraisers would not be permitted to disclose the comparable properties that they used in assessing value.

**The National Association of Independent Insurers (98-EV-141)** supports the proposed amendment to Evidence Rule 703.

**Jon B. Comstock, Esq. (98-EV-142)** supports the proposed change to Evidence Rule 703, stating that there has been “routine abuse” under the current Rule, and that “this rule change will produce fairness to all parties.”

**Karl Protil, Esq. (98-EV-145)** strongly opposes the proposed amendment to Evidence Rule 703. He states that an expert “should be allowed to state the facts upon which he relied. If not, then you undermine that expert’s credibility and allow the opponent to argue that the expert’s opinion is not based on a proper foundation.”

**Ken Baughman, Esq. (98-EV-146)** opposes the proposed amendment to Evidence Rule 703.

**Pamela O’Dwyer, Esq. (98-EV-147)** opposes the proposed amendment to Evidence Rule 703.

**The Prison Law Office (98-EV-149)** opposes the proposed amendment to Evidence Rule 703.

**Jeffrey P. Foote, Esq. (98-EV-151)** opposes the proposed amendment to Evidence Rule 703.

**Matthew B. Weber, Esq. (98-EV-152)** opposes the proposed amendment to Evidence Rule 703, on the ground that it “will be obfuscating numerous issues which this rule is specifically designed to illuminate.”

**J. Michael Black, Esq. (98-EV-153)** does not agree “with any proposal which would prevent experts from relying on hearsay, scientific data.”

**Norman E. Harned, Esq. (98-EV-155)** opposes the proposed change to Evidence Rule 703.

**Daniel W. Aherin, Esq. (98-EV-157)** opposes the proposed amendment to Evidence Rule 703, on the ground that it is “geared towards preventing individual litigants from presenting reasonable expert testimony.”

**The Atlantic Legal Foundation (98-EV-158)** supports the proposal’s placement of the burden on the proponent to show that the otherwise inadmissible facts or data relied upon by an expert should be disclosed to the jury. The Foundation suggests, however, that criteria should be added to the Committee Note for “the court to use in deciding whether to admit the otherwise inadmissible evidence.”

**Paul T. Hoffman, Esq. (98-EV-159)** opposes the proposed amendment to Evidence Rule 703, in the belief that the proposal would prohibit experts from relying on inadmissible facts or data.

**Hon. William J. Giovan (98-EV-160)** Judge for the Circuit Court for the Third Judicial Circuit of Michigan, states that the proposed amendment to Evidence Rule 703 “does not go far enough” and suggests that the Rule be amended “to restore the former requirement that expert opinion be based upon facts that are in evidence.” He asserts that a return to the common-law rule is the only way to avoid “the practical obliteration of the hearsay rule.”

**Hon. Russell A. Eliason (98-EV-161)**, Magistrate Judge for the United States District Court of the District of North Carolina, proposes that Evidence Rule 703 be amended to delete the second sentence of the current Rule, and to replace it with the following language: “If the expert relies on facts or data which the court has ruled to be inadmissible evidence, but such evidence is of the type reasonably relied upon by experts in the particular field in formulating conclusions about the subject and the court finds the conclusions to be sufficiently helpful and reliable pursuant to Rule 702, then the court may permit the expert to testify and the evidence shall be disclosed to the jury under appropriate limiting instructions unless the prejudicial effect outweighs their probative value.”

**Edward J. Carreiro, Jr., Esq. (98-EV-162)** opposes the proposed amendment to Evidence Rule 703.

**R. Gary Stephens, Esq. (98-EV-163)** opposes the proposed amendment to Evidence Rule 703, on the ground that it will force counsel to qualify for admissibility all evidence relied upon by an expert, thus unnecessarily increasing the cost of litigation.

**Warren F. Fitzgerald, Esq. (98-EV-165)** states that the proposed

amendment to Evidence Rule 703 is “an undue restriction upon the ability of qualified experts to provide the sometimes necessary explanations of the foundations of their opinions.”

**Anthony Tarricone, Esq. (98-EV-166)** opposes the proposed amendment to Evidence Rule 703 on the ground that it “would undoubtedly extend the length and complexity of discovery and trial by mandating the introduction in evidence of information and data that, while relied upon by the expert, are not necessary for the court’s and jury’s consideration.”

**Annette Gonthier Kiely, Esq. (98-EV-167)** states that the proposed amendment to Evidence Rule 703 should not be adopted “since it is redundant and will open the door to needless and costly collateral evidentiary disputes.”

**David Dwork, Esq. (98-EV-168)** states that the proposed amendment to Evidence Rule 703 “will merely invite lengthy disputes and voir dire examinations on issues that are more appropriately and effectively dealt with currently by cross-examination and the presentation of opposing evidence.”

**M. R. Smith, Esq. (98-EV-169)** supports the proposed amendment to Evidence Rule 703.

**Navistar International Transportation Corp. (98-EV-171)** supports the proposed amendment to Evidence Rule 703, but suggests “that further guidelines need to be incorporated into the proposed change to Rule 703 if the change is to be meaningful.”

**The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172)** agrees with

the proposed change to Evidence Rule 703. It suggests, however, that the Committee Note should “clarify that a party need not seek a ruling of the Court if the other party agrees that the probative value of the otherwise inadmissible evidence substantially outweighs its prejudicial effect.”

**The Federal Magistrate Judges Association (98-EV-173)** opposes the proposed amendment to Evidence Rule 703 on the ground that it is “unnecessary.”

**Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174)** favor the proposed amendment to Evidence Rule 703. They argue that the current rule “has too often been used as a ‘back door’ for the admissibility of otherwise inadmissible and highly prejudicial evidence.” They suggest, however, that the proposal be revised to address “the latitude to be given to the proponent on re-direct examination to fairly address the issues raised when the opponent of the evidence, during cross-examination pursuant to Rule 705, requires the expert to expose some or all of the underlying facts or data.”

**The Litigation Section of the District of Columbia Bar (98-EV-178)** opposes the proposed amendment to Evidence Rule 703 on the ground that it is “unnecessary.” The Section contends that the proposal “would have the practical effect of encouraging surprise objections to what may be the most critical part of a litigant’s case.”

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

1           The following are not excluded by the hearsay rule, even



2       though the declarant is available as a witness:

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(6) Records of regularly conducted activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this

18 paragraph includes business, institution, association,  
19 profession, occupation, and calling of every kind, whether  
20 or not conducted for profit.

21 \* \* \* \* \*

#### COMMITTEE NOTE

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

#### **GAP Report — Proposed Amendment to Rule 803(6)**

The Committee made no changes to the published draft of the proposed amendment to Evidence Rule 803(6).

#### **Summary of Comments on the Proposed Amendment to Evidence Rule 803(6)**

**Professor Richard Friedman (98-EV 007)** states that the proposed amendment to Evidence Rule 803(6) is “generally salutary” and “may save some expense.”

