

Minutes

Civil Rules Advisory Committee

October 2-3, 2003

The Civil Rules Advisory Committee met on October 2 and 3, 2003, at the Hyatt Regency in Sacramento, California. The meeting was attended by Judge Lee H. Rosenthal, Chair; Sheila Birnbaum, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Judge H. Brent McKnight; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee member Dean Mary Kay Kane also attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Robert Deyling, and Professor Steven S. Gensler, Supreme Court Fellow, represented the Administrative Office. Thomas E. Willging, Kenneth Withers, and Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Stefan Cassella, Esq., also attended for the Department of Justice, with Assistant United States Attorneys Richard Hoffman and Courtney Lind. Observers included Judge Christopher M. Klein; Peter Freeman, Esq., and Jeffrey Greenbaum, Esq. (ABA Litigation Section); Stefanie Bernay, Esq.; Brooke Coleman, Esq.; and Alfred W. Cortese, Jr., Esq..

Judge Rosenthal began the meeting by noting that in an unusual twist, no Committee member has become a law school dean — or even migrated to the academy — since the last meeting. Judge McKnight has become a District Judge. Sheila Birnbaum is attending her final meeting at the conclusion of her second term as a member, carrying on active involvement in the Committee's work that began several years before appointment as a member and that bids fair to continue into the future. Judge Levi has been appointed chair of the Standing Committee. Both graduates will be suitably recognized at dinner. Frank Cicero, Jr., a new Committee member, attended Style Subcommittee meetings in August but was not able to attend this meeting.

Minutes

The Minutes for the May 1-2, 2003, meeting were approved.

Administrative Office Report

John Rabiej delivered the Administrative Office Report. The Office has focused its legislative attention on three bills.

Minutes
Civil Rules Advisory Committee, October 2-3, 2003
page -2-

The E-Government Act of 2002 is law. It requires promulgation of rules through the Enabling Act process to address concerns about privacy and security arising from the conversion to electronic court records. There is no time deadline for adopting these rules. By 2007, all e-court records must be made available to the public. The Judicial Conference is authorized to issue interim rules and interpretive statements. The Standing Committee has taken the lead in implementing the Enabling Act Rules requirement, creating a subcommittee chaired by Judge Fitzwater. All of the advisory committee reporters are members, with Professor Capra as lead reporter. Judge Scheindlin is the Civil Rules Advisory Committee member of the subcommittee. It seems likely that subcommittee proposals will be reviewed by the advisory committees before final Standing Committee action. The Judicial Conference has adopted a privacy policy for some cases, and is working on a policy for criminal cases. Judge Levi plans to invite two members from the Committee on Court Administration and Case Management to serve as liaisons on the subcommittee.

The minimum-diversity class-action bill that passed the House this year includes a mandatory interlocutory appeal provision that would undo the recently adopted Civil Rule 23(f) discretionary appeal provision. The Senate bill has no comparable provision. There had been plans to bring the bill to the Senate floor in September; it may yet be brought to the Senate this session. An earlier version of the House bill included several provisions that would interfere with the Rule 23 amendments slated to take effect this December 1. As passed, the House bill includes a provision that would accelerate the effective date of the Rule 23 amendments if the bill should become law before December 1; that prospect is diminishing. Absent further developments, the pending amendments will take effect on December 1.

An asbestos bill has emerged with great effort on all sides. Judge Becker of the Third Circuit has been working hard to find a compromise solution that will be acceptable to all sides. The prospects for success, however, do not appear promising.

There is a bill pending to undo the Lexecon decision, so that a multidistrict consolidation court could retain cases for trial as well as pretrial proceedings.

This Committee had no proposals to present to the Judicial Conference at its September meeting.

The Judicial Conference did resolve to address several removal questions dealing with the time to remove when defendants are served at different times; removal when the diversity amount-in-controversy requirement does not appear on the face of the original state-court complaint but later appears; exceptions to the present requirement that a diversity action be removed no more than one year after filing; and the "separate and independent claim or cause of action" provision in 28 U.S.C. § 1441(c).

Style: Rules 16-25, less 23

Judge Rosenthal observed that the Style Project is successfully meeting the ambitious schedule we have set. The process begins with revision of the “Garner-Pointer” draft by the Style consultants; review by “the professors”; submission of a further-revised draft to the Style Subcommittee; consideration by Subcommittee A or B of a draft annotated with footnote questions; and, with further revisions, consideration by the full Committee. Each rule has a member-in-charge for consideration in the subcommittee and then in the full Committee. Specific difficult issues may be subject to additional research at each step.

The project remains careful to avoid changes in the substance of any rule. Desirable changes of meaning — including resolutions of ambiguities that cannot be corrected as a matter of style without risk of changed meaning — are collected for action on separate tracks. Some of these substantive changes may be published for comment in tandem with the style drafts.

This process has not only managed to stay on schedule but has also worked very well. Style Rules 1 through 15 have been approved by the Standing Committee for publication as part of a larger package. We hope to publish all of Rules 1-37 and 45, minus Rule 23, as a first Style package. At this meeting we have for consideration Rules 16-37, minus Rule 23, plus Rule 45.

The Style Project has produced a long list of “global issues” that must be considered after we have achieved an overview of the contexts in which troubling words and phrases appear. Examples include the choices between “stipulate” and “agree”; between “disobedient” and some other word such as “noncompliant”; between “United States statute” and “federal statute.” Some of these choices are likely to be made by adopting a single term to be used consistently throughout the Rules; others likely will lead to use of different terms according to context and history.

We also need to remain aware of the need to adjust Rules amendments made in the ongoing course of business to Style conventions. Rules 24, 27, and 45 are on today’s Style agenda, for example, and also are the subject of amendments published for comment last August.

Judge Russell began the Subcommittee A presentation by noting that the Standing Committee’s Style Subcommittee and those who have worked with it in bringing drafts to the Advisory Committee Subcommittees have done outstanding work in focusing the issues for discussion.

Rule 16. Discussion began with the first part of Style Rule 16(a). The current Style draft adheres to the present rule by referring to “one or more conferences before trial.” The Style Subcommittee would prefer to refer only to “pretrial conferences” throughout Rule 16. This recommendation was questioned by noting that bankruptcy courts have an aggressive practice called “pretrial” that occurs immediately after filing. It is understood that this event is different from later pretrial conferences. “Conferences before trial” is more suitable. Another comment was that in practice it is common to refer to the final conference held to set trial issues as the “pretrial” conference, and that it is better to refer to other conferences as other conferences. So the first conference often is called the “Rule 16” or “scheduling” conference; later trials are “pretrial conferences,” while the trial-setting

conference is the “final pretrial conference.” And “settlement conferences” are quite distinct from conferences that focus on preparing the case for trial. Rule 26(f), moreover, refers to the Rule 16(b) conference as the scheduling conference. On the other hand, it was noted that the caption of present Rule 16 and the tag-line of present Rule 16(a), refer to “pretrial conferences.” At the end, the consensus was to adopt “pretrial conference” throughout if that continues to be the Style Subcommittee preference.

So Style Rule 16(b)(3)(B)(iii) refers to “other conferences”; this will be changed, as the Style Subcommittee recommends, to “pretrial.”

Present Rule 16(c)(3) refers to action with respect to “the possibility of obtaining admissions.” Style 16(c)(2)(C) refers simply to “obtaining admissions.” Some participants are concerned that this form may be read by some eager judges to imply an authority to direct “admissions” that a party resists. But the very concept of “admission” may be so imbued with notions of willing consent that “possibility of” adds no useful restraint. The Style draft will remain as it is.

Separately, it was asked whether the Committee Note should make it clear that a settlement conference is a “pretrial conference” governed by Rule 16. Both present and Style Rules 16(a)(5) refer to facilitating settlement as an object of a pretrial conference. There is no change, and no need for Note comment.

Present Rule 16(e) states that after any Rule 16 conference, “an order shall be entered reciting the action taken.” Style Rule 16(d) translates “shall” as “should.” “Should” was adopted as an accurate reflection of practice. But does it accurately reflect the original intent? This illustrates the global question whether “must” often seems to change the character of discretion established by present rules into a binding “instruction manual.” Does “must enter an order” mean that the court cannot comply by simply stating the results on the record? And what of the frequent occurrence that there is no reporter, no record, and no order?

Further discussion expanded on the general global issue. “Shall” may be used in the present rules as a deliberate ambiguity. Working from a presumption that it should be translated as “must” is a mistake. The Rules are aimed primarily at guiding the lawyers, reposing discretion in judges that should not be confined by unnecessary force. The rules should be drafted for the typical judge — that is, for the good judge — and not for the rare bad judge. The choice makes a subtle but powerful difference that can affect the entire rule process into the future. In various places we wind up saying “must” when there is discretion not to act as the rule says the judge must. “Must” is appropriate when there is a nondiscretionary statutory duty, or a duty so clear as to warrant appellate enforcement by extraordinary writ, or some other clearly nondiscretionary duty. Style Rule 16(b)(1), saying that a judge “must” enter a scheduling order, is an example; many times the parties and court have agreed that the time deadline that Rule 16(b)(2) says “must” be honored is inappropriate and should be deferred.

So Style Rule 16(b)(3)(A) says that the scheduling order must limit the time to complete discovery. But there are many cases in which the court and parties know there will be no discovery. Why must the order include a meaningless time limit?

Professor Kimble noted that this argument is an observation that “shall” has been corrupted, to state only a “soft duty.” We do need to pay attention to each use of shall in the present rules to be alert to this possibility, and to translate each use according to present meaning. So we attempt to recognize clearly established discretion by using “may” or “should” rather than “must.”

It was observed that Rule 16 took on its present form in 1983 and later. The commands were designed to encourage judges to do things they had not been doing. The command that an order must be entered after every conference made more sense before those changes were adopted. And as time has passed, judges are keeping cases managed and on track. Requiring an order after a settlement conference, for example, may seem inappropriate.

Carrying forward on the global issue, it was suggested that “shall” “is a soft imperative.” Changing to “may,” which conveys no imperative sense, is a change of meaning even if it reflects practice and good sense. “Should” is not as much of a reduction; it implies an obligation to adhere as an ordinary practice, with room to deviate.

Another general question asked whether it is within the Style Project to adopt changes merely because they reflect current practice: Does practice justify changes of language only when practice reflects interpretive resolution of present ambiguity, or can practice not authorized by clear present language justify new language?

Another suggestion was that the feeling of departure from present “shall” language may be reduced by relying on the passive voice. “An order should be entered.” The passive voice suggests flexibility: the lawyer prepares an order to be entered, or the “order” is taken on the record and a “minute” order is entered that simply recites entry of a full order in the record. Professor Kimble responded that this is an “end run.” If we indulge this finesse in Rule 16, will it be used elsewhere?

“May” also may be ambiguous — it can be used to express a grant of authority, but it also can be used in a predictive way. The Style Project seeks to avoid the predictive sense, using “may” only in the sense of recognizing authority.

The Committee was reminded that this is the third Style Project. The “shall”-to-“must” presumption has been adopted for the Appellate and Criminal Rules. Deviations in the Civil Rules, frequently translating to “may” or “should,” could create confusion.

A further source of difficulty arises from the use of “shall” and “may” together in closely related parts of a single present rule. If we render some present “shalls” as “may,” we eliminate a contrast that surely has meaning in the present rule. The present contrast implies different levels of discretion; the change will often affect meaning as the former contrast is forgotten.

The discussion was briefly brought back to Style Rule 16(d) by asking whether there was a consensus on the use of “should,” and then opened up to the question whether all of Rule 16 should be reexamined for this question.

Support was offered for “should” in Style Rule 16(d). But it was pointed out that Style (b)(2) uses “must” for issuing a scheduling order as soon as practicable, and urged that Style (b)(3)(A) should be changed from “must” limit specific matters to “should.” It was pointed out that a single “shall” covers both of these matters in present 16(b), and urged that because this is a global issue the choices might be postponed for later discussion. But it was suggested in response that the Committee should make decisions that are appropriate to each context as it goes through the rules. The eventual global discussion will be better informed by this careful effort to think through each present “shall.”

One view is that “should” is the better word when the present “shall” means “should in the normal course, if appropriate.” So in Style 16(d), “should” enter an order is better, while in Style 16(e) it is better to say that the final pretrial conference “must” be held as close to the start of trial as is reasonable. But the qualification implied by “as is reasonable” can inform the choice in either of two ways: it shows that “must” does not mean what it says, but by that very token it mollifies the apparent command of “must” and avoids any real mischief. A further difficulty appears, however, in the continuation of the same Style Rule 16(e) sentence, which says that the final pretrial conference must be attended by at least one attorney who will conduct the trial for each party. This truly is a command. Present Rule 16(d) says “shall” in both settings; is it proper to translate one shall as “should,” the other as “must”? If we actually mean different levels of command, why not use different words of command?

Another suggestion was that the purpose of the Style Project is to hew as closely as possible to the present rule. “Should” may imply too much discretion to ignore the command that the final pretrial conference be held close to trial. The discretion implied by “as is reasonable” may afford discretion enough; “must” is not burdensome.

A motion to amend Style Rule 16(e) to say: “The [final] pretrial conference must ~~should~~ be held as close to the start of trial as is reasonable” failed by 3 votes in favor, 7 votes against.

It was agreed that Style Rule 16(b)(2) will continue to say that the judge “must” issue the scheduling order as soon as practicable, etc.

