

**MINUTES**  
**CIVIL RULES ADVISORY COMMITTEE**  
**MAY 22-23, 2006**

1           The Civil Rules Advisory Committee met on May 22 and 23, 2006, at the Administrative  
2 Office of the United States Courts in Washington, D.C.. The meeting was attended by Judge Lee  
3 H. Rosenthal, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Frank Cicero, Jr., Esq.;  
4 Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L.  
5 Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B.  
6 Russell; and Chilton Davis Varner, Esq., who attended by telephone. Professor Edward H. Cooper  
7 was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter.  
8 Professors Thomas D. Rowe, Jr., and R. Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., attended  
9 as consultants. Judge Sidney A. Fitzwater, Judge Thomas W. Thrash, Jr., and Professor Daniel R.  
10 Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended  
11 as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida,  
12 and Jeffrey Barr represented the Administrative Office; Robert Deyling also attended, as did Kate  
13 Simon who staffs the Committee on Court Administration and Case Management. Thomas  
14 Willging, Emery G. Lee, and Rebecca Norwick represented the Federal Judicial Center. Ted Hirt,  
15 Esq., Department of Justice, was present. Alfred W. Cortese, Jr., Esq., and Jeffrey Greenbaum  
16 (ABA Litigation Section liaison) attended as observers. Professor Daniel J. Capra attended by  
17 telephone for the discussion of Civil Rule 5.2 and a report on proposed Evidence Rule 502.

18           Judge Rosenthal opened the meeting by noting the expectation that the Committee's work  
19 on the Style Project will be brought to a conclusion. That result will bring enormous satisfaction.  
20 She also noted that the September meeting will be the final meeting for members Judge Russell,  
21 Justice Hecht, and Frank Cicero, and anticipated the expressions of gratitude that will be offered in  
22 September for their constant engagement in all aspects of the Committee's work during their years  
23 as members.

24           Judge Rosenthal also noted that after the Judicial Conference approved a package including  
25 the e-discovery amendments, Supplemental Rule G on civil forfeiture, new Rule 5.1., and  
26 amendments of Rule 50(b), the Supreme Court transmitted them to Congress. That package standing  
27 alone represents a remarkable feat of productivity.

28           Turning to a sad note, Judge Rosenthal observed that the passing of Judge Edward Becker  
29 had lost the Committee a true friend of the rules process. Judge Becker was known to all of us. He  
30 regarded himself as a "Philadelphia Lawyer." Two Philadelphia lawyers on the Committee, Judge  
31 Baylson and Robert Heim, offered their own tributes. Judge Baylson recounted meeting with Judge  
32 Becker not long before his death. They discussed the Committee's consideration of Rule 15, a  
33 subject long pursued by Judge Becker. Judge Becker remained actively engaged with the topic and  
34 was pleased that the Committee had appointed a subcommittee and would be taking up its  
35 recommendations this spring. Robert Heim noted that the Philadelphia news stories had described  
36 Judge Becker as one of the most influential appellate judges, known both for his learning and his  
37 modesty. Those words captured him well. He was a prodigious intellect. He would put questions  
38 at oral argument that the best lawyers had not anticipated — but would help the lawyer work toward  
39 an answer. He also had a great sense of humor — not only did he write a district-court opinion in  
40 verse, but it was good verse! He was a good, kind, man. We will be less without him.

41           John Rabiej reported that the agenda for the Judicial Conference meeting in March was  
42 relatively light. Judge Rosenthal added that Chief Justice Roberts presided to admirable effect.

*October 2005 Minutes*

44           The minutes of the October 2005 meeting were approved, subject to correction of technical  
45 errors identified by the Reporter.

46

*Rule 5.2*

47 Judge Rosenthal introduced discussion of Rule 5.2, the Civil Rules version of the “E-  
48 Government Act” rule. She noted that it is important that the Bankruptcy, Civil, and Criminal Rules  
49 be identical as far as possible. That means that no one Advisory Committee is as free as it might  
50 wish to shape its rule entirely to its own liking. Rule 5.2(c), however, is unique to the Civil Rules  
51 and can be developed outside this constraint. Apart from Rule 5.2(c), coordination must be  
52 accomplished through the Standing Committee subcommittee constituted for this purpose, as  
53 assisted by Professor Capra. The Reporters for the several Advisory Committees have exchanged  
54 a flurry of e-mail messages; changes have been recommended even since the version of Rule 5.2 that  
55 appears in the agenda book.

56 Judge Fitzwater, Chair of the Standing Committee E-Government Act Subcommittee, began  
57 discussion by noting that the Subcommittee developed a template rule drafted by Professor Capra.  
58 The Bankruptcy and Criminal Rules Committees have adopted revisions at their spring meetings.  
59 The Civil Rules Committee now has its turn. The Reporters have worked hard to achieve  
60 uniformity.

61 Professor Capra noted that achieving uniformity is a nettlesome task, but it is one required  
62 by the E-Government Act as well as the ambition to avoid discrepancies between different sets of  
63 Enabling Act rules that address the same subject. A lot of time has been devoted to discussing  
64 choices between “the” or “a,” between “and” or “or,” and so on.

65 Looking to Civil Rule 5.2, Professor Capra noted that subdivisions (a) and (b) are common  
66 among Bankruptcy, Civil, and Criminal Rules. Rule 5.2(c) is unique to the Civil Rules. It began  
67 with the Committee on Court Administration and Case Management, which was persuaded that the  
68 burden of redacting files in Social Security cases justified a different approach. The Department of  
69 Justice has made the case that immigration cases deserve similar treatment for similar reasons.  
70 Subdivision (d) is required by the E-Government Act. Subdivision (e) reflects the value of  
71 protective orders. Subdivision (f) ties to an amendment of the E-Government Act adopted by  
72 Congress on advice of the Department of Justice. Subdivision (g) also is drawn from the E-  
73 Government Act. Subdivision (h), finally, is a provision on waiver adopted uniformly across the  
74 rules sets.

75 A list of changes from the agenda book version of Rule 5.2 recommended by the Reporters’  
76 group were described. The Reporters agreed that each set of rules should adhere to its own internal  
77 style conventions. The internal cross-reference in Rule 5.2(h), for example, will be to “Rule 5.2(a),”  
78 not to “(a),” nor to “subdivision (a).”

79 A change in subdivision (b)(4) temporarily adopted in other rules but not shown in the  
80 agenda book was abandoned by all, leaving the agenda book version current again: “the record of  
81 a court or tribunal ~~whose decision becomes part of the record \* \* \*~~ is exempt from redaction. All  
82 Reporters came to agree that the exemption should extend to any record filed in the present  
83 proceeding without regard to whether the other court’s “decision” in some sense “becomes part of  
84 the record.”

85 A style change in Rule 5.2(e)(2) described a court order limiting or prohibiting “a nonparty’s  
86 remote electronic access ~~by a nonparty~~ to a document filed with the court.” This change conforms  
87 to the style convention favoring use of the possessive whenever possible. Together with the  
88 convention favoring drafting in the singular, the effect remains the same. The order can apply to all  
89 nonparties. This revision is a good illustration of the need to accept uniformity among the rules, and  
90 to defer to the Style Subcommittee.

91 The Committee Note observes that a party who has waived redaction by filing its own  
92 information without redaction can seek relief from the waiver. The question whether the opportunity  
93 for relief should be reflected in rule text was answered by noting that the rule is designed to support  
94 a deliberate choice to avoid the cost of redaction, and to make clear that one party's waiver does not  
95 defeat the right of others to insist on redaction.

96 Several public comments addressed subdivision (c), which allows a nonparty full electronic  
97 access to social-security and immigration files at the courthouse, but severely limits remote  
98 electronic access by a nonparty. The comments suggested diverging concerns. One concern was  
99 that it is important to allow convenient and full electronic access by public media and scholarly  
100 researchers, particularly to court files bearing on the troubled practices in immigration matters. But  
101 an opposing concern was that "data miners" will take advantage of electronic access at the  
102 courthouse to gather vast amounts of personal information including identifiers, financial  
103 information, and health information. Because subdivision (c) is unique to Civil Rule 5.2, it can be  
104 revised without need for coordination with the other Advisory Committees. It would be possible  
105 to meet these comments by revising the provisions for social-security and immigration cases.  
106 Nonparties could be barred from electronic access to the administrative record, whether remotely  
107 or at the courthouse. That would make it possible to avoid the great burden of redacting the  
108 administrative record. At the same time, the legitimate needs of public media and academic  
109 researchers could be satisfied by a court order permitting access.

110 The Department of Justice initially requested that immigration cases be added to subdivision  
111 (c) because of the great burden of redacting the administrative file and because of the risk that  
112 mistakes still would be made. The burden of redacting papers prepared for purposes of court review  
113 would not be as great. On the other hand, it is late in the day to consider revisions. As to social-  
114 security cases, the published proposal reflected recommendations of the Committee on Court  
115 Administration and Case Management that have been adopted as Judicial Conference policy. Some  
116 knowledgeable comments suggest that the risk presented by "data miners" is real, but clear  
117 information is hard to come by. On the other hand, the bankruptcy courts have had experience with  
118 data miners for many years. Traditionally mining has been accomplished by sending people to the  
119 courthouse to physically comb through records. But surely it will become a matter of electronic  
120 searching as courts complete the transition to electronic filing. For the moment the cost of access  
121 is ten cents a page, a formidable barrier. But that may change. Just what the consequences will be,  
122 however, is not so clear. And it is important to remember the fundamental starting point established  
123 by Judicial Conference policy: absent good reason, public access to electronic court records should  
124 be as complete as access to paper court records. This is the "practical obscurity" issue — so long  
125 as access required physical presence at the courthouse and individual reading of paper files, most  
126 sensitive information was protected by the barriers to access. "Only the most determined or the most  
127 academic" will undertake the effort. Electronic access may change the balance, but it is difficult to  
128 predict when or how.

129 It was observed that the case-management software now being adopted will enable court  
130 clerks to manage the three levels of access provided by Rule 5.2 — full remote electronic access by  
131 a party or a party's attorney; full electronic access for anyone at the courthouse; and limited remote  
132 electronic access by nonparties.

133 And it was agreed that the limits on remote electronic access by a nonparty will not limit a  
134 judge's authority to use electronic court files from home or an office away from the courthouse  
135 housing the relevant computer file.

136 The Committee approved a motion to recommend adoption of Rule 5.2 to the Standing  
137 Committee, noting again the remarkable level of work required to achieve consistency across the  
138 sets of rules.

139 *Evidence Rule 502*

140 Judge Rosenthal noted that several Advisory Committee members attended the Evidence  
141 Rules Committee's conference and meeting to consider proposed Evidence Rule 502 and expressed  
142 appreciation to Judge Smith and Professor Capra, Chair and Reporter of the Evidence Rules  
143 Committee, for the opportunity. This Committee has been frustrated in its attempts to deal with  
144 waiver of attorney-client privilege and work-product protection by inadvertent production in  
145 discovery. The perils of inadvertent production have increased with the rapid growth of discovering  
146 electronically stored information. Efforts to avoid inadvertent production — and to avoid the risk  
147 of waiving privilege as to all communications touching the subject-matter of an inadvertently  
148 produced communication — add to cost and delay in discovery. The discovery problems, however,  
149 intersect with larger problems that lie in the Evidence Rules Committee's province. A rule that  
150 modifies an evidentiary privilege, moreover, can take effect only if approved by an Act of Congress.  
151 The Evidence Committee's work is welcome, and the invitation to participate in its work is also  
152 welcome.

153 Judge Baylson observed that the current draft Rule 502 reflects substantial revisions from  
154 the draft that initiated the Evidence Rules Committee's work. It addresses topics beyond the  
155 discovery problems, including adoption of a "selective waiver" approach to disclosure to  
156 government agencies while cooperating in an investigation.

157 Professor Capra began his description of Rule 502 by observing that it does not establish  
158 rules on waiver. Instead, it addresses a few acts that do not waive attorney-client privilege or work-  
159 product protection. Although the goal is to perfect a draft that can be submitted to Congress for  
160 enactment by Act of Congress, the present proposal is to recommend publication of the rule for  
161 public comment in the regular Enabling Act process. The rule is in "a very initial stage."

162 Subdivision (a) addresses the scope of a waiver by limiting "subject-matter" waiver to  
163 communications or information that "ought in fairness to be considered with the disclosed  
164 communication or information." This "fairness" test is adapted from Evidence Rule 106.

165 Subdivision (b) is the central provision governing inadvertent disclosure in federal litigation  
166 or federal administrative proceedings. It provides that the disclosure does not effect a waiver if the  
167 holder of the privilege or work product took reasonable precautions to prevent disclosure and took  
168 reasonably prompt measures to rectify the error after the holder knew or should have known of the  
169 disclosure. The procedures of proposed Civil Rule 26(b)(5)(B) are incorporated.

170 Subdivisions (d) and (e) expand the provisions for discovery. Subdivision (e) recognizes the  
171 binding effect of an agreement on the effect of disclosure, but limits the effect to the parties to the  
172 agreement. Subdivision (d) makes an agreement binding on all persons or entities if it is  
173 incorporated in a federal court order governing disclosure in connection with litigation pending  
174 before the court.

175 Subdivision (c) governs selective waiver, permitting disclosure to a federal agency exercising  
176 regulatory, investigative, or enforcement authority without waiving privilege or work-product  
177 protection. This provision will be controversial. The proposal is to publish it in brackets to indicate  
178 recognition of its controversial character.

179 Judge Rosenthal noted that an American Bar Association task force has considered earlier  
180 drafts. Individual members of the task force have raised the question whether the selective waiver  
181 provisions will prove counterproductive. Their concern is that government agencies have become  
182 too insistent on extracting waivers as a condition of favorable treatment for cooperating in an  
183 investigation. Adopting selective waiver might increase the frequency of waiver demands and  
184 increase the pressure to succumb.

185 Judge Rosenthal noted another interaction with the pending e-discovery amendments. There  
186 was concern that the provisions addressing privileged and work-product material might be read to  
187 promise greater protection than in fact can be delivered through the Civil Rules. Evidence Rule 502  
188 would bolster the protection.

189 It was noted that Gregory Joseph continues to press the question whether a single waiver rule  
190 should differentiate between waiver of work-product and waiver of privilege.

191 Finally, it was observed that there is a relation between this topic and Rule 26(a)(2)(B). The  
192 American Bar Association Litigation Section is considering the questions that arise from sharing  
193 privileged and work-product materials with expert trial witnesses. Disclosure and discovery rules  
194 can be adapted to answer this question in part, although the waiver question will arise at trial as well.

195 *Style Project*

196 Judge Rosenthal introduced the Style Project materials by noting the amount of work that  
197 has been done. Something like 750 documents have been generated. Many of them are long. The  
198 work has been done so well that in five years no one will remember that there was a Style Project  
199 — the restyled rules will come to seem original and inevitable. But some work remains to be done  
200 at this meeting. Many of the footnotes in the agenda draft identify choices that probably do not need  
201 further discussion. But all of the footnotes, and indeed all of the Style Rules, remain open for  
202 discussion. Any issues that require further drafting that cannot be accomplished “on the floor” will  
203 be resolved by circulating final texts for approval after the meeting.

204 Rule 1: Present Rule 1 says that these rules govern “all suits of a civil nature.” Style Rule 1 changed  
205 this to “all civil actions and proceedings.” Comments expressed concern that “and proceedings”  
206 may expand the domain governed by the rules, a substantive change. The Standing Committee Style  
207 Subcommittee [SCSSC] recommended deletion of “and proceedings,” and Subcommittee A agreed.  
208 But further consideration suggests that “and proceedings” should be retained. Rule 3 says that a  
209 “civil action” is commenced by filing a complaint. There is a risk that Rule 3 might be read as a  
210 definition, foreclosing application of the rules to events that are not initiated by filing a complaint.  
211 One illustration is a Rule 27 petition to perpetuate testimony — it is clear that the Civil Rules must  
212 govern this proceeding, but the problem also is clear. The Second Circuit has ruled that  
213 confirmation of an arbitration award under legislation implementing the New York Convention need  
214 not be by formal complaint, even though Rule 81(a)(6) provides that the rules govern “proceedings  
215 under” 9 U.S.C. Apart from that, “proceedings” is a word used both in the Civil Rules and in other  
216 sets of rules. Civil Rule 26(a)(1)(E) refers to some of the things excluded from initial disclosure  
217 obligations as “proceedings.” Rule 60(b) refers to a motion to relief from a “proceeding.” Evidence  
218 Rule 1101(b) applies the Evidence Rules to “civil actions and proceedings.”