**James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016)** favor the proposed amendment to Evidence Rule 803(6).

**Professor Lynn McLain (98-EV-030)** supports the proposed amendment to Evidence Rule 803(6), noting that Maryland adopted a similar rule in 1994.

**Hon. Edward R. Becker (98-EV-065)**, Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 803(6), noting that it is “extremely well justified by the Committee’s accompanying commentary.”

**The Civil Justice Reform Act Advisory Group for the United States District Court of the Western District of Washington (98-EV-073)** endorses the proposed amendment to Evidence Rule 803(6).

**The State Bar of Arizona (98-EV-075)** supports the adoption of the proposed amendment to Evidence Rule 803(6).

**The National Association of Railroad Trial Counsel (98-EV-077)** supports the proposed amendment to Evidence Rule 803(6).

**The Chicago Chapter of the Federal Bar Association (98-EV-078)** states that the proposed amendment to Evidence Rule 803(6) “makes sense and should be approved.”

**The Federal Practice Section of the Connecticut Bar Association (98-EV-079)** endorses the proposed amendment to Evidence Rule 803(6).

**The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080)** support the proposed amendment to Evidence Rule 803(6).

**The Pennsylvania Trial Lawyers Association (98-EV-081)** supports the proposed amendment to Evidence Rule 803(6).

**The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084)** believes that the proposed amendment to Evidence Rule 803(6) brings the Rule "into conformity with the increasingly common practice of the federal courts" and "appropriately" imposes "some of the burden with respect to the foundation requirements to the party challenging the evidence."

**The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088)** opposes the proposed amendment to Evidence Rule 803(6) as applied to criminal cases.

**Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103)** reported on a meeting of some members of the Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that "there is no existing American Bar Association policy known to us that addresses these changes." Nonetheless, the professors report that a "substantial majority" of those present "were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that this change might unduly impair a criminal defendant's ability to

cross-examine witnesses who would no longer take the stand to establish the foundation for business records.”

**Professor Myrna Raeder (98-EV-106)** is “troubled by the elimination of a custodian from Rule 803(6).” She recognizes that under the proposed amendment “the opponent can always raise the question of untrustworthiness, but the rule places the burden on the opponent to demonstrate untrustworthiness, which in criminal cases with limited discovery is harder to do than in civil cases.”

**Russell T. Golla, Esq. (98-EV-112)** supports the proposed amendment to Evidence Rule 803(6).

**The Philadelphia Bar Association (98-EV-118)** supports the proposed amendment to Evidence Rule 803(6).

**The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126)** recommends the adoption of the proposed amendment to Evidence Rule 803(6).

**The National Association of Independent Insurers (98-EV-141)** supports the proposed amendment to Evidence Rule 803(6).

**Jon B. Comstock, Esq. (98-EV-142)** supports the proposed change to Evidence Rule 803(6).

**M. R. Smith, Esq. (98-EV-169)** supports the proposed amendment to Evidence Rule 803(6).

**The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172)** agrees with the proposed change to Evidence Rule 803(6).

**The Federal Magistrate Judges Association (98-EV-173)** supports the proposed amendment to Evidence Rule 803(6).

**Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174)** support the proposed amendment to Evidence Rule 803(6).

**Rule 902. Self-authentication**

1           Extrinsic evidence of authenticity as a condition  
2           precedent to admissibility is not required with respect to  
3           the following:

4   \* \* \* \* \*

5           (11) Certified domestic records of regularly conducted  
6           activity. — The original or a duplicate of a domestic  
7           record of regularly conducted activity that would be  
8           admissible under Rule 803(6) if accompanied by a written  
9           declaration of its custodian or other qualified person, in  
10           a manner complying with any Act of Congress or rule  
11           prescribed by the Supreme Court pursuant to statutory  
12           authority, certifying that the record —

13 (A) was made at or near the time of the occurrence of  
14 the matters set forth by, or from information  
15 transmitted by, a person with knowledge of those  
16 matters;

17 (B) was kept in the course of the regularly conducted  
18 activity; and

19 (C) was made by the regularly conducted activity as a  
20 regular practice.

21 A party intending to offer a record into evidence under  
22 this paragraph must provide written notice of that  
23 intention to all adverse parties, and must make the record  
24 and declaration available for inspection sufficiently in  
25 advance of their offer into evidence to provide an adverse  
26 party with a fair opportunity to challenge them.

27 (12) Certified foreign records of regularly conducted  
28 activity. — In a civil case, the original or a duplicate of  
29 a foreign record of regularly conducted activity that would

30 be admissible under Rule 803(6) if accompanied by a  
31 written declaration by its custodian or other qualified  
32 person certifying that the record —

33 (A) was made at or near the time of the occurrence of  
34 the matters set forth by, or from information  
35 transmitted by, a person with knowledge of those  
36 matters;

37 (B) was kept in the course of the regularly conducted  
38 activity; and

39 (C) was made by the regularly conducted activity as a  
40 regular practice.

41 The declaration must be signed in a manner that, if  
42 falsely made, would subject the maker to criminal penalty  
43 under the laws of the country where the declaration is  
44 signed. A party intending to offer a record into evidence  
45 under this paragraph must provide written notice of that  
46 intention to all adverse parties, and must make the record



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47 and declaration available for inspection sufficiently in  
48 advance of their offer into evidence to provide an adverse  
49 party with a fair opportunity to challenge them.

**COMMITTEE NOTE**

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. § 1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

**GAP Report — Proposed Amendment to Rule 902**

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 902:

1. Minor stylistic changes were made in the text, in accordance with suggestions of the Style Subcommittee of the

Standing Committee on Rules of Practice and Procedure.

2. The phrase “in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority” was added to proposed Rule 902(11), to provide consistency with Evidence Rule 902(4). The Committee Note was amended to accord with this textual change.

3. Minor stylistic changes were made in the text to provide a uniform construction of the terms “declaration” and “certifying.”

4. The notice provisions in the text were revised to clarify that the proponent must make both the declaration and the underlying record available for inspection.

#### **Summary of Comments on the Proposed Amendment to Evidence Rule 902**

**Professor Richard Friedman (98-EV-007)** states that the proposed amendment to Evidence Rule 902 is “generally salutary” and “may save some expense.” He suggests one change: that the proponent should not only make available the records sought to be admitted, but should also assure that the certifying witness be made available for a deposition on the subject matter of the certification.

**Professor Dale A. Nance (98-EV-014)** endorses the goal of the proposed amendment to Evidence Rule 902, however, he suggests certain revisions in the wording of the proposal as issued for public comment. He proposes that the reference to admissibility under Rule 803(6) should be deleted. He also suggests that the notice provisions should be modified to make clear that the opponent would have an

opportunity to challenge the declaration signed by the custodian or other qualified witness.

**James E. Garvey, Esq. and other Fellows of the American College of Trial Lawyers (98-EV-016)** favor the proposed amendment to Evidence Rule 902.

**Professor Lynn McLain (98-EV-030)** supports the proposed amendment to Evidence Rule 902, noting that Maryland adopted a similar rule in 1994.