Turning back to Style Rule 16(b)(3)(A), which says that the scheduling order “must” limit the time to join parties, and so on, it was noted that a change to “should” or “may” could justify collapsing subparagraphs (A) and (B) into a single paragraph that lists all subjects as permissive contents of the scheduling order. Adherence to “must” was defended on the ground that a command was intended in 1983, but the defense was weakened by the further observation that “may” or “should” may conform better to actual practice.

An observer commented that courts have been flexible on all these issues, seeing them as a matter of discretionary case management. This comment was seconded by agreement and a suggestion that “should” fits the matters described as “required contents” in Style Rule 16(b)(3)(A). If we do adopt “should,” perhaps the Committee Note should explain that the translation of “shall” reflects modern practice. But this course is appropriate only if the present rule is ambiguous and current practice is uniform. And it may be difficult to say that the present rule is ambiguous; the first three scheduling orders are listed as “shall,” while the next three are listed after “may.” But if current

practice treats all as a matter of permission, not command, is that enough? Particularly if we retain two subparagraphs — (A) would be “should” include what now is “shall” include, while (B) would continue the present “may.”

This discussion led to the suggestion that there seemed to be a consensus that “should” is better for the “required” topics, but that it is a change from the present rule. If so, the change is better left to a parallel noncontroversial-but-substantive change track.

Discussion came full circle to the observation that “shall” has become intrinsically ambiguous wherever it appears in the present rules. If we translate it as “must,” we risk increasing the force of the command and adding rigidity. If we translate it as “should,” and even more so if we translate it as “may,” we risk reducing the force of the behest. So if the present “shall” is treated as a matter of discretion in case management, translating it as “must” may widen the gap from current practice.

The approach of resolving style ambiguities by relying on current practice was then addressed directly by pointing to three possible approaches: (1) The intent of the original drafters can be researched. (2) The interpretive approaches in current cases can be researched to the extent that the decisions have been put into accessible public research resources. (3) We can rely on more impressionistic views of what is current practice. But “the plural of anecdote is not data.” The collective experience even of a group as diverse and as experienced as the Committee and those who assist it is great, but not all-encompassing.

One judge observed that the Style 16(b)(3)(A) time limits are set because they can be modified. It is good to have initial targets from the beginning. “Must” keeps the current structure. Another observed that the original drafters wanted the court to address these matters. The structure should be preserved. An observer added that in practice it is important to have closure of pretrial practice, and clarity about deadlines. We should be careful about changes.

Returning to the ambiguity of “shall,” it was suggested that it has the virtues that ambiguity at times presents. It preserves discretion, “but with an imperative overtone.” “Must,” on the other hand, seems to confer a right on litigants, and does not seem appropriate in the (b)(3)(A) context. There is an existing comfort with “shall” that disappears with “must.” No one reads “shall” as a “very strict imperative.” “Should,” on the other hand, may seem a substantive change — and that is unfortunate.

One modest beginning might be to delete the Style taglines: (b)(3)(A) is “Required Contents,” and (B) is “Permitted Contents.” But the stylists protested that taglines are used for all subparagraphs unless the subparagraphs are simply items in a list. Perhaps different taglines could be adopted: “Ordinary Contents” and “Additional Contents.”

At this point Professor Kimble stated that a review of 1,300 appellate cases shows courts agreeing that “shall” is mandatory. But then many of the opinions go on to recognize qualifications. “Over time, there are corruptions; it has been made ambiguous.”

A motion to approve the present structure of Style Rule 16(b)(3) with the taglines as is was approved, 7 votes for and 3 votes against.

An attempt was made to capture this discussion by suggesting three things. First, the ambiguity of “shall” cannot be resolved by the strategy used for many other ambiguities. With many ambiguities, present language can be carried forward without change for fear that any change to resolve the ambiguity will bring a change of meaning. But we have forsworn any use of “shall,” so we must resolve the ambiguity each time it appears. The discussion shows that many of the resolutions will effect changes of meaning. Second, there is a particular problem when years or even decades of practice demonstrate nearly universal disregard of original intent. It may have been intended that district judges always “must” enter scheduling orders according to a defined schedule, and always “must” address specific topics. But if discretion is widely recognized in practice, we must face two propositions — “shall” is treated as ambiguous, and there almost certainly are good reasons to exercise discretion. Third, the Committee needs to focus again on the recurring uncertainty whether to establish a parallel track for changes that seem too close to substance to be made as a matter of style, but that seem right and noncontroversial. Care must be taken to avoid confusion in the important stage of public comment.

The separate track issue was addressed by the suggestion that a limited number of small substantive changes can be taken up. A large number likely would cause great delay, engender consternation, and defeat any opportunity for Committee consideration of more important things. The best approach is to accumulate a list of possible small substantive changes as the Style process goes on. At the end, the list can be culled, selecting a manageable number of items for substantive revision.

A style suggestion was made for Style Rule 16(b)(4). Style 16(b)(1) says that “the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order.” There is no apparent need to repeat all of this in (b)(4), which might be shortened: “and by leave of the district judge or, when authorized by local rule, of a magistrate judge.” “[T]he judge” plainly refers to the judge who entered the order.

Style Rule 16 was approved subject to this discussion.

Rule 17. Style Rule 17(a)(2) says that an action under a United States statute for another's use or benefit “must” be brought in the name of the United States. Professor Rowe's research shows that every use-plaintiff statute requires this form. It is a proper rendition of “shall” in present Rule 17(a).

Style Rule 17 was approved.

Rule 18. Present Rule 18 addresses the situation in which “a claim is one cognizable only after another claim has been prosecuted to a conclusion.” Extensive discussion in the subcommittee left substantial uncertainty as to the best translation of these antique phrases. Research by Professor Rowe indicates that the best translation is that one claim “is contingent on the disposition of the other.”

Style Rule 18 was approved.

Rule 19. Style Rule 19(a)(1)(B) was drafted to require joinder if feasible of a person who “appears to have” an interest relating to the action. This draft rested on a First Circuit decision adopting this phrase as a translation of present Rule 19(a)'s reference to a person who “claims” an interest. This translation seemed a good rendition of probable original intent. Further research by Professor Rowe, however, shows that other courts have found meaning in “claims.” Some cases say that joinder is not required if the absent person does not mean to assert the claim that appears. Because the change of language might have substantive consequences, the Style draft presented for approval reverts to “claims an interest.” This return to the present rule was approved.

The addition of “either” in Style Rule 19(a)(2) was approved: “a person who refuses to join as a plaintiff may be made either a defendant or * * * a plaintiff.” This addition makes it clear that the person must be joined as one or the other, defeating any implication that nonjoinder is available as a third alternative.

When Rule 19(b) was revised in 1966, the drafters retained the familiar reference to an “indispensable” party, but demoted it to the role of mere label. After a court completes the required analysis and concludes that an action should not proceed without a nonparty that cannot be joined, the action is dismissed, “the absent person being thus regarded as indispensable.” The Style draft discards “indispensable.” Because the word has been used in merely conclusional fashion, no substantive change will follow. And although a few lawyers may encounter some research difficulties in looking for the familiar “indispensable” label, the change will promote clarity. The word “is not necessary.”

Style Rule 19 was approved.

Rule 20. Style Rule 20(a)(1)(A) joins two elements in a single subparagraph: the plaintiffs (1) assert any right to relief jointly, severally, or in the alternative; and (2) the right is “with respect to or arising out of the same transaction,” etc. It was suggested that here, and again in (b)(2)(A), it would be better to separate these two thoughts into individual subparagraphs. It was agreed that the Style Subcommittee would consider this question.

Style Rule 20 was approved, subject to consideration whether to divide the two (A) subparagraphs into two subparagraphs or to designate the two thoughts as items.

Rule 21. Style Rule 21 was approved.

Rule 22. Style Rule 22 was approved.

Rule 23.1, 23.2. Style Rules 23.1 and 23.2 were discussed together.

The reduced reference in Style 23.1(b)(2) to a “court,” rather than “court of the United States,” was approved. It is clear from the context that the reference can be only to the court of the United States in which the action is filed.

In subcommittee discussion, the dismissals that require court approval and notice were limited to “voluntary” dismissals. The theory was that Rule 23.2 in particular invokes Rule 23(e) procedures, and on December 1 Rule 23(e) will be amended to require court approval of a class action dismissal only if the dismissal is voluntary. The theory is that court approval inheres in an involuntary dismissal. The voluntary dismissal concept was added to Style Rule 23.1 to keep it parallel with 23.2. But it was suggested that there is a problem. Present Rule 23.1 says that the action shall not be dismissed without court approval, and notice of the proposed dismissal shall be given in such manner as the court directs. What is the parallel to Rule 23(e), which as amended will require court approval of a voluntary dismissal only if the class has been certified? Research could be undertaken on the dismissal question, with perhaps uncertain results, or the references to “voluntary” and “voluntarily” can be stripped from both Style rules. There is no apparent loss in deleting these words. Deletion was approved. The second paragraph of the draft Committee Note will be deleted.

The notice question is different. Present Rule 23.1 says that notice of a dismissal or compromise of a derivative action shall be given to shareholders or members in such manner as the court directs. Style Rule 23.1(c) renders this as “must.” “Must” may be important, whether the dismissal is voluntary or involuntary, because notice is an important element in determining whether the dismissal has res judicata effects on nonparty shareholders or members. It was agreed that research would be undertaken to determine whether it is proper to say that notice “must” be given.

Separately, it was complained that the boilerplate Style revision language that constitutes the first paragraph of every Style Rule Committee Note does not accurately reflect the uncertainties that inhere in translating “shall” as “may,” “should,” or “must.”

Finally, it was agreed that further research would be undertaken to verify the belief that there is no meaning in this stylistic difference between present Rules 23.1 and 23.2. Rule 23.1 says a derivative action “may not be maintained if * * *.” Rule 23.2 says the action “may be maintained only if * * *.” The Style Subcommittee would prefer to adopt a consistent expression, recognizing that the inconsistent expressions were adopted when both rules were created at the same time in 1966.

With these changes and open questions, Style Rules 23.1 and 23.2 were approved.

Rule 24. Style Rules 24(a) and (b) were approved without discussion.

Style Rule 24(c)(1) accurately renders present “shalls” as “must.” But it simply provides that a motion to intervene must be served on the parties, eliminating the present rule’s “as provided in Rule 5.” This may create an ambiguity. One reason for intervening, rather than seeking to amend a complaint to join as an added plaintiff, is to avoid the possible difficulties of effecting Rule 4 service of summons and complaint on one or more defendants. The present rule makes it clear that Rule 4 service is not required. Although Rule 5 states the procedure for serving a motion, elimination of the cross-reference may create uncertainty. It was agreed to restore the reference: “A motion to intervene must be served on the parties under Rule 5.” This will provide a useful reassurance.

Style Rule 24(c)(2) and (3) are caught up in the August publication of a proposed Rule 5.1 that would supersede these portions of present Rule 24(c). These provisions address the court’s statutory duty to notify the United States Attorney General or a state attorney general when the

constitutionality of an Act of Congress or state statute is called in question. The style of Rule 5.1, and its content, will be subject to further discussion after the comment period concludes. One particular point of style contention will be whether the statutory reference to intervention when an “Act of Congress” is challenged should be restyled to some more colloquial term. The Style Subcommittee prefers to use a different phrase.

The Style Rule 24(c)(3) tag line refers to a party's “duty” to call the court's attention to the court's notice duty, but the text refers to the party's responsibility and only says that the party “should” act. Is this a party “duty”? The rule expressly says that failure to act does not waive any constitutional rights otherwise timely asserted. One suggestion was that although the right is not lost, the party might lose the case — that sounds like a duty. Other sanctions might be appropriate for failure to call the court's attention to the court's notice duty. Perhaps the tag line might better be “Party's responsibility,” drawing directly from the Style text. The Style Subcommittee will consider this question.

Separately, there was an intimation of questions that will be raised when proposed Rule 5.1 comes back for discussion after the public comment period. Problems were seen in requiring a party to give notice to a nonparty (the attorney general), and in providing for two notices — one from the party, and a second from the court.

Style Rule 24 was approved, after restoring “under Rule 5” to subdivision (a)(1) and subject to the style questions carried forward to the Rule 5.1 discussion.

Rule 25. Present Rule 25(a)(2) says that when, upon death of a party, the action survives only among the surviving parties, the death shall be suggested on the record. Style Rule 25 does not anywhere refer to this requirement. Elimination of a direction to note death on the record has been thought appropriate on the theory that the only function of the suggestion is to trigger the 90-day period for substituting a new party for a deceased party. The treatises describe that as the only function of the statement. That subject is covered by present and Style Rules 25(a)(1). But the suggestion may have other values, helping to defeat strategic choices not to reveal a death. The deletion may have substantive consequences, and restoration is easy. Rule 25(a)(2) would begin “If a party dies, the death must be stated on the record and if the right * * * survives only * * *.”

Who, it was asked, must make the statement? There is an awkwardness here. Who is to be sanctioned for failure — presumably it is the person with knowledge. Stating that the death “must” be stated, rather than “should” be stated, may increase the inclination to impose sanctions. And sanctions may be useful because the party who knows may not want to trigger the time to substitute. If the focus is on the party who wants to obtain the benefit of the substitution period, “should” may be a better word.

It was suggested that the obligation to state the death on the record might be moved from (a)(2) to (a)(1), where it fits with the purpose to trigger the substitution period. There may be some difficulty with the question whether present Rule 25(a)(1) recognizes the court's authority to effect substitution without a party motion. Some cases seem to imply that the court lacks this authority, saying that substitution cannot be made and that it “is too bad that no one made a motion” to substitute. There is some ambiguity in the first two sentences of present (a)(1). The first sentence

says that the court may order substitution. But the second sentence begins by stating that “the motion for substitution may be made,” perhaps implying that a motion must be made. It does seem strange to have a court acting on its own to add parties to an action. But a court can act under Rule 17(c) to appoint a guardian ad litem. A court can extend the Rule 25(a)(1) substitution period if an estate is not formed in time to be substituted.