219 Discussion began by noting that this is a question of substance, not mere style. Some support  
220 was expressed for returning to the present rule’s “suits of a civil nature” as the only way to avoid  
221 unintended changes. One member who did not like “suits of a civil nature” suggested that the rule  
222 might be limited to “civil actions,” leaving the complications to be addressed in the Committee Note.  
223 That suggestion was met by renewal of the observation that Committee Note statements must be

224 supported by rule text. Further discussion expressed uncertainty whether any example could be  
225 found of circumstances in which “proceedings” would bring into the Civil Rules something they do  
226 not govern now.

227 The conclusion was that Rule 1 should go forward as published, retaining “and proceedings”  
228 and “and proceeding.” The paragraph of the Committee Note referring to summary statutory  
229 proceedings was revised by expanding it to say: “This change does not affect ~~the~~ such questions as  
230 whether the Civil Rules apply to summary proceedings created by statute. \* \* \*”

231 Rule 4: Two changes were made in Rule 4(d)(1)(D): “using text prescribed in ~~Official Form 5~~ ~~1A~~  
232 \* \* \*.” Former Form 1A is restyled as Form 5. The forms are not described as “official” in Rule  
233 84. Although Rule 4(d) directs that Form 5 be used to inform the defendant of the consequences of  
234 waiving and not waiving service, there is no need to describe it as “official” for this purpose.

235 Rule 5.1(a)(1)(A): Rule 5.1, which is before Congress on track to take effect on December 1, 2006,  
236 was not published in the Style Rules package. In the course of revising it to conform to style  
237 conventions, a word was inadvertently intruded. The Committee agreed that it must be deleted: “the  
238 parties do not include the United States, one of its agencies, or one of its officers or employees ~~sued~~  
239 in an official capacity.” During the development of Rule 5.1 it was early recognized that there is  
240 no reason to require notice to the United States when the United States or one of its agents is a  
241 plaintiff.

242 Styling Rule 5.1 changed references to certification of “a constitutional challenge” to  
243 certification that a statute “has been questioned.” This change was approved. It draws from the  
244 language of 28 U.S.C. § 2403 and reflects the use of “question” elsewhere in Rule 5.1.

245 Rule 9(a)(2): Present Rule 9(a) directs that a party who raises an issue about another party’s capacity  
246 or authority to sue or legal existence “do so by specific negative averment.” The Style Rule says  
247 “do so by specific denial.” “Specific denial” was approved. It may seem awkward since Rule  
248 9(a)(1) carries forward the rule that a party need not allege its capacity, authority, or legal existence  
249 — there is no allegation to deny. But the Style Rule continues to provide that the denial must state  
250 any supporting facts peculiarly within the pleader’s knowledge. If the pleader knows none, it cannot  
251 plead with any greater “particularity” than a denial (which may rest on a lack of information or  
252 belief).

253 Rule 10: Two changes were made in the caption of Rule 10(c): “Adoption by Reference; ~~Attached~~  
254 Exhibits.”

255 Rule 12: The Bankruptcy Rules Committee suggested that the Committee Note should be expanded  
256 to describe the rearrangement of material among the subdivisions: “Some subdivisions have been  
257 redesignated. Former subdivision 12(c) has been divided into new 12(c) and (d), while former  
258 subdivision (d) has become new 12(i).” The purpose is to assist future researchers, particularly  
259 those who rely on electronic searches. An electronic search for cases discussing Rule 12(i), for  
260 example, would stop short at December 1, 2007. To be sure, the chart of changes published as  
261 Appendix B to the Style Rules, pages 220-221 of the publication book, will be carried forward with  
262 the Style Rules, but researchers may not routinely consult that chart, particularly after the Style  
263 Rules have been in effect for a time.

264 This suggestion was framed as a general issue, to be implemented by adding each item in the  
265 Appendix B chart to the relevant Committee Note. Judge Thrash stated that the SCSSC would rather  
266 not add to the length of the Committee Notes in this way. Further discussion agreed that expanded  
267 Committee Notes might be useful during the period of transition to the Style Rules, but expressed

268 hope that all of the major rules publications would include the Appendix B chart as a research aid.  
269 Some publications likely will also provide this information in annotations to each specific rule. The  
270 Committee agreed that Committee Note language should not be added.

271 Rule 16: Rule 16(c)(1) carries forward a phrase from the present rule: “*If appropriate*, the court may  
272 require that a party or its representative be present or reasonably available by telephone to consider  
273 possible settlement.” (Style-Substance Rule 16(c) changes this to being reasonably available by  
274 “other means.”) “If appropriate” is an “intensifier.” Retaining it violates the drafting guidelines —  
275 a court should not be admonished to avoid doing something inappropriate. The phrase was carried  
276 forward because of the sensitivities that attend court directions to discuss settlement — a party may  
277 legitimately take the position that it will not settle on terms that compromise its position in any way.  
278 It also reflects a pragmatic concern. The Department of Justice, for example, has clear rules on who  
279 has authority to settle; large settlements require approval by a person in a high position facing many  
280 competing demands. “If appropriate” has been useful in persuading reluctant judges that it is not  
281 appropriate to require that a high official be committed to immediate availability, and that it suffices  
282 to have participation by a person who can contribute usefully to the discussion. The Committee  
283 agreed that it would not be desirable to remove the words from the rule text only to restore them by  
284 an admonition in the Committee Note. Concern was expressed that if the words actually do have  
285 an effect, deletion would change meaning. But it was noted that “if appropriate” does not directly  
286 provide much restraint, and that these words are relatively new in the rule. A motion to delete the  
287 words failed, 3 yes and 6 no.

288 Rule 16(e) as published read: “The court may modify an order *issued after a final pretrial*  
289 *conference* only to prevent manifest injustice.” Comments observed that this formula seems to apply  
290 to any order issued after that time. One example would be a Rule 51 order to submit proposed jury  
291 instructions ten days before trial. A revision was suggested: “an order reciting the action taken at  
292 the conference \* \* \*.” But Subcommittee A concluded that this revision is vulnerable to the risk that  
293 actions may be taken at a final pretrial conference that are not expressly recited in the order. One  
294 illustration of particular concern has been approval of a Rule 36 admission — the “manifest  
295 injustice” standard should apply to later withdrawal or amendment if the admission was adopted at  
296 the final pretrial conference, but the order might not recite this action. The Committee approved this  
297 final revision: “The court may modify ~~an~~ the order issued after a final pretrial conference only to  
298 prevent manifest injustice.”

299 Rule 23: Professor Kimble proposed a revision of Rule 23(e) to avoid repeated references to  
300 “settlement, voluntary dismissal, or compromise.” As compared to other parts of Rule 23, the  
301 language of this subdivision is new and has not acquired a large body of interpretive decisions. The  
302 revision clearly says the same things in fewer words. The Committee approved a revised Rule 23(e):

303 **(e) Settlement, Voluntary Dismissal, or compromise.** \* \* \* The following procedures apply to a  
304 proposed settlement, voluntary dismissal, or compromise:

305 (1) The court must direct notice in a reasonable manner to all class members who  
306 would be bound by the proposed settlement, voluntary dismissal, or  
307 compromise.

308 (2) If the proposal would bind class members, ~~the~~ court may approve it a  
309 settlement, voluntary dismissal, or compromise that would bind class  
310 members only after a hearing and on finding that it is fair, reasonable, and  
311 adequate.

312 (3) The parties seeking approval must file a statement identifying any agreement  
313 made in connection with the proposed settlement, ~~voluntary dismissal, or~~  
314 ~~compromise.~~

315 (4) [unchanged]

316 (5) Any class member may object to the proposal if it ~~a proposed settlement,~~  
317 ~~voluntary dismissal, or compromise~~ that requires court approval under this  
318 subdivision (e) \* \* \*.”

319 It was noted that although paragraph (4) refers only to refusal to approve a settlement, this  
320 provision for a second opt-out opportunity stands within itself and need not be revised to reflect  
321 editing of “voluntary dismissal or compromise.”

322 Rule 25: Present Rule 25(a)(1) says that unless a motion to substitute is made within 90 days after  
323 death is suggested on the record, “the action *shall* be dismissed as to the deceased party.” The  
324 published Style Rule — shaped after lengthy discussion — said the action “may” be dismissed.”  
325 This decision drew from the provisions of Rule 6(b), which allow the court to extend the time to  
326 move for substitution even after the 90-day period has expired. To say that the court “must” dismiss  
327 obscures the alternative power to allow substitution and refuse to dismiss. Rule 6(b), on the other  
328 hand, remains. It clearly qualifies “must,” so long as anyone thinks to read it. And there are  
329 situations in which the court must dismiss — there is no one carrying on the litigation with respect  
330 to the dead party, and no one seeking an extension of time to substitute a successor or representative.  
331 Some Committee members suggested that in any event, “shall” in the present rule means “must.”  
332 Of course there are situations in which the court should not dismiss — one would involve a contest  
333 for appointment as representative that cannot be resolved within 90 days after service of the  
334 statement noting death. At a minimum, the final sentence in the proposed Committee Note  
335 explaining the change to “may” should be deleted — in such a situation there is no negligence, not  
336 excusable negligence.

337 Turning to the Committee Note, it was agreed that there is no need for Committee Note  
338 explanation when a Style Rule substitutes “must” for “shall” in a present rule. That is the routine  
339 act. Explanation may be appropriate when “shall” is changed to “may” or “should.”

340 A motion to substitute “must” for “may,” and to delete the proposed Committee Note  
341 paragraph that would explain the use of “may,” was approved over two dissents.

342 Rule 26: Rule 26(a)(1)(C) presented the occasion to discuss a global issue. “Agree,” “consent,” and  
343 “stipulate” appear throughout the rules. They may be characterized as “written” or “in writing,” or  
344 they may be used without a reference to writing. The global resolution has been to prefer “stipulate”  
345 and “stipulation” as a general matter, but to use other words if the context makes that appropriate.  
346 “Agreement” is used, for example, in Rule 23(e)(3) to refer to the side agreements that at times may  
347 accompany a class-action settlement; Rule 35(b)(6) refers to an agreement for a physical or mental  
348 examination without court order. In these places “stipulate” would not be appropriate. The  
349 Committee agreed that there is no need to reconsider the many places in which references to writing  
350 have been omitted. Almost all agreements are reduced to writing, at least in electronic form.  
351 Careful practitioners invariably dispatch a confirming memorandum.

352 Rule 26(e) was discussed extensively in drafting the Style version. The present rule creates  
353 a duty to supplement or correct a disclosure or discovery response “to include information thereafter  
354 acquired” if a party “learns” that the disclosure or response is incomplete or incorrect. All reference  
355 to “thereafter acquired” was deleted from the Style Rule because this limit was thought to have



356 disappeared from actual practice. All lawyers understand that there is an obligation to supplement  
357 or correct a disclosure or response no matter whether the omitted information was known at the time  
358 of the initial disclosure or response or whether in some sense the party “learned” of information  
359 “later acquired.” Subcommittee B recommended that this issue be considered further, noting that  
360 the Rule could read: “must supplement or correct its disclosure or response to include later-acquired  
361 information. The party must do so: \* \* \*” The first question was whether the reference to later-  
362 acquired information is needed to avoid an implication that it is proper to dole out disclosures and  
363 discovery responses in bits and pieces — a party can argue that it has not violated Rule 26(g) by  
364 deliberately revealing its information later rather than in timely fashion. The history of Rule 26(e)  
365 was explored. The 1970 version presented many puzzles. For example, it contemplated that a  
366 response could be both complete and incorrect when made. If a response was both complete and  
367 correct when made, on the other hand, supplementation was required only if failure to supplement  
368 amounted to knowing concealment. Later amendments were designed to clarify and strengthen the  
369 duty to supplement. Throughout the period from the inception of Rule 26(e) in 1970, however, it  
370 has been understood that it does not justify a deliberate tactic of making and later supplementing  
371 incomplete responses. On the other hand, it was noted that there is confusion in practice. Lawyers  
372 expect that adversary counsel will respond forthrightly with the information available at the time of  
373 responding. But there is uncertainty as to what will happen with information later acquired. It is  
374 standard practice to serve a request to supplement. That practice is likely to continue, although  
375 perhaps somewhat limited by the Rule 33 limit on the number of interrogatories, no matter what  
376 Rule 26(e) says. A motion to add the “later-acquired information” language failed for want of a  
377 second. Because this issue is explicitly discussed in the Committee Note, and because the  
378 Committee’s decision is so clear, the matter may be allowed to rest as it is.

379 Rule 34: Professor Kimble suggested that the drafting of later rules could be improved by adopting  
380 a definition of “inspection” in Rule 34(a): “In these Rules, an inspection of documents, tangible  
381 things, or land includes the right to copy, test, sample, measure, survey, or photograph.” This  
382 definition could be incorporated in other rules — particularly Rule 45 — to reduce the ambiguities  
383 that arise from the various ways in which “inspect” and “produce” are (or are not) amplified. Rule  
384 26(a)(1)(A)(iii), for example, refers to “inspection and copying as under Rule 34.” Although the  
385 rules do not have a general definitions rule, definitions are scattered throughout. Rule 54(a), for  
386 example, defines “judgment.” Rule 81(d)(1) and (2) define “state law” and “state.” It might be  
387 possible as an alternative to define “inspect” in Rule 45 alone, but that might create some implied  
388 confusion in Rule 34. One reason for considering the question now is that “test and sample” were  
389 added for documents only as part of the e-discovery amendments process. But the new emphasis  
390 might be obscured if it were rolled back into a single common definition only one year after it takes  
391 effect. The SCSSC thought it too late to adopt a definition without adequate time to ensure against  
392 unintended consequences. And Subcommittee A worried about the possible consequences in  
393 discovery of electronically stored information. The definition was put aside.

394 Rule 37: Style Rule 37(c)(1) carried forward a confusion in the present rule. “Disclose” is used  
395 initially in the technical sense of Rule 26(a) disclosure, while it is used later in a more general sense  
396 to refer to revealing information through disclosure or discovery. An interim proposal was to write  
397 the rule to forbid use of “unrevealed information.” Subcommittee A recommended a further  
398 revision. Discussion led to these changes:

399 **(c) Failure to Disclose, to Amend Supplement an Earlier Response, or to Admit.**

400 **(1) Failure to Disclose or Amend Supplement.** If a party fails to disclose ~~the provide~~  
401 information or identify a witness as required by Rule 26(a) or (e). ~~— or to provide~~

402 ~~the additional or corrective information required by Rule 26(e) —~~ the party is not  
403 ~~allowed to use as that information or witness to supply evidence on a motion, at a~~  
404 ~~hearing, or at a trial any witness or information not so disclosed,~~ unless the failure  
405 was substantially justified or is harmless. \* \* \*

406 Rule 39: Present Rule 39(a) provides that after a demand for jury trial the parties can consent to  
407 nonjury trial by filing a written stipulation “or by an oral stipulation made *in open court* and entered  
408 in the record.” Style Rule 39(a) omits the reference to “in open court.” The SCSSC prefers the Rule  
409 as published, but was uncertain whether it changes the Rule’s meaning. A Committee member  
410 suggested that the open-court requirement may be intended to protect a client who wants a jury trial  
411 against hidden surrender of the jury-trial demand by the lawyer. But the Rule generates confusion.  
412 A pretrial conference would be a likely occasion to agree to withdraw a jury demand, and the  
413 agreement could be put on the record. But is the conference “in open court”? Professor Rowe, who  
414 researched this issue for the Subcommittee, observed that the cases recognize consent in at least two  
415 sets of circumstances that are not “in open court.” One is an agreement to withdraw made at a  
416 pretrial conference. The other is waiver by conduct, notably proceeding to a bench trial without  
417 objection. These decisions seem to be sensible. If “in open court” is added back to Style Rule 39(a),  
418 it will continue to be ignored as it has been when there is good reason to ignore it. The Committee  
419 concluded that Rule 39(a) should remain as published, without “in open court.”