**Hon. Edward R. Becker (98-EV-065)**, Chief Judge of the United States Court of Appeals for the Third Circuit, supports the proposed amendment to Evidence Rule 902, noting that it is “extremely well justified by the Committee’s accompanying commentary.”

**The State Bar of Arizona (98-EV-075)** supports the adoption of the proposed amendment to Evidence Rule 902.

**The National Association of Railroad Trial Counsel (98-EV-077)** supports the proposed amendment to Evidence Rule 902.

**The Chicago Chapter of the Federal Bar Association (98-EV-078)** supports the proposed amendment to Evidence Rule 902.

**The Federal Practice Section of the Connecticut Bar Association (98-EV-079)** endorses the proposed amendment to Evidence Rule 902.

**The Phoenix and Tucson Chapters of the Federal Bar Association (98-EV-080)** support the proposed amendment to Evidence Rule 902.

**The Pennsylvania Trial Lawyers Association (98-EV-081)** supports the proposed amendment to Evidence Rule 902. The Association believes “that the procedures for admitting domestic records and foreign records should be similar.”

**The Federal Rules of Evidence Committee of the American College of Trial Lawyers (98-EV-084)** supports the proposed amendment to Evidence Rule 902, declaring that it “appropriately” reallocates “some of the burden with respect to the foundation requirements to the party challenging the evidence.” The Committee states that the proposal’s notice requirement “ensures that the Rule will achieve the benefit of efficiency without undue risk of unfairness.”

**The Committee on Federal Courts of the Association of the Bar of the City of New York (98-EV-088)** opposes the proposed amendment to Evidence Rule 902 as applied to criminal cases, “both because of Confrontation Clause concerns, and also because the Committee is concerned that, given the restricted scope of pretrial discovery available in criminal cases, the opponent of the evidence (which may be either the prosecution or the defense) may have insufficient information to weigh the need for the testimony of the custodian until the evidence is offered at trial.” The Committee concludes that the proposed amendment “would prevent the opponent of the document from having any chance to challenge its authenticity or admissibility unless the opponent had the foresight and the knowledge to articulate a challenge to it in advance. While it may be reasonable to require such foresight in civil cases, the Committee is concerned that it may be unreasonable” in criminal cases.

**Professors Bruce Comly French and Elizabeth Phillips Marsh (98-EV-103)** reported on a meeting of some members of the

Committee on Rules of Evidence and Criminal Procedure of the Criminal Justice Section of the American Bar Association. The professors noted that “there is no existing American Bar Association policy known to us that addresses these changes.” Nonetheless, the professors report that a “substantial majority” of those present “were concerned, as a matter of underlying policy to promote cross-examination and potentially, as a matter of confrontation rights, that this change might unduly impair a criminal defendant’s ability to cross-examine witnesses who would no longer take the stand to establish the foundation for business records.”

**Russell T. Golla, Esq. (98-EV-112)** supports the proposed amendment to Evidence Rule 902.

**The Philadelphia Bar Association (98-EV-118)** supports the proposed amendment to Evidence Rule 902, but suggests that the language of the proposal, as issued for public comment, be amended to more closely track the language of Evidence Rule 803(6). The Association also recommends that the Committee Note refer to statutory authority governing certifications and declarations under oath. Finally, the Association recommends that the notice provisions in the proposal should specify that the notice must be given in time to permit a pretrial deposition of the witness making the declaration.

**The Court Rules and Administration Committee of the Minnesota State Bar Association (98-EV-126)** recommends the adoption of the proposed amendment to Evidence Rule 902.

**The National Association of Independent Insurers (98-EV-141)** supports the proposed amendment to Evidence Rule 902.

**Jon B. Comstock, Esq. (98-EV-142)** supports the proposed change to Evidence Rule 902.

**M. R. Smith, Esq. (98-EV-169)** supports the proposed amendment to Evidence Rule 902.

**The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar (98-EV-172)** agrees with the proposed change to Evidence Rule 902.

**The Federal Magistrate Judges Association (98-EV-173)** supports the proposed amendment to Evidence Rule 902, because it “retains concepts of fairness for the parties, reduce[s] trial time, and minimize[s] the parties’ expenses” and therefore it is “in the best interests of all concerned and of the system at large.” The Association suggests, however, that paragraphs (11) and (12) of the proposal, as released for public comment, be reworded for consistency “so that both read as a certification under oath or on a written declaration to avoid confusion.”

**Nine members of the leadership of the Section of Litigation of the American Bar Association (98-EV-174)** support the proposed amendment to Evidence Rule 902. They suggest, however, the addition of “a general requirement that the adverse party must provide notice of intent to challenge the admissibility of the evidence sufficiently in advance of trial to provide the proponent a fair opportunity to obtain and present live testimony.”

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

Agenda F-18 (Appendix C)  
Rules  
September 1999

**ANTHONY J. SCIRICA**  
CHAIR

**PETER G. McCABE**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**WILL L. GARWOOD**  
APPELLATE RULES

**ADRIAN G. DUPLANTIER**  
BANKRUPTCY RULES

**PAUL V. NIEMEYER**  
CIVIL RULES

**W. EUGENE DAVIS**  
CRIMINAL RULES

**FERN M. SMITH**  
EVIDENCE RULES

TO: Honorable Anthony J. Scirica, Chair  
Standing Committee on Rules of Practice  
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair  
Advisory Committee on Bankruptcy Rules

DATE: May 7, 1999

RE: Report of the Advisory Committee on Bankruptcy Rules

**I. Introduction**

The Advisory Committee on Bankruptcy Rules met on March 18-19, 1999, at the Airlie Center in Warrenton, Virginia. The Advisory Committee considered public comments regarding two packages of proposed amendments to the Bankruptcy Rules that were published in August 1998.

The first package, titled the "Litigation Package," includes proposed amendments to 27 Bankruptcy Rules that would substantially revise procedures relating to litigation (other than adversary proceedings) in bankruptcy courts. Complete revisions of Rules 9013(motions) and 9014 (contested matters) are the primary focus of the Litigation Package. The Committee received 176 letters or E-mail messages, and heard 14 witnesses testify at a public hearing in Washington, D.C., on January 28, 1999, commenting on the Litigation Package. Most of the commentators opposed the proposed amendments or suggested substantial revisions. In view of the numerous comments, the Advisory Committee decided to study further the Litigation Package. The Committee will not be presenting to the Standing Committee at its June 1999 meeting any of the proposed amendments included in the Litigation Package.

The second package of proposed amendments published in August 1998 includes miscellaneous revisions to six Bankruptcy Rules (Rules 1007, 1017, 2002(a), 2002(j), 4003, 4004, and 5003) and two Official Bankruptcy Forms (Form 1 — Voluntary Petition, and Form 7 — Statement of Financial Affairs). The Advisory Committee received 17 letters or E-mail messages commenting on these proposed amendments (no witnesses testified on these amendments at the public hearing). At its meeting at the Airlie Center, the Advisory Committee

considered these comments and decided to study further the proposed amendments to Rules 1007 and 2002(j) and Official Bankruptcy Forms 1 and 7. The Committee approved the proposed amendments to Rules 1017, 2002(a), 4003, 4004, and 5003, and will present them to the Standing Committee at its June 1999 meeting for final approval and transmission to the Judicial Conference.