It was agreed that the behest to state death on the record should be softened to “should”: “If a party dies, the death should be stated on the record * * *.” And it was agreed that this provision should be restored to some place within Style Rule 25(a).

The question whether to locate the suggestion of death in Rule 25(a)(1) instead of (a)(2) invoked some uncertainty. It is strange that present (a)(1) does not refer to any duty to state death; it merely sets the time to substitute from the suggestion on the record. Present (a)(2) does state a duty to suggest death, but attaches no apparent consequence. The theory that its only function is to operate through (a)(1) implies careless drafting. An alternative view is that (a)(1) leaves the matter to the initiative of any party that wishes to trigger the substitution period, while (a)(2) states a duty in order to make the record clear so that the court will know when the action is concluded by disposition of all claims among all remaining parties, and perhaps so that the remaining parties are spared the burdens of continuing the action as if procedural duties were owed a person who has become irrelevant by death and the failure of survivorship.

It was agreed that the Style Subcommittee will study the question whether the statement of death provision should remain in (a)(2), or instead should be moved to (a)(1).

Another question was left for further research. Present Rule 25(a)(1) says in the first sentence that the court may order substitution if a party dies and the claim is not extinguished. Standing alone, it seems to imply that the court may act without motion. The second sentence, however, begins: “*The* motion for substitution may be made * * *.” This sentence may imply that the court can act only on motion. Style drafts have taken different approaches to this uncertainty. One draft said in the first sentence that “the court may, on motion, order substitution.” The current draft deletes “on motion” from the first sentence, and begins the second sentence with “A motion for substitution may be made * * *.” Discussion reflected continuing uncertainty. It was suggested that there are no cases that recognize a court's authority to substitute parties without a motion, and that it is unseemly for a court to seek to control the identity of the adversaries who appear before it. In addition, cases that deal with untimely motions to substitute often seem to assume that there is no authority to act without motion, expressing regret that no timely motion was made to enable substitution. Research will inform the decision whether to fall back on the earlier draft.

The balance of Style Rule 25 was approved, subject to a determination whether to retain in (a)(2) the provision that death should be stated on the record, or whether instead the provision should be moved to (a)(1).

Style Rules 26-37 and 45, minus 23

Rule 26(a). Judge Kelly, chair of Subcommittee B, launched the discussion of Rule 26.

Mixed references to “agree,” “agree in writing,” and “stipulate” recur throughout the discovery rules. Choices have been made in reviewing the Style drafts, but it is recognized that this issue is a global issue that will be considered at the spring Advisory Committee meeting.

It was noted that Style Rule 26(a)(1)(A) has been changed from referring to exceptions “directed” by the court to refer to exceptions “ordered” by the court. The purpose of the change is to rely on the convention that an “order” is a case-specific event, ousting any implication that a court may direct exceptions by adopting a local rule.

Since the subcommittee meeting, Style Rule 26(a)(2)(B)(i), (ii), and (iii) have been rearranged, raising the question whether “them” at the ends of (ii) and (iii) clearly refers back to the opinions described in (i). This is a question for the Style Subcommittee.

The elimination of present Rule 26(a)(5) as a redundant index was noted without further discussion. The Committee Note should explain the deletion.

Rule 26(b). Style Rule 26(b)(1) carries forward the reference to “books” that appears in the present rule. This has seemed an antiquated reference. Usage in the present rules is not consistent. “Books” does not appear in the Rule 34(a) definition of “documents,” but does appear in Rule 45(a)(1)(C) — which is supposed to be the nonparty analogue of Rule 34. No case of recent vintage turns anything on the reference to “books.” The Committee concluded that “books” should be deleted from Style Rules 26(b)(1) and 45(a)(1)(A)(iii). The Committee Note should explain that discovery of “books” continues to be permitted.

Present Rule 26(b)(2) says that the court may alter the limits on discovery, and then says that the frequency or extent of use of discovery “shall be limited” if the court determines any of three enumerated things, such as the (iii) determination that the burden outweighs likely benefit. Style (b)(2)(B) renders “shall” as “must.” Subcommittee B raised the question whether “should” would be better than “must.” Views supporting “should” urged that it is “softer, better.” There is so much discretion built into the enumerated factors, which call for balancing judgments of many sorts, that “must” does not fit. Saying “must,” further, may discourage the court from making the findings — the conclusion that discovery should not be limited will be expressed by finding that none of these determinations is appropriate. Defense of “must,” however, began with the observation that the tag lines of (b)(2)(A) and (B) are useful: “(A) When Permitted,” and “(B) When Required.” Not long ago Rule 26(b)(1) was amended to include an express but redundant reminder that all discovery is subject to the three (b)(2) factors. We have decided to retain this redundant reminder in Style 26(b)(1) to emphasize the importance of these limits. It would be a mistake to fall back on the softer “should.” If one of these findings is made, some limit should be required: “must” expresses the intended command. The Committee did not recommend a change from “must.”

To correct a slip of the style pen, it was agreed that 26(b)(2)(B) should refer to local rule in the singular, not to local rules.

It was agreed that the Committee Note to Style 26(b)(3) should explain that the clear provision for obtaining a party's own statement by request fills in an apparent gap in the present rule,

which establishes the request procedure for a nonparty but does not describe the procedure for a party.

Another style question was asked of 26(b)(4)(B), which begins: “Generally, a party may not * * *.” Generally is ordinarily disfavored. The Style Subcommittee chose to use it here, however, and it will remain.

Rule 26(e). Style Rule 26(e) presented two questions. From the beginning in 1970, Rule 26(e) has stated a duty to supplement discovery responses to include “information thereafter acquired.” Style 26(e)(1) deletes these words. Attempting to unravel the limiting effect these words might have is difficult. In 1970 Rule 26(e) stated that a party who had responded to a discovery request with a response that was “complete when made” had a duty to supplement the response only as follows. The “as follows” included the limit to information thereafter acquired, and then complicated matters further by distinguishing between an answer that was “incorrect when made” and an answer that “though correct when made is no longer true.” Although nothing in the context or Committee Note indicates it, the underlying assumption may have been that there is a continuing duty to supply information that was available at the time of the initial response but not supplied. The additional information would be a continuing response to the initial request, not a supplemental response. On that reading, “information thereafter acquired” would serve the purpose of distinguishing the narrower duty to supplement from the broader duty to continue the initial response process. The Committee agreed that there should be a duty to supply information that was available at the time of the initial disclosure or discovery response but was not provided. The question is whether that is what the rule means now. There is no obvious reading. There is some natural attraction to the view that the rule only attaches to information acquired after the initial response, rather like the opportunity to engage in supplemental pleading under Rule 15(d). Carrying out the Rule 15 analogy, information available at the time of the initial response would be supplied by amending the initial disclosure or response, not by supplementing. But it was suggested that in practice there is a continuing stream of information as parties provide first responses and then continuing responses. Despite the curious drafting of Rule 26(e) as it began in 1970 and has since been amended, it seems now to mean that there is a continuing duty to supply relevant information, whether it was available but not supplied at the time of the first response or was acquired after that time. Deletion of “to include information thereafter acquired” was approved.

The second Rule 26(e) question arises from the distinction between present (e)(1) and present (e)(2). (e)(1) states a duty to supplement Rule 26(a) disclosures “at appropriate intervals.” (e)(2) states a duty “seasonably to amend a prior response to” a discovery request. The distinct expression of the timing requirement in present (e)(1) was deliberately adopted when Rule 26(a) disclosure was adopted in 1993. Whatever the subtle distinction may have been, the cases do not reflect any difference in application. Style Rule 26(e)(1) thus brings disclosure and discovery together, and states a duty to supplement “in a timely manner.” The Committee Note will explain that this change reflects the determination that no distinction has been observed in practice.

Rule 26(g). Both present and Style Rules 26(g)(1) require the signature to a disclosure and discovery response to include the signer's address. The temptation to add “and telephone number” was resisted

because it might be a substantive change. The issue may, however, be addressed separately as a desirable substantive change.

Style Rule 26(g)(1)(B)(i) brings back a question faced with Rule 11(b)(1). Both present rules refer to “needless increase in the cost of litigation.” Style Rule 11(b)(1) changed this to “unnecessary * * * expense.” Style Rule 26(b)(1)(B)(i) initially adopted the Style Rule 11 phrase, but the subcommittee changed it back to “needlessly increase the litigation costs.” It was agreed that the same expression should be used in both rules, despite the observation that Rule 11 is widely perceived as having real force while Rule 26(g) may be something of a paper tiger. In revisiting the question, however, the subcommittee believed that “needlessly increase the litigation costs” has a clearer focus on something wasteful or bad. “Unnecessary expense” is not as pointed. A change to “unnecessary expense,” further, could change the result. The question whether “litigation costs” might be confused with statutory taxable costs was answered by agreeing that “litigation costs” is not a term of art and does not invoke the limited concept of taxable costs. A motion to change Rule 11 to conform with the current Style Rule 26(g)(1)(B)(i) formulation passed. Style Rule 11 will be changed to adopt the formula “needlessly increase the litigation costs.”

Present Rule 26(g)(2)(A) provides that the signature on a discovery request, response, or objection certifies that it is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. It does not include the provision in present Rule 11(b)(2) that recognizes in addition a nonfrivolous argument for the establishment of new law. Style Rule 11 carries forward the argument to establish new law. The contrast between Rule 26(g) and Rule 11 is troubling. But adding the new-law argument to Rule 26(g) may be a substantive change. The change will not be made in the Style process. The question, however, may deserve separate consideration as a substantive improvement.

Present Rule 26(g)(1) does not say that an unsigned disclosure must be stricken. Present Rule 26(g)(2) does say that an unsigned discovery request, response, or objection must be stricken unless it is signed promptly. Style Rule 26(g)(2) calls for striking an unsigned disclosure. The Committee Note will explain that this extension corrects an obvious drafting oversight that is properly corrected within the scope of the Style Project.

Style Rule 26 was approved with the changes made in the discussion.

Rule 27

Style Rule 27(a)(1) changes “in any court of the United States” in the present rule to “in a United States court.” It has been determined that “court of the United States” has been used in the Civil Rules in a sense that does not derive from the definition in 28 U.S.C. § 451. But “court of the United States” might seem to imply that the rule authorizes a petition to perpetuate testimony in a state court. It might be better to say “a United States court,” or “a federal court.” This is a global issue that recurs throughout the rules. Drafting must be clear that territorial courts are included. Consideration of the choice will carry forward.

Style Rule 27(a)(2) overlaps an amendment that was published for comment in August. The Style Subcommittee will continue work on the published amendment as the amendment continues through the comment and later action periods. Because that process is independent of the Style process, it is possible to make changes that affect meaning subject to the usual tests that determine whether further publication is required.

The Committee Note might state that the reference in Style Rule 27(b)(1) to an appeal that “may be taken” means the same thing as the reference in present Rule 27(b) to the situation in which the time for appeal has not expired. This period includes the time after expiration of the initial appeal period if the district court retains authority to extend appeal time.

Style Rule 27 was approved.

Rule 28

Present Rule 28(b) states that a notice or commission “may designate the person before whom the deposition is to be taken either by name or descriptive title.” Style Rule 28(b)(3) initially changed this to “must” designate, but has reverted to “may designate — by name or descriptive title — the person before whom the deposition is to be taken.” “Must” was changed because it could create complications for practitioners. The State Department has expressed a preference for “may.” But a question remains. The present rule says “either by name or descriptive title”; does that imply that one or the other must be used? And does the Style draft, by eliminating “either,” change the meaning so that the notice or commission may designate by name, designate by descriptive title, or not designate at all? Without “either,” the choice not to designate at all seems available. With “either,” the present rule is ambiguous. The question whether to restore “either” was left to the Style Subcommittee.

It was agreed that the caption of (b)(3) would be changed by adding “a”: “Form of a Request
* * *.”

Style Rule 28 was approved subject to the questions raised in the discussion.

Rule 29

Style Rule 29 was approved without discussion.

Rule 30

Style Rule 30(b)(5)(A)(iv) refers to administration of the “oath,” omitting the present rule's reference to “affirmation.” Although Rule 43(d) says that a solemn affirmation may be used whenever a Civil Rule requires an oath, the sensitivities that many feel toward an oath requirement led to

agreement that “or affirmation” should be restored to the Style Rule, and also to Style Rule 32(d)(3)(B)(i).

Style Rule 30(f)(2)(A)(ii) resolves an ambiguity in present Rule 30(f). Rule 30(f) now says that a party who produces documents or things for inspection at a deposition may retain “the materials” if, (B), it “offer[s] the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition.” “Materials” might refer only to the originals, an implication perhaps strengthened by the reference to annexation. But it might refer also to copies. The Style Rule resolves this by saying that “the originals” may be used as if annexed. It was pointed out that Evidence Rule 1003 allows copies to be used as evidence in many circumstances. And at least in some places, people actually practice by using copies. To refer only to “originals” in the Style Rule may be to narrow the rule. But to refer to “originals or copies” may be to broaden the rule. We cannot adopt either expression without further and perhaps uncertain research. A motion to go back to “materials” passed.

