MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 28-29, 2004

The Civil Rules Advisory Committee met on October 28 and 29, 2004, at the La Fonda hotel in Santa Fe, New Mexico. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Jose A. Cabranes; Frank Cicero, Jr., Esq.; Daniel C. Girard, 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 Thomas B. Russell; and Judge Shira Ann Scheindlin. Retiring members Judge Richard H. Kyle, Professor Myles V. Lynk, and Andrew M. Scherffius, Esq. also attended. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee members Judge Thomas W. Thrash, Jr., and Dean Mary Kay Kane also attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, were present. Professor Daniel J. Capra, Reporter for the Evidence Rules Committee, attended as Lead Reporter for the E-Government Act Subcommittee. Peter G. McCabe, John K. Rabiej, James Ishida, and Robert Deyling represented the Administrative Office. Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., and Elizabeth Shapiro, Esq., Department of Justice, were present. Brooke D. Coleman, Esq., attended as Rules Law Clerk for Judge Levi. Observers included Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison); Loren Kieve and Irwin Warren (ABA Litigation Section Style Liaisons); and Alfred W. Cortese, Jr., Esq..

Judge Rosenthal opened the meeting by asking all participants and observers to identify themselves, and by extending congratulations to the Boston Red Sox fans on the World Series sweep. She introduced new members Cabranes and Girard, and noted that new member Chilton Varner was prevented from attending by an unalterable obligation to appear in a West Virginia state court.

The three new members replace three outgoing members who have distinguished themselves by hard work and exemplary contributions to the Committee's work. They also have been marvelous friends, whose companionship will be sorely missed.

Judge Rosenthal went on to report on the September meeting of the Judicial Conference. The Conference approved proposed amendments to Civil Rules 6, 27, and 45, and also Supplemental Rules B and C, for transmission to the Supreme Court. It devoted much of its attention to the budget challenges that confront the federal courts.

Proposed rules amendments published in August included a new Supplemental Rule G for civil forfeiture proceedings, a revision of Rule 50(b), and discovery rules provisions designed to deal with discovery of electronically stored information. The discovery amendments are already attracting close attention in formal conferences and bar groups, and written comments have begun to arrive. Requests for time at the scheduled public hearings also are being made.

It is desirable that as many Committee members as possible attend the public hearings. The hearings are always important, and will be particularly important with respect to discovery of computer-based information because the bar knows about developing practice and problems in ways that do not quickly come to the attention of judges. We are likely to hear from many different experiences and perspectives. To the extent possible, it helps to look at written comments even before the hearings to become familiar with the sorts of issues that are being raised. Even now, committee members who participate in bar conferences are learning things that were not learned during the years of careful work that led up to the proposed amendments.

Last June, the Standing Committee approved Style Rules 38 through 63 for eventual publication as part of a complete set of Style rules. The cycle of style work is precisely on schedule.

Minutes

The minutes for the April 14-15, 2004 meeting were approved.

Legislative Report

John Rabiej noted that the House passed a bill that would amend Civil Rule 11 in several respects. The changes would delete the "safe harbor" and would make sanctions mandatory. In addition, state courts would be obliged to apply the federal rule in actions that grow out of events affecting commerce. As Secretary of the Judicial Conference, Leonidas Ralph Mecham sent a letter on this bill to Senator Hatch as Chair of the Senate Judiciary Committee. The letter recounts the history of the 1983-1993 period when Rule 11 mandated sanctions, including the several FJC studies that found a consensus that there are better ways to deal with abusive litigation. The letter also explains the reasons for changing to discretionary sanctions in the 1993 Rule 11 amendments, describes the FJC study of the effects of the 1993 amendments, and urges that the present rule is working well. These bills will come back in the next Congress. It may be desirable to consider asking the FJC to undertake a further study of judges' views on the ongoing operation of present Rule 11.