\* \* \* \* \*

## II. Action Items

### A. Proposed Amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, and 5003 Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

#### 1. *Public Comment.*

The Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 1999. A public hearing on the preliminary draft was held on January 28, 1999, in Washington, D.C.

Sixteen letters or E-mail messages were received and no witnesses testified regarding the proposed amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, or 5003. The comments contained in these letters and E-mail messages are summarized on a rule-by-rule basis following the text of each rule in the GAP Report (see pages 4 - 15 below). These comments were reviewed at the Advisory Committee meeting and, as a result, several revisions were made to the published draft. The post-publication revisions are identified in the GAP Report.

#### 2. *Synopsis of Proposed Amendments:*

(a) Rule 1017(e) is amended to permit the court to grant a timely request for an extension of time to file a motion to dismiss a chapter 7 case under § 707(b), whether the court rules on the request before or after the expiration of the 60-day time limit for filing the extension request.

(b) Rule 2002(a) is amended to avoid the expense of sending to all creditors notice of a hearing on a request for compensation or reimbursement of expenses if the request does not exceed \$1,000. The current rule provides that notice is not necessary if the amount of the request does not exceed \$500. The amendment also eliminates certain ambiguities in the current rule.



(c) Rule 4003(b) is amended to permit the court to grant a timely request for an extension of time to object to a list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day time limit for filing an objection. The amendments also extend the rule to apply to an objection filed by any party in interest, instead of limiting it to objections filed by a trustee or creditor.

(d) Rule 4004(c)(1) is amended to delay the granting of a discharge in a chapter 7 case while a motion for an extension of time to file a motion to dismiss the case under § 707(b) is pending.

(e) Rule 5003 is amended to permit the United States and the state in which the court is located to file statements designating safe harbor mailing addresses for notice purposes. The amendment requires the clerk to maintain a register of these addresses. Failure to use a mailing address in the register does not invalidate any notice that is otherwise effective under applicable law.

**PROPOSED AMENDMENTS TO THE FEDERAL RULES  
OF BANKRUPTCY PROCEDURE\***

**Rule 1017. Dismissal or Conversion of Case; Suspension**

\*\*\*\*\*

1  
2 (e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S  
3 CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The  
4 court may dismiss an individual debtor's case for substantial  
5 abuse under § 707(b) only on motion by the United States  
6 trustee or on the court's own motion and after a hearing on  
7 notice to the debtor, the trustee, the United States trustee, and  
8 any other entities as the court directs.

9 (1) A motion to dismiss a case for substantial abuse  
10 may be filed by the United States trustee only within 60  
11 days after the first date set for the meeting of creditors  
12 under § 341(a), unless, on request filed by the United  
13 States trustee before the time has expired, the court for  
14 cause extends the time for filing the motion to dismiss.

---

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

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15 The United States trustee shall set forth in the motion all  
16 matters to be submitted to the court for its consideration  
17 at the hearing.

18 \* \* \* \* \*

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request filed by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under § 707(b), whether the court rules on the request before or after the expiration of the 60-day period.

Reporter's Note on Text of Rule 1017(e). The above text of Rule 1017(e) is not based on the text of the rule in effect on this date. The above text embodies amendments that have been promulgated by the Supreme Court in April 1999 and, unless Congress acts with respect to the amendments, will become effective on December 1, 1999.

Public Comment on Proposed Amendments to Rule 1017(e):

(1) Hon. Christopher M. Klein (Bankr. E.D. Cal.) asked whether Rule 1017(e)(1) permits the court to extend the time for the court to dismiss the case for substantial abuse *sua sponte*.

(2) Peter C. Fessenden, Esq. (Brunswick, Maine) supports all the proposed amendments.

GAP Report on Rule 1017(e). No changes since publication.

**Rule 2002. Notices to Creditors, Equity Security Holders,  
United States, and United States Trustee**

1 (a) TWENTY-DAY NOTICES TO PARTIES IN  
2 INTEREST. Except as provided in subdivisions (h), (i), and  
3 (l) of this rule, the clerk, or some other person as the court  
4 may direct, shall give the debtor, the trustee, all creditors and  
5 indenture trustees at least 20 days' notice by mail of:

6 \* \* \* \* \*

7 ~~(6) hearings on all applications for compensation or~~  
8 ~~reimbursement of expenses totaling in excess of \$500 a~~  
9 ~~hearing on any entity's request for compensation or~~  
10 ~~reimbursement of expenses if the request exceeds \$1,000;~~

11 \* \* \* \* \*

COMMITTEE NOTE

Paragraph(a)(6) is amended to increase the dollar amount from \$500 to \$1,000. The amount was last amended in 1987, when it was changed from \$100 to \$500. The amendment also clarifies that the notice is required only if a particular entity is requesting more than \$1,000 as compensation or reimbursement of expenses. If several professionals are requesting compensation or reimbursement, and

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only one hearing will be held on all applications, notice under paragraph (a)(6) is required only with respect to the entities that have requested more than \$1,000. If each applicant requests \$1,000 or less, notice under paragraph (a)(6) is not required even though the aggregate amount of all applications to be considered at the hearing is more than \$1,000.

If a particular entity had filed prior applications or had received compensation or reimbursement of expenses at an earlier time in the case, the amounts previously requested or awarded are not considered when determining whether the present application exceeds \$1,000 for the purpose of applying this rule.

##### Public Comment on Proposed Amendments to Rule 2002(a):

(1) Hon. Arthur J. Spector (on behalf of the four bankruptcy judges in the E.D. Mich.) supports the proposed amendments.

(2) Terence H. Dunn, Clerk (D. Ore.) supports the proposed amendments.

(3) Peter C. Fessenden, Esq. (Brunswick, Maine) suggests that the \$500 dollar amount be maintained. Also, "the rule should be amended to clarify that notice and opportunity for hearing on a fee application is required if the *aggregate total* fee application exceeds the threshold amount." Based on his experience as a chapter 13 trustee for over 18 years, even \$500 can be a significant burden on debtors. The bankruptcy judges in Maine take seriously their responsibility to review fee applications; "inefficiency and padding are ferreted out and disallowed. Raising the level of unscrutinized fees to \$1,000 may impose an unfair burden on those least able to afford it." Regardless of the dollar amount used, he comments that the existing and

proposed rules are ambiguous. Are notice and hearing escaped if the *particular request* is less than \$500/\$1,000, or if the *total aggregate fees to date* are less than that amount? Especially in chapter 13, counsel could “fly below radar” simply by spreading out fee requests to receive court approval without any meaningful review. Rule 2002(a)(6) should clarify that notice and opportunity for hearing are waived only if the application indicates that the total aggregate fees do not exceed the dollar limit in the rule.

GAP Report on Rule 2002(a). No changes since publication.