420 Rule 44.1: Present Rule 44.1 is a good example of the “intensifier” problem. It requires a party who  
421 intends to raise an issue of foreign law to “give notice by pleadings or other *reasonable* written  
422 notice.” Style Rule 44.1 deletes “reasonable,” in keeping with the convention that a rule need not  
423 negate the implication that “unreasonable” notice suffices. If Rule 44.1 requires “reasonable”  
424 notice, other rules that require only “notice” might seem to authorize notice without regard to  
425 reasonableness. Comments and continuing discussion, however, focused on the 1966 Committee  
426 Note written on adopting Rule 44.1 and on the practical needs it reflected. The Note reflects concern  
427 that notice must be reasonable. The time of notice is important. The need for ample notice of an  
428 intent to raise an issue of foreign law may be less now than in 1966, although some foreign-law  
429 sources are not readily available for on-line research. On-line access varies greatly from one country  
430 to another. And the need for time to find an expert witness remains. There is some question as well  
431 whether a foreign-law expert witness need be disclosed under Rule 26(a)(2); reasonable advance  
432 notice is important. Taking “reasonable” out of the rule, moreover, may send a message — some  
433 people reading in earlier opinions will compare the former text without searching out the  
434 disappearance of “reasonable” in the style process.

435 Further concern was expressed that simply removing “reasonable” without explanation  
436 would be confusing. Work with the restyled Criminal Rules has caused difficulty to one member  
437 who has found it difficult to heed the purpose to make no change in meaning when the words seem  
438 to change meaning. It was suggested that this difficulty might be ameliorated by adding a specific  
439 explanation to the Committee Note. But it was responded that each Committee Note reminds that  
440 the general restyling does not change meaning, and that any attempt to explain all of the decisions  
441 to delete intensifiers would be both incomplete and cumbersome. At the same time, thought should  
442 be given to finding a general way to carry advice on this drafting convention, and a few others, with  
443 the new rules. A general memorandum might be attached. Or it might be more effective to  
444 condense the general memorandum into an expanded Committee Note to Rule 1.

445 A motion was made to revise Rule 44.1 to read: “must give notice by a pleading or other  
446 plead it or give other reasonable notice in writing.” The motion failed, 4 yes to 5 no. But it was

447 agreed that an attempt should be made to summarize some of the style conventions, including the  
448 deletion of intensifiers, in the Committee Note to Rule 1.

449 Rule 45: This change was approved for Rule 45(c)(2)(B)(ii): “inspection and copying may be ~~done~~  
450 required only as directed in the order \* \* \*.” A comment suggested that “done” implies that the  
451 parties cannot agree to resolve an objection without a confirming court order. Although this  
452 implication seems strained, the change avoids any risk.

453 A long-festering question was renewed in comparing Style Rule 45(c)(2)(B)(ii) with  
454 45(c)(3)(B)(iii). As published, each carried forward the words of the present rule. (2)(B)(ii) directs  
455 the court to protect a nonparty from “significant” expense resulting from compliance with a  
456 discovery subpoena to produce documents or tangible things or to permit inspection. (3)(B)(iii)  
457 directs the court to protect a nonparty against “substantial” expense to travel more than 100 miles  
458 to attend trial. Some participants expressed confusion as to which is greater — “significant”  
459 expense or “substantial” expense. A small sum may be significant to a person in straitened  
460 circumstances; a large sum may be insignificant to a wealthy person. Another view was that  
461 “substantial” refers to a larger sum than “significant,” and thus affords less protection. On this view,  
462 it was argued that greater protection is required at the discovery stage because of long experience  
463 demonstrating the huge burdens that discovery can impose and because a nonparty is not fairly  
464 subjected to the costs of participating in discovery in litigation among others. The trial itself,  
465 however, is more important, and it is fair to require greater sacrifices of nonparties who are called  
466 for the central duty of appearing as witnesses. Although the SCSSC adhered to the view expressed  
467 by many that there is no apparent reason to use different words in these two provisions, the  
468 Committee concluded that in the midst of such confusion it is better to carry forward the language  
469 of the present rule. The Style Rule will remain as published.

470 Rule 48: As published, Style Rule 48 said: “A jury must have no fewer than 6 and no more than 12  
471 members.” A comment suggested that this formulation might be read with the second sentence to  
472 authorize a stipulation to begin with fewer than 6 jurors. The Committee agreed to revise Rule 48  
473 to read: “A jury must initially have at least ~~no fewer than~~ 6 and no more than 12 members \* \* \*.”

474 Rule 50: Amendments to Rule 50(b) now pending in Congress and to take effect December 1, 2006,  
475 were not reflected in the published Style Rules. The amended rule is designed to discard the former  
476 practice that allowed a renewed motion for judgment as a matter of law — formerly called judgment  
477 notwithstanding the verdict — only if a motion for judgment as a matter of law — formerly called  
478 a directed verdict — was made at the close of all the evidence. In place of this requirement the new  
479 rule allows renewal of any motion for judgment as a matter of law made “under Rule 50(a).”  
480 Despite the style convention that prefers to avoid cross-references within a single rule by formal  
481 designation — as “under Rule 50(a)” — this approach was adopted after careful consideration of  
482 alternatives. The suggestion that Rule 50(b) could allow renewal of “a motion for judgment as a  
483 matter of law” was rejected in drafting the revised rule. One problem is that this formulation might  
484 obscure the rule that a renewed motion may rely only on the law and facts specified in the pre-  
485 submission motion. Another problem is that Rule 56, both in its present form and in its style form,  
486 bases summary judgment on showing that the moving party is entitled to judgment as a matter of  
487 law. It was deliberately decided not to allow a post-submission motion to be supported by a pretrial  
488 motion for summary judgment. The Committee agreed that Rule 50(b) should continue to refer to  
489 a motion “made under Rule 50(a).”

490 At Professor Kimble’s suggestion, a revision of punctuation was made: “No later than 10  
491 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict,

492 no later than 10 days after the jury was discharged — the movant may file a renewed motion \* \*  
493 .\*”

494 Rule 63: Present Rule 63 begins: “If a trial or hearing has been commenced and the judge is unable  
495 to proceed,” another judge may proceed. Style Rule 63 began: “If the judge who commenced a  
496 hearing or trial is unable to proceed \* \* \*.” A comment pointed out that this version narrowed the  
497 present rule. There may be a succession of successors — the judge who commenced a hearing may  
498 be succeeded by another judge, who later becomes unable to proceed and must be succeeded by yet  
499 another judge. A tentative response revised the rule to read: “If the judge who ~~commenced~~  
500 conducted a hearing or trial \* \* \*.” But this too was defective because it seemed to apply only if the  
501 hearing or trial was concluded, losing sight of the present rule’s application to mid-hearing  
502 disability. Recognizing that it is important to be open-ended about the point at which a judge  
503 becomes unable to proceed, it was agreed that the rule should begin: “If ~~the a judge who commenced~~  
504 conducting a hearing or trial is unable to proceed, any other judge may proceed ~~with it~~ upon  
505 certifying familiarity with the record \* \* \*.”

506 Rule 64: Style Rule 64 provided for use of state pretrial security measures “to satisfy the potential  
507 judgment.” The Bankruptcy Rules Committee pointed out that this rule is forward-looking.  
508 Provisional remedies are used not to satisfy a judgment, but to protect the ability to enforce a  
509 judgment if an enforceable judgment is entered. The Committee approved their suggested revision:  
510 “provides for seizing a person or property to satisfy secure satisfaction of the potential judgment.”

511 Rule 65: Present Rule 65 includes a “classic syntactic ambiguity.” Rule 65(d) says that an  
512 injunction “is binding only upon the parties to the action, their officers, agents, servants, employees,  
513 and attorneys, and upon those persons in active concert or participation with them who receive  
514 actual notice of the order by personal service or otherwise.” Absent a comma between “with them”  
515 and “who receive actual notice,” the rule could be read to say that an injunction binds a party and  
516 its employees, etc., whether or not the party or its employees have actual notice. On this reading,  
517 actual notice is required only as to persons in active concert with a party or (depending on resolution  
518 of another ambiguity) in active concert with a party’s employees. This ambiguity was resolved in  
519 the Style Rule by clearly limiting the notice requirement to “other persons \* \* \* who are in active  
520 concert with” a party or its employees, etc. Further research by Professor Rowe, however, disclosed  
521 that Rule 65(d) was intended to carry forward the provisions in former 28 U.S.C. § 363. Section 363  
522 included the comma missing from Rule 65(d); it clearly applied the “actual notice” requirement to  
523 parties and their employees. In most circumstances, moreover, it is appropriate to bind a party only  
524 after actual notice of the injunction.

525 This revision was proposed:

526 **(2) Persons Bound.** The order binds only the following who receive actual notice  
527 of it by personal service or otherwise:

528 **(A)** the parties;

529 **(B)** the parties’ officers, agents, servants, employees, and attorneys; and

530 **(C)** other persons ~~who receive actual notice of the order by personal service~~  
531 ~~or otherwise and~~ who are in active concert or participation with  
532 anyone described in Rule 65(d)(2)(A) or (B).

533 Discussion took many paths. Draft Committee Note language to explain this provision raised  
534 the question whether the Note should say that “ordinarily” a party is bound only with actual notice.

535 This question addresses the rarified possibility that in some situations it may be appropriate to  
536 invoke a doctrine of “anticipatory contempt,” binding a party who anticipates entry of an injunction  
537 and acts deliberately to prevent effective relief. An example would be cutting down an ancient tree  
538 while the court is considering whether to enjoin the cutting. It was agreed that the Note should not  
539 venture into this territory.

540 Further discussion explored the expectations of practicing lawyers. If you serve a party’s  
541 attorney, that is thought to be notice to the party. And if a party is served, why should its employees  
542 not be bound? It was responded that the party is bound, and is subject to contempt if it does not  
543 comply. Disobedience by a party’s employees is attributed to the party; the party has every interest  
544 in seeing to it that its employees are notified of the obligation to comply with the order. Temporary  
545 restraining orders are particularly likely to be submitted to the court with instructions that inform  
546 the party restrained about its obligations to get notice to its employees. But an employee who acts  
547 without actual notice should not be personally subject to contempt. So the party who wins an  
548 injunction may find it in its own interest to see to it that employees are notified — to tell the  
549 employee with the chain saw that the tree must not be cut down. Of course in many circumstances  
550 it will be necessary to rely on the employer because the party who won the order “does not know  
551 where to go” to notify employees.

552 The change was approved. The draft Committee Note language to explain the change was  
553 deleted. (Restoration of the Note, with slight modifications to remove any implications addressed  
554 to anticipatory contempt, was approved by post-meeting vote.)

555 Rule 69: Present Rule 69 directs that the procedure on execution “shall be in accordance with” state  
556 practice. Style Rule 69 said the procedure “must follow” state procedure. A comment expressed  
557 concern that “must follow” would bind federal courts too closely to state practice, creating a risk that  
558 inadequate state procedure might defeat effective enforcement of a federal judgment. The  
559 Committee approved Subcommittee A’s recommendation to change to words closer to the present  
560 rule: “must follow accord with the procedure of the state \* \* \*.”

561 Rule 71.1: Present Rule 71A(b) allows joinder of separate pieces of property as defendants in a  
562 single condemnation proceeding “whether in the same or different ownership.” Style Rule 71.1(b)  
563 said “no matter who owns them.” A comment expressed concern that these words might be read to  
564 defeat immunities that depend on ownership, such as those that protect government property from  
565 condemnation by another government. The concern seems strained. The rule only addresses joinder  
566 procedure. Nonetheless the Committee determined to change the language to read: “no matter ~~who~~  
567 owns them whether they are owned by the same persons or ~~whether they are~~ sought for the same  
568 use,” subject to final SCSSC review for style.

569 Late comments renewed a question that was not again reviewed by a subcommittee. Present  
570 Rule 71A(e) states that “the defendant may serve a notice of appearance designating the property  
571 in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all  
572 proceedings affecting *it*.” “it” is patently ambiguous. If properly used in the original drafting, it  
573 could refer only to the defendant as the only antecedent within the sentence. But “it” could easily  
574 be read to refer to the property. This reading might be bolstered by the in rem nature of a  
575 condemnation proceeding. And as a practical matter, the government finds it easier to make an  
576 objective judgment whether a proceeding affects the property than to make an at-times subjective  
577 judgment whether a proceeding affects a particular owner. It also could be urged that after a  
578 defendant gives notice that it has no objection or defense to the taking, the defendant is interested  
579 only in compensation. In a proceeding to condemn more than one piece of property, further, “it”  
580 could be read to distinguish among the separate properties.

581 The suggestion that “it” should be carried forward as an ambiguity that cannot be resolved  
582 was met with the protest that the ambiguity is so offensive that the Committee must give an answer  
583 one way or the other.

584 Further discussion noted that it is possible to imagine real circumstances where the choice  
585 makes a difference. Co-owners, for example, may disagree about objecting to the condemnation.  
586 If one answers with an objection or defense and the other gives notice that it has no objection or  
587 defense, should the one who has no objection or defense be given notice of proceedings to determine  
588 whether to condemn the property because the proceedings affect the property? Or should it not be  
589 given notice because the proceedings do not affect that defendant? Or both co-owners may agree  
590 that taking is proper, and even agree on the appropriate just compensation, but disagree about  
591 allocation of the compensation between them. Surely notice must be given of allocation proceedings  
592 initiated by one co-owner, even though the proceeding does not seem to affect the property.

593 Several alternatives were suggested. The rule could require notice of “all later proceedings.”  
594 The difficulty with that alternative lies in condemnation of multiple parcels — many of the owners  
595 may have no interest at all in most of the proceedings. Another alternative is to require notice of all  
596 later proceedings “relating to that property.” “Relating to” would include such proceedings as those  
597 to allocate compensation, whether or not they “affect” the property in any meaningful way. Yet  
598 another possibility would require notice of later proceedings “affecting the defendant or the  
599 property.”

600 Professor Rowe pointed to conflicting indicators about the present rule. One treatise states  
601 that notice must be given of later proceedings affecting the property, but says nothing further to  
602 explain or support this reading. The original Committee Note requires notice of proceedings  
603 “affecting him,” seeming to refer to the owner.

604 Finding no “canonical answer,” it was suggested that the published rule — “affecting the  
605 defendant” — should be retained.

606 A motion to substitute “relating to that property” failed, 3 yes and 7 no.

607 A motion to carry forward with the rule as published — “affecting the defendant” — passed  
608 with one dissent.

609 Present Rule 71A(h) says that a party “may” have a jury by demanding it. Style Rule  
610 71.1(h)(1) says that the court tries all issues except when compensation must be determined “by a  
611 jury when a party demands one.” A late comment suggested that the Style Rule expands the right  
612 to jury trial. It is settled that the Seventh Amendment does not apply to condemnation proceedings,  
613 and it was urged that the Style Project should not expand the right. An illustration of a possible  
614 problem was given. After a demand for jury trial a court may appoint commissioners, but then  
615 conclude that the commissioners are not diligently discharging their duties and take the case back  
616 from them. Can the judge then try the case without a jury? The present rule does not clearly address  
617 this. It was concluded that there is no reason attempt an answer in the Style Rule. There is no need  
618 to change the Style Rule.