An observer suggested that if there is to be a Rule 11 survey, it would be useful to include experience under the Rule 11 provisions of the Private Securities Litigation Reform Act. There is a "breathtaking lack of case law to show what actual practice is" under this statute.

Others observed that academics of all shades of view, liberal and conservative, oppose the Rule 11 bills. And state judges strongly oppose the idea that Congress should legislate state procedure. Texas, for example, had mandatory sanctions in its equivalent to Rule 11, and — just as with Rule 11 — chose to go back to a system of discretionary sanctions.

Class-action reform legislation again passed in the House, but stalled in the Senate. It is likely to come back in the next Congress.

Judge Levi noted that Congress at present seems fairly aggressive about rules of procedure. Part of his job as Standing Committee Chair is to remind Congress of the Enabling Act process. He regularly suggests that it would be useful to have Congressional staff attend advisory committee meetings to learn about the actual operation of the process. These suggestions have not been notably successful.

Rule 5(e): Permission for Mandatory E-Filing Rules

The Committee on Court Administration and Case Management (CACM) has asked adoption on an expedited basis of rules that would authorize local rules that require electronic filing. For the Civil Rules, the amendment to Rule 5(e) is simple:

> **(c) Filing with the Court Defined.** * * * A court may by local rule permit <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

If at least the Bankruptcy, Civil, and perhaps Criminal Rules Advisory Committees agree that this change is proper and not controversial, the plan is to seek Standing Committee approval by mail ballot for publication in November, 2004, with a public comment period that closes on February 15, 2005. The advisory committees could consider the public comments and — if all goes well —

recommend approval for adoption at the June 2005 Standing Committee meeting.

CACM believes that expedited action is desirable for two sets of reasons. First, electronic filing saves money for the courts. This saving does not represent a transfer of costs to electronic filers; to the contrary, a careful study has shown that electronic filers also save time and money. Second, district courts already are requiring electronic filing. At the latest count, 31 districts by standing order, procedural manual, or local rule require electronic filing of all documents, and seven more require that some documents be filed electronically. This number is an impressive proportion of the courts that have gone "online" with the Case Management/Electronic Court Filing system (CM/ECF). The national rules should catch up with the reality of actual practice.

Several participants noted that the bar and courts, including state courts, have become enthusiastic converts to the advantages of electronic filing. Initial fears that small law offices would be put at a disadvantage have disappeared in face of the reality that small offices reap proportionally greater benefits than do large offices.

It was asked whether the need for speed is so great as to suggest asking Congress to adopt an amendment that would take effect before the contemplated December 1, 2006 effective date of the Rule 5(e) amendment. Several responses were offered. One was that if it goes to Congress, there might be pressure to adopt a mandatory national rule, not one that relies on local discretion. In turn, that could choke off desirable experimentation that will generate a sound basis for eventual adoption of a nationally uniform set of qualifications or exceptions. As a practical matter, moreover, the mere publication of the proposed amendments will give the amendments immediate effect. Districts that want to require electronic filing will feel free to follow the lead of the many districts that already do so. In these circumstances, finally, the adoption of an accelerated publication and comment period does not do violence to the ordinary pace of rulemaking.

The Bankruptcy Rules Advisory Committee has already adopted the CACM proposal. The Bankruptcy Rule amendment is accompanied by a brief Committee Note set out in the agenda materials.

The proposed Rule 5(e) amendment does not attempt to identify the circumstances in which exceptions should be permitted. Present practices uniformly allow exceptions for pro se litigants, recognizing that many of them are not prepared to participate in electronic filing. It is not enough to have access to a computer; appropriate programs must be used, and the user must become adept in using them. The survey of electronic filing experience shows that small firms have had to acquire new software and train staff in its use or even, at times, hire new staff. Individual litigants cannot be expected to undertake this effort. Apart from this identifiable category of concerns, there also may be concerns that some materials can be transformed to electronic form for filing only with considerable expense and difficulty. Yet other needs for exceptions may arise. Although provision for exceptions could be made by a general "good cause" provision, it seems too early to attempt to draft national-rule provisions that qualify the permission to adopt local rules. More particularly, it would be difficult to draft a sound rule for adoption on an expedited basis.