**Rule 4003. Exemptions**

\* \* \* \* \*

1  
2 (b) ~~OBJECTIONS~~ OBJECTING TO A CLAIM OF  
3 EXEMPTIONS. ~~The trustee or any creditor may file~~  
4 objections A party in interest may file an objection to the list  
5 of property claimed as exempt only within 30 days after ~~the~~  
6 ~~conclusion of the meeting of creditors held pursuant to Rule~~  
7 2003(a) under § 341(a) is concluded or within 30 days after  
8 ~~the filing of any amendment to the list or supplemental~~  
9 schedules is filed, whichever is later. ~~unless, within such~~  
10 ~~period, further time is granted by the court.~~ The court may, for

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11 cause, extend the time for filing objections if, before the time  
12 to object expires, a party in interest files a request for an  
13 extension. Copies of the objections shall be delivered or  
14 mailed to the trustee, and to the person filing the list, and the  
15 attorney for ~~such~~ that person.

16 \* \* \* \* \*

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request for an extension of time to file objections to the list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day period. The purpose of this amendment is to avoid the harshness of the present rule which has been construed to deprive a bankruptcy court of jurisdiction to grant a timely request for an extension if it has failed to rule on the request within the 30-day period. See In re Laurain, 113 F.3d 595 (6th Cir. 1997); Matter of Stoulig, 45 F.3d 957 (5th Cir. 1995); In re Brayshaw, 912 F.2d 1255 (10th Cir. 1990). The amendments clarify that the extension may be granted only for cause. The amendments also conform the rule to § 522(l) of the Code by recognizing that any party in interest may file an objection or request for an extension of time under this rule. Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 4003:

(1) Hon. Arthur J. Spector (on behalf of the four bankruptcy judges in the E.D. Mich.) supports the proposed amendments that will

obviate the possibility of harsh results such as those created in *In re Laurain*, 113 F.3d 595 (6th Cir. 1997).

(2) Hon. Leslie Tchaikovsky (on behalf of nine bankruptcy judges of N.D. Cal.) suggests that Rule 4003(b) be further revised to clarify that an objection to an exemption is governed by Rule 9014. Also, further amend the rule to provide that the time limit for objecting to exemptions does not apply to chapter 11 cases and, in such cases, to permit the court to set a deadline.

(3) Shirley C. Arcuri, Esq., on behalf of the Local Rules Advisory Committee (Bankr. M.D. Fla.), expressed support for the proposed amendments to Rule 4003(b) that will allow trustees additional time, if warranted, to file objections to claims of exemption. Trustees are sometimes forced to file objections even if they are unsure of the merits in order to meet the 30-day time limit. Some of these are subsequently withdrawn. The amendment will allow trustees more time to determine the merits of an objection before filing it.

(4) Martha L. Davis, General Counsel, Executive Office for United States Trustees, commented that the reference to an objection to claimed exemptions filed by the "trustee or a creditor" is incomplete. Section 552(l) refers to a "party." She suggests similar language in Rule 4003(b) because the United States trustee sometimes finds it necessary to object to a debtor's claim of exemptions, particularly in chapter 11.

(5) Judy B. Calton, Esq., on behalf of the Advisory Committee of the Bankruptcy Court for the Eastern District of Michigan, expressed support for the proposed amendments to Rule 4003(b), but is concerned that the inclusion of this provision might, by negative implication, be deemed to preclude the court from granting extensions of exclusivity or the time to assume or reject nonresidential leases if the statutory time period expires where a



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timely filed request for extension is pending. She suggests that similar provisions be placed in other rules with respect to such requests and/or the language permitting enlargement of time in Rule 9006(b) be strengthened.

(6) Peter C. Fessenden, Esq. (Brunswick, Maine) supports the proposed amendments.

GAP Report on Rule 4003(b). The words "trustee or creditor" were replaced by "party in interest" to conform to § 522(l) of the Bankruptcy Code which permits any party in interest to object to claimed exemptions. Style revisions also were made to the published draft.

**Rule 4004. Grant or Denial of Discharge**

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\* \* \* \* \*

2

(c) GRANT OF DISCHARGE.

3

(1) In a chapter 7 case, on expiration of the time fixed

4

for filing a complaint objecting to discharge and the time

5

fixed for filing a motion to dismiss the case pursuant to

6

under Rule 1017(e), the court shall forthwith grant the

7

discharge unless:

8

~~(a)~~(A) the debtor is not an individual,

9                    ~~(b)~~(B) a complaint objecting to the discharge has  
10                    been filed,

11                    ~~(c)~~(C) the debtor has filed a waiver under  
12                    § 727(a)(10),

13                    ~~(d)~~(D) a motion to dismiss the case under  
14                    pursuant to Rule 1017(e) is pending,

15                    ~~(e)~~(E) a motion to extend the time for filing a  
16                    complaint objecting to discharge is pending, or

17                    (F) a motion to extend the time for filing a motion  
18                    to dismiss the case under Rule 1017(e)(1) is pending.

19                    or

20                    ~~(f)~~(G) the debtor has not paid in full the filing fee  
21                    prescribed by 28 U.S.C. § 1930(a) and any other fee  
22                    prescribed by the Judicial Conference of the United  
23                    States under 28 U.S.C. § 1930(b) that is payable to the  
24                    clerk upon the commencement of a case under the  
25                    Code.

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\* \* \* \* \*

COMMITTEE NOTE

Subdivision (c) is amended so that a discharge will not be granted while a motion requesting an extension of time to file a motion to dismiss the case under § 707(b) is pending. Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 4004(c):

(1) Hon. Christopher M. Klein (E.D. Cal.) asks whether the court may extend the time *sua sponte*? Consider revising the rule to take into account undeserved discharges in cases that should be dismissed. There has been a problem when the debtor does not attend the meeting of creditors, which the trustee keeps continuing, and ultimately the case gets dismissed for failure to prosecute, but the discharge has been automatically entered under Rule 4004(c). Since section 349 does not provide that dismissal vacates the discharge, there is an opportunity for manipulation in which a debtor gets the benefit of a discharge without giving up nonexempt property to creditors.

(2) Peter C. Fessenden, Esq. (Brunswick, Maine) supports the proposed amendments.

GAP Report on Rule 4004(c). No changes since publication except for style revisions.

**Rule 5003. Records Kept By the Clerk**

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(E) REGISTER OF MAILING ADDRESSES OF FEDERAL AND STATE GOVERNMENTAL UNITS. The United States or the state or territory in which the court is located may file a statement designating its mailing address. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes these mailing addresses, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register

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18 annually, effective January 2 of each year. The mailing  
19 address in the register is conclusively presumed to be a proper  
20 address for the governmental unit, but the failure to use that  
21 mailing address does not invalidate any notice that is  
22 otherwise effective under applicable law.

23 (e) (f) OTHER BOOKS AND RECORDS OF THE  
24 CLERK. The clerk shall also keep ~~such~~ any other books and  
25 records ~~as may be~~ required by the Director of the  
26 Administrative Office of the United States Courts.