Further discussion of subdivision (f) increased the perplexities. Many lawyers faced with voluminous documents or things produced at a deposition react by postponing the deposition to enable a careful examination rather than attempt to depose a witness without understanding the materials. Should that bear on the understanding of “materials” as used in the present rule? Even the need to make copies, much less carefully inspect the originals, may prolong a deposition needlessly (and what of the presumptive 7-hour limit?). And is the uncertainty compounded by the further provision, carried forward in Style 30(f)(2)(B), that a party may move for an order to attach the originals to the deposition? Attaching the originals avoids the need to make copies at the deposition, and reduces the risk that inaccurate copies may be used later if copies may be used.

It was agreed that these aspects of Rule 30(f) need further study.

Separately, it was noted that Style Rule 30(f)(2)(B) omits the statement in the present rule that originals attached to the deposition may be ordered returned to the court. Since Rule 5(d) establishes a general rule that depositions need not be filed, it should be clear that filing the originals occurs only if there is a Rule 5(d) order to file the deposition.

Style Rule 30 was approved subject to this discussion.

Rule 31

Present Rule 31(b) directs the officer who administers a deposition on written questions to “prepare, certify, and file or mail the deposition.” Style Rule 31(b)(2) and (3) translate this as “prepare and certify the deposition” and “send it to the party.” “File” is deleted in deference to the 2000 amendment of Rule 5(d) that bars filing absent use in the action or court order. “Send it” seems broader than “mail,” because it encompasses other methods of delivery. But this makes sense and is appropriate to balance the elimination of the filing alternative.

Discussion of Style Rule 31(c) wound back to the 31(b) discussion in part. Present Rule 31(c) directs the party taking the deposition to give notice to all other parties when the deposition is filed. Until the 2000 amendment of Rule 5(d), the rules contemplated that depositions would be filed; during this time, Rule 31(c) assured notice to all parties that the deposition had been taken. Now that filing occurs only when the deposition is used in the action or when a court orders filing, it is possible that the other parties will never be informed that the deposition has been taken. Style Rule 31(c) fills this gap in part, providing that a party who files a Rule 31 deposition must give notice of the filing to all other parties. Other approaches were considered. The most direct alternative would require that the party who noticed the deposition give notice to all other parties when the deposition is “completed.” Given the finite definition of the Rule 31 deposition by the written questions, the concept of “completion” might work without undue uncertainty. But that might be a change greater than a Style Project should undertake.

It was asked why there is any need to give notice of completion. If any party attempts to use the deposition, there will be a motion and the motion will be served on others, providing notice and often excerpts of the deposition. In some courts, it is routine to direct that an entire deposition be filed whenever any part of it is used. One response was that a deposition may be filed in circumstances that do not give notice. And of course a party who does not like the deposition answers may not use the deposition, leaving to other parties the burden of inquiring into the completion and outcome.

Another suggestion was that Style 31(b)(3) could direct the officer to send the deposition to the parties, not only “the party” who noticed the deposition. In some ways it may be a good idea to send it to all parties. But present Rule 31(b) does not direct that the deposition be sent to all parties; this would be a significant change. The change, moreover, requires consideration of payment for the costs of sending copies of the deposition — including any exhibits — to all parties. Although Rule 31 continues to be used in practice, it is difficult to suppose that there is any consistent established practice that we could conform to as a mere Style improvement. And there may be no special need for the change. All parties know that the deposition is to be taken. Any party can arrange with the reporter to get a copy by offering to pay.

It was concluded that Style Rule 31(b)(2) and (3), and Style Rule 31(c), should carry forward as submitted.

Style suggestions were made. It was agreed that Style Rule 31(c) should be changed to refer to “the” deposition: “A party who files a the deposition must * * *.” It was further agreed that Rule 31(c) should track the style of Style Rule 30(f)(4): “A party who files the deposition must promptly notify all other parties when it is filed.” The reference to “who” was explained on the ground that the choice between “a party who” and “a party that” depends on context. When “party” is used in a generic sense, the choice is “who.”

Style Rule 31 was approved with the style changes noted.

Judge Russell opened Subcommittee A's presentation with Style Rule 32.

Present Rule 32(a) applies to “the trial or * * * the hearing of a motion or an interlocutory proceeding.” The Committee Note will explain that Style Rule 32(a)(1)'s reference to “any trial or hearing” includes the “interlocutory proceeding” reference. In similar fashion, the Note will explain that “hearing” includes disposition of a motion, whether or not there is an oral hearing on the motion. Present Rule 32(a) introduces four numbered paragraphs by stating that a deposition is admissible “in accordance with any of the following provisions.” This limit was omitted in earlier Style drafts. Research confirms, however, that the limit is an effective limit. Style Rule 32(a)(1)(C) was added accordingly, limiting use to a use “permitted by paragraphs (2) through (8).”

Present Rules 32 and 33 refer variously to “the rules of evidence” and to “the Federal Rules of Evidence.” The Committee Note will explain that the Style Rules carry these usages forward without change, but will not comment further on the perplexities that arise from the distinction.

Style Rule 32(a)(5)(B) presents a style choice — whether to refer, as the Style Draft does, to “a party who demonstrates that” or instead to refer, as pure grammar might require, to “a party that demonstrates that.”

The final paragraph of present Rule 32(a) allows use of a deposition “lawfully taken and duly filed” in a former action. The elimination of a general filing requirement by the 2000 Rule 5(d) amendment creates a translation problem. Elimination of the general filing requirement creates a slight risk by reducing the assurance of authenticity. But consistent with the limits of the Style project, it was agreed that the best resolution is that proposed by Style Rule 32(a)(8): A deposition “lawfully taken and, if required, filed * * *” in a prior action may be used in a later action.

It was noted that Style Rule 32(d)(2)(B) changes an earlier style draft reference to “due” diligence back to the “reasonable diligence” used in the present rule. Present Rule 32(d)(4) refers to “due” diligence, and the Style draft had sought uniformity. Uniformity is achieved in the current Style draft by using “reasonable” in both places. “Reasonable” seems the better choice because “due diligence” is a phrase that has acquired special connotations that do not fit this procedural context.

“Affirmation” will be added back to Style Rule 32(d)(3)(B), to accord with the decision made for Style Rule 30(b)(5)(A)(iv).

A style question was raised by asking whether it would be better to refer to a witness's “competence” rather than “competency” in Style Rule 32(d)(3)(A). “Competency” is used in the Evidence Rules. The Style Subcommittee controls this choice.

Style Rule 32 was approved with the change in (d)(3)(B).

Rule 33

The Committee Note to Style Rule 33(a)(1) will explain deletion of the present Rule 33(a) cross-reference to the Rule 26(d) discovery moratorium. The cross-reference was redundant when

added in 1993, but served a purpose as a reminder of the new Rule 26(d) provisions. That purpose has been served. The same Note will be provided for the same point in Style Rules 34(b) and 36(a).

The Committee Note to Style Rule 33(a)(2) also will explain deletion of “not necessarily” from the present Rule 33(c) provision that an interrogatory “is not necessarily objectionable” because it calls for an opinion or contention. Although the deletion may seem a clear change of substance, it is not. Contention and opinion discovery are routinely permitted in practice without pausing to ask what circumstances might make discovery objectionable “merely because it asks for an opinion or contention * * *.”

Style Rule 33(b)(3) includes a cross-reference to Rule 29. The use of cross-references is a global issue, but the outcome almost certainly will be that some cross-references are appropriate. This cross-reference is useful because it ensures that a stipulation extending the time to respond to interrogatories must adhere to the restrictions imposed by Rule 29. The Committee recommends that the cross-reference be preserved.

Present Rule 33(d) may seem ambiguous when it refers to an answer that may be ascertained “from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof.” Style Rule 33(d) changes this to an answer that may be determined “by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records.” This style assumes that an existing compilation, abstract, or summary that is a business record is within the present rule, and that the inquiring party can be put to the chore of compiling, abstracting, or summarizing all records, including existing compilations, abstracts, or summaries. The change was approved. No Committee Note explanation is necessary.

Style Rule 33 was approved.

Rule 34

The era of discovering computer-based information was anticipated in present Rule 34(a)'s definition of “documents” to include “other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.” Translating this definition into a new style is difficult, and overlaps with the ongoing Discovery Subcommittee study of computer-based discovery. Style Rule 34(a)(1)(A) is the most recent effort: “other data compilations from which information can be obtained or can, if necessary, be translated by the responding party into a reasonably usable form.” Present Rule 34(a) rather clearly seems to refer to translation of the data compilations, at least if the commas are to be trusted. The Style draft could be read to refer to translation of the information. The Style draft also may be more open to the view that the responding party can produce the data compilation and wait for a request to render it into reasonably usable form. Suggested alternatives included: “from which information can be obtained after any necessary translation by the responding party,” or — to avoid burying the “translate” verb in “translation” — “from which information can be obtained after the responding party translates the data into a reasonably usable form.” The Style Subcommittee will continue to work on this drafting chore.

The reference in Style Rule 34(a)(1)(A) to “sound recordings” is a generalization of the present rule's reference to “phono-records.” It clearly includes tape media. But it would reach a video recording only if focus were put on the sound track, ignoring the video. It was suggested that “video recordings” should be added to the Style rule. Everyone understands that video recordings are subject to Rule 34 discovery. It was decided that the better style choice would be to strike “sound,” so that the definition of documents will include “recordings.”

Style Rule 34(a)(1) allows a requesting party to inspect and copy “and to test or sample” documents. The reference to testing or sampling was brought up from an earlier Style draft that, carrying forward the present rule, referred to testing and sampling only with respect to tangible things. The intention was to reflect the common practice of testing documents for authenticity. But the reference to sampling may venture into the domain of electronic discovery, creating an opportunity to “sample” data in the electronic system where it resides. Rather than push the Style Project into areas that are being explored by the Discovery Subcommittee, it was concluded that “— and to test or sample —” should be deleted from Style Rule 34(a)(1)(A), and restored to (a)(1)(B) as in the next prior Style draft.

The Committee Note will explain deletion of the redundant cross-reference to the Rule 26(d) discovery moratorium that appears in present Rule 34(b), as with Rules 33 and 36.

Style Rule 34 was approved with these changes.

Rule 35

Rule 35(b) presents serious difficulties when read literally. The references to who may demand a copy of a Rule 35 examination report and the statement of the demand's consequences suggest questionable results. There is no indication, however, that these conceptual difficulties have caused any difficulty in practice. Rather than attempt to resolve them as a matter of style, the Committee agreed to carry them forward in Style Rule 35(b) without change.

Style 35(b)(1) does, however, present a question that was referred to the Style Subcommittee for further consideration. Present Rule 35(b)(1) states that on request, the party causing the examination to be made “shall deliver to the requesting party a copy of” the report. Style 35(b)(1) simply says that the party who moved for the examination must deliver a copy of the report, without saying to whom it must be delivered. Perhaps it should say: “must, on request, deliver to the requester a copy * * *.”

Style Rule 35 was approved.

Rule 36

Style Rule 36 was approved.

Rule 37

Style Rule 37(b)(2)(B) presents a style question that was deferred for later resolution. Present Rule 37(b)(2)(E) refers to “the party failing to comply.” The Style rule refers to “the disobedient party.” “Disobedient” seems harsh, almost offensive, to some. Some other expression may be preferable.

The final paragraph of present Rule 37(b) states that “in lieu of or in addition []to” any of the sanctions listed in subparagraphs (A) through (E), “the court shall require” a party failing to obey a discovery order to pay the reasonable expenses caused by the failure. Style Rule 37(b)(2)(C) translates “shall” as “must.” In 1970, “shall” was intended to be mandatory, although there are many escapes built into the rule. Great discretion is built into the excuses that the failure was substantially justified or that other circumstances make an expense award unjust. But the structure confirms the mandatory intent. “Must” is the only word that accurately reflects the original intention. At the same time, the original intent has not been honored in practice. Courts seldom award expenses, particularly attorney fees. “Must,” moreover, might seem to imply that the court is obliged to make the award — unless it finds an excuse — even though no party has moved for an award. It was concluded that the original intent should be honored by retaining “must” in the Style rule. Even if awards are rare in actual practice, the practice does not reflect a general interpretive conclusion that “shall” really means “should” or “may.”

Separately, it was agreed that “require” should be changed to “order” in Style Rule 37(b)(2)(C): “the court must ~~require~~ order the disobedient party * * *.”

It also was agreed that Style Rule 37(c)(2) can say that the requesting party “may move that the party who failed to admit pay.” There is no need to say “move for an order.”

Style Rule 37 was approved with the change of “require” to “order.”

Rule 45

Style Rule 45(a)(1)(A)(iii) deletes the reference to “books” from present Rule 45(a)(1)(C). The deletion was approved, adopting the decision made with Style Rule 26(b)(1).

A proposed revision of Rule 45(a)(2) was published for comment in August. The style does not agree in all details with Style Rule 45(a)(2). It was agreed that the style issues can be resolved when the published proposal is considered for adoption next spring.

The heading of Style 45(a)(3), “Issued by Whom,” was approved.

Present Rule 45(a)(3) authorizes an attorney to issue a subpoena “on behalf of a court.” Style Rule 45(a)(3) authorizes an attorney to issue a subpoena “from” a court. It may seem odd to describe a subpoena issued by an attorney as one “from” a court. But the attorney is acting as an officer of the court, and it is desirable to maintain a uniform reference to subpoenas as “from” the court. This expression was approved.