The lack of any qualifications or exceptions in the proposed amendment opens the question whether the Committee Note should attempt to offer guidance on these or other questions. The Bankruptcy Rule Note includes a paragraph suggesting that "courts can include provisions to protect access to the courts for those who may not have access to or the resources for electronic filing." A shorter alternative proposed for consideration in the agenda materials suggests that local rules and the model rule "will generate experience that will facilitate gradual convergence on uniform exceptions to account for circumstances that warrant paper filing." This language is more general, reflecting the thought that there may be good reasons for excusing electronic filing of some materials even when the parties are generally filing in electronic form.

A second question also might be addressed in the Committee Note. Rule 5(b)(2)(D) permits electronic service only if "consented to in writing by the person served." Some courts are treating participation in electronic filing as consent to electronic service. There is no collision if a party has a free choice whether to agree to electronic filing. But if local rules or practice require participation in electronic filing, a rule that exacts consent to electronic service as part of electronic filing defeats the consent protection embodied in Rule 5(b)(2)(D). The agenda includes a draft committee note paragraph stating that a court that wishes to couple electronic filing with electronic service must adopt a provision that enables a party to withdraw from electronic service, whether by withdrawing from electronic filing entirely or by withdrawing consent only as to electronic service.

A motion to say nothing in the Committee Note about the Rule 5(b)(2)(D) question was adopted without dissent.

It was suggested that the alternative brief Committee Note in the agenda materials was preferable to the Bankruptcy Rules Committee Note. But it was recognized that all committees should adopt a common note, and that the form to be published will be worked out under Standing Committee auspices in the next few days.

Publication of the proposed Rule 5(e) amendment with an accelerated comment period was approved unanimously.

Style Project: Rules 64-86

Style Rules 64 through 86 were reviewed by Subcommittees A and B in July, and are now ready for consideration by the full Advisory Committee. If approved, the entire Style package of rules can be presented to the Standing Committee in January for approval for publication in mid-February. Publication of the full package will justify a lengthy comment period. If the comment period closes in mid-January 2006, hearings could be held toward the close of the period, perhaps including one in conjunction with the January Standing Committee meeting. Then the comments would be considered at the spring Advisory Committee meeting. If all goes well, approval for adoption could be recommended to the June 2006 Standing Committee meeting, looking for an effective date of December 1, 2007.

It is important to present as clean a package as possible to the Standing Committee. Some of the decisions to be made at this meeting will require implementation. And there will be a "final sweep" through the full package to check for uniform adherence to the resolution of global issues and to find overlooked glitches. No major issues are anticipated. The final review process will be undertaken by Judge Rosenthal as Committee Chair, with the concurrence of the consultants and reporters.

The issues presented by the Style Project are important. The gains can be great. But we are bound by a vow not to change meaning. In the process, the Committee has "touched on all the great issues of the day." Indeed the recurring question whether to render a present-rule "shall" as "must" or "may" found a parallel at oral argument this month in the Supreme Court cases considering application of the *Blakely* decision to the federal Sentencing Guidelines: the statutory "shall" provoked an exchange on the question whether "shall" can mean "may."

Rule 64. Present Rule 64 adopts state remedies for seizure of person and property, "regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action." Style Rule 64(b) reduces this to "however designated and regardless of whether state procedure requires an independent action." It was agreed that it is proper to delete "ancillary to an action"; "regardless of whether state procedure requires an independent action" clearly reaches both remedies that are provided in the main action and those that must be pursued through an independent action.