COMMITTEE NOTE

Subdivision (e) is added to provide a source where debtors, their attorneys, and other parties may go to determine whether the United States or the state or territory in which the court is located has filed a statement designating a mailing address for notice purposes. By using the address in the register — which must be available to the public — the sender is assured that the mailing address is proper. But the use of an address that differs from the address included in the register does not invalidate the notice if it is otherwise effective under applicable law.

The register may include a separate mailing address for each department, agency, or instrumentality of the United States or the state or territory. This rule does not require that addresses of

municipalities or other local governmental units be included in the register, but the clerk may include them.

Although it is important for the register to be kept current, debtors, their attorneys, and other parties should be able to rely on mailing addresses listed in the register without the need to continuously inquire as to new or amended addresses. Therefore, the clerk must update the register, but only once each year.

To avoid unnecessary cost and burden on the clerk and to keep the register a reasonable length, the clerk is not required to include more than one mailing address for a particular agency, department, or instrumentality of the United States or the state or territory. But if more than one address is included, the clerk is required to include information so that a person using the register could determine when each address should be used. In any event, the inclusion of more than one address for a particular department, agency, or instrumentality, does not impose on a person sending a notice the duty to send it to more than one address.

Public Comment on Proposed Amendments to Rule 5003:

(1) The bankruptcy judges and clerk of the District of South Carolina commented that the amendments will require significant administrative time and effort in the clerk's office for a product that is optional. It would be better to permit the court to solicit from all creditors, including credit card companies and governmental units, one address for noticing purposes.

(2) Terence H. Dunn, Clerk (D. Ore.) opposes this change, which would require extensive administrative effort in the clerk's office while stating that a failure to use the address in the register does not invalidate the notice. Expansion of the electronic noticing contract for

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bankruptcy courts will help eliminate the need for this proposal. The increasing number of pro se debtors will negate the effect of this rule since many are not sophisticated enough to check the register. If this rule is kept, the court should maintain these records only on its PACER system rather than wasting time and money printing paper copies and mailing.

(3) Arthur J. Fried, General Counsel, Social Security Administration, opposes the proposed amendments to this rule because they provide that a debtor's failure to comply will not affect the validity of the notice if the governmental unit has notice or actual knowledge in time to participate. While this may appear to protect the debtor, in practice it may result in adverse consequences, i.e., failure to give timely notice to the appropriate component of SSA may result in the continued collection of overpayments that normally would be suspended as a result of the automatic stay. Monthly Social Security benefits may be inadvertently withheld. Notice failures also will result in added time and expense to the courts because of contempt proceedings when the stay is violated due to poor notice of the case.

(4) Shirley C. Arcuri, Esq., Local Rules Advisory Committee (Bankr. M.D. Fla.) supports the amendments to this rule because they provide certainty as to where to send notices to governmental agencies.

(5) Hon. Christopher M. Klein (Bankr. E.D. Cal.) commented that the concept of a clearinghouse for addresses is appealing, but the details raise questions. Since updated only once each year, some addresses will be obsolete. The conclusive presumption of an obsolete address raises concerns especially in an era when the Postal Service seems to be getting less efficient at forwarding mail. If the address contains an error, is the conclusive presumption operative? The burdens on clerks may be greater than anticipated. Given the opportunity for misunderstanding when something does not happen when and as

anticipated, this proposal should not be adopted in its present form.

(6) The Executive Office for United States Attorneys commented that the register is a good idea, but multiple addresses for agencies are needed so that an agency can have different addresses for offices handling different types of loans. Suggests eliminating the information requirement enabling the user to determine which address is applicable. The failure to use the provided mailing address does not invalidate notice, so the purpose of this provision is unclear and its effectiveness is uncertain.

(7) Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group, wrote that this rule would require extensive administrative effort by clerks' offices without a clear purpose because failure to use the specified address would not invalidate an otherwise valid notice.

(8) Peter H. Arkison, Esq. (Bellingham, WA) suggested that the register should be expanded to include local governmental units such as cities and counties.

(9) Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Department of Justice, expressed concern about the limitation that the clerk is not obligated to list more than one address for an agency. The IRS might want to use more than one address in the future (depending on the type of proceeding) as a result of the pending reorganization of the IRS along functional lines. While most clerks will cooperate, the proposed rule would give clerks the right to deny such a request arbitrarily. Proposes language stating that "the clerk may include more than one mailing address. . ." (rather than "the clerk is not required to include more than one . . .").

(10) Karen Cordry, Esq., on behalf of Bankruptcy and Taxation



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Working Group, National Association of Attorneys General, suggests that action on this amendment be delayed until it is possible to assess the likelihood of new legislation, which may deal with these issues. The register is a useful concept, but the restrictions on it make it less helpful (even harmful). Opposes excluding other states and municipalities, and limiting it to one address for each agency. Updating only once each year is not sufficient (forwarding addresses are limited in time, certainly less than one year). Since the address is conclusively presumed to be the correct one, if an agency moves and notifies the debtor, the debtor may still send notices to the old address (i.e., room for abuse). It is important that it be accurate (updated) and mandatory (not optional), or it will be of little value. A properly constructed, updated, mandatory register that is on the Internet would be very useful.

(11) Peter C. Fessenden, Esq. (Brunswick, Maine) supports the proposed amendments.

GAP Report on Rule 5003. No changes since publication.

**PROPOSED RULE AMENDMENTS  
GENERATING SUBSTANTIAL CONTROVERSY**

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on certain controversial rule amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

**Federal Rules of Civil Procedure**

I. Rule 26(a)(1) (Mandatory Initial Disclosure)

A. Brief Description

The Judicial Conference instructed the rules committees to consider whether national uniformity should be adopted for initial disclosure. The proposed amendment eliminates the existing discretion to "opt-out" of the initial disclosure procedures by local rule. The initial disclosure obligation has been narrowed to require disclosure only of information that the disclosing party may use to support its claims or defenses. In addition, eight categories of cases and proceedings have been excluded from the requirements. The parties may agree to forgo disclosure, and any party may object to it thereby submitting the question whether to require disclosure to the judge.

B. Arguments in Favor

- The proposed amendment is consistent with current practice under which some form of initial disclosure is used by most courts for most cases; it eliminates opportunities for forum shopping and the present confusion caused by different procedures; and it supports the national policy of uniform procedure in federal courts.
- Studies suggest and surveys support the conclusion that initial disclosure procedures are an effective means of case management, compelling attorneys to deal with issues at an early stage of litigation and leading to quicker and less costly case dispositions.
- The amendment deletes the most controversial aspect of the initial disclosure provision, which required attorneys to disclose unfavorable information, and this change has received broad support in the organized bar.
- Disclosure geared to witnesses and documents a party may use to support its own positions is easily administered by the parties, avoiding the need to

guess at what information an adversary may deem relevant. Judicial enforcement, when needed, also will be easy and direct.

- The proposed amendment excludes eight types of low-discovery cases and proceedings in which disclosure is not appropriate (more than one-third of the average district court's docket), it allows the parties to abstain in individual cases by stipulation, and any party may, by objecting, obtain an order defining disclosure for a particular case.