619 Rule 73: After renewed discussion of the relationship between the language of Rule 73 and the  
620 underlying statute, 28 U.S.C. § 636(c), the Committee adopted these changes in Style Rule 73:

621 (a) **Trial by Consent.** When authorized under 28 U.S.C. § 636(c), a magistrate  
622 judge may, if all parties consent, conduct ~~the proceedings in~~ a civil action or

623 proceeding, including a jury or nonjury trial. A record ~~of the proceedings~~  
624 must be made in accordance with 28 U.S.C. § 636(c)(5).

625 **(b) Consent Procedure.**

626 **(1) In General.** When a magistrate judge has been designated to conduct  
627 civil actions or proceedings, \* \* \*

628 **Rule 86(b):** A new Rule 86(b) was presented for discussion. Comments on the Style Project  
629 expressed concern that the supersession effects of the Civil Rules would be expanded by  
630 promulgating the entire body of the Civil Rules to take effect on December 1, 2007. One running  
631 example has been used to illustrate the argument. Rule 11 was amended in 1993. In 1995 the  
632 Private Securities Litigation Reform Act enacted provisions that conflict with and that supersede  
633 Rule 11. Even though Style Rule 11 does not change the meaning of any provision in Rule 11, by  
634 taking effect on December 1, 2007, it might be thought to supersede the inconsistent provisions of  
635 the PSLRA.

636 The Committee agreed that this supersession argument is not persuasive. The Style Project  
637 involves only improved expression of unchanged meaning. It is not intended to affect the  
638 relationships between any rule and any conflicting statute. To the contrary, any conflict should be  
639 resolved by comparing the first effective dates of the rule provision and of the statute that conflicts  
640 with it.

641 The first question is whether it is necessary to say anything, anywhere, about this  
642 supersession argument. The argument is so thin that it might not deserve any form of response.  
643 There is no indication that the argument was even made with respect to the style revisions taking  
644 effect in 1987 to make rules language gender-neutral. Most of the cases that deal with comparable  
645 problems look to the first effective date of the rule, disregarding subsequent amendments that change  
646 expression but not meaning. The Appellate Rules were restyled without any evident supersession-  
647 related concern. In restyling the Criminal Rules, a conflict appeared between Criminal Rule 48(b)  
648 and the later-enacted Speedy Trial Act. The Committee Note explains that “[i]n re-promulgating  
649 Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy  
650 Trial Act.”

651 The argument has been made, however, and may be made again. In addition, there is a pair  
652 of cases in the Sixth Circuit that suggest that the argument may prevail by sheer inadvertence. In  
653 *Floyd v. U.S. Postal Service*, 6th Cir.1997, 105 F.3d 274, the court found 28 U.S.C. § 1915(a)(3)  
654 inconsistent with Appellate Rule 24(a), and concluded that § 1915(a)(3) was later in time and  
655 superseded Rule 24(a). Two years later, in *Callihan v. Schneider*, 6th Cir.1999, 178 F.3d 800, 802-  
656 804, the court concluded that the Style Project amendment of Rule 24(a) established Rule 24(a) as  
657 later in time, so it now superseded § 1915(a)(3). There is no explanation, no recognition of the  
658 effect of the fact that the Rule 24 revisions carried forward the rule’s meaning without change, and  
659 no explanation of the reason for concluding that the supersession relationship should be reversed by  
660 a style amendment that was recognized to carry forward the once-superseded meaning.

661 In addition to these Sixth Circuit cases, mixed signals can be found in a few cases that  
662 responded to complex relationships between rules and statutes without apparently recognizing or  
663 responding to the complexities.

664 Several methods of responding to the supersession question have been considered. One  
665 would address the question in a Committee Note, perhaps attached to Rule 1 as part of a general  
666 explanation of the Style Project. Another would suggest that the Supreme Court address and negate

667 the supersession argument in the message transmitting the rules to Congress. Still another would  
668 be to address the question directly in a rule.

669 Draft Rule 86(b) represents the recommendation to address supersession directly in a rule.  
670 This approach is not vulnerable to the charge that it seeks to exercise the supersession authority of  
671 28 U.S.C. § 2072(b) to supersede § 2072(b). No circularity is involved because there is no attempt  
672 to supersede any statute. To the contrary, the rule expresses a guide to interpreting the Style  
673 Amendments — they are not intended to affect the meaning of any rule nor to affect the supersession  
674 effect of any rule. The authority to adopt rules of practice and procedure includes authority to define  
675 what they mean.

676 The draft presented for discussion read:

677 **(b) December 1, 2007 Amendments.** The amendments adopted on December 1,  
678 2007, do not change the date on which any provision that conflicts with  
679 another law took effect for purposes of 28 U.S.C. § 2072(b).

680 The Committee Note expanded on this theme, stating in part that if there is a conflict  
681 between a rule and another law, “the portion of the rule that conflicts with another law took effect  
682 on the day that part of the rule was first adopted.”

683 Discussion focused in part on the wisdom of including any provision in the rules at all. The  
684 supersession argument is weak. One member observed that the rule “looks twisted around the axle  
685 responding to a crazy theory.” More generally, it was asked whether future rules amendments would  
686 require similar provisions stating that incidental style changes do not affect supersession. On the  
687 other hand, the decisions are not as uniform or as uniformly clear as might be wished. And highly  
688 respected scholars may find the supersession argument an intriguing — and therefore troubling —  
689 concern.

690 The Committee agreed unanimously to develop a Rule 86(b) provision. The draft, however,  
691 should be refined. Any rule should refer to the date amendments “take effect,” responding not only  
692 to the language of § 2072(b) but also to the process by which the Supreme Court adopts the rules  
693 but the effective date is delayed until Congress either lets a rule take effect by inaction or acts to  
694 establish an effective date.

695 Finding rule text expressions to clearly address the Style Project also came on for discussion.  
696 Other amendments are slated to take effect on December 1, 2007, in addition to the Style Project.  
697 The Style-Substance Track includes changes that were thought unsuited to the Style Project because  
698 they do change meaning, albeit in technical and very limited ways. And new Rule 5.2, reflecting  
699 uniform E-Government Act Rules, should take effect then as well. One way to address this question  
700 may be to identify the rules by numbers, in groups: Rules 1-5.1, 6-73, and 77-86. [The gaps reflect  
701 new Rule 5.2 and the decision to leave idle the numbers for abrogated Rules 74-76.]

702 Other questions addressed the Committee Note. The statement that the amendments do not  
703 change the meaning of any rule seems inconsistent with the Style-Substance Track amendments.  
704 The suggestion that any conflict between a rule and another law should be decided on December 1,  
705 2007 in the same way as it would have been decided on November 30, 2007, although a correct  
706 statement of the proposition, was troubling because it seemed to overlook decisions to be made after  
707 December 1, 2007. Adding “or thereafter,” however, might cause confusion by seeming to freeze  
708 a moment of comparison without recognizing future rules amendments.



709 Further discussion suggested that the Committee Note should focus, although briefly, on the  
710 central proposition. The Style Project and the Style-Substance amendments are not intended to  
711 change the date on which any rule provision took effect for the supersession purpose of determining  
712 priority in time. This is a matter of interpreting the rules, not an exercise of the supersession  
713 authority.

714 Revised rule text and Committee Note will be circulated to the Committee for review after  
715 the meeting.

716 *Style-Substance Track*

717 Two of the published Style-Substance amendments were abandoned. Comments on Style  
718 Rule 8(a)(3) established good reasons to maintain the seemingly archaic reference to “relief in the  
719 alternative.” These words capture the many situations in which the pleader is uncertain as to the  
720 available forms of relief, or prefers a form of relief that may not be available. The proposal to  
721 amend Rule 36(b) was superseded by the clarification of Style Rule 16(e) noted above. Taken  
722 together, Style Rule 16(e) and Style Rule 36(b) apply the “manifest injustice” standard to  
723 withdrawal or amendment of an admission adopted at a final pretrial conference.

724 Small style changes were made in two other Style-Substance rules.

725 Rule 30(b)(6) was amended by deleting a comma: “a governmental agency, or other entity;  
726 \* \* \*.

727 Rule 31 was amended by changing the paragraph captions in subdivision (c):

728 **(c) Notice of Completion or filing.**

729 **(1) Notice of Completion. \* \* \***

730 **(2) Notice of Filing \* \* \*. ”**

731 The second sentence of the Rule 31 Committee Note also was revised: “A deposition is  
732 completed when \* \* \* the deponent has either waived or exercised the ~~Rule 30(e)(1)~~ right of review  
733 under Rule 30(e)(1).”

734 *Style Forms*

735 Form 2: The Committee agreed to correct Form 2 by adding a missing opening parenthesis and by  
736 transposing the signature lines. The corrected sequence will be signature, printed name, address,  
737 e-mail address, and telephone number.

738 Form 10: A comment suggested that the reference to interest in the demand for judgment should read  
739 “plus interest as available under applicable law.” This suggestion was rejected. The need to  
740 ascertain applicable law is plain.

741 Form 19: The form copyright complaint has caused difficulty throughout the Style Project. Present  
742 Form 17 was adopted under the Copyright Act of 1909 and was last amended in 1948. It has not  
743 been adjusted since enactment of the Copyright Act of 1976. The conversion to Style Project style  
744 has not been the subject of comments from people specialized in copyright practice. Department  
745 of Justice lawyers reviewed the Style Form and found a substantive error that has been corrected —  
746 paragraph 8 no longer implies that there is a common-law remedy for simply continuing to publish  
747 and sell an infringing book. It remains to be decided whether there should be a form copyright  
748 complaint at all. Discussion asked whether anyone uses the forms — at least one member has never

749 seen a complaint that resembles any form. The role of the forms, however, is illustrative. Judge  
750 Clark long ago observed that it is not possible to clearly define the intent of Rule 8 in rule language,  
751 but that the forms serve as pictures illustrating the nature of federal pleading requirements.  
752 Although the concern remains that the revised Style Form 19 “goes half-way, fixing half the  
753 mistakes,” the Committee decided to carry Style Form 19 forward.

754 *E-Discovery Amendments*

755 The electronic discovery amendments scheduled to take effect on December 1, 2006, were  
756 published and adopted without thorough Style Project review, although many of the Style Project  
757 conventions were followed. Early drafts of the electronic discovery amendments followed two  
758 tracks, one fitting into the Style Project and one using the present rule language, but the two-track  
759 approach was abandoned. Publication of both versions, one recast to fit within the slightly changed  
760 structure of the Style Project discovery rules, would have created difficulty if not outright  
761 consternation. Drafting to conform the e-discovery amendments to the Style Project has proceeded  
762 separately from the main Style Project. Professor Marcus presented the fruits of his labors. He  
763 began by noting that he and Professor Kimble had worked through some of the questions presented  
764 in the agenda materials, simplifying the task facing the Committee.

765 Rule 26(b)(2)(B): The question raised by Rule 26(b)(2)(B) is whether the subparagraphs in  
766 subdivision (b)(2) should be rearranged. The Committee agreed to the first step, merging  
767 subparagraph (D) into subparagraph (C):

768 **(C) When Required.** On motion or on its own, ~~the~~ court must limit the frequency  
769 or extent \* \* \*.

770 ~~**(D) On Motion or the Court's Own Initiative.** The court may act on motion or on~~  
771 ~~its own after reasonable notice.~~

772 Professor Kimble suggested that subparagraphs (B) and (C) be transposed, so the sequence  
773 would be “(A) When Permitted,” “(B) When Required,” and “(C) Electronically Stored  
774 Information.” This suggestion was resisted. Although the captions may seem to flow more neatly  
775 from “permitted” to “required” to e-information as an afterthought, the sequence in which issues  
776 arise in practice is better reflected in the current arrangement. (A) deals with general limits likely  
777 to be set — if at all — early in the course of managing an action. (B), focusing on discovery of  
778 electronically stored information, addresses issues that will arise as a party asserts that some  
779 information is not reasonably accessible and the parties then attempt to work out the problem. The  
780 court will be asked to act under (C) only if the parties’ efforts fail. Beyond this concern, Rule  
781 26(b)(2)(B) has become familiar to practitioners engaged in e-discovery disputes even before it has  
782 become effective. It is used to guide practice now. By the time the Style Project takes effect the  
783 (b)(2)(B) label will be well known and will be reflected in several — and perhaps many — reported  
784 decisions. It should not be changed now. The Committee agreed to retain the present sequence of  
785 subparagraphs, but also agreed to change the caption for subparagraph (B): “Specific Limitations  
786 for Electronically Stored Information.”

787 Rule 26(f)(3): The provision for discussing electronically stored information at the Rule 26(f)  
788 conference provided the occasion to revisit an oft-discussed style question. The e-discovery  
789 amendments were deliberately written to describe the “form or forms” of production. It has been  
790 recognized throughout that “the form” of production can encompass multiple forms, corresponding  
791 to the fact that it may be inconvenient or impossible to produce different kinds of electronically  
792 stored information in a single form. But the form of production issue has proved contentious in

793 practice. It was decided to emphasize the frequent need to produce in different forms by referring  
794 to “form or forms.” The question has been renewed in conforming the e-discovery amendments to  
795 style conventions. This issue arises repeatedly throughout the e-discovery amendments. Professor  
796 Marcus and Professor Kimble worked together to determine how best to reconcile the functional  
797 need for emphasis with the style convention to draft in the singular. In some places “form or forms”  
798 will remain — Rules 26(f)(3)(C), 34(b)(1)(C), and 45(a)(1)(B) are examples. In other places it may  
799 work to retreat to “form” — Rule 34(b)(2)(D) is an example. The SCSSC agreed to the  
800 compromise, maintaining the virtues of adhering to style conventions but recognizing the special  
801 substantive concerns that have moved the Advisory Committee in addressing this topic.

802 Rule 45(a)(1)(A)(iii) introduces a similar question. The 2006 amendments introduced a new concept  
803 to the text of Rule 34 — “documents” may be requested not only for inspection and copying but also  
804 for testing and sampling. Rule 45 addresses discovery from nonparties as the analogue to Rule 34  
805 discovery among parties. It seems necessary to add “testing, or sampling” in Rule 45(a)(1)(A)(iii)  
806 as it defines the “command” of a subpoena. Need “testing and sampling” reappear whenever Rule  
807 45 refers to production or inspection and copying? Rule 45 must be made easy to read because it  
808 is addressed to nonparties, many of whom have not been involved in the underlying action in any  
809 way that would inform them about the issues. But it has not been consistent in approaching the ways  
810 of referring to production. Although there is a risk of negative implications, it does not seem  
811 worthwhile to constantly repeat “inspecting, copying, testing, or sampling.” The Committee decided  
812 to leave to Professor Marcus the task of one final review to determine how best to achieve parallel  
813 expression without unnecessary repetition.

814 Rule 45(d): This rule presented some questions readily answered and another that proved difficult.

815 As a matter of style, the phrases appearing in paragraphs (1)(B), (C), and (D) as variations  
816 on “person responding to a subpoena” were shortened as marked by deleting “to a[the] subpoena.”  
817 Paragraph (1)(B) was further amended by adding two words: “or in a reasonably usable form or  
818 forms ~~that are reasonably usable;~~” And two words were deleted from (2)(B): If information is  
819 produced in response to a subpoena ~~that~~ is subject to a claim of privilege \* \* \*.”

820 The introduction to (d)(1) proved much more difficult. The e-discovery amendments  
821 changed Rule 34(b)(2)(D) but failed to make a corresponding change in Rule 45(d)(1). The agenda  
822 materials showed the addition of a parallel change in Rule 45(d)(1): “Unless the parties and the  
823 person responding to a subpoena otherwise agree, or the court otherwise orders, these procedures  
824 apply to producing documents or electronically stored information for production: \* \* \*.”  
825 Discussion showed that the problem is more difficult in Rule 45 than in Rule 34. Even in a two-  
826 party action three persons are interested in Rule 45 nonparty subpoena. The draft rule language  
827 seems to require agreement among all parties, not only the party serving the subpoena, and the  
828 person responding to the subpoena. But in practice the party serving the subpoena commonly works  
829 out the objections with the person responding and notifies the other parties. The other parties are  
830 not put in a position to block the agreement. They can object, or can serve their own subpoenas, if  
831 the agreement threatens to deprive them of desired information. Problems remain even on this  
832 practice — different parties may have different levels of interest in the form of production,  
833 particularly with electronically stored information. A nonparty who produces in one form in  
834 response to an initial subpoena may argue that it should not be required to produce the same  
835 information in a different form in response to a second subpoena served by a different party.