Rule 65. It was noted that Style Rule 65(b)(3) retains "older matters of the same character," replacing an earlier style suggestion that this phrase be replaced by "temporary restraining orders issued earlier without notice." Professor Rowe's research suggests that there is no clear case-law treatment defining the "older matters of the same character" that do not take precedence over a preliminary injunction hearing that follows issuance of a no-notice TRO. It seems better to carry forward the present language, which may recognize that "the same character" may refer to the same character of urgency.

Present Rule 65(b) requires that a TRO granted without notice "be filed forthwith." Style Rule 65(b)(2) directs that it "be promptly filed." It was asked whether "promptly" conveys the same sense of immediacy as "forthwith." Views were offered that "forthwith" indeed sets a shorter deadline. But it was objected that "forthwith" seems antique. It is a good lawyerly term that means "right now." "Promptly," on the other hand, implies reasonableness. The suggestion that "immediately" might be substituted was met by the observation that it is not an established term of lawyerly art.

It was agreed that Rule 65(b) requires the court, not a party, to file the TRO. This might have a bearing on the word chosen to convey the desire for expeditious entry. But the question seems one appropriately resolved by the Style Subcommittee. Although three Committee members voted that the Committee should make a choice, it was concluded that the choice whether to substitute some word for "forthwith" — likely "immediately" — would be referred to the Style Subcommittee.

An observer suggested that two deletions from present Rule 65(b) should be restored. The present rule speaks of an order issued without notice "to the adverse party or that party's attorney," and requires the applicant's attorney to certify "in writing" the efforts made to give notice. Style Rule 65(b)(1) deletes the reference to notice to the party's attorney, and also deletes "in writing." These proceedings are done on an emergency basis. It may be possible to give notice to an adverse party's attorney when it is not possible to give notice to the party, and it is important to recognize that. It was responded that throughout the rules, we say "without notice" without adding a reference to a party's attorney. So too, "certify" appears in many places: do we want to create an inconsistency — with possible negative implications — by adding "in writing" here but not elsewhere?

Others expressed concern that no-notice TRO procedure is special, and deserves special safeguards. Often a party does not have an attorney when the action is filed, and often enough the plaintiff will not know whether there is an attorney. But there may be, and it was urged that this is a reason to restore the reference to an attorney. It was asked whether the result is that the party requesting a TRO has a choice whether to serve the adverse party or the adverse party's attorney, and responded that restoring this reference would leave the Style Rule exactly where the present rule is. It was suggested that if you know an adverse party has representation, rules of professional responsibility require that notice be directed to the attorney. Compare Rule 5(b)(1), directing service on the attorney when a party is represented by an attorney. If we delete "or its attorney," we seem to suggest that it is proper to serve only the party.

On two motions, it was voted with one dissent to restore "or its attorney," and voted unanimously to restore "in writing." The result is:

> **(1)** ***Issuing Without Notice.*** The court may issue a temporary restraining order without notice to the adverse party or its attorney only if: * * *
>
> **(B)** the movant's attorney certifies in writing any efforts made to give notice

* * *.

The Committee referred to the Style Subcommittee the suggestion that the tag line for Style Rule 65(d)(2) should be "**(2) *~~Scope~~ Persons Bound.***"

It was noted that Style Rule 65(d)(1)(C) directs that the order granting an injunction describe the acts restrained "or required." "Required" is new, but appropriately reflects abandonment of the old fiction that an injunction can only forbid, not require, action by the party enjoined.

Present Rule 65(e) refers to a statute relating to temporary restraining orders "and" preliminary injunctions in actions affecting employer and employee. Style Rule 65(e)(1) changes "and" to "or." This change was accepted.

Rule 65.1. Present Rule 65.1 refers to security given "in the form of a bond or stipulation or other undertaking with one or more sureties." Style Rule 65.1 deletes "stipulation." It was asked whether "stipulation" has some distinctive technical meaning that requires that it be restored. Two responses defeated any suggestion that "stipulation" be restored. No case interpreting the rule has discussed this word. And "or other undertaking with one or more sureties" — which is retained in the Style Rule — seems all-encompassing. Still, it may be useful to identify this issue as one on which comment will be helpful.