C. Arguments in Opposition

- Courts should have the authority to fashion individualized procedures governing initial disclosure to meet local conditions by general local rules, not only case-specific orders.
- Mandatory disclosure is not appropriate in many cases.

D. Rules Committees Consideration

Most courts have adopted initial disclosure procedures and little satellite litigation has resulted from it. Disclosure is an important feature of the pretrial process, and it could affect a variety of other aspects of the pretrial development of a case. The rules committees determined that there is no valid reason for local variation by rule. Uniform procedures are consistent with the longstanding policy of the Judicial Conference. Judges retain the authority, however, to fashion different disclosure procedures in individual cases. The Advisory Committee voted unanimously to approve the amendment. The Standing Committee approved the amendment by a vote of 11 to 1.

II. Rule 26(b)(1) (Scope of Discovery)

A. Brief Description

Under the proposed amendments, the scope of attorney-managed discovery extends to all information that is relevant to claims and defenses in an action. But the court retains the authority to order discovery of information relevant to the "subject matter" involved in an action — the current scope of attorney-managed discovery — on a showing of good cause.

B. Arguments in Favor

- Studies, public comments, and testimony at hearings show that although discovery is working well in most cases, discovery is unnecessarily expensive and burdensome in a substantial and troubling number of cases

when it is actively used. The “subject matter” scope of present discovery encourages fishing expeditions by counsel and discourages some courts from enforcing reasonable limits. The proposed amendment establishes a more definite standard that limits attorney-managed discovery to the identified claims and defenses in the action.

- Expanded discovery remains available out to the limits of the litigation’s subject matter, as determined by the court in its discretion for good cause.
- By involving the judge in regulating the scope in cases with discovery problems, the amendment encourages effective judicial control at an appropriate time.

C. Arguments in Opposition

- There is little, if any, difference between information relevant to the “claims and defenses” and “subject matter.”
- The new standard will generate satellite litigation over its meaning.
- The new standard will encourage defendants to resist discovery requests, depriving plaintiffs of useful information.
- Plaintiffs will assert more claims and specify more facts in pleadings to expand potential discovery and will routinely request court orders expanding discovery.

D. Rules Committees Consideration

The rules committees were repeatedly told that the current rule does not adequately guide courts on the standards that limit overbroad discovery. The amendment is intended to signal that the court should usually limit discovery to the claims and defenses, but the court retains authority to order discovery appropriate to the case. The committees concluded that satellite litigation over the meaning of the new standard will not be great and will quickly dissipate once the bar becomes familiar with it. The new standard relies on terms customarily used by the bench and bar. It is more definite, and a party failing to respond adequately to a discovery request will be subject to existing sanctions.

The potential of parties pleading additional claims for which no basis exists will be restrained by the possibility of Rule 11 sanctions. A party’s failure to disclose information supporting the claims or defenses in accordance with Rule 26(a)(1), moreover, will quickly reveal possible Rule 11 violations. The Advisory

Committee rejected a motion to delete this proposed amendment by a vote of 9 to 4. The Standing Committee approved the amendment by a vote of 10 to 2.

### III. Rule 26(b)(2) (Cost-Bearing Provision)

#### A. Brief Description

The amendment makes explicit the power — now implicit in Rule 26(b)(2) and explicit in Rule 26(c) — to condition “disproportionate” discovery on payment of part or all of the resulting cost. A cross-reference is included in Rule 34 dealing with the production of documents, which is the source of many cost complaints.

#### B. Arguments in Favor

- The discretionary limitations in Rule 26(b)(2)(i), (ii), and (iii) seem to require that the court “limit” inappropriate discovery. Yet courts have found it useful at times to permit questionable discovery on condition that the requesting party bear part or all of the reasonable response costs. The amendment makes this useful management tool explicit, encouraging parties to focus on meaningful discovery and supporting courts that seek a reasonable accommodation of the possibility that seemingly inappropriate discovery might yield useful information.

#### C. Arguments in Opposition

- The amendment would engender differential treatment between the rich and poor.

#### D. Rules Committees Consideration

The rules committees were often told about excessive expenses due to discovery requests that had little promise of producing useful information. The committees carefully considered, but found unpersuasive, concerns that the proposal might lead to differential treatment for the rich and poor. The proposed amendment simply makes explicit the court’s implicit authority to condition discovery that exceeds the limitations of Rule 26(b)(2)(i), (ii), and (iii) on payment of reasonable costs of discovery. It allows a court to approve a discovery request that it would not otherwise approve, because the requested information is outside the limits of Rule 26(b)(2)(i), (ii), or (iii). The proposed amendment will protect a responding party against part or all of the burdens imposed by excessive, duplicative, or dilatory discovery, but — when invoked — enable an inquiring party to test its own faith that seemingly inappropriate discovery will yield useful information. In appropriate cases, moreover, the judge may consider the parties’ resources in making this determination. The Advisory Committee rejected a motion to delete this proposed amendment by a vote of 8 to 5. The Standing Committee approved the amendment by a vote of 11 to 1.

## **Federal Rules of Evidence**

### **I. Rule 103 (Rulings on Evidence)**

#### **A. Brief Description**

Under the proposed amendment to Rule 103(a), a party need not renew an objection or offer of proof at trial if the advance ruling on evidence by the judge is definitive; otherwise renewal is required. The advisory committee decided to eliminate the codification and extension of the Supreme Court's decision in *Luce vs. United States*, which had been contained in the proposal as published for comment. Under *Luce*, a criminal defendant must testify at trial to preserve the right to appeal an advance ruling admitting impeachment evidence.

#### **B. Arguments in Favor**

- The proposed amendment would address an ongoing conflict among the courts over whether it is necessary for a party to renew an objection or offer of proof at trial after the trial court has made an advance ruling on the admissibility of the proffered evidence.
- Whether *Luce* should be extended to civil cases is an issue hotly debated in the courts, and its resolution is better left to case-law development.

#### **C. Arguments in Opposition**

- Elimination of the *Luce* reference in the proposed amendment could create the unintended inference that the omission purports to overrule *Luce*.

#### **D. Rules Committees Consideration**

Public comment on the proposed amendment's resolution of the renewal issue was uniformly positive, but the extension of *Luce* was generally negative. The rules committees decided to delete the reference to *Luce*. The omission should not lead to a wrong inference because the proposed amendment concerns renewal of objections or offers of proof, while *Luce* concerns fulfillment of a condition precedent to the trial court's ruling. The Committee Note was revised, however, to indicate explicitly that the proposed amendment is not intended to affect the rule set forth in *Luce* or its progeny.

### **II. Rule 701 (Opinion Testimony by Lay Witnesses)**

#### **A. Brief Description**

Under the proposed amendment to Rule 701, a witness's testimony must be scrutinized under the Evidence Rules regulating expert opinion to the extent that

the witness is providing scientific, technical, or other specialized information within the scope of Rule 702.