Rule 45(b)(1) now says that “[p]rior notice” of a subpoena commanding production of documents or things must be served on each party. It does not say “prior to what.” It is clear enough that notice must be given before compliance. Style Rule 45(b)(1) says that a copy of the subpoena must be served “before it issues.” Research by Professor Rowe, however, suggests that the cases tend to look for service on other parties before the subpoena is served on the person commanded to produce. “Issuance” does not make much sense as the focus, particularly when the process of generating a copy in the lawyer's office is difficult to distinguish from the process of “issuing” the subpoena. “Before it is served on the witness” may be better.

A related question asked why require a copy of the actual subpoena; why not simply require notice of what the subpoena requires? The present rule speaks only of “prior notice of any commanded production,” not of a copy of the subpoena. It was agreed that the Style Subcommittee should revise the Style Rule to provide that the notice served on the parties may be a copy of the subpoena, but that the notice also may be in some other form. This approach will be particularly valuable if there can be orders to produce directed to a nonparty by means other than a subpoena.

Returning to the translation of “prior notice,” it was suggested that some practitioners serve the subpoena on the witness and notice on other parties at the same time. It also was suggested that in practice parties are not served before the witness is served. “‘Prior notice’ does not mean before service. That's not how it is done.”

So, it was suggested, one strategy might be to “serve” the parties by mail on Thursday, followed by personal service on the witness on Friday in hopes that immediate compliance might be accomplished before the other parties even have notice. The cases show concern about abuse, about deliberate delay in serving notice on the parties who might object to the scope of the subpoena or seek production of other items from the same witness. To carry forward “prior notice” would leave an ambiguity that the cases pretty much reject.

The first vote was to retain “prior notice,” to carry forward the ambiguity of the present rule.

Renewed discussion, however, led to a different result. The 1991 Committee Note says that “prior notice” was added to give the parties an opportunity to object to the production, to demand production of other things, and to monitor compliance. One leading treatise says that notice is required before service on the witness; notice before the witness complies does not suffice. No case adopts a “before return time” reading, and several cases expressly reject it. The cases show that the argument seems to arise when there is good-faith misunderstanding, or else when there is wilful cutting of corners. The ability to crank out your own subpoena is a temptation to serve and hope for compliance before other parties do anything. Something specific in the rule would be useful, and need not be a substantive change.

It was observed that notice to the parties before service on the witness should be appraised in light of impending court capacities. Soon it will be possible to serve all parties and the witness simultaneously by electronic means. By the same token, it will be possible to serve all parties at one moment, and to serve the witness a moment later.

The question whether a substantive change would be worked by changing “prior notice” to “before it is served” was addressed by finding that “prior notice” is patently ambiguous, and that the cases pretty much resolve the ambiguity to calling for notice to the parties before service on the witness. This is not perfect because notice may be served on the witness by means more expeditious than the means chosen to serve the parties, but it is within the realm of the Style Project.

A motion to require service of notice on the parties before the subpoena is served was adopted.

The question whether the rule should say “must be served on each party as provided in Rule 5(b) before it is served on the witness” was addressed by observing that Style Rule 45 does not refer to witnesses. But it is useful to complete “before it is served” with an explicit reference to the person served. The Style Subcommittee will work on this. A rough beginning, along the lines of the discussion, would be:

* * * If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then notice of the command[ed production or inspection] must be served on each party as provided in Rule 5(b) before the subpoena is served on the person commanded to [produce]{make the production} or to permit inspection.

Present Rule 45(d)(2) describes the manner of asserting privilege to resist a subpoena. The language differs from the language of Rule 26(b)(5) addressing the same subject. It was agreed that Style Rule 45(d)(2) should adopt the language of Style Rule 26(b)(5), expressing the same thought in the same words. The Committee Note will explain the change in these terms.

Style Rule 45 was approved, subject to the discussion.

Discovery of Computer-Based Information

Judge Rosenthal introduced the discussion of discovering information stored in electronic media. The Committee and the Discovery Subcommittee have been preparing the groundwork for some time now. The question is whether rules changes are necessary, or at least desirable, to address the questions that grow out of efforts to discover information stored in computers or other electronic media. The time seems to have come to engage the issue fully. The practice is growing. Cases are emerging. The results of the cases are not uniform. Even questions familiar from other forms of discovery may become more acute — inadvertent privilege waiver may fall into this category.

The Discovery Subcommittee has been busy and productive. They have prepared drafts to focus discussion at this meeting.

Further work on these questions will be enhanced by a conference planned for next February. Professor Dan Capra, Reporter of the Evidence Rules Committee, has volunteered to sponsor a conference on electronic discovery at Fordham Law School. The format will involve several panel discussions that will include audience participation. The central focus will be to advise the Advisory Committee and the Standing Committee whether we need rules, and if so what the rules might be.

All members of both Committees will be invited to attend. Many people are engaged in working through these discovery problems. Several have already shared their views with the Subcommittee. The conference will afford an opportunity for sustained discussion and an exchange of views and experience among panel members and other participants.

Professor Lynk then launched the Discovery Subcommittee Report. After the Subcommittee met in May, it divided proposed rule topics among groups of two subcommittee members for each proposal. Their draft rules were designed to identify the issues: which rules might be used to address electronic discovery. Professor Marcus then integrated these proposals into a single package that was presented to the Subcommittee at a day-long meeting on September 5. The meeting discussed each proposal extensively, and also continued to explore the possible need for rules changes. Several categories of possible change were explored: (1) whether the parties should be encouraged to discuss these questions through changes in Rules 16(b) and 26(f), and also Form 35. (2) whether Rule 34 should define “documents” to include electronic information in terms different from present terms. (3) whether Rule 34(a) should define the form for producing electronic information. (4) whether a safe-harbor for data preservation should be provided, perhaps in Rule 34(a), or Rule 37, or a new Rule “34.1.” (5) whether there should be separate sanctions provisions, perhaps subject to a “materiality” limit. And (6) whether inadvertent disclosure of privileged information, a problem familiar from discovering paper documents, is a greater problem with electronic discovery; this question has been addressed in the past, with draft “quick peek” rules, and raises special questions about the 28 U.S.C. § 2074(b) limits on adopting rules that affect privileges.

After the September 5 meeting, Professor Marcus produced the memorandum in the agenda materials. The memorandum includes specific rule drafts. The drafts, however, are not recommendations. Instead they are designed to support Advisory Committee discussion by providing an informed synthesis of Subcommittee deliberations up to now.

Three broad areas are open for discussion: Are there issues that should be addressed in addition to those addressed by these drafts? Should some of the issues addressed by these drafts be dropped from further consideration? Is the general perspective appropriate?

Professor Marcus noted that discovery changes inspire controversy. Many people are paying close attention to discovery of computer-based information. At least three have commented on the agenda materials within days after the agenda book became available. The interest of many establishes the need to take care, but also ensures that help is available.

The Subcommittee discussed the possibility of creating initial disclosure obligations with respect to computer-based information. Study of several alternatives, however, led to the conclusion that there is no real need to follow this approach. Comments on the advantages of pursuing it further are welcome. Without addressing initial disclosure, seven topics remain in this set of proposals.

Definition of Electronic Information. The first question is whether to undertake a definition of the subject, including a choice of label — electronic-information? Computer-based information? Digital data? The phrase used for the moment is “electronically stored data.” It is used in the Rule 26 draft in a way designed to support its use throughout the discovery rules. But is some other phrase better? It would be good to have a single term to be used throughout, and perhaps a definition of the term.

At some point, in rule or Committee Note, it would be useful to provide a comprehensive explanation of the subject. As an example, work is being done to develop non-electronic means of computing by chemical or biological methods.

It was asked whether computer-science experts had been consulted in the effort to define, or at least describe, the subject. Ken Withers of the Federal Judicial Center is a nationally recognized expert on these problems. The first panel at the February conference will present computer experts who will address this question. Even with this help, the question remains open, both whether a workable definition is possible and what it might be. Mr. Withers noted that in his view the proposed language is only a beginning. It should be circulated to information managers, information science experts, and others for comments. The definition likely should be more general than specific — no one knows what new technology will emerge. The only common term now available is “digital,” referring to information reduced to base-two numeric form.

It was observed that the draft definition would be more effective if the list of examples were changed from “and” to “or” — “the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, ~~and~~ or media viewers.”

An observer suggested concern that the proposal “will advance the mind-set of electronic discovery.” This is an emerging practice. Must we start saving our voice mails? The list will become part of every lawyer's check list. The proposal is “getting out ahead of the bar.” It should suffice to say that “electronic data” are discoverable. General terms are better, leaving the way open for case-by-case development and refinement. Practice has moved beyond any question whether electronic data are discoverable as “documents.” The fights now are over reasonable relationship to the issues in the case.

It also was stated that there is an entire industry of “information management.” The subjects are not merely electronic or digital. “Information is what discovery is about. No one questions the idea you're looking for intelligible information. We should be as generic as possible.” The focus should be on discoverability without regard to storage medium. It should be up to the responding party to seek protection against undue burdens.

The definition will affect attorney behavior. One participant described a law firm that has directed its attorneys not to discuss conflicts of interest by e-mail or voice mail.

Another observer said that the problems have now been with us for some time. It is essential “to simplify, clarify, and generalize.” There is no need for a Rule 26 definition. A definition might be useful in Rule 34, perhaps even in Rule 33. The central point is that electronic information is discoverable on the same terms as all other information.

Raising the profile of this topic may increase discovery activity. The question whether to attempt to draft rules, whether on definition or anything else, remains constantly before the Committee. The question persists because many people say that they want guidelines, not ex post judicial responses.

Yet another observation was that “this is what discovery is about today.” Some enterprises do everything on computers. It is not possible to raise the profile of these discovery topics higher than it is now. And it is possible to do something to help. Many lawyers and many enterprises want rational guidance on what they need to do. Such discovery can be a multi-million dollar undertaking even in a single case. A definition is needed somewhere.

At the same time, the Committee was reminded that many cases have no discovery at all. Only limited discovery is undertaken in many others. Rules permitting discovery do not automatically cause discovery. Rules in this area will not foment greater activity.

Prompting Early Discussion. The second set of questions is whether the rules should be amended to prompt early discussion of electronic discovery. The materials include draft amendments of Rules 26(f) and 16(b), and also a revised Form 35. These drafts respond to the common agreement that it is important to talk about these issues before the problems become intractable. Inviting discussion will not impose any new burdens on discovery in cases that will not involve electronic information.

The Rule 26(f) draft adds two items to the discovery plan. The first, written in general terms, addresses whether any party anticipates disclosure or discovery of electronically stored data, and any arrangements that might facilitate management of such disclosure or discovery. General terms were thought better in this provision, leaving more detailed exemplification to the Committee Note or other devices. The second addresses inadvertent privilege waiver, a topic that is involved with all forms of discovery.

Some district courts have adopted local rules addressing discussion of electronic information at the discovery conference. One question is whether such provisions suffice in themselves — need the rules do more than direct attention to discussion and resolution among the parties? Are additional rules helpful to focus the parties on what they can do?

The Form 35 changes are designed to remind the parties of the need to focus on these issues in the discovery conference.

The Rule 16(b) changes similarly are designed to remind the court of the need to attend to these issues.

The first suggestion was that it might be useful to address preservation issues in Rule 26(f), rather than defer them for later rules. We may need to encourage the parties to consider a preservation order at the beginning of the litigation. This approach is illustrated in an elaborated form of Rule 26(f)(3) set out in note 2 on page 6 of the agenda materials.

An observer suggested a cross-reference to Rule 53 to encourage discussion about the possible use of a master to manage discovery. A discovery master can be useful in general, but may be particularly useful in dealing with electronic discovery.

Another value of adopting some provision in Rule 26(f) is to catch up with the local rules. If a national rule is not adopted soon, there will be a patchwork of different rules across many districts. There are at least four local district rules now. They are very specific. But the proposed

national rule will not supersede them — the specificity does not seem to be inconsistent with the draft as it stands now.

It also was asked whether the Rule 16 approach would fit better in Rule 16(a), suggesting that electronic discovery is more a general matter within the broad objectives of the pretrial conference structure than a specific matter for a scheduling order. But it was noted that Rule 16(c) seemed inappropriate, and that Rule 16(b) focuses on the time when the judge should be thinking about these issues.

Define “Document”. The third question is illustrated by a draft Rule 34(a) definition of “document.” It may be that this is the only place where a definition is needed, satisfying the needs that instead might be addressed by a general Rule 26 definition. At least as a first effort, this draft is more abbreviated than the Rule 26 draft. But it includes, as optional material, a controversial provision that includes in the definition “all data stored or maintained on that document.” These words describe “metadata” and “embedded data.” An extension of this alternative would limit discovery by requiring production of metadata or embedded data only on court order. Production in sanitized form — .pdf or .tiff — does not reveal this information. The “metadata” include information generated by the computer itself when a document is created or a data base is used. This information identifies such matters as when a document was created, what computer was used to create it, what is the history of the document, and so on. Embedded data are previous edits, comments, and the like, created by users but stored in ways that do not “appear on the screen” unless a specific direction is given. Both metadata and embedded data are searchable. Whether they need be produced stirs much debate.

Production of metadata and embedded data “is not a small issue.” We could define “document” to include only the information that appears on the screen. That is all that is captured in portable document format and like “picture” translations of electronic documents. Or we could define “document” to include all the associated information stored in the computer. No one will know which definition is correct unless the rule provides it. The choice is fought out in all big cases. It is not possible to assert that there is a settled or common practice now to provide only .pdf or .tiff format. In some cases, at least, parties are providing the information on discs that include the metadata. Each party wants the metadata because it facilitates electronic searching. A “paper” response is relatively useless in comparison — the chore of visually sorting through 10,000,000 document pages is no longer necessary. The live question is whether to make discovery of metadata and embedded data available only on court order. And an answer can be found in present Rule 34 only by asking a person who takes the view you want.