Rule 66. Present Rule 66 requires a court order for dismissal of an action "wherein a receiver has been appointed." Style Rule 66 at first suggested changing "has been" to "is" appointed. A question arose whether court approval should be required if dismissal is sought after a receiver is appointed and then is discharged. Research by Professor Rowe suggested that it would be risky to change "has been" to "is." The Committee agreed with the Style Subcommittee decision to restore "has been."

Rule 67. No issues required further discussion.

Rule 68. Present Rule 68 provides for an offer of judgment after a determination of liability when the extent of liability remains to be determined "by further proceedings." Earlier Style drafts deleted "by further proceedings." Subcommittee A asked for research on the possible meaning of this phrase. Professor Rowe's research suggested that it would be safer to restore this phrase. Restoration was approved.

The choice between "adverse party" and "opposing party" has been resolved as a global matter by preferring "opposing party" unless "adverse party" is required for substantive reasons. It was agreed that "opposing party" should be substituted in Style Rule 68(a) in the two places where "adverse party" has been carried forward from present Rule 68.

Another global issue has involved the choice between "allow" and "permit." Present Rule 68 and Style Rule 68(a) both refer to an offer to "allow" judgment to be entered. It was agreed that the Style Subcommittee should make the final choice.

It was observed that both present Rule 68 and Style Rule 68(d) do not expressly limit liability for costs to the setting in which the offer of judgment is not accepted. The omission does not seem important, although a judgment based on an accepted offer is literally not more favorable than the offer. It is understood that the sanction is available only when the offer is not accepted. But it may be helpful to indicate this proposition in the tag-line for subdivision (d), referring to "Offer not Accepted" or something of the sort. This suggestion was referred to the Style Subcommittee.

Rule 69. In keeping with the global resolution, it was agreed that Style Rule 69(a)(1) properly deletes "district" from the reference to "the state where the ~~district~~ court is located."

Present Rule 69(b) states both that in an action against a revenue officer or an officer of

Congress the final judgment shall be satisfied as provided in two designated statutes and also that execution shall not issue against the officer or the officer's property. Style Rule 69(b) omits the provision that execution shall not issue. The Department of Justice has explored this omission, without drawing any particular conclusion. It would be possible to say that the judgment "must be executed and satisfied" as provided in the designated statutes, but that might carry an untoward implication that a judgment can be "executed" against the United States. 28 U.S.C. § 2006, one of the statutes, provides for satisfaction, not execution. It was suggested that the present rule provides a substantive protection for the officer that should not be changed. But it was noted that the Style Rule carries this protection forward by providing that "the judgment must be satisfied as those statutes provide." The statutes bar execution against the officer, and this protection is incorporated by this language. Both § 2006 and 2 U.S.C. § 118, further, provide protection against execution in circumstances not reflected in the language of present Rule 69(b). It was agreed that Style Rule 69(b) should be proposed as drafted, with the addition of this paragraph to the Committee Note:

> Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against the officer.

Rule 70. Present Rule 70 refers to a judgment that "directs" a party to execute a conveyance. Style Rule 70(a) had this as "orders," but in its current form has it as "requires." The Style Subcommittee is free to conform this word to whatever global resolution is finally adopted.

A later part of Style Rule 70(a) provides that the court may "order" another person to do an act commanded. It was agreed that the tag line should be changed to reflect this word: "**~~Directing~~ Ordering Another to Act.**"

Present Rule 70 begins the sentence on a vesting order: "If real or personal property is within the district * * *." Style Rule 70(b) adds "the": "If the real or personal property is within the district * * *." It was agreed that this addition properly reflects the limit that authorizes a vesting order only as to property that is within the district.