836 In the end it was agreed that it is too late to attempt to establish in Rule 45(d)(1) a provision  
837 that draws from Rule 34(b)(2)(D) with suitable modifications to fit the nonparty subpoena situation.  
838 The draft will be simplified. Subject to further style work, (d)(1) may begin:

839 (1) **Producing Documents or Electronically Stored Information.** ~~Unless the~~  
840 ~~parties and the person responding to a subpoena otherwise agree, or the court~~  
841 ~~otherwise orders,~~ These procedures apply to producing documents or  
842 electronically stored information for inspection: \* \* \*

843 *Time Counting Project*

844 Judge Rosenthal noted that work on the Civil Rules time provisions will have to proceed on  
845 a tight schedule over the summer. The next meeting is set for early September. Two subcommittees  
846 are designated, each to consider half of the rules. It will be important to coordinate the two  
847 subcommittees as common questions arise. But the allocation of rules between them attempts to  
848 bring together rules that obviously present common questions. Rules 50, 52, 59, and 60, for  
849 example, establish time limits for post-judgment motions. Rule 6(b) prohibits extension of any of  
850 these periods. They should be assigned to the same subcommittee, and to the same members of that  
851 subcommittee. Final recommendations must be ready in time for submission to the Standing  
852 Committee in the spring of 2007. The first step, however, is to consider the “template” prepared by  
853 the Standing Committee’s Time-Computation Subcommittee. The template has conveniently been  
854 framed as Civil Rule 6(a).

855 The template’s central feature is abolition of the “eleven-day” rule that omits intervening  
856 Saturdays, Sundays, and legal holidays in computing periods of less than eleven days. Abolition is  
857 not left to chance — the template not only says “count every day,” it also says “including  
858 intermediate Saturdays, Sundays, and legal holidays.” The redundant inclusion was added for fear  
859 that practitioners accustomed to the present system might otherwise hesitate to believe and rely on  
860 a simple direction to count every day. This feature will require reconsideration of every period  
861 now set at 10 days or less. As the rule now stands, a 10-day period in fact means a minimum of 14  
862 days. When three-day holiday weekends intervene, it can run still longer. Shorter periods, however,  
863 are more variable. The two-day period set by Rule 65(b) for notice of a motion to dissolve a  
864 temporary restraining order, for example, can readily mean two days because it expires before  
865 reaching a weekend.

866 Abolition of the eleven-day rule presents a question that needs to be thought through. Rule  
867 6(a) establishes rules that “apply in computing any time period specified in these rules or in any  
868 local rule, court order, or statute.” Each district may need to survey its own local rules to determine  
869 whether adjustments are appropriate. That can be managed. Greater difficulty arises with respect  
870 to statutory time periods. Two illustrations that apply to civil practice are provided by 28 U.S.C.A.  
871 § 1292(b) (ten days to seek permission for an interlocutory appeal) and § 1453(c)(1) (7 days to ask  
872 a court of appeals to accept appeal from a remand order). As to statutory periods, each of the  
873 obvious alternatives presents a problem. If nothing is done, the real duration of these statutory  
874 periods is shortened. If the eleven-day rule is preserved for statutory periods alone, practitioners  
875 may encounter even greater confusion than they encounter with the present rule. And an attempt  
876 to adopt specific periods, statute-by-statute, must inevitably overlook some statutes and seem an  
877 arrogant assertion of supersession authority as to the statutory periods that are revised. It may be  
878 argued that extension of specific statutory periods by rule simply carries forward the effects long  
879 since established by Rule 6(a), but the appearance will be different.

880 The Committee Note advises that the method used to measure periods expressed in days also  
881 applies to periods expressed in weeks, months, and years. The Civil Rules do not appear to define  
882 any periods in weeks or months. Civil Rule 60(b) sets an outer limit of one year for some motions.  
883 There is no definition of what is a year — whether always 365 days, or 366 days if a leap year is  
884 involved.

885 The template also introduces a new feature, describing a method for counting periods  
886 expressed in hours. This paragraph is a response to at least one statute, and several pending bills,  
887 that set such periods. It is a useful answer to questions that otherwise must cause great perplexity.

888 The template also addresses calculation of periods that must be counted backward from an  
889 end-point. Rule 56(c), for example, requires that a motion for summary judgment be served at least  
890 10 days before the day set for the hearing. The template — as clearly expressed in the Committee  
891 Note — contemplates that this period be determined by continuing to count in the same direction.  
892 If the 10th day before the hearing day is a Saturday, the motion must be served on Friday. This  
893 approach reduces the time available to the moving party, but increases the time available to the  
894 responding party.

895 The Time-Computation Subcommittee recommends that the advisory committees consider  
896 two sets of provisions left unchanged by the template rule. Rule 6(a) excludes the last day of a  
897 period when weather “or other conditions” make the clerk’s office inaccessible. Adapting this  
898 provision to failures of electronic filing may prove difficult. And Rule 6(e) allows an additional  
899 three days to act in response to a paper that is served by any means other than personal service,  
900 perhaps skewing strategic incentives in choosing among the modes of service. Beyond these  
901 provisions, this Committee may wish to consider the part of Rule 6(b) that prohibits extensions of  
902 some time periods. This provision causes grief to lawyers who rely on the general authority to  
903 extend without bothering to look for the specific prohibition.

904 A first question in approaching reconsideration of time periods is to decide whether there is  
905 any view that the collective set of time periods is too generous or too stingy. Is an overly generous  
906 approach to time responsible for undue expense and delay? Or is an unreasonably stingy approach  
907 responsible for unduly compressed work, tacit but risky disregard of deadlines, or widespread  
908 modification by agreement? Are time periods that have endured for many years simply out of touch  
909 with increasingly complex forms of litigation that cannot be managed in periods that were  
910 reasonable for simpler forms? Or is judicial management, particularly through Rule 16, sufficient  
911 to account for the cases that do not fit comfortably within the general rules? It was agreed that the  
912 overall approach in the rules is not unduly generous. In the end, the Committee agreed that there  
913 is no reason to adopt a general preference, either to generally shorten or generally extend present  
914 periods. Instead, each time period should be evaluated in its own terms.

915 The Rule 6(a) problem of electronic inaccessibility begins with present rule language that  
916 seems to focus on physical barriers. “[W]eather or other conditions” does not obviously address  
917 interruptions in the court’s capacity to receive electronic communications, nor difficulties that may  
918 arise in a filer’s computer system. This impression is reinforced by the preface: “when the act to  
919 be done is the filing of a paper in court.” Although Rule 5(e) defines an electronic filing as a paper,  
920 there is no direct clarification of Rule 6(a). Rule 6(a) could be written to address “a filing in court,”  
921 and “a day on which the clerk’s office is inaccessible.” But those steps still would not speak directly  
922 to electronic impediments to electronic filing.

923 The problem of filing impediments is exacerbated by the phenomenon that although lawyers  
924 know they should not wait to file on the last permissible moment, many frequently do delay.

925 One peculiar aspect of electronic filing impediments is that they may be more likely than  
926 physical impediments to arise for brief periods. The court’s system can fail briefly, return to service,  
927 fail again, and so on. If an express provision is to be written, what should it say about the duration  
928 of the failure and about the time of day when the failure occurs? Should a one-hour failure at the  
929 end of the day be treated differently than a two-hour failure in the morning? Should this and like

930 problems be treated by leaving matters to the discretion of the judge? A discretionary approach does  
931 not give the comfort of clear rules, but it may be as much relief as can be tolerated. Still, it might  
932 work to allow filing the day after any day on which the court's system was unable to receive e-  
933 filings for any measurable period.

934 A different question was raised by asking whether we should expect lawyers to be prepared  
935 to file in paper if the e-filing system is down, and to file electronically if the court is not physically  
936 accessible? One answer was that the whole purpose of converting to e-filing would be defeated by  
937 requiring constant readiness to file in paper. "Inaccessible" should mean that the court is physically  
938 inaccessible or that e-filing is not possible. A suggestion that the Committee Note might say that  
939 there is no requirement of substitute paper filing when the e-filing system is down was met,  
940 however, with the response that such matters should be addressed in rule text or not at all.

941 A similar question was raised by observing that a lawyer in San Francisco can work until  
942 9:00 Pacific Time and still file electronically just before midnight in the Southern District of New  
943 York. That opportunity becomes something that lawyers rely on. If we want them to be able to rely  
944 on it safely, we should be clear about it. It would be possible to define when a day ends. The most  
945 likely choices would be the period when the clerk's office is open or midnight. Some courts accept  
946 e-filings up to midnight. Some accept paper filings up to midnight as well, relying on a "drop box."  
947 But other courts do not have drop boxes, and the likelihood is that security considerations and  
948 electronic filing will reduce or eliminate them altogether. It is possible that variations in local  
949 circumstances make it difficult to adopt a uniform national rule. But consideration should be given  
950 — perhaps with help from the Time-Computation Subcommittee — to defining the end of the day.  
951 It may be that different definitions are suitable for paper filing and for e-filing. Midnight would do  
952 for e-filing as a national rule; for paper filings, when they are permitted, extension beyond regular  
953 business hours might be left to local rules.

954 Further discussion suggested that it would be better to begin afresh, departing from the  
955 "inaccessible office" concept. Three different concerns should be considered: physical  
956 inaccessibility, inability of the court's e-filing system to receive a filing, and inability of a filer's  
957 system to make a filing. Allowance also must be made for parties, such as pro se litigants, who are  
958 exempted from otherwise mandatory e-filing systems.

959 The question of failures in the filer's computer system raises issues that are difficult to  
960 police. Most lawyers will be honest. And allowing an extra day for filing "won't hurt anyone." "If  
961 you never excuse a sending-end crash, lawyers will have to invest huge amounts in technology."  
962 But there is room for some maneuvering or even abuse. Perhaps more importantly, express  
963 allowance for filers' problems is likely to invite disputes. It may be better to rely on the general  
964 authority to excuse a failure and to extend the time to act. That approach encounters difficulty with  
965 the time periods that cannot be extended — the 10-day periods set in Rules 50, 52, and 59 are the  
966 most sensitive. If the problem seems severe enough, it might be possible to amend Rule 6(b) to  
967 allow extension of those periods for e-filing failures. Tactical abuse of the opportunity might not  
968 be a problem, at least so long as those periods are treated as mandatory and jurisdictional. Few  
969 lawyers would risk loss of the opportunity to make those motions by relying on the court's  
970 willingness to grant an extension of a day or two to offset an e-filing mishap.

971 The e-filing problem should be considered by the Standing Committee Technology  
972 Subcommittee. Meanwhile, the approach to Rule 6(a) will be to adopt open terms that are not  
973 limited to physical inaccessibility but that do not directly address e-filing mishaps. The reference  
974 to filing a "paper" will be changed to a neutral "filing." Nothing will be said about problems on the  
975 filer's end.

976 The question of legal holidays was addressed by asking whether the definition of “legal  
977 holiday” should include a day declared a holiday by the state where the court is held. Deference to  
978 local holidays is strongly supported by the desire for uniformity among local courts. Many lawyers  
979 in Massachusetts, for example, might not pause to inquire whether Patriots Day is an occasion for  
980 closing federal courts. The Time-Computation Subcommittee should consider this question. The  
981 question is further complicated by local district practices. At least some districts are likely to close  
982 on Friday after Thanksgiving, or after a Thursday Christmas Day, even though those days do not  
983 meet any of the Rule 6(a) definitions of “legal holiday.” Perhaps the definition should be revised  
984 to exclude the last day of the period whenever the clerk’s office is closed on that day, no matter what  
985 the reason. At the end, a question went unanswered — is there any state that has half-day holidays?  
986 Or court that closes for half a day?

987 Rule 6(b) presents a different question. It forbids extension of the periods set by several  
988 rules. It continues to be the source of grief. The court cannot extend the time to file post-judgment  
989 motions under Rules 50, 52, or 59, nor can it extend the time to file a motion to vacate under Rule  
990 60. The Rule 50, 52, and 59 periods tie to the time to appeal. Lawyers continue to lose the  
991 opportunity to win post-judgment relief because they fail to meet the 10-day deadline. At times they  
992 lose the right to appeal by relying on an untimely motion to suspend appeal time in the way that a  
993 timely motion would do. And on rare occasions they are caught in a trap when the district court  
994 mistakenly attempts to grant a forbidden extension. Reliance on an unauthorized extension as an  
995 excuse to extend appeal time under the “exceptional circumstances” doctrine almost always fails.  
996 Nonetheless, the rules are clear. And they serve important purposes, seeking to achieve prompt  
997 consideration and disposition of post-trial motions, and to expedite appeals. Any attempt to permit  
998 even limited flexibility could defeat these purposes. This question will be considered, but the case  
999 for change remains to be made.

1000 The Time-Computation Subcommittee decided to retain the extra three days provided by  
1001 Rule 6(e) for acting in response to service by means other than personal service. But it was  
1002 concerned that any distinction among methods of service — or the absence of any distinction —  
1003 might affect strategic choices among the methods. It seems sad that lawyers would attempt to select  
1004 the method of service best calculated to reduce the effective time available to respond. But such  
1005 tactical calculations seem common. This question too remains open for consideration.

1006 Turning to one final question, it was agreed that time computations will be facilitated if  
1007 individual periods are expressed in multiples of seven days. That approach will minimize the  
1008 occasions when a period ends on a Saturday or Sunday. Periods now set at 10 days are likely to  
1009 become 14 days, although some — such as the 10-day period set for a temporary restraining order  
1010 — may require separate deliberation.

1011 *Rules 13(f), 15*

1012 Judge Baylson presented the report of the Rule 15 Subcommittee. The first proposal would  
1013 amend Rule 15(a) by changing the periods in which a party may amend a pleading “once as a matter  
1014 of course.” Present Rule 15(a) allows amendment within 20 days if a responsive pleading is not  
1015 allowed and the action is not yet on the trial calendar. The proposal would change the period to 21  
1016 days, anticipating a preference for multiples of seven in the Time-Computation Project. It also  
1017 would delete the reference to the trial calendar. Many courts do not have a trial calendar, and Style  
1018 Rule 40 will eliminate the former reference to the trial calendar.

1019 More important changes are recommended for a pleading to which a responsive pleading is  
1020 required. Present Rule 15(a) terminates the right to amend once as a matter of course after a

1021 responsive pleading is served. The proposal would extend the right to 21 days after service of a  
1022 responsive pleading. This expansion matches a contraction for cases in which the pleading is  
1023 challenged by a motion before the responsive pleading is served. Because a motion is not a  
1024 “pleading” as defined in Rule 7, a motion does not now cut off the right to amend once as a matter  
1025 of course. The right persists indefinitely. Some judges regularly encounter the frustration of  
1026 investing time in a motion only to find an amendment of the challenged pleading. The proposed  
1027 amendment would terminate the right to amend once as a matter of course 21 days after service of  
1028 a motion under Rule 12(b), (e), or (f) addressed to the pleading. The amendment will support better  
1029 judicial management and expedite disposition.

1030 The draft was improved: “A party may amend ~~a party’s~~ its pleading once \* \* \*.”

1031 Discussion began with support of the 21-day limit to amend after service of a responsive  
1032 motion. This was seen as the most important part of the amendment. Doubts were expressed about  
1033 extending the right to amend to 21 days after service of a responsive pleading. The opportunity may  
1034 be used not for curative purposes “but to throw in bad changes.” These doubts were met by the  
1035 observation that a pleader recognizes the importance of the first amendment. After one amendment,  
1036 it becomes more difficult to win permission to make another amendment. “Taking the first shot will  
1037 be a matter for care.”