This view was seconded by the observation that what you want in discovery is intelligible data. A .pdf picture is not enough. Far more information can be pulled out of the electronic file if the metadata are attached.

A caution was sounded in the reminder that the document people consciously create does not show who created it, when, who all got copies, and so on. The question is whether we should compel production of information in addition to the “document” itself. The added information can be useful in a small number of cases. But the cost may be great when large numbers of documents

are involved, and often there will be no benefit. We need a better understanding of practical realities before undertaking to draft a rule.

A rejoining observation was that if metadata and embedded data are not included in the definition of a document, discovery will be difficult because the requesting party will need to show relevance. The relevance of hidden information may be hard to establish.

All of this simply frames the issue. Electronic creation and preservation of documents includes information that commonly is not preserved for paper documents. Ordinarily it is easy to produce this information. It may seem as relevant as the visible “document” it attaches to. Should we have a different test of relevance because there was no intent to create or preserve this information? And should the question be addressed only as one of relevance, without attempting to shoehorn it into a definition of “document”?

An observer suggested that it is a trap to try to understand these questions through focusing on the definition of a “document.” Metadata and embedded data are not documents. They are data. There are many bits of data that have nothing to do with letters, memoranda, or the like. Emerging best-practice information storage is quite different from the practices that have developed for paper documents. The questions should be addressed by means other than the definition of a document.

The question was reframed in direct terms: should a party be able to demand production in a form that can be searched by computer? The document that appears on the screen or that is printed is only part of the file. If we define document to include the whole file, you will get it and be able to search it. The issue indeed is more important than this, because databases commonly do not exist in a form that even resembles a “document.” Information is put in. No document exists until someone directs specific questions that are answered by preparing something that is a document. As more information is put in, the same questions would be answered by creating a different “document.” This form of data storage and manipulation may not yield to capture within a definition of “document.”

The question of local rules returned briefly: if a general national rule is adopted, should more specific local rules be accepted? The intent should be made clear.

Returning to the definition question, it was suggested that we need to cope with what is a document today. The 20th-Century concept of a document no longer avails.

The difficulties were suggested again by asking what you should do when you get a Rule 34 request for documents on specified topics. The information may be stored on thousands of computers. A common approach is to establish a new server specifically for responding to this discovery. Then an electronic search is done of the rest of the system, searching by words, dates, and the like. The information is downloaded and stored on the discovery server. The search process is based on metadata, and captures embedded data. One question is who gets to formulate the search queries. A responding party will seek to formulate the queries, and will assert that the choices made are themselves protected from discovery as work-product material. But if work-product protection is to be made available, there may be a need for some form of judicial review to ensure that the search was undertaken in a manner designed to gather all relevant information.

The values of broad discovery were suggested by observing that discovery is a search for evidence, for truth. The analogue to embedded data in earlier technology is audio dictation that has been erased but may be recoverable. What we decide in addressing these questions will govern what is preserved. But the costs of preservation may not be as great today as they were yesterday, and may shrink still further tomorrow.

The final suggestion was that probably the rules cannot avoid the need for case-by-case analysis. Generally we think of discovery in terms of good litigants who honestly seek to provide existing information and bad-faith litigants who seek to conceal existing information. But new technology makes it possible to generate new information from data even though the person who possesses the data does not know that the data can generate the information. This phenomenon will not readily yield to definition.

Form of Production. The fourth question addressed by the drafts is the form of producing electronically stored information. The first draft presents alternative Rule 34(b) provisions — the first requires that the party requesting discovery specify the form in which electronically stored data are to be produced, while the second alternative simply permits specification of form. The form of production will determine whether metadata and embedded data are produced. The Subcommittee could not decide whether to require, or simply to permit, that the request specify the form of production.

When the request specifies the form of production there must be an opportunity to object to the chosen form. Provision is made in a draft rule that again has several alternative provisions bearing on the need to search for documents that are not reasonably accessible or are not available in the usual course of the producing party's activities.

Finally, the draft provides that a party may produce electronically stored information in the form in which it is ordinarily stored, and need produce in only one form.

Discussion began with an observer's suggestion that the form of production affects two issues. One is the integrity of the data. The other is the utility of the data — production in the form in which the data are maintained may not be best. Production in a form that cannot be changed avoids disputes about who changed the document when competing versions emerge later. Some litigants are driven by the desire to avoid producing useful information. There are neutral, non-alterable formats that can preserve integrity. And it is important to provide metadata, which can lead to admissible evidence; this is an important part of the utility of the data, and should be discoverable.

These suggestions were reflected in the suggestion that the form of production is related to the Rule 26 definition of the scope of discovery. Information is made useful by metadata. Although this may not fit the traditional sense of leading to the discovery of admissible evidence, it is important for the same reasons. And the metadata or embedded data may be relevant in themselves. Perhaps it is better to capture these elements in the scope of discovery than to relegate them to the definition of a document or the form of responding. Or perhaps there should be an independent provision for the production of “data” that is not anchored in the definition of a “document.”

Another observer suggested that the draft should be written in the alternative. Information may be created in one form, stored in another, and protected for integrity in a third. Flexibility should be retained for the producing party. If the procedure is made too rigid, costs will be magnified greatly. The form of the response should be addressed by focusing on the needs of the case, beginning with the Rule 26(f) conference. And it will be difficult to define “metadata” or “embedded data.” It is better here also to be general, to avoid confining definitions. But the scope of discovery should not be expanded far beyond the present scope.

It was asked how many computer users are even aware that their computers generate and preserve metadata and embedded data. Should we demand that people produce information they were not aware of creating?

In further discussion, an observer asked whether it is wise to allow the inquiring party to specify a form of production. It does happen that the inquiring party may demand paper, not electronic, materials. A reply was that we want to protect against an obligation to produce in two forms. If the responding party chooses the form, the inquiring party may find it more difficult to use and ask for production in another form. Allowing an initial specification avoids that problem.

Another observer suggested that this question shows another aspect of the fallacy of thinking and defining in terms of “documents.” The hard copy is an excised version of the information in the electronic file. A responding party may play the game by providing only paper copy. Rather than define “document” the rules should focus on data or information.

This comment was met by the assertion that it is not a game. The paper copy gives what has always been given in discovery. We still need to get better information about the costs and burdens of providing metadata and embedded data. We do not know what will be the effect of requiring that they be produced.

In related fashion, it was noted that good studies have been made of the practices of big business enterprises. In many otherwise sophisticated companies very few people are aware of the reach of discovery. Only a minority of major corporations even have looked into these questions.

The form-of-production issue also affects Rule 33 interrogatory responses. The drafts include a new subdivision (e) that would permit a party to respond to an interrogatory by producing electronically stored data for search by the inquiring party. Rule 33(d) occupies a nether world between Rule 33 answers to interrogatories and Rule 34 document production. An interrogatory can compel a party to create an answer that did not exist before the party investigated the information required to frame an answer. Rule 33(d) enables a responding party to produce business records that enable the inquiring party to undertake the investigation and create the answer. The Rule 33(e) draft builds on analogy to Rule 33(d), permitting a response that provides electronic business records. Since most business records are kept in electronic form today, it seems certain that Rule 33(d) already is being invoked by providing electronic business records.

Providing electronic business records may require use of the responding party's software to enable the inquiring party to determine the answer as readily as the responding party could. That is built into the draft, but could lead to real complications.

It is difficult to know how often this provision will be used. The answer will be informed by the present use of Rule 33(d), remembering that in the present setting a Rule 33(d) response ordinarily must include access to electronic records. The draft can be seen as a way to describe and regulate discovery practice that must be occurring now.

A judge described a case in which a party had to reconstruct a decommissioned computer system, giving access to records through the software it had to recreate.

It was suggested that we need much more information about the comparative costs of producing records in different forms. This suggestion was met by the response that the purpose is to create a system in which the burden of determining an answer is equal for both parties. The responding party has a choice: it can assume the burden of making the information available in a form that makes access and manipulation equal, or it can undertake to research the information and provide an answer to the interrogatory. Access to electronic records simply mimics present Rule 33(d); the responding party has a choice of how to respond.

Another tactic has been to use a neutral, perhaps a court-appointed master, to do the search.

Burden of Responding. The fifth set of questions involves the burden of retrieving, reviewing, and producing inaccessible data. The proposed direction of the rule is clear enough: the Subcommittee believes the rule should protect against the burden of producing "inaccessible" data unless a court determines that the burden is justified. The difficulty is in defining or describing the distinction between data that are accessible only with undue effort and data that genuinely are beyond recall. The draft addresses these questions through new Rule 26 provisions, so as to reach all modes of discovery.

One question is whether these provisions should address disclosure as well as discovery. The answer reflected in the draft is that disclosure should not be addressed. As reconstituted, disclosure addresses only information that a party may use in its case. If a party has in fact retrieved information for its own purposes and intends to use it, the information should be disclosed even though the party would not have been required to retrieve it in response to a discovery request. For that matter, once the information has in fact been retrieved, it should be subject to discovery without regard to the burden undertaken to retrieve it and the retrieving party's choice not to use it in its own case.

That leaves the problem of describing the information that need not be retrieved. Much of the problem arises from disaster-recovery systems, designed for business purposes and storing information in a form that can be searched only with great difficulty. But it seems awkward to frame a rule in terms of disaster-recovery systems. A rule could refer in open terms to undue burden or expense, or to the need to migrate the information to a usable form, or to availability in the usual course of business. The draft adds an optional proviso that protects against the undue burdens — however described — only if the responding party preserves a single day's full set of backup data.

One difficulty with relying on access in the ordinary course of business is that there is little apparent reason to protect data that are easily accessible merely because there is no occasion to access them during ordinary business operations. Rule 34 already is expansive, looking for production of documents in a party's possession, custody, or control. There is little reason to cut back on this concept for electronic records, but the translation is not easy.

Even if reliance were to be placed on the "ordinary course of business," some further translation is required to reach parties whose records are not maintained for business purposes. Ordinary people should enjoy the protection of whatever protection is appropriate. And ordinary people should not be able to defeat any production by asserting that because they are not in business, nothing is accessible in the ordinary course of business.

The one-day data backup was suggested as a pragmatic maneuver to protect against data destruction. But it presents serious problems.

However the basic protection comes to be defined, the draft also provides that further discovery can be ordered for good cause. The order may direct that the inquiring party pay part or all of the response expenses. The basic provision that a court may order production of data difficult to access has not been controversial in the Subcommittee. But there is concern about adding explicit cost-bearing provisions. A past proposal to make explicit the cost-bearing authority implicit in Rule 26(b)(2) provoked controversy and was withdrawn from Judicial Conference consideration. It may be better to avoid any repetition of that experience. The draft also suggests that the cost-bearing direction might be limited to paying for "extraordinary efforts." The term is borrowed from Texas practice, where lawyers like it, but the concept may prove elusive.

The short of it is that no one on the Subcommittee favors a duty to "scour the earth" in all discovery requests in all cases, but no one has suggested an easy approach through rule language. There is constant change in what is accessible, what is inaccessible without great effort, what is in fact inaccessible no matter what effort is expended. Accessibility may differ greatly across different information systems.

Returning to the question of disaster-recovery systems, it was suggested that the practical question is back-up tapes. They are designed for disaster recovery, not information retrieval. There should be a presumption that a party need not bear the expense of maintaining back-up tapes indefinitely or searching whatever back-up tapes are available. "Extraordinary" efforts might include that approach, but we should seek a better definition.

Discussion of back-up tapes expanded. A back-up tape is a "data dump" of everything in a straight physical bit-stream order. It does not distinguish deleted data, programs, or anything else. It all can be reloaded on the computer. But it is impossible to retrieve anything without restoring the entire tape to the original system with the same software. Back-up tapes are useless for business purposes after more than a few days. But information technology people refuse to destroy them unless there is a clear and clearly enforced recycling program. That means that many firms are stuck with vast numbers of old back-ups. It costs a minimum of \$1,200 per tape to restore. If there are 1,000 tapes the cost is \$1,200,000 before you can even start to search the material. Consider a large

corporation that has several thousand servers to back up. To order it to suspend recycling tapes inflicts some cost in acquiring ever more tapes, but the cost is not great. The cost of doing anything with the preserved tapes, however, can be enormous.

The back-up tape question is different from the “archive” systems maintained by many firms with systems for managing electronic data. The archive systems often are not “on line,” but are “near line.” The information is easily accessible. The problem is that perhaps 30% of companies have this. Many information technology people use back-up tapes as a substitute for archive systems.

A pithy summary was that “much has been inadvertently retained.”

The one-day “snapshot” of information was first questioned by asking why we should require preservation of information simply because it is no longer in the regular computer system. Why not treat it as destroyed, just as paper documents that have been discarded? Particularly if a system includes archived information, why require a search beyond it into back-up tapes that still may be preserved? Perhaps we should frame a rule that creates an incentive to maintain a good archive system, protecting against discovery of information inadvertently retained only if there is a systematic and thorough preservation system.

The Committee was reminded that “deleted” information often remains available on forensic inquiry. Information generated by the computer on its own also often remains available even though the associated document was deliberately “deleted.” The question remains whether any of this material should be discoverable.

The scope of discovery today includes relevant information reasonably calculated to lead to the discovery of admissible evidence. Do these problems suggest a need to reconsider this general scope, as a way to free firms to revamp the way they manage information?