Present Rule 70 authorizes sequestration or attachment of property on application of a party entitled to performance. Style Rule 70(c) adds three words: "entitled to performance of an act." The addition was approved.

Rule 71: No issues required further discussion.

Rule 71.1. (Present Rule 71A has been renumbered as 71.1 to conform to the convention used for all other rules interpolated between whole-numbered rules.)

It was agreed that as with Rule 65, the word to be substituted for "forthwith" should be left to the Style Subcommittee.

Present Rule 71A(c)(2) says that "process" shall be served as provided in subdivision (d). Style Rule 71.1(c)(4) changes this to "notice." Both present Rule 71A(d) and Style Rule 71.1(d) speak throughout of "notice." The reference to "process" seems misleading, even though the rule expressly provides that delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4, see Style Rule 71.1(d)(4). But this provision justifies carrying forward the present tag line for subdivision (d) as "Process."

Present Rule 71A(d)(1) says that notices are directed to the defendants "named or designated in the complaint." Style Rule 71.1(d)(1) shortens this to "the named defendants." It was agreed that it is proper to delete "or designated." Under Style Rule 71.1(c)(1) the property is both "named" and "designated" as a defendant, so "named" will cover both the property and the individual defendants.

Present Rule 71A(c) refers to the "use" for which property is to be taken, while present Rule 71A(d)(2) refers to "uses." It was agreed that these provisions should be uniform. Because property may be taken for multiple uses, it was further agreed that "uses" would be chosen for both Style 71.1(c)(2)(B) and (d)(2)(A)(iv).

An extraneous "of" will be deleted from Style Rule 71.1(d)(2)(A)(v).

Two Style-Substance Track amendments were approved. In the present rule, both appear in Rule 71A(d)(2). The first would add an explicit reminder — already provided in Form 28 — that a party who does not serve an answer may file a notice of appearance. The second would parallel Style-Substance Track amendments of Rules 11(a) and 26(g)(1) by directing that the notice include the telephone number and electronic-mail address of the plaintiff's attorney. These changes would be made in Style Rule 71.1 by adding a new item (vii) to subdivision (d)(2)(A) and by revising subdivision (d)(2)(B).

Present Rule 71A(d)(3)(B) says that when the appropriate circumstances are shown, service by publication "shall be made" in the described manner. Style Rule 71.1(d)(3)(B) renders this as "[s]ervice is then made * * *." This rendition was accepted. This is one of the instances in which a present rule uses "shall" to describe how an act is done when someone undertakes to do it.

Present Rule 71A(e) states that "the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting *it*." The question is whether "it" should be rendered in Style Rule 71.1(e)(1) as "it," "the property," or "the defendant." Complicated arguments can be made to imagine proceedings that affect a defendant but do not affect the underlying property — there may be no dispute about the taking and no dispute about total compensation, but a dispute between different claimants over distribution of the compensation. It is more difficult to imagine a dispute that affects the property but does not also affect an individual claiming an interest in it. One resolution of the ambiguity may be: "notice of all later proceedings relating to the property." Although the Style project has often carried forward an ambiguity that does not seem to yield to ready clarification, this ambiguity should be clarified if possible. The "proceedings relating to the property" approach seems to work — it would reach distribution of proceeds. Concern was expressed that this formula might be too broad. It often happens that in proceedings to condemn a large number of small parcels many of the defendants seek to participate only in the distribution. Must they be given notice of all proceedings that relate to the property, including those that challenge the taking? Suppose co-owners of a single piece of property disagree about the taking itself — one resists condemnation, while the other welcomes it: must notice of proceedings on the taking issue go to the co-owner who is interested only in compensation? It was suggested that proceedings affecting "the defendant" is the broader and better term. If we believe that the authors of the present rule were drafting carefully, that is indeed what "it" means now: the only antecedent in this sentence is "the defendant." The next sentence, moreover, having referred first to the defendant and then to the property, closes by requiring the defendant to answer after service "upon the defendant." Respect for our predecessors suggests we give them credit for intending the apparent meaning of "it." The motion passed: Rule 71.1(e)(1) will conclude: "notice of all later proceedings affecting the defendant." But it will be useful to point to the choice and solicit comment on this question.