B. Arguments in Favor

- The proposed amendment is intended to eliminate the risk that the reliability factors contained in Rule 702 will be evaded through the simple expedient of proffering an expert as an lay witness.
- By channeling testimony that is actually expert testimony to Rule 702, the amendment ensures that a party will not evade the expert witness disclosure requirements set forth in Civil Rule 26 and Criminal Rule 16.

C. Arguments in Opposition

- The testimony of lay witnesses sometimes includes expert opinion and drawing a distinction between expert and lay opinion can be very difficult in many cases.
- The identity of a lay witness whose testimony includes some expert opinion will subject that witness to the disclosure requirements.

D. Rules Committees Consideration

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. The rules committees decided that the need to ensure the reliability of this type of testimony and the need to further the policies of disclosure outweighed any possible disadvantages in disclosing a potential expert prior to trial. The amendment was clarified, however, to provide that only testimony based on scientific, technical, or other specialized knowledge "within the scope of Rule 702" would not qualify under Rule 701. The Committee Note also emphasizes that Rule 701 does not prohibit lay witness testimony on matters of common knowledge that traditionally have been the subject of lay opinion.

III. Rule 702 (Testimony by Experts)

A. Brief Description

The proposed amendment to Rule 702 provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony consistent with the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Co. v. Carmichael*.

B. Arguments in Favor

- The amendment is needed to address the conflicts among the courts in the application of the *Daubert* standards.
- The amendment is intended to foster greater uniformity in the approach taken by federal courts to *Daubert* issues.

C. Arguments in Opposition

- No need to codify principles governing expert witness testimony announced by Supreme Court in three cases (*Daubert*, *Joiner*, and *Kumho*).
- The fact-finding role of the jury will be undermined by the heightened role of the judge as the “gatekeeper.”
- The amendment will generate increased motion practice.

D. Rules Committees Consideration

The rules committees determined that the principles of *Daubert* should be contained in Rule 702 to ensure more uniform application among the courts. The committees also concluded that most of the concerns expressed about the proposed amendments were not directed at the proposal, but at the case law that the proposal codifies, most importantly *Daubert* and *Kumho*. But the Committee Note was revised to clarify that the amendments were not intended to usurp the role of the jury, nor to provide an excuse to challenge every expert, nor to prohibit experience-based testimony.

## **Federal Rules of Criminal Procedure**

I. Rule 32.2 (Forfeiture)

A. Brief Description

The proposed new Rule 32.2 (Forfeiture Procedures) establishes a comprehensive set of forfeiture procedures, consolidating several procedural rules (i.e., Rules 7, 31, 32, and 38) governing the forfeiture of assets in a criminal case. Under the proposed rule, the defendant’s interest in property is forfeited as part of sentencing. The defendant would retain the right to have the jury determine whether the requisite nexus was established between the property to be forfeited and the offense committed by the defendant, but the jury would not determine the precise extent of the defendant’s interest in the property. Procedures governing ancillary proceedings before a separate jury are prescribed to determine the claims of any third party asserting an interest in the property.



B. Arguments in Favor

- Uniform procedures governing forfeiture proceedings will eliminate the existing patchwork of practices and conflicting caselaw that have created confusion.
- The new rule applies *Libretti v. United States*, 116 S. Ct. 356 (1995), which found that criminal forfeiture is not an element of the offense but rather a part of sentencing. The Court's conclusion calls into question many aspects of the current forfeiture procedures and standards, which are premised on assumptions that *Libretti* no longer finds viable.
- The new rule accounts for legislation enacted in 1984 — years after the forfeiture rules were promulgated — that established a specific post-trial, ancillary proceeding to identify and determine third-party interests in forfeited property.
- The proposed rule makes forfeiture proceedings more efficient. It avoids the duplicative work and potential inconsistent rulings made by a subsequent jury, who determines the ownership of forfeitable property after the jury in the underlying criminal case had earlier determined the defendant's ownership in the same property.
- The new rule sets out a national, uniform procedure governing discovery in ancillary third-party forfeiture proceedings that adopts discovery and other procedures in the Federal Rules of Civil Procedure. This practice follows the prevailing case law and addresses some conflicting practices in the courts.

C. Arguments in Opposition

Only six comments were received, primarily supporting the new rule. The National Association of Criminal Defense Lawyers (NACDL) was the principal opponent of the new rule. They objected to the substance of the rule and questioned the committee's decision not to republish the proposal for additional comment. NACDL submitted separate objections (which varied in each submission) to the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure, and the Judicial Conference — each in turn considered and rejected NACDL's objections.

NACDL's substantive objections to the new rule include the following:

- It improperly deprives the defendant of a right to have the jury in the underlying trial determine the extent of the defendant's interest in the forfeitable property.

- It erroneously applies a preponderance of the evidence standard in a criminal forfeiture case.
- It authorizes a “personal money judgment” as a form of criminal forfeiture, which has no basis in the law.
- It fails to provide adequate notice to the defendant of the specific assets subject to forfeiture.
- It is substantive in nature and should not be promulgated through the Rules Enabling Act rulemaking process.

NACDL also raised concerns that changes to the proposal were made after initial publication without republication.

D. Rules Committees Consideration

Consistent with *Libretti*, the advisory committee concluded that the defendant has no right to a jury trial on forfeiture and did not extend the right to a defendant in the original proposal. But at the urging of the Standing Committee, the proposed new rule was amended to give both parties a right to demand a jury trial on the critical issue of nexus between the crime and the property. The new rule, however, will avoid the redundancy of having a jury determine the extent of the defendant’s interest in property vis a vis third parties in the criminal case, only to relitigate those same issues in a subsequent ancillary proceeding before another jury.

The new rule says nothing about, and makes no changes to, the burden of proof. The Committee Note merely refers to *Libretti*’s conclusion that forfeiture is part of the defendant’s sentence. Moreover, the notice provisions simply adopt the widely-accepted view that existing Rule 7(c)(2) is a notice provision that requires the government only to give notice to the defendant that it will be seeking the forfeiture of the defendant’s property in a criminal case. Once notified, a defendant can seek an itemization of the specific property by filing a motion for a bill of particulars.

Personal money judgments have routinely been included in criminal forfeiture judgments for more than a decade. The current practice has been considered by several courts of appeals, all of whom have endorsed or acquiesced in such a practice. The new rule takes no position on the merits of the practice, but does provide needed guidance to courts who wish to issue such orders.

The criminal forfeiture rules have been traditionally recognized as procedural and have been governed by the Federal Rules of Criminal Procedure since 1972. They need to be updated to reflect subsequent legislation and *Libretti*

and to account for conflicting lower court interpretations of the existing patchwork of rules.

Both the Advisory and Standing Committees concluded that republication of the proposed new rule was unnecessary. The Advisory and Standing Committees heard from NACDL in writing on three occasions and once at a lengthy hearing. NACDL's concerns were carefully considered and their major objection regarding recourse to a jury trial was partially accepted in the amended rule. Few other comments were submitted during the initial six-month public comment period. Republication would serve no useful purpose.