1038 Another question asked what happens to the motion if the challenged pleading is amended  
1039 before the motion is decided. The answer was that practice would carry on as at present — the only  
1040 difference is that the amendment must be made earlier than may happen now. The amendment may  
1041 moot the motion. It may require that the motion be amended or be superseded by a new motion.  
1042 The parties and court will respond as the circumstances dictate.

1043 The proposed amendment of Rule 15(a) was approved as a recommendation for publication.  
1044 The Committee Note should include a statement that the abrogation of Rule 13(f), as discussed next,  
1045 establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

1046 Turning to Rule 13(f), Judge Baylson described the recommendation to abrogate. Under  
1047 Rule 13(f) the court may permit a party to amend a pleading to add a counterclaim. On its face, the  
1048 rule invokes the amendment process. Both Rule 15(a)(2) and Rule 13(f) speak of allowing  
1049 amendment if “justice so requires.” Rule 13(f) adds a set of other words not in Rule 15(a): “if [the  
1050 counterclaim] was omitted through oversight, inadvertence, or excusable neglect.” Despite these  
1051 additional words, courts apparently administer Rule 13(f) as if it repeated Rule 15(a) verbatim. Nor  
1052 is there any reason to suppose that the standards for permitting amendment should be different.  
1053 Abrogation of Rule 13(f), finally, will end any lingering uncertainty whether the relation-back tests  
1054 of Rule 15(c) apply to an amendment that adds a counterclaim.

1055 Abrogation of Rule 13(f) was approved without dissent. Publication will be recommended  
1056 to the Standing Committee.

1057 Judge Baylson then turned to Rule 15(c), a topic that divided the Subcommittee. The  
1058 Committee first put Rule 15(c) on the agenda in response to the suggestion of a first-year law  
1059 student. The suggestion addressed a very specific point. A few courts had then taken a view of Rule  
1060 15(c)(3) that now has been adopted by several circuits. Relation back of an amendment changing  
1061 the party against whom a claim is asserted requires that the new party have received notice that but  
1062 for some “mistake” concerning the identity of the proper party, the new party would have been sued.  
1063 “[M]istake” is read to cover only a claimant who erroneously believes that the right defendant has  
1064 been identified. If the claimant knows that it cannot identify the proper defendant, there is no  
1065 “mistake,” but only ignorance. This interpretation could easily be changed by adding four words:



1066 “mistake or lack of information.” Consideration of this simple change, later strongly urged by Judge  
1067 Becker in *Singletary v. Pennsylvania Department of Corrections*, 3d Cir.2001, 266 F.3d 186,  
1068 gradually grew into an elaborate study of Rule 15(c). The study found many conceptual  
1069 shortcomings in the rule, but at the same time found little indication that the shortcomings have any  
1070 significant effect on practice.

1071 One of the glaring conceptual difficulties with Rule 15(c)(3) is its reliance on notice to the  
1072 new defendant “within the period provided by Rule 4(m) for service of the summons and  
1073 complaint.” Apart from other problems, Rule 4(m) does not set a firm 120-day period. It allows  
1074 extensions. The 1991 Committee Note observes that Rule 15(c)(3) “allows not only the 120 days  
1075 specified in [Rule 4(m)], but also any additional time resulting from any extension ordered by the  
1076 court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service  
1077 of the summons.” Since the Note refers to an extension “pursuant to” Rule 4(m), and since the only  
1078 example refers to reasons that relate only to serving process, it is easy to conclude that the  
1079 incorporation of Rule 4(m) does not create an open-ended authorization to defeat the statute of  
1080 limitations by granting an extension whenever the court would prefer to proceed to the merits. But  
1081 it also can be argued that incorporation of Rule 4(m) creates such open-ended authority as to defeat  
1082 limitations defenses in the court’s discretion.

1083 Two Subcommittee members, drawing from the view that Rule 15(c)(3) now effectively  
1084 establishes discretion to suspend a limitations defense for a defendant not initially named, proposed  
1085 two broad amendments. One would respond to concerns that Rule 15(c) subverts state limitations  
1086 periods by limiting what now are paragraphs (2) and (3) — to become Style Rule 15(c)(1)(B) and  
1087 (C) — to a claim or defense governed by federal law. The second would create discretion to allow  
1088 joinder of a new defendant, to be guided by the claimant’s diligence in identifying the new defendant  
1089 and in seeking amendment, and by finding that the new defendant would not be prejudiced in  
1090 defending on the merits. In the Style version, the proposal would be:

1091 **(c) Relation Back of Amendments.**

1092 **(1) *When an Amendment May Relate Back.*** An amendment to a pleading relates  
1093 back to the date of the original pleading when: \* \* \*

1094 **(B)** the amendment asserts a claim or defense that is governed by federal  
1095 law and that arose out of the conduct, transaction, or occurrence set  
1096 out — or attempted to be set out — in the original pleading; or

1097 **(C)** the amendment changes the name or the identity of — or adds — a party  
1098 against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied, and  
1099 the court finds:

1100 **(i)** the pleader has exercised diligence in ascertaining the name of the  
1101 party;

1102 (ii) the amendment is sought within a reasonable time after serving  
1103 the pleading on the other parties against whom the claim is  
1104 asserted; and

1105 (iii) the party to be added, identified, or named will not be prejudiced  
1106 in defending on the merits.

1107 Subcommittee members who support this approach believe that it carries forward the  
1108 increasingly broad set of doctrines used to suspend the running of limitations periods. Definition  
1109 of the time a claim arose, concepts of estoppel and fraudulent concealment, and other approaches  
1110 have undermined the seeming precision of limitations periods.

1111 Those who oppose the proposal begin by doubting the view that the incorporation of Rule  
1112 4(m) authorizes a court to defeat a valid limitations defense by the simple act of pretending to extend  
1113 the time to serve process for reasons that have nothing to do with difficulties in effecting service.  
1114 Rule 15(c) applies only when the court cannot find that notice to a defendant was timely within  
1115 established limitations doctrine. The court can legitimately employ all of the devices used to  
1116 interpret the limitations statute first. But if it cannot find a way to escape the limitations bar, there  
1117 is no reason to use Rule 15(c) to establish a new discretion. This discretion would be especially  
1118 peculiar because it could not be established for a claim against a defendant properly named in the  
1119 original pleading. If limitations doctrine bars the claim then, no one would contend that the  
1120 Enabling Act should be used to create new limitations doctrine that allows an untimely claim if the  
1121 court finds the plaintiff was diligent and the defendant would not be prejudiced.

1122 The Enabling Act question was pressed further. One member suggested doubts about the  
1123 legitimacy of present Rule 15(c)(2) and (3), and urged that an attempt to broaden relation-back rules  
1124 might end up by forcing repeal of present rules that do have a legitimate function in correcting what  
1125 are truly procedural errors. The decision in *Schiavone v. Fortune*, 1986, 477 U.S. 21, that present  
1126 Rule 15(c) aims to correct is an example of circumstances that properly allow relation back.

1127 Further doubts were expressed about the wisdom of tangling with the many problems  
1128 identified in the supporting Rule 15 materials. At least until conceptual confusion is matched by  
1129 practical difficulties, it is better to let Rule 15(c) rest as it is.

1130 Attention turned to the narrower question whether to expand the concept of “mistake” by  
1131 adding “or lack of information.” The question commonly arises in actions against police officers.  
1132 The plaintiff cannot identify the officer claimed to have violated the Fourth Amendment without  
1133 filing suit and using discovery. The alternative of filing the action well before the limitations period  
1134 has run is not always practicable. The desire to help such plaintiffs has not generated any strong  
1135 support for expanding Rule 27 to authorize discovery to aid in bringing an action. An expanded  
1136 relation-back doctrine seems attractive in this setting. But “the context is broader than police  
1137 officers.” The Department of Justice often encounters “Bivens” complaints that include numbers  
1138 of “unknown-named” federal agents in circumstances that threaten broad intrusions on limitations  
1139 periods.

1140 The issues are difficult. The Committee is not shy about tackling difficult issues. But it  
1141 seems wise to take on difficult issues only when there is a clear problem in practice. The balance  
1142 between difficulty and need seems close.

1143 A motion to remove further work on Rule 15(c) from the agenda was adopted, 7 yes and 5  
1144 no.

1145 *Rule 48 — Jury Polling*

1146 The Committee decided in October 2005 to give final consideration this month to a proposal  
1147 to recommend publication of a jury polling provision as part of Rule 48. The draft proposal is taken  
1148 nearly verbatim from Criminal Rule 31(d), honoring the preference to avoid discrepancies between  
1149 parallel provisions that may generate unwarranted implications. But one departure from Rule 31(d)  
1150 is necessary and another seems desirable. Rule 48 allows the parties to stipulate to a nonunanimous  
1151 verdict; the Criminal Rules have no parallel provision. Criminal Rule 31(d) provides that if the poll  
1152 reveals a lack of unanimity, the court may “declare a mistrial and discharge the jury.” Although  
1153 those words are not inaccurate in a civil trial, they are tailored to the double-jeopardy concerns that  
1154 surround mistrial in a criminal prosecution. The Civil Rules refer simply to a “new trial” in the  
1155 parallel provisions of Rule 49(b) that address inconsistencies when a general verdict is accompanied  
1156 by interrogatories. The Committee agreed that the new part of Rule 48, to become subdivision (c),  
1157 would read:

1158 **(c) Polling.** After a verdict is returned but before the jury is discharged, the court must on  
1159 a party’s request, or may on its own, poll the jurors individually. If the poll reveals  
1160 a lack of unanimity or assent by the number of jurors required by the parties’  
1161 stipulation, the court may direct the jury to deliberate further or may order a new  
1162 trial.

1163 The question whether the court must carry through with the new trial in every case was  
1164 answered with a clear “no.” A properly preserved motion for judgment as a matter of law can be  
1165 renewed under Rule 50(b), corresponding to what once was called judgment notwithstanding the  
1166 jury’s failure to agree. If that fails, a new trial order simply returns the case to pretrial mode. The  
1167 parties can settle. Summary judgment is available — and the record of the first trial provides an  
1168 excellent starting point for showing what evidence is available. The direction to “order a new trial”  
1169 does not change the usual incidents of a new trial order.

1170 The October meeting noted a question presented by the argument in a pending Tenth Circuit  
1171 case that by requiring that the jurors be polled “individually” Criminal Rule 31(d) requires one-by-  
1172 one polling apart from all other jurors. That is not the traditional method of polling. There are good  
1173 reasons to conduct the poll in front of the entire jury. The argument was rejected by the Tenth  
1174 Circuit. It seems safe to adhere to the language of Criminal Rule 31(d).

1175 Rule 48 became the occasion for discussing the timing of publication. The Standing  
1176 Committee has already approved publication at a future date of a modest Rule 8(c) amendment. The  
1177 recommendations to publish amendments of Rules 13, 15, and 48, along with a new Rule 62.1, raise  
1178 the question whether the time has come to provide some respite for the bench and bar. The e-  
1179 discovery amendments and other important new rules and amendments are on track to take effect  
1180 on December 1, 2006. The Style amendments still are aimed to take effect on December 1, 2007.  
1181 Becoming familiar with all of these changes will take time. Proposals published for comment in  
1182 2006 would be on track to take effect on December 1, 2008. Although none of the current proposals  
1183 would effect a dramatic change, it may be better to defer publication. Other advisory committees  
1184 have deferred publication of proposals otherwise ready in order to assemble a larger bundle for  
1185 publication. On the other hand, account must also be taken of the size of the eventual publication  
1186 bundle. Work is proceeding on the Time-Computation Project. If the time rules are published in

1187 2007, other proposals may be lost in the shadows of time. This effect would be enhanced if work  
1188 on summary judgment or pleading proceed on a pace for publication in 2007. The Committee  
1189 concluded that the time for publication should be decided by the Standing Committee after  
1190 consultation with Judge Levi and Reporter Coquillette.

1191 *Rules 54(d), 58(c)(2), Appellate 4*

1192 Professor Gensler reported his conclusions on the Appellate Rules Committee's  
1193 recommendation that the Civil Rules be amended to impose a deadline for exercising the Rule  
1194 58(c)(2) (Style Rule 58(e)) authority to suspend appeal time when a timely motion for attorney fees  
1195 is made.

1196 The origin of Rule 58(c)(2) lies in the Supreme Court ruling that a timely motion for attorney  
1197 fees does not affect the finality of a judgment on the merits. The fee demand is not a "claim" for  
1198 purposes of Rule 54(b), so disposition of all "claims" in the case establishes a final judgment. Nor  
1199 is the fee motion one to alter or amend the judgment, so it does not count as a Rule 59(e) motion that  
1200 suspends appeal time under Appellate Rule 4. If it were not for Rule 58(c)(2), the result would be  
1201 that a party wishing to appeal judgment on the merits must file a notice of appeal within the allotted  
1202 time or lose the right to appeal. That result is sound when it is better to have the appeal on the  
1203 merits decided before the attorney-fee questions are decided by the district court. But it can be a  
1204 source of difficulty when it would be better to present both merits and the fee issues in a single  
1205 appeal.

1206 The response of Rule 58(c)(2) is to establish the district court's authority to decide whether  
1207 a fee motion should suspend appeal time. It is not easy for a tyro to unravel the rule. As stated in  
1208 Style Rule 58(e):

1209 But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may  
1210 act before a notice of appeal has been filed and become effective to order that the  
1211 motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as  
1212 a timely motion under Rule 59.

1213 The Sixth Circuit had to wrestle with this provision in *Wikel ex rel. Wikel v. Birmingham*  
1214 *Public Schools*, 6th Cir. 2004, 360 F.3d 604, lamenting the difficulty of working through four rules  
1215 to find an answer. Its opinion also reflects the absence of any explicit provision in Rule 58 that cuts  
1216 off the time for seeking an order when there is no notice of appeal. It would be possible to read the  
1217 rule literally to support an argument that so long as there is a timely fee motion the court can  
1218 suspend the time to appeal on the merits long after the time to appeal has run. Judgment is entered  
1219 in Day 1. A timely fee motion is made on Day 12. Days march by and the time to appeal on the  
1220 merits expires. On Day 150 the court rules on the fee motion. On Day 160 a party moves for an  
1221 order that the timely fee motion has the effect of suspending time to appeal on the merits. Because  
1222 no notice of appeal has yet been filed, Rule 58 might seem to allow the order. Few courts are likely  
1223 to grant such an order. The more plausible reading, moreover, is that the court must act while it is  
1224 still possible to file an appeal notice that will become effective.

1225 The complexity of these rules is not welcome. But the experience of Appellate Rule 4 is  
1226 instructive. Provisions that ought to be clear on careful reading have been continually amended to  
1227 meet the challenge of careless reading. Lawyers continue to lose the opportunity to appeal  
1228 nonetheless. Surrender to careless practice, however, would carry a high price. There are good  
1229 reasons for complexity. Post-judgment motions should be timely made. Rule 6(b), indeed,  
1230 specifically prohibits extensions of time. Appeal time is taken very seriously — only recently has  
1231 there been any room even to question the "mandatory and jurisdictional" characterization.

1232 Integrating these provisions is complicated by the concern that one party should not be able to defeat  
1233 another's opportunity to make a timely post-judgment motion by immediately filing a preemptive  
1234 notice of appeal. The desire to protect appellants who file premature notices of appeal, or who file  
1235 a timely notice that then is suspended by a post-judgment motion, leads to further complexity. Great  
1236 care must be taken in considering still further complications.

1237 The potential gap in Rule 58 could be addressed by adding one word — the court must act  
1238 before a “timely” notice of appeal has been filed and has become effective. This amendment,  
1239 however, would not reduce the complexity of the rules’ interplay. Other attempts to fix the rule by  
1240 requiring that a motion to suspend appeal be made — that the district court act — within the original  
1241 appeal time encounter the difficulty that a case order or statute may set the time to move for attorney  
1242 fees beyond the appeal period.