Present Rule 71A(f) allows free amendment of the complaint, but prohibits an amendment "which will result in a dismissal forbidden by subdivision (i)." The difficulty is that subdivision (i) does not directly forbid dismissals; the first two paragraphs describe means by which a plaintiff may dismiss in certain circumstances. Style 71.1(f) carries forward the reference to a dismissal "forbidden by" subdivision (i). It was suggested that perhaps this would better say "a dismissal not authorized by (i)(1) or (2)." But it is not clear whether (i) is properly described as authorizing a

dismissal. It was agreed that "inconsistent" would be substituted. This part of Style Rule 71.1(f) will read: "But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2)."

Four means of determining compensation are provided by present Rule 71A(h). The final sentence is "Trial of all issues shall otherwise be by the court." As to compensation, the rule earlier provides that compensation is determined by any tribunal specially constituted by Act of Congress, and that if there is no such tribunal compensation is determined by a jury if a party has demanded a jury unless the court orders that compensation is to be determined by a three-person commission. It was agreed that under the present rule, a three-person commission can be appointed only if there is no statutory tribunal and if a party has demanded a jury. If there is no jury demand, compensation is determined by the court. The means of expressing these alternatives in Style Rule 71.1(h) has proved difficult. Doubt was expressed whether the Style draft was clear enough on the proposition that the court determines compensation unless one of the other three methods applies. One suggestion was that 71.1(h)(1) could begin: "the court must try all issues, except when compensation is determined * * *." An alternative was "the court must try all issues, including compensation, except when compensation must be determined * * *." The "flow" of this version was doubted. In the end, it was agreed that, subject to final review by the Style Subcommittee, Style Rule 71.1(h)(1) would begin: "In an action involving eminent domain under federal law, the court ~~must try~~ tries all issues, including compensation, except ~~that~~ when compensation must be determined * * *."

It was asked whether Style Rule 71.1(h)(1)(A) and (B) would be better tied together by adding a few words to (B): "if there is no ~~such~~ tribunal specially constituted, either party * * *." The answer was that under the Style Project conventions, "such" is the proper cross-reference back to a preceding provision. The reader of subparagraph (B) should understand that "such" ties back to the tribunal described in subparagraph (A).

Style Rule 71.1(i)(1) allows a plaintiff to dismiss "without a court order." It was agreed that the choice whether to include the "a" can be left for resolution as a global matter.

Present Rule 71A(i)(2) concludes by providing that on stipulation by the parties "the court may vacate any judgment that has been entered." Style Rule 71.1(i)(2) added several words: "may vacate a judgment already entered that did not vest title." The suggestion that these words be deleted was approved. Although the present rule is ambiguous, practice recognizes that a judgment vesting title may be vacated on stipulation of the plaintiff and the other parties.

Style Rule 71.1(j)(2) initially deleted many words from present Rule 71A(j), so as to say only that the court must enter judgment for the deficiency when a defendant is awarded greater compensation than provided by an initial deposit, and that the court must enter judgment for the overpayment when a defendant is awarded less compensation than provided by an initial deposit. Concern was expressed that this reduced language might lead to "netting" — if one defendant is overcompensated and another defendant is undercompensated, the court might enter judgment for one defendant against the other, not the plaintiff. The result might be a loss if the defendant ordered to pay cannot be made to pay. To address this concern, the Style draft restored the full language of the present rule. It was agreed that the same effect can be achieved by again deleting some of these words. As revised, Style Rule 71.1(j)(2) will read:

> the court must enter judgment ~~for that defendant and~~ against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment ~~for the plaintiff and~~ against that defendant for the overpayment.