An observer seconded this question, adding that any rule that forces people to design information system behavior in circumstances not directly tied to an actual litigation is outside the Enabling Act. This suggestion met the response that the drafts only tell parties what to do in litigation. If the litigation duties induce people to change their practices to make it easier to comply with litigation duties, that is their affair. Of course many people will not choose to change. Others will change because they have been educated by their lawyers. Lawyers already are telling business firms to recycle their backup tapes. Business firms are changing their information practices in other ways because of the demands of discovery.

The Rule 26(b)(1) question was renewed with the statement that the Committee should not back into expanding the scope of discovery. “Reasonably calculated to lead to the discovery of admissible evidence” takes on a new meaning for information “buried on the hard drive.” We have lived in a physical world. We are trying to adjust to a world of plasma and semiconductors. But the principles are the same. Perhaps we should not attempt in the rules to address “inaccessible” electronic information any more than we have attempted to address “inaccessible” paper information — which is not addressed at all. It seems likely that most people today treat printed information that has been covered by “white-out” as inaccessible. And thirty years of warehoused files are likely treated as inaccessible in many circumstances. How can we address all of these problems?

Privilege Waiver. The sixth problem addressed, inadvertent privilege waiver, exists with respect to paper discovery. The Subcommittee heard a single illustration of a case in which 27 people were used for six weeks to screen paper documents for privilege. Is that worth doing? Privilege protection adds to the burden of screening. The need to avoid inadvertent production is greatly increased because production often is held to waive privilege not only for the produced document but for all other privileged communications on the same subject. The drafts submitted for discussion thus go beyond electronic information.

In approaching protection against inadvertent waiver, attention must be paid to 28 U.S.C. § 2074(b), which requires an Act of Congress to approve any rule that creates, modifies, or abolishes an evidentiary privilege. But there is a strong argument that this section does not apply to either of the proposals. Some rules already touch on privilege, including rules adopted after § 2074(b) was enacted. The Committee Note to revised Rule 26(b)(4) says that privilege is waived as to documents used to prepare an expert trial witness. Rule 26(b)(5) requires a privilege log. These rules, and the proposals on inadvertent waiver, regulate the discovery process rather than privileges.

The first proposal has been before the Committee for several years. Characterized as the “quick peek,” it draws from practices adopted by many lawyers in cases that involve discovery of large quantities of paper. The parties agree that they can look at everything without any privilege waiver. Specific discovery demands are framed to focus only on the papers the parties actually want; discovery objections are made in response to those demands. These agreements have proved effective between the parties, but it is uncertain whether they protect against nonparty claims that a privilege has been waived by disclosure. The proposal relies on both agreement among the parties and court order. At first blush, however, it may seem that this approach will not work for electronic information. Often “the warehouse” is provided entire in the form of a few compact discs. The requesting party has possession of all the information; how is its search to be restricted to the parts it later specifies as the subject of formal “production”? But if the discovery response takes a different form, the “quick peek” approach still may work. Discovery may take the form of questions addressed directly to the responding party's computer system, often through an intermediary and at times through direct cooperation of the parties.

A second approach is designed to capture the tests that have emerged in the cases that struggle to limit the perils of inadvertent waiver. Mistaken production does not always waive privilege. The general test is to ask whether waiver is fair. This general test is detailed by looking to a number of open-ended factors such as the volume of documents searched in response to the discovery request; the efforts made to avoid disclosure of privileged materials; whether the privilege was identified and asserted promptly after the mistaken production; the extent of the disclosure; and the prejudice to any party that would result from finding or refusing to find a waiver.

These proposals both relate to all forms of discovery, not merely discovery of electronically stored information. The question remains whether it is appropriate to address the problem at all through the Civil Rules.

Discussion began with a new question not addressed by these proposals. Raw electronic data may be produced in response to a discovery request. The party who requested the data may then manipulate the data to produce information that the producing party never intended to come into

existence, revealing trade secrets, confidential business information, or the like. The substantive law of trade-secret protection requires diligent efforts to maintain secrecy. Does the discovery response defeat protection? The “quick peek” approach can work in this area as well as in the area of evidentiary privileges.

The Committee was reminded that one reason for approaching the waiver problem by rule is that party agreements for a “quick peek” may not be binding on nonparties. The quick peek approach is being used now. It works reasonably well. But the difficulties of attempting to enshrine it in a rule are great.

Despite the difficulties, the Committee has heard that the huge cost of privilege review is the greatest source of expense in document production. And now it is starting to hear that the volume of electronic data further increases the cost. The pressure to do something through the rules increases in measure with the costs. It would be good to know how frequently the “quick peek” approach is used now by party agreement, and whether other forms of party agreements are being used. We should be anxious to get information about approaches that might be incorporated into the rules.

Texas has a simple rule. Inadvertently produced privileged matter must be returned if the producing party asks quickly. But even with this rule, litigators say they routinely negotiate agreements like this.

A long-familiar theme was brought back from other contexts. The draft that summarizes the factors considered in the cases must encounter the tradition that rules should not simply adopt a list of case-developed factors. A rule that requires return of the inadvertently produced document is better; the fighting then will contest whether the document is privileged, not the multiple factors that may limit inadvertent waiver.

An observer noted that there is case law requiring reasonable efforts to protect privilege. Electronic information systems may not be designed to establish reasonable efforts. Waiver may occur outside inadvertent discovery responses.

Preservation. The final problem addressed by the proposals is the duty to preserve electronically stored data after the commencement of an action. Two drafts present the same approach as a new Rule 34.1 and as an addition to Rule 26. The rule announces a preservation obligation, but then provides a safe harbor for the good-faith operation of disaster-recovery or other systems. The safe harbor is framed by stating that “nothing in these rules” requires suspension of ordinary systems in order to make it clear that the rule does not address preservation requirements imposed by other law. The Rule 26 draft is more limited than the Rule 34.1 draft, however, because it addresses only electronically stored data. The Rule 34.1 draft also addresses documents and tangible things. Lastly, the drafts include new Rule 37 provisions that prohibit sanctions for failure to preserve electronically stored information unless the party willfully or recklessly destroyed data in violation of Rule 34.1 [or 26(h)(3)], or destroyed data described with reasonable particularity in a discovery request. Sanctions could not be imposed for negligent destruction of data not specifically described in a discovery

request. This focus on “willfully or recklessly” responds to concerns raised by the Residential Funding decision.

A drafting question was raised by pointing out that the sanction limit for destroying data described in a discovery request does not state that the discovery request must have been received before the responsive data were deleted. The drafting will be reviewed to make this clear.

A second question asked whether a sanction could be imposed for destruction of data that are not material. The footnotes illustrate a possible approach that requires a showing of material prejudice to the requesting party. This provision was not included in the draft because of a belief that courts exercise restraint in imposing sanctions in ways that make it unnecessary.

An explanation of the link between the sanction provision and the duty to preserve described in Rule 34.1 [or 26(h)(3)] was offered by referring to the common-law duty to preserve information. It is not certain when the common-law duty attaches with respect to information relevant to litigation not yet filed but likely to be brought. Should a party that anticipates being sued be obliged, for example, to preserve backup tapes? It was thought risky to draft a rule that might incorporate these uncertain open-ended obligations.

The Rule 37 sanctions provision reaches a party who “made unavailable” electronically stored information. Does that reach failure to turn over data that continue to exist? As drafted, the rule seems to reach a “failure to produce,” and “making unavailable” can easily describe a failure to produce. But the association among “deleted, destroyed, or otherwise made unavailable” may limit the apparent meaning. This drafting question will be considered further.

A direct duty-to-preserve illustration was put as a question. Your computers are leased. The lease runs out and the computers must be returned, hard drives and all. Is there an obligation to preserve the information on the hard drives?

This question was addressed by an observer who found it difficult to create preservation requirements by procedural rule. What must be preserved by a huge enterprise with many computer systems? The problem is illustrated by the proviso that would require a party to preserve “a single day's full set of * * * backup data” when an action is commenced. A big company is sued every day. The proviso would require it to maintain a full set of backup data covering many years.

So it was asked whether preservation requirements include substantive components beyond Enabling Act reach. There are many substantive statutes and regulations that impose preservation requirements. The Committee has heard many plaintive assertions that there is an acute need for guidance, particularly with respect to electronically stored information. Requesting parties need protection against information loss. But producing parties need assurance that they are protected in the ongoing routine operation of their computer systems, despite an inadvertent failure to preserve data relevant to an ongoing litigation. There is a risk that discovery rules will impose undue costs — itself a “substantive” consequence of great importance. Perhaps in the end the Committee will conclude that preservation guidance is beyond the proper scope of the Enabling Act. But continuing inquiry may at least show some steps that can be taken to provide guidance.

These observations were followed by a reminder that the first formal inquiry made by the Discovery Subcommittee was a conference held at Hastings College of the Law. Both plaintiffs' and defendants' representatives reflected great concern about the problems of preservation and spoliation. The agreement that there are serious problems suggests that there may be ways in which the Committee can help. The fact that electronically stored information has generated special sensitivities, however, should not blind the Committee to the risk that rules that address only electronic information may generate unintended inferences as to other forms of information.

Draft Admiralty Rule G

The minutes of the May meeting summarize the review of draft Supplemental Rule G as it then stood. The purpose of this rule is to gather all the forfeiture provisions that are now scattered throughout the Supplemental Rules, separating them from admiralty procedure and placing them together. The draft also addresses many issues that are not addressed by the Supplemental Rules, responding to statutory changes, the great increase in the number of civil forfeiture actions, and even new constitutional developments. The National Association of Criminal Defense Lawyers was asked to provide comments on an earlier draft and responded with detailed criticisms that have been addressed throughout the continuing revision process.

The present discussion does not aim at approval of any part of the current draft. Instead it aims at providing information about the direction of the draft, providing advance notice of one of the difficult issues — standing — that will be presented when a draft is presented for Committee deliberation. With continued hard work and some luck, the draft may be ready for study at the spring meeting.

Judge McKnight described the work of the subcommittee charged to work on developing Rule G. The subcommittee has held five conference calls, running two hours each. It has come a long way in the project to explore every part of the draft. Many issues have been thoroughly researched and discussed. Stefan Cassella, acting for the Department of Justice, and the letters from the National Association of Criminal Defense lawyers, have provided invaluable help and direction. Standing to claim property subject to forfeiture has proved a particularly thorny issue. Ned Diver, Rules Clerk for Judge Scirica, prepared a lengthy and excellent memorandum on standing. The central question is whether a possessory interest should suffice to establish claim standing. Once standing is recognized, the claimant can put the government to its proof. The Department of Justice has urged a relatively narrow definition that limits standing to a person who would qualify as an “owner” within the definition of the innocent-owner defense of the Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C. § 983(d)(6). The Department presents compelling arguments for its position. But the issue is not simple. The definition of standing affects property rights. Some possessory interests would not be protected. This narrowing may better be a matter for Congress. A further reason for avoiding any attempt to define claim standing is that the problems appear to arise in a relatively small portion of the cases. The subcommittee has concluded that we should aim for a rule that does not undertake to define standing.

The reasons for avoiding a definition of claim standing were stated in greater detail. In part, the reasons go to the limits of the Enabling Act process. In other part, the reasons go to the difficulty of justifying the limits chosen in the drafts.

The limits of the Enabling Act process begin with the changes that have made standing a matter of renewed concern to the Department of Justice. Before CAFRA, the government's burden in a civil forfeiture proceeding was to show probable cause to forfeit. Probable cause could be shown even by reliance on hearsay evidence. Once probable cause was shown, the claimant had the burden either to prove that the property was not forfeitable or to prove a defense. In this setting, courts adopted a “colorable interest” standing test that allowed claim standing on the basis of any interest

that, if proved, would satisfy the Article III “injury-in-fact” standing test. The apparent reason was that if the property were indeed forfeitable, the claimant's interest would be resolved at the step of determining ownership as an element of innocent ownership. CAFRA, however, places the burden on the government to prove forfeitability by a preponderance of the admissible evidence. Two difficulties appear. One is that the case for forfeiture often depends on circumstantial evidence; however compelling, reliance on circumstantial evidence is at times chancy. The second is that more direct evidence may be available, but can be produced only at the cost of jeopardizing ongoing criminal investigations or risking the effectiveness and even the lives of confidential informants. Put to the choice of revealing this direct evidence or risking loss of the forfeiture, the government may be compelled to rely on the circumstantial evidence alone. The government believes that it should not be forced to these burdens and risks absent a significant preliminary showing that the claimant has a worthy protectable interest.

Against this background, several reasons urge caution in relying on the Enabling Act process to define claim standing.

First, there is a plausible argument that CAFRA intends to define claim standing by § 983(a)(4), which states that any person claiming an interest in the seized property may make a claim. There are good reasons to doubt that this provision was intended to define claim standing. Ordinarily standing must be established by more than mere assertion; Article III does not recognize standing for anyone who claims to have an interest but cannot point to any concrete interest. The provision seems procedural, designed to invoke the admiralty rule procedures, rather than definitional. But some astute observers believe that the provision may define standing, and the argument that it does define standing will surely be made. An attempt to narrow the definition of standing will be characterized, rightly or wrongly, as an attempt to supersede Congress's recent work.

Second, the very occasion for the attempt to narrow standing arises from the consequences of the amendments that place the burden on the government. The attempt will be seen as an effort to undermine the Reform Act determination that the burden should be increased, quite apart from any theory that CAFRA itself defines standing. It will be argued, and the argument will be carried to Congress with force, that the Enabling Act is being invoked to countermand the consequences of a deliberate legislative choice.