1243 Confronting these perplexities last October, the Committee asked the Federal Judicial Center  
1244 to study actual use of Rule 58 in practice. The first phase of the study initially examined a sample  
1245 of more than 8,500 cases terminated over the last eleven years in eight districts. Then it went on to  
1246 examine at least 200,000 docket sheets that combine references to attorney fees, appeal, and extend.  
1247 This phase found almost no evidence that Rule 58 is used to suspend appeal time. The second phase  
1248 responded to the observation that reported opinions do reflect simultaneous consideration on appeal  
1249 of the merits and attorney-fee awards. Nineteen of these cases were identified. The circumstances  
1250 that led to combined consideration varied, but almost invariably seemed “legitimate” in the sense  
1251 that the district court had not deliberately delayed entry of judgment on the merits for the purpose  
1252 of resolving attorney-fee issues.

1253 Docket-sheet research of this sort may overlook some cases. But it provides a reliable  
1254 indication that courts are not encountering widespread difficulty with the tightly drawn maze  
1255 established by the combination of Civil Rules 54 and 58 with Appellate Rule 4.

1256 The Federal Judicial Center was thanked for its work and help.

1257 The Committee concluded that there is not sufficient need to justify the risks of further  
1258 rulemaking in this area. This conclusion will be reported to the Appellate Rules Committee so that  
1259 further work can be undertaken if it reaches a different conclusion.

1260 *Rule “62.1” — Indicative Rulings*

1261 The “indicative rulings” question has remained on the agenda for a few years. It began with  
1262 a recommendation by the Solicitor General to the Appellate Rules Committee. The Appellate Rules  
1263 Committee concluded that any rule change should be made in the Civil Rules because the question  
1264 arises most frequently in civil practice and also because the case-law answers are better developed  
1265 in civil actions.

1266 The clear starting point is provided by cases that deal with a Civil Rule 60(b) motion to  
1267 vacate a judgment that is pending on appeal. Almost all circuits agree on a common approach. They  
1268 begin with the theory that a pending appeal transfers jurisdiction of a case to the court of appeals.  
1269 The district court lacks jurisdiction to affect the judgment. At the same time, there are important  
1270 reasons to allow the district court to consider the motion. The appeal does not suspend the time  
1271 limits of Rule 60(b) — the motion still must be made within a reasonable time, and there is a one-  
1272 year outer limit if the motion relies on the grounds expressed in paragraphs (1), (2), and (3). The  
1273 district court, moreover, is commonly in a better position to determine whether the motion should  
1274 be granted. These competing concerns are reconciled by holding that the district court can entertain  
1275 the motion and can either deny the motion or indicate that it would grant the motion if the court of

1276 appeals remands for that purpose. Some courts introduce modest variations, but the core remains  
1277 — the district court can, if it wishes, consider the motion pending appeal, but cannot grant it absent  
1278 a remand for that purpose.

1279 Although the practice is well settled under Rule 60(b), several reasons are advanced for  
1280 expressing it in a rule. A national rule would eliminate the minor disuniformities among the circuits.  
1281 It would give clear notice of a practice that remains unfamiliar to many lawyers and to at least a few  
1282 judges. It could establish useful procedural incidents, such as a requirement that the movant inform  
1283 the court of appeals both when the motion is filed and again when the district court acts on the  
1284 motion. It might — although this is a sensitive issue — prove useful when the parties wish to settle  
1285 pending appeal but are able to reach agreement only if there is a firm assurance that the district court  
1286 is willing to vacate its judgment upon settlement.

1287 A more general purpose would be served by adopting a new rule that is not confined to Rule  
1288 60(b) motions. A new rule — tentatively numbered Rule 62.1 — could address all situations in  
1289 which a pending appeal ousts district court authority to act.

1290 Discussion began with the impact on settlement pending appeal. The Supreme Court has  
1291 suggested that a court of appeals should vacate a judgment to reflect a settlement on appeal only in  
1292 “exceptional circumstances.” But it suggested at the same time that without considering whether  
1293 there are exceptional circumstances, the court of appeals may remand to the district court to consider  
1294 the parties’ request to vacate, “which it may do pursuant to Federal Rule of Procedure 60(b).” *U.S.*  
1295 *Bancorp Mort. Co. v. Bonner Mall Partnership*, 1994, 513 U.S. 18. District-court consideration is  
1296 an accepted practice. Recognizing the practice in the rule “does not put any weight on the scales;  
1297 it does not make it more likely that a request to vacate will be granted.” Further support was offered  
1298 with the observation that “in the settlement context you want assurance the settlement will go  
1299 through and the judgment will be vacated.” Each of the alternative drafts supports remand for this  
1300 purpose.

1301 The Department of Justice prefers adoption of a broader rule that reaches beyond Rule 60(b).  
1302 The established Rule 60(b) procedure has proved useful. It introduces a structured dialogue between  
1303 the trial court and the appellate court that can be useful in other settings as well. An express rule  
1304 will not create a new procedure. It will only make an established procedure more accessible.  
1305 Adopting a rule confined to Rule 60(b) motions, on the other hand, might be read to imply that the  
1306 same useful procedure should not be followed in other circumstances. The Rule 62.1 draft does not  
1307 attempt to define district court authority. Rather, it is framed in terms that apply only when  
1308 independent doctrine establishes that a pending appeal defeats the district court’s authority to act  
1309 on a motion. A party can file a motion in the alternative, arguing that the district court has authority  
1310 and should grant the motion, and arguing alternatively that the district court should indicate that it  
1311 would grant the motion if it concludes that it needs a remand to establish its authority. One complex  
1312 illustration is provided by a case in which a qui tam relator appealed from dismissal for want of  
1313 jurisdiction of a False Claims Act action. While the appeal was pending the Department of Justice  
1314 concluded that it should intervene in the action. It would be useful to be able to win a district-court  
1315 ruling that intervention would be granted if the court of appeals were to remand.

1316 Support for the Rule 62.1 alternative was offered with a different example. One party to a  
1317 class action might take an appeal. Then settlement becomes possible. It can be important to win  
1318 a remand so the trial court can proceed to settlement.

1319 It was noted that neither the Rule 60 version nor the Rule 62.1 version would affect the time  
1320 limits for making motions.

1321 A narrower question is presented by a drafting alternative. The rule can call for an indication  
1322 that the district court “would” grant the motion on remand, or instead it can call for an indication  
1323 that the district court “might” grant the motion. There are competing concerns. The court of appeals  
1324 may be reluctant to remand without an assurance that delay of the appeal will lead to accelerated  
1325 disposition of the new issues put to the district court. But the district court may be reluctant to invest  
1326 heavily in full proceedings and decision when the court of appeals may proceed to resolve the appeal  
1327 — and on grounds that may moot the district court’s indicative grant of relief.

1328 The question whether the district court should be able to seek remand by stating only that  
1329 it “would” grant relief was approached by asking whether “would likely” is a useful compromise.  
1330 This proposal was attractive, but “might” was further supported. The court of appeals, after all, is  
1331 left in control. It can decide whether “might grant” provides a sufficient reason to remand in light  
1332 of the progress of the appeal and the weight of the reasons for investing further district-court effort  
1333 only if a remand provides assurance that an appellate decision will not defeat the effort. A district  
1334 judge will have to invest more effort to determine that it “would” grant the motion than to determine  
1335 that it “might” grant the motion. But perhaps that is a good thing — the court has to think harder.  
1336 On the other hand, the district court has the alternative option — which must be written into the rule  
1337 — to defer any consideration at all. The ability to consider the motion to the point of determining  
1338 that a real investment of effort will be required to reach a final conclusion may be important. A  
1339 remand in this circumstance will allow the court to go either way, to grant the motion or to deny it.

1340 It was pointed out that if the rule published for comment is the broader version, Rule 62.1,  
1341 the indicative ruling practice will be extended into territory where it is not firmly established. For  
1342 this reason, it seems better to publish it with bracketed alternatives — the district court can indicate  
1343 that it “[might][would]” grant relief if the case is remanded.

1344 A motion was made to adopt the broader Rule 62.1 version. Discussion began with the  
1345 observation that the most common application of this version will involve interlocutory injunction  
1346 appeals under § 1292(a)(1). Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish a firm  
1347 rule not only that the district court can act on a motion to “suspend, modify, restore, or grant an  
1348 injunction,” but also that it is the preferred forum. Several courts of appeals, however, defeat these  
1349 rules by relying on the theory that an appeal ousts district-court jurisdiction of the order being  
1350 appealed. One approach to this problem might be to rewrite these rules to establish that they mean  
1351 what they rightly say — it is better that the first consideration be in the court of appeals. This  
1352 invitation was not taken up.

1353 It was agreed that the broad Rule 62.1 approach should not attempt to define the situations  
1354 in which a pending appeal ousts district-court jurisdiction. Instead it should be drafted in terms that  
1355 assume that independent sources of authority establish that the district-court lacks authority.

1356 The motion to adopt the general Rule 62.1 approach was approved, 9 yes and none opposed.

1357 The draft rule in the agenda materials was refined to read:

1358 **Rule 62.1 Indicative Rulings**

1359 **(a) Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to  
1360 grant because of an appeal that has been docketed and is pending, the court may:

1361 **(1)** defer consideration of the motion,

1362 (2) deny the motion, or

1363 (3) indicate that it [might][would] grant the motion if the appellate court should  
1364 remand for that purpose.

1365 **(b) Notice to Appellate Court.** The movant must notify the clerk of the appellate court when the  
1366 motion is filed and when the district court rules on the motion.

1367 **(c) Indicative Statement.** If the [district] court indicates that it [might][would] grant the  
1368 motion, the appellate court may remand the action to the district court.

1369 *Subcommittee Report: Rule 30(b)(6)*

1370 Judge Campbell introduced the report on Rule 30(b)(6) by observing that the Subcommittee  
1371 also is addressing at least two questions about Rule 26(a)(2)(B) disclosure of trial expert-witness  
1372 reports.

1373 Rule 30(b)(6) came to the agenda with a memorandum from the New York State Bar  
1374 Association Committee on Federal Procedure. The Subcommittee sought further information by  
1375 sending a letter to bar groups that had commented on the e-discovery amendments. Fourteen letters  
1376 were received in response. Professor Marcus also researched the origins of Rule 30(b)(6) and the  
1377 case law. Working with these responses, the Subcommittee identified six issues to consider.  
1378 Professor Marcus drafted illustrative rule language to focus the discussion.

1379 Some of the issues that arise in practice are case-specific and are not suitable for treatment  
1380 in a national rule. For example, there is no way to say that 30(b)(6) depositions should be used at  
1381 the beginning or at the end of discovery. Use early in discovery is often important to identify the  
1382 sources of information to support further discovery, or to develop information needed for efficient  
1383 discovery of electronically stored information. But use later in the discovery period also may be  
1384 important.

1385 Another set of issues not likely to yield to rule amendments concern the scope of the  
1386 deposition. How broad or particular is the notice of the matters on which examination is requested?  
1387 How clear is the deponent's designation of the matters on which a named person will testify? How  
1388 closely must examination of the witness adhere to the notice of matters for examination? Responses  
1389 indicate that lawyers who represent plaintiffs complain that named witnesses often are unprepared.  
1390 Lawyers who represent defendants complain that notices are unclear and that questioning regularly  
1391 extends beyond matters identified in the notice. "That's how adversaries are." We cannot hope to  
1392 accomplish much by rules changes.

1393 Other questions may be susceptible to rules provisions, but remain difficult. Illustrations are  
1394 provided by disputes about the "binding" effect of a witness's answers and by the related questions  
1395 whether supplementation after the deposition should be seen as a duty or as an opportunity.

1396 Professor Marcus began his presentation by noting that rule 30(b)(6) is a valuable and  
1397 important device. Although there are legitimate concerns about its implementation, the concerns  
1398 do not of themselves mean that ameliorative reform is possible. The topics that became the focus  
1399 of Subcommittee deliberation seem the best way to introduce the topic.



1400 One suggestion, advanced by David Bernick at the October meeting, was that Rule 30(b)(6)  
1401 should be limited to questions that locate the sources of proof. There was no Subcommittee support  
1402 for this approach. The original purpose revealed by the 1960s deliberations that led to adoption of  
1403 Rule 30(b)(6) in 1970 is to go further. These depositions were analogized to Rule 33 interrogatories,  
1404 which clearly go further.

1405 A second set of suggestions arise from disputes about treatment of a witness's deposition  
1406 statement as a binding "judicial admission." Many bar groups find this an important problem. Some  
1407 groups say there is not enough binding effect, and that the rule should be changed to expand binding  
1408 effects. Other groups think there is too much binding effect now. The cases do not establish a clear  
1409 picture of present practice. The case most often cited for a strict "judicial admission" approach is  
1410 *Rainey v. American Forest & Paper Assn.*, D.D.C.1998, 26 F.Supp.2d 83. But the *Rainey* decision  
1411 is tied to failure to prepare the witness, emphasizing that a corporation named as deponent has a duty  
1412 to prepare its witness "to be able to give binding answers on its behalf." Other decisions find that  
1413 the "sounder view" permits a party to contradict the deposition testimony of its designated witness,  
1414 subject to impeachment use of the deposition testimony. This approach at times seems to treat the  
1415 designated witness in the same way as a deponent directly named in the notice, and may include the  
1416 "sham affidavit" approach that authorizes a court to disregard a self-serving and affidavit that  
1417 attempts to defeat summary judgment by contradicting the affiant's deposition testimony. Moore's  
1418 Treatise, on the other hand, says that the designated witness's testimony binds the entity. This is  
1419 a subject that could be addressed by amendment.

1420 A Subcommittee member observed that the bar group comments provided "excellent input"  
1421 on the question of binding effect. The Subcommittee seemed to agree that the better rule permits  
1422 an entity named as deponent to present evidence that contradicts the deposition testimony of its  
1423 designated witness. Impeachment by use of the deposition is available. The question may arise  
1424 more frequently — perhaps much more frequently — than published opinions reflect. And the  
1425 statement in the Moore's Treatise will be cited every day by lawyers seeking to take advantage of  
1426 a purported admission.

1427 Another comment addressed the "sham affidavit" rule, observing that this "is not a Rule  
1428 30(b)(6) problem." It is a form of judicial estoppel. There is no need to amend Rule 30(b)(6) to  
1429 address this doctrine.

1430 A Committee member thought it appropriate to leave these questions to the courts. But it  
1431 seemed surprising that the letters did not speak to "the problem I encounter most." Rule 30(b)(6)  
1432 depositions are used to penetrate work-product protection and privilege. To educate a witness for  
1433 the deposition you have to educate the witness in counsel's work product. There are difficult  
1434 questions about the extent of the duty to teach the witness about things counsel has found in  
1435 preparing for trial.

1436 Discussion of work-product problems began with a reminder that work-product does not  
1437 protect fact information uncovered by counsel in preparing for trial. The information is subject to  
1438 discovery by deposing individual witnesses, by interrogatory, by production of documents, and by  
1439 requests to admit. It is equally subject to discovery through Rule 30(b)(6). The question instead  
1440 goes to matters of theory, contention, and strategy.

1441 The bar groups were asked to comment on work-product issues, and provided some  
1442 comments. The American College of Trial Lawyers asked whether Evidence Rule 612 applies at  
1443 all — are documents used to prepare a witness used to refresh memory, or instead to educate? The  
1444 New York State Bar Association memorandum that began this project focused on work-product

1445 questions and attempts to commit the entity to defined contentions through the designated witness.  
1446 These questions are difficult. The memorandum by Gregory Joseph in the Evidence Rule 502  
1447 agenda materials remarks that a lawyer should assume that the book of materials used to prepare the  
1448 designated witness will be subject to discovery. This question relates to one of the questions  
1449 presented by Rule 26(a)(2)(B): is a party obliged to disclose the briefing book used in helping a trial-  
1450 expert witness to develop expert opinions?

1451 Professor Marcus returned to the “judicial admissions” problem by pointing to a draft in the  
1452 agenda materials. This draft would add two new sentences to Rule 30(b)(6): “The responding  
1453 organization must adequately prepare the person or persons designated to testify so that they can  
1454 testify as to the information known or reasonably available to the organization. If such preparation  
1455 is adequately done, the court may not treat answers given during the deposition as judicial  
1456 admissions.” This draft “mediates between those who want a clearer duty to prepare and those who  
1457 want to address admission effects in the Rule.” The rule text could be supplemented by Committee  
1458 Note discussion of the nature of the duty to prepare the witness.