Third, Enabling Act rules are not to abridge, enlarge, or modify any substantive right. As standing doctrine exists today, the protection of claim standing extends to possessory interests and record-title interests that do not qualify as “ownership” within the definition of § 983(d)(6). A person who has possession of an attache case containing \$100,000 wrapped in duct tape and surrounded by fabric softener sheets is protected by state substantive law against anyone who takes it from him. The narrow standing definition would defeat that protection against the United States when it claims civil forfeiture. So a person who has record title to real property is protected against the world. The narrow standing definition would defeat that protection when the record title is treated as transparent. These refusals to recognize or protect interests protected by state law can easily be seen as the modification or abridgement of substantive rights.

Finally, and more generally, it is difficult to resolve in the Enabling Act process the policy choices that must be made in deciding whether to supersede the judicially developed claim standing tests. They seem better fit for resolution by Congress.

Taken together, these concerns suggest that a narrow definition of claim standing should be undertaken only for the most compelling reasons.

Even if an attempt is made to define claim standing in Rule G, there are reasons to doubt the wisdom of borrowing the § 983(d)(6) definition of “ownership.” Although it is said that Congress looked to the standing decisions in drafting the definition, the definition clearly is narrower than the standing decisions on the books when Congress acted. There is little reason to suppose that the tests should be the same. The innocent-owner defense is relevant only if the property is otherwise forfeitable; the reasons to refuse to protect attenuated interests sustain the policies that establish forfeiture. Claim standing, on the other hand, is also relevant when the property is not forfeitable. More attenuated interests deserve protection — and are protected under current standing law — when the only issue is whether the government must establish forfeitability in order to keep the property.

The difficulty of appraising the arguments for a narrow standing test is most apparent in confronting the pragmatic arguments. It is difficult to know how often the government will fail to establish a worthy forfeiture claim because the only evidence is circumstantial. Accepting the argument that the government may need to withhold evidence to protect ongoing criminal investigations or confidential informants, it is difficult to know how often this happens. Equal difficulties arise in determining how often the risks are run, leading to actual interference with ongoing investigations or loss of confidential informants. So too with nuisance claimants (the prisoner who reads the Wall Street Journal and claims in every published forfeiture), stalking horses who hold nominal record title, and couriers. Claims are made by such people, but it is difficult to know how frequently and with what effect.

The reasons for adopting the § 983(d)(6) definition of ownership as the standing test were stated more succinctly. The starting point is that forfeiture is an *in rem* proceeding. The government does not choose its adversaries. Claimants in fact include couriers, prisoners, and nominal title owners. Claims have been made by people who assert that although they possessed the property, they were not aware of the possession — “I did not know that money was in my suitcase” — mere naked possession. Current case law does deny standing to general unsecured creditors and to the naked-unknowing possessor.

Claims based on tenuous or fictitious interests are a great problem for the government. The government should be required to prove forfeitability only when a claim is made by someone with an interest. An illustration is presented by a case in which a motorist saw money spilling from laundry detergent boxes falling from the car in front of him. He stopped to gather the money and was assailed by the driver of the first car. While they were fighting, a passing motorist called the police. The possessory interest of the following motorist surely does not deserve protection. But claim standing was recognized, and the government had to pay a \$10,000 settlement in order to avoid putting on proof of forfeitability that would have jeopardized an undercover operation.

Present standing theory evolved when courts saw no harm in it. The government's burden to show probable cause was not onerous. Tenuous relationships could be sorted out and rejected when the proceedings moved to the innocent-owner defense. Now the standing theory works real harm.

CAFRA, in § 983(d)(6), establishes an affirmative defense. The first step requires the claimant to prove ownership, broadly defined. Then the claimant must establish innocence, more narrowly defined. A donee, for example, may not be a bona fide purchaser for value and will fail for that reason. It is better to eliminate the "colorable interest" test of current standing decisions and begin with ownership as defined in § 983(d)(6).

If standing is not to be addressed by Rule G, however, it will be even more important to establish procedures to resolve standing before proceeding to the government's proof of forfeitability. A classic example is the person who claims that the cash is the proceeds of selling a ranch in Mexico. At least there should be a preliminary showing that there was a ranch, that it was sold, and that the selling price can account for the amount of cash involved.

It also is important to clarify the approach to be taken when cross-motions for summary judgment are filed. Both forfeitability and innocent ownership may be addressed. The case for forfeitability may depend on circumstantial evidence that presents questions for trial. But summary judgment for the government may be appropriate on the innocent-owner defense; if so, judgment should be entered for the government without need to try forfeitability.

Adoption of provisions addressing preliminary determinations on standing will require careful drafting to ensure that the court does not resolve triable fact issues that invoke the right to jury trial.

Facing these pressures, and with the help of Ned Diver's excellent memorandum, the subcommittee asked for a draft that excludes a definition of standing. The draft includes procedural protections for the government in addition to those that address pretrial determination of standing. Under G(5)(a), a claim must state the claimant's interest. G(5)(c) provides for interrogatories addressing claim standing that must be answered before a motion to dismiss can be granted. This limitation on dismissal addresses the experience that objections are made on venue, limitations, and particularized pleading grounds before an answer is filed. The government wants to be able to determine whether the claimant has a real interest, or is only a stalking horse, before being put to address these issues.

A reminder of Enabling Act sensitivities was added. One concern is that if Congress allows an Enabling Act rule to take effect by inaction, there is no Act of Congress to provide the President an opportunity to review and perhaps to veto. The Executive Branch shares the interest that the Enabling Act process pay attention to desirable constraints. Even when a particular proposal seems to favor Executive Branch interests, these concerns remain and should be honored.

The relationship between bankruptcy and forfeiture proceedings was addressed. What if a Trustee acquires interests in forfeiture property through § 541: can bankruptcy be used as a tactic to expand standing? What about the automatic stay? The intersection of forfeiture and bankruptcy is very complex. No attempt is made to deal with that in draft Rule G. There is a growing body of case law on which goes first, whether the government becomes only a claimant for forfeiture in the

bankruptcy proceeding. Some cases say the forfeiture goes first if issue is joined. So if the forfeiture is initiated after the bankruptcy proceeding commences, the Ninth Circuit Bankruptcy Appellate Panel says the forfeiture goes ahead, but some bankruptcy courts reach the opposite conclusion. The Department of Justice has decided not to address these issues in Rule G at this time.

Draft G(7)(d)(ii) says that standing is for the court, not the jury: why? This is the weight of case law. Some cases, however, assume without analysis that the question is for the jury, as part of the ownership question. It was noted that the most recent conference call began to discuss this question and related questions, but did not conclude. They remain open for further subcommittee work.

As a separate question, it was asked whether the Department of Justice intends to ask for CAFRA amendments. Although there are some provisions that it would like have amended, none focus on standing. It does not seem likely that other amendments will be suggested in the near future. Congress exhausted its energies for forfeiture issues during the seven years of dispute that produced CAFRA.

The discussion concluded by observing that many of the provisions in draft Rule G were written by the Department of Justice to improve the position of claimants. This has not been a one-way street. For the first time, for example, the rule provides individual notice to potential claimants in addition to notice by publication. The effort is to produce a balanced rule that fairly weighs competing interests.

Filed, Sealed Settlements

Confidential settlement agreements are common. Much attention has been drawn, however, to the occasional practice of filing a settlement agreement under seal. The District of South Carolina has adopted a local rule that purports to prohibit sealing a filed settlement agreement. The Committee asked the Federal Judicial Center to undertake a study of this practice.

Tim Reagan presented a progress report on the study. The report addressed the frequency of filing sealed settlement agreements, and the circumstances of filing.

The frequency of filed sealed settlement agreements varies from district to district. Docket records have been analyzed for just more than half of all districts. Across this sample, the average rate is slightly less than one in three hundred cases — about 0.3%. About ten percent of the courts examined have no such filings. Another ten percent have filings at twice or more the national rate. The rate in the District of Puerto Rico is about 3%. In the District of Hawaii the rate is about 2%, but that seems to be accounted for by the practice of filing under seal the transcript of a successful settlement conference.

The reasons for filing are obvious in about half the cases. The settlement needs court approval; the filing is the transcript of a settlement conference; the settlement is filed with a motion to enforce. It seems likely that other filings were made to facilitate any enforcement proceeding that

might become necessary in the future. For the most part the motive seems to be to protect information about the amount paid.

Looking to what is sealed, with an eye to determining whether important information is closed to public access, it turns out that the complaint is almost never sealed. In a very small number of cases the whole file has been sealed.

It was noted that James Rooks, of ATLA, submitted two papers on court secrecy that were circulated to the Committee for this meeting. The focus is on secrecy in broad terms that reach far beyond filed and sealed settlement agreements.

Another observation was that the FJC study provides valuable fact information to address conjectural fears that sealed settlement agreements filed in court are depriving the public of information needed to protect health and safety. This is a remarkably thorough study. But still further inquiries are being made to determine whether present practices interfere with public access to important information.

The FJC study also includes a survey of court rules on sealing. The docket study seems to suggest that there is no correlation between court rules and the frequency of sealing.

In response to a question why the study has not turned up a greater frequency of sealed settlement conference transcripts, it was noted that the search method reaches only matters that are entered on the docket sheet with “seal.” In the District of Hawaii the docket entries are unusually complete, enabling researchers to catch more subtle nuances that may be obscured in other districts. And of course practices vary. Some judges — perhaps many — do not transcribe anything at a settlement conference. Perhaps commonly there is nothing in the record to seal. But if the court retains jurisdiction to enforce a settlement, then the agreement is filed and sealed.

The search cannot provide assured information about rejected motions to file under seal. But the sense is that this does not occur frequently. So too, there seem to be few motions to unseal. When there is a motion to unseal, it may be made by a party or by a nonparty — usually the nonparty is the press.

Consideration will be given to the question whether the FJC study has reached a point at which it would be helpful to describe the interim findings to Senator Kohl, who has long expressed interest in access to litigation materials and who has introduced legislation on the topic.

Federal Judicial Center Rule 23 Study

Judge Rosenthal noted that the Class Action Subcommittee has carried forward the question whether to adopt a settlement-class rule. The proposal that was published for comment several years ago generated great controversy. The proposal was withdrawn as the Amchem and Ortiz decisions were anticipated and then handed down. Those decisions emphasized limits imposed by present Rule 23, leaving open the question whether Rule 23 should be amended to reduce rule-based obstacles to settlement classes. Constitutional constraints remain, however, and must inform any rule. A rule

must observe constitutional requirements. Wise rulemaking often yields further, accounting for the policies that shape constitutional requirements beyond the limits of compulsion.

The Federal Judicial Center was asked to undertake a study that might show whether there is now a need to pursue a settlement-class rule.

Mr. Willging presented a summary of the present stage of the FJC study. The “bottom line” is that Amchem and Ortiz do not drive plaintiffs' choices between filing in state or federal courts, and do not drive defendants' decisions whether to attempt removal of state-court actions. General class-certification rules and approaches do seem to have some importance, generally in the minds of defendants contemplating removal. Direct questions focused on the Amchem and Ortiz decisions showed that they are not major factors, but at times were among the concerns that influence the choice of forum. The effect is particularly likely to be felt in property damage and personal injury cases.

One finding has been that the cases that were settled in federal courts involved classes much smaller than the classes in cases that settled in state courts. The amount of recovery per individual class member, however, was considerably greater in the federal-court actions. There is no clear explanation of this pattern.

Many of the cases in the study had parallel litigation that also was settled. Again, it is difficult to know what this information might suggest for possible Rule 23 amendments.

It was observed that it is intrinsically difficult for a study like this to gather information about cases that could not be settled because of doubts arising from the Amchem and Ortiz decisions.

The Committee thanked the Federal Judicial Center for undertaking the study. The final report will be ready for the spring meeting.

Rules 15, 50(b)

The Committee has carried forward for some time the inquiry whether Rule 15 should be amended. One particular proposal has been to adjust the relation-back provisions of Rule 15(c)(3). Other questions address the right to amend once as a matter of course and the best means of expressing and perhaps distinguishing the tests for amendment before trial and at trial. The issues are conceptually difficult. The real-world importance of the issues has not yet been examined; if they are primarily theoretical, there may be little reason to wrestle with the conceptual questions. In order to help frame the questions for action, a Subcommittee chaired by Judge Kyle will study the proposals and report to the Committee. It may be that proposals can be pursued in tandem with the Style Project.

A more recent proposal addresses Rule 50(b). The proposal is easily defined. Rule 50(b) continues to allow a post-verdict motion for judgment as a matter of law only if the moving party moved for judgment at the close of all the evidence. Many decisions reflect failures to comply with this requirement, and several decisions have announced approaches that have eroded the requirement

at the margins. The question is whether the purposes served by the present rule can be served as well by a rule that is easier to apply and that does not cause inadvertent forfeiture of a deserved judgment. Although easily identified, the question touches Seventh Amendment sensitivities that must be carefully judged. This proposal too is referred to the Subcommittee chaired by Judge Kyle.

Rule 62.1

In response to a proposal by the Solicitor General referred to the Committee by the Appellate Rules Committee, a draft of a new Rule "62.1" has been prepared. The draft seeks to express a procedure adopted by most of the circuits to regulate relationships between district courts and appellate courts when a motion is made to vacate a judgment pending appeal. There are some variations in practice across the country, and many lawyers remain unfamiliar with the proper procedure. Even district courts might benefit from having the procedure spelled out in the rules. This proposal will be carried forward on the agenda.

Next Meeting

The next Committee meeting was tentatively set for April 29 and 30, probably in Washington, D.C.

Respectfully submitted,

Edward H. Cooper
Reporter