1459 The question of binding effect also can be approached through Rule 26(e) by addressing the  
1460 duty to supplement testimony provided under Rule 30(b)(6). Rule 26(e) could establish a duty to  
1461 supplement or correct testimony by a Rule 30(b)(6) designated witness, and perhaps establish a right  
1462 to “retake” the deposition free of the Rule 30(a)(2)(B) need for permission to examine the same  
1463 witness twice. The duty to supplement would tie directly to Rule 37(c)(1), which prohibits use of  
1464 testimony that a party failed to provide under the duty to supplement. The American Bar  
1465 Association Litigation Section was circumspect in addressing this possibility. One concern is that  
1466 an explicit duty to supplement might come to be used as an opportunity to delay responses — in  
1467 effect the answers at deposition would be “I don’t know; we’ll get back to you later on that.”

1468 The question of scope could be addressed by adding a sentence to Rule 30(b)(6):  
1469 “Questioning during the deposition must be limited to the matters for which the person was  
1470 designated to testify.” The bar groups provided varying reports. Some said that questioning beyond  
1471 the designation occurs frequently; others said that judges never allow it; some said that such  
1472 questioning occurs, often with the acquiescence of all parties, because it is more sensible than  
1473 requiring that the same witness be named in a second notice and deposed as an individual. Still  
1474 others raised the question whether questioning that extends beyond the designation automatically  
1475 converts the deposition into a second deposition for purposes of the presumptive limit to ten  
1476 depositions.

1477 Another suggestion, responding to concern about contention questions, is that Rule 30(b)(6)  
1478 should be amended to state that the persons designated by the entity named as deponent “must testify  
1479 to factual information known or reasonably available to the organization.” Administration of this  
1480 provision might prove difficult. What should be done, for example, with a question that asks for “all  
1481 facts that support paragraph 4 of the complaint”?

1482 Perhaps predictably, a number of comments addressed application of the rules that govern  
1483 the number and duration of depositions. Some of the answers are clearly established now, and seem  
1484 right. The Committee Note to Rule 30(a) states that a 30(b)(6) deposition counts as one deposition  
1485 “even though more than one person may be designated to testify.” The Committee Note to Rule  
1486 30(d) says that the seven-hour limit applies separately to each person designated. But there is no  
1487 clear answer to the question whether a second 30(b)(6) deposition of the same organization is  
1488 subject to the Rule 30(a)(2)(B) requirement for permission or stipulation if “the person to be  
1489 examined already has been deposed in the case.”

1490           Complaints about the difficulty of preparing one or more witnesses to testify about  
1491 information “known or reasonably available to the organization” might be addressed by amendment.  
1492 In preparing Rule 30(b)(6), the Committee rejected a version that called for testimony on  
1493 information “readily obtainable” by the organization. It would be possible to soften the rule now  
1494 by referring to information “readily” available. But — particularly by relieving the organization of  
1495 the duty to prepare the witness on all information “known” to the organization — this might reduce  
1496 the value of 30(b)(6) too far.

1497           Discussion began with an observation that one judge encounters contention questions on  
1498 Rule 30(b)(6) depositions “all the time.” People would rather bind the corporation by asking  
1499 deposition questions of a witness than by using interrogatories. Interrogatory answers will be  
1500 carefully framed by a lawyer. A witness, no matter how well prepared, cannot be expected to be as  
1501 careful or as precise. Questioners “use it to beat people over the head.”

1502           There may be some relation between contention questions and complaints that deposition  
1503 notices are too broad, or that notices are too specific but on too many topics, or that questions are  
1504 asked on topics unrelated to the notices. But it is difficult to improve on the drafting of the present  
1505 rule in these respects. Self-control by attorneys, and when necessary control by the court, are the  
1506 most effective devices.

1507           It was suggested that part of the response to concern about admissions and contention  
1508 questions may lie in clearly recognizing a right to supplement deposition testimony. Any other  
1509 witness has a right to supplement deposition testimony at trial.

1510           A different slant was taken on contention discovery by suggesting that if a contention  
1511 question is asked during early discovery the proper answer should be that the information is not yet  
1512 reasonably available. If need be, a protective order could be sought on this ground.

1513           The evolution in Rule 30(b)(6) practice was noted. For many years these depositions were  
1514 used to identify sources of information to be sought by other discovery methods. That use  
1515 responded to the purpose that launched the rule. But today these depositions are used for  
1516 gamesmanship. “Tell me everything you’ve learned about the case.” Rule 33 interrogatories are  
1517 not extensively used in “big” cases. A lawyer will draft an answer that cannot be usefully read to  
1518 a jury. The deposition “is just a shortcut to get inside what other lawyers have done.” It is used to  
1519 trip up the witness.

1520           A defense of 30(b)(6) depositions was offered. They can be a useful short cut, compared to  
1521 the “long cut” by interrogatories and individual depositions. Not only are more costly modes of  
1522 discovery avoided. A Rule 30(b)(6) deposition may be the only way to get straight answers.

1523           The Subcommittee agreed that it should work further on the use of Rule 30(b)(6) deposition  
1524 testimony as a judicial admission. Judge Campbell asked whether it also should work further on  
1525 supplementing the testimony, noting that under present Rule 26(e) the only occasion for  
1526 supplementing deposition testimony arises from deposition of a trial-expert witness. If  
1527 supplementation is required, Rule 30(b)(6) depositions would be treated differently from other  
1528 depositions. That may not be a good thing. And it would not be good to allow supplementation only  
1529 on showing good cause. The deposition remains a process of questioning a human witness. A  
1530 person answering questions may not answer perfectly the first time around. A right to supplement  
1531 of course affects potential use of an original deposition answer as a judicial admission. In any event,  
1532 if rule language is adopted to address the admission question, supplementation will be implicated  
1533 whether or not an explicit rule provision addresses supplementation.

1534 Judge Campbell summed up the discussion. The Subcommittee will not address questions  
1535 such as the number of depositions or second depositions of the same organization. It is widely  
1536 recognized that the organization has a duty to prepare the witness; there is no need to elaborate in  
1537 the rule. One proposal from a bar group recommended adoption of the California approach, which  
1538 requires designation of the “most knowledgeable” person. To the extent that approach is different  
1539 from Rule 30(b)(6), there is little apparent reason to change direction now. Rule 30(b)(6) is  
1540 functioning well enough. A Committee member observed that in practice the California rule is not  
1541 much different from Rule 30(b)(6) anyway.

1542 The Subcommittee will consider the admission issue, noting that the cases seem to be  
1543 moving toward the conclusion that the deposition testimony is not binding. It also will consider the  
1544 “work-product” issues.

1545 *Rule 26(a)(2)(B)*

1546 Jeffrey Greenbaum reported on the American Bar Association Litigation Section report on  
1547 discovery of work-product and privileged information revealed to a trial-expert witness. The report  
1548 is not yet official ABA policy; it will be submitted to the House of Delegates with a recommendation  
1549 for adoption.

1550 The cases divide on protecting by privilege communications between an expert trial witness  
1551 and counsel.

1552 Discovery of draft expert reports also is treated in different ways. Some judges order at the  
1553 beginning of a case that drafts be preserved. Some experts flatly refuse to keep drafts, or even to  
1554 make a draft. A cautious attorney simply talks with the expert, or views a draft report only on a  
1555 computer screen. Experts often scrub drafts from their hard drives. The difficulties created by these  
1556 practices are reflected by part of the 1993 Committee Note that recognizes that an expert witness  
1557 may need an attorney’s help in preparing a disclosure report, offering an automobile mechanic as  
1558 an example.

1559 The ABA recommends adoption of a national rule to establish uniform practice. The rule  
1560 should bar discovery of draft reports. And it should protect work-product involved in exchanges  
1561 between the attorney and the expert trial witness. Disclosure and discovery should still be available  
1562 as to the expert’s analysis and the data on which it is based. The expert can be cross-examined.  
1563 This system will protect against the disadvantages that arise when a well financed party is able to  
1564 hire two sets of experts, one set acting as trial consultants protected by work-product, while another  
1565 party is able only to hire trial experts who will be subject to full discovery. New Jersey has had such  
1566 a rule for a few years, and it works well.

1567 It was noted that Massachusetts has a rule similar to the New Jersey rule, and reported that  
1568 it works well.

1569 Professor Marcus noted that the 1993 Committee Note operated on the premise that “the  
1570 collaborative process of preparing expert testimony” should be in the open. Disclosure and  
1571 discovery are advanced as important counterbalances to the adversary character of expert testimony.

1572 The question whether to permit discovery leads to the further question whether a different  
1573 rule should apply at trial. Is it desirable to bar disclosure or discovery of something that can be  
1574 sought at trial?

1575 The Subcommittee will study the questions raised by the ABA report. It also will continue  
1576 to study the distinctive treatment that Rule 26(a)(2)(B) extends to expert trial witnesses who are

1577 employees of a party and whose duties as employees do not regularly involve giving expert  
1578 testimony.

1579 *Ongoing Project: Rule 56*

1580 Judge Rosenthal reported that work on the Rule 56 project has proceeded. The primary work  
1581 is reflected in a thorough report by James Ishida that distills a great amount of work in collecting  
1582 and organizing local rules on summary judgment. The local rules take a wide range of approaches.  
1583 There may be much to be learned from them in revising the national rule.

1584 Rule 56 practice has developed away from the practices that might be inferred from the rule  
1585 text. The Committee has been reluctant to reconsider the standard for deciding whether there is a  
1586 genuine issue of material fact. But there is continuing interest in revising the procedures for  
1587 considering a Rule 56 motion, for determining whether there is a genuine issue.

1588 The Committee agreed that a proposal focusing on Rule 56 procedures should be prepared  
1589 for consideration at the fall meeting.

1590 *Ongoing Project: Rule "8" — Notice Pleading*

1591 Judge Rosenthal recalled the decision that summary judgment should be considered in  
1592 tandem with notice pleading. The common core involves identifying the optimal use of pleading,  
1593 discovery, and summary judgment to identify and dispose of cases that do not merit trial. An  
1594 adequate opportunity for discovery must be provided, but there may be room to improve present  
1595 practice.

1596 The primary work since the last meeting is reflected in a report by Jeffrey Barr on  
1597 "heightened pleading" decisions. Supreme Court decisions rule that heightened pleading can be  
1598 required only when demanded by rule or statute. Otherwise notice pleading governs. But the  
1599 opinions recognize that there may be unmet needs for heightened pleading that could be addressed  
1600 by amending the pleading rules. The Barr memorandum surveys many recent decisions, including  
1601 not only those that reject heightened pleading but also some that gamely continue to require it. It  
1602 is excellent work.

1603 A survey of express statements in opinions may not tell the whole story. Even as courts  
1604 continue to say that they do not require heightened pleading, some opinions seem to demand levels  
1605 of detail far different from the pictures painted by the "Rule 84" Forms. Practice seems to reflect  
1606 the views of at least some judges that some forms of litigation require more careful initial screening  
1607 than bare notice pleading supports.

1608 The initial work has addressed several options. "Fact" pleading might be restored,  
1609 abandoning the 1938 experiment with what is commonly called "notice" pleading. Or Rule 8 might  
1610 be amended to give teeth to the requirement that the plain and simple statement show that the  
1611 pleader is entitled to relief. Or specific rules might be adopted for specific claims, in the mode of  
1612 Rule 9(b). Or, failing any general approach, an attempt might be made to reinvigorate Rule 12(e),  
1613 moving it back toward the former bill of particulars.

1614 Initial discussion suggested that there is not much enthusiasm for reverting to fact pleading.  
1615 Nor is there much enthusiasm for attempting a general redefinition of notice pleading. It does not  
1616 seem likely that proposals to abandon notice pleading, or to redefine it, would survive the full course  
1617 of Enabling Act scrutiny. Some observers believe that courts will de facto follow variable standards,  
1618 generally requiring more exacting pleading standards in some types of cases. And at least some of

1619 those who hold this view conclude that the practice is a good thing. But many of them also believe  
1620 that it would be pointless to attempt either to enshrine this approach in rule text or to extirpate it.

1621 The alternative of adopting specific pleading rules for specific types of claims was  
1622 considered next. It is possible to expand Rule 9(b) to require particularized pleading of claims in  
1623 addition to claims of fraud or mistake. Or Rule 9 could be expanded by adding additional  
1624 subdivisions. Or a provision might be added to recognize authority to adopt local pleading  
1625 requirements in the manner of the standing orders or local rules that require "case statements" in  
1626 actions under the Racketeer Influenced and Corrupt Organizations Act.

1627 Two difficulties were identified with the task of developing claim-specific pleading rules.  
1628 One problem arises from the need for detailed knowledge about the underlying substantive law and  
1629 the practicalities of litigating claims arising under that law. Another problem arises from the  
1630 perception that the seemingly procedural pleading rules are surreptitiously motivated by distaste for  
1631 the substantive rights or defenses subjected to higher standards.

1632 Greater enthusiasm was expressed for exploring an expansion of Rule 12(e). The draft in  
1633 the agenda materials would authorize an order for a more definite statement when more particular  
1634 pleading will support informed decision of a motion under Rule 12(b), (c), (d), or (f). This case-  
1635 specific approach might improve the position not only of defendants but also of plaintiffs who now  
1636 must contend with unstated practices that in operation require heightened pleading without useful  
1637 guidance.

1638 *Federal Judicial Center Report*

1639 Thomas Willging reported on the preliminary phases of the Federal Judicial Center study of  
1640 the Class Action Fairness Act. He began by noting that class actions have been discussed at every  
1641 meeting of the Advisory Committee that he has attended since 1994. The interim report was  
1642 prepared by Willging with Emery lee and others.

1643 The first phase will study filing practices. The interim report covers three districts; it is  
1644 hoped that all districts can be covered by next September. They also hope to extend the study  
1645 beyond the current time limit, June 30, 2005.

1646 One surprise has been the level of activity. In the 1994 study of four districts, they found  
1647 407 cases terminated over a period of 2 years. For only three of those districts, this study shows  
1648 1,871 filings over a period of four years. That looks like a big increase. The figure will be broken  
1649 down into smaller components as the study proceeds.

1650 Changes in the rate of filings over the four-year period show that in two of the three districts,  
1651 Northern California and Northern Illinois, filings increased in the short period between the effective  
1652 date of CAFA, February 18, 2005, and June 30. They had expected there would be a lag before  
1653 filings increased, in light of rumors that lawyers were accelerating the time of filing state-court  
1654 actions before February 18 to defeat removal.

1655 Separate attention is being paid to state-based contract and tort actions to see whether these  
1656 actions will be shifted to federal courts after CAFA. Current filings are very low. This establishes  
1657 a clear base for comparison.

1658 Removals will be examined closely. The experience has been that there is a low level of  
1659 diversity filings and a low level of removals. This pre-CAFA experience may make it easier to  
1660 examine the causal effects of CAFA.

1661

*Next Meeting*

1662           The next meeting is scheduled for September 7 and 8 in Nashville, Tennessee, at the  
1663 Vanderbilt Law School. The dates will be changed only if it is possible to reduce further the number  
1664 of scheduling conflicts.

1665

*Vote After Meeting*

1666           The questions left open for final decisions by electronic voting after the meeting were  
1667 submitted to the Committee on May 30 and resolved by balloting that concluded on June 1.

1668           The Committee approved revised text for Rule 86(b), style changes to integrate into the Style  
1669 Rules the electronic-discovery amendments scheduled to take effect next December 1, expanded  
1670 Committee Note language for Style Rule 1 that provides a general description of the purposes and  
1671 methods of the Style Project, and restoration to the Committee Note for Style Rule 65(d) of a  
1672 paragraph explaining resolution of the ambiguity described above. The final texts of these new  
materials are attached.

Respectfully submitted,

Edward H. Cooper  
Reporter