Rule 72. It was asked whether Style Rule 72(a) could be shortened by providing that the magistrate judge "issue a written ~~order stating the~~ decision." The next sentences repeatedly refer to objections

to the order, and so on. Each of these references would have to be changed to "decision." In the end it was decided to make no change. What you object to is the order, not the explanation of it by the decision.

Rule 72 also became the occasion to discuss the choice between using numerals and spelling out numbers. One suggestion was to spell out only "one," leaving all other numbers to numerals. A second suggestion was to spell every number from one through ten. More complex suggestions were that numerals could be used for days, no matter how few; that words should be used as part of compound structures, such as "three-judge court;" that words should be used for plural numbers (twos, not 2s); that numbers should be spelled at the beginning of a sentence, no matter how large; that numerals should be used when any number in the same sentence is a numeral — use "6" if the same sentence also refers to "12." It was observed that the criminal rules use numerals throughout, however small the number; after extensive discussion, the Appellate Rules came to the same practice. The view was expressed that it is better not to use numerals whenever possible. The apparent conclusion was that the Style Subcommittee should adopt methods consistent with the Appellate and Criminal Rules.

Rule 73. It was agreed that Style Rule 73(a) should conclude: "must be made in accordance~~ing to~~ with 28 U.S.C. § 636(c)(5)."

The final sentence of present Rule 73(b) states that a district judge may vacate a reference to a magistrate judge "under extraordinary circumstances shown by a party." It was asked whether "extraordinary" should be changed to "exceptional." "Exceptional" is used in some other rules, and may mean the same thing. It was urged that the same word should be used everywhere in the rules. But it also was argued that "extraordinary" is a term of art, and should be retained. It sets a higher standard than "exceptional," and the choice is deliberate. The risk to be feared is judge-shopping, that a party who has consented to trial by a magistrate judge will seek to renege when events seem to be taking an unpleasant turn. It also was suggested that use of a single word can itself be confusing — that "exceptional" actually has different meanings in each of the four uses identified in this discussion. On motion, it was decided to retain "extraordinary" in Style Rule 73(b)(3), ten yes and no contrary votes.

Earlier drafts of Style 73(a) began "When specially designated by local rule or a district court order, a magistrate judge may, if all parties consent, conduct the proceedings in a civil action." This was changed to "When authorized under 28 U.S.C. § 636(c) * * * " because local rules designate magistrate judges generally. But it was observed that some courts allow the parties to consent to appointment of a magistrate judge other than the one designated by the general selection system. Does Style Rule 73(b)(1) reflect this clearly enough? Should we restore more of the present rule's "consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c)"? It was responded that these words in the present rule do not clarify the ability to consent to a different magistrate judge. Further discussion suggested that there may be differences among the districts in the manner of designating magistrate judges for specific cases. It also was suggested that a court may not want to designate all magistrate judges for all cases, that individual judge designations are proper. One approach would be to change Style Rule 73(b) to the active voice: "When the court has designated a magistrate judge to conduct a civil action * * *." This language would apply both to a general designation and to a specific judge designation. That is what the present rule should mean. But it was responded that the change to the active voice does not help, and might cause some confusion. The question whether the Committee Note to Style Rule 73 should address this question was opened but not decided.

The tag line for Style Rule 73(c), "Normal Appeal Route," has drawn suggestions for revision. It was agreed that the question is a matter of style to be resolved by the Style Subcommittee.

Rules 74, 75, and 76. These rules were abrogated in 1997. There was no further discussion of the decision to reserve these rule numbers for possible future use, avoiding any renumbering of Rules 77 through 86.

Rule 77. Present Rule 77(a) says the district courts "shall be deemed always open." Style Rule 77(a) says every district court "is always open." But not all courts have drop boxes. Not all are in fact always open. Appellate Rule 45(a)(2) says a court of appeals is always open. Criminal Rule 56(a) says a district court is "considered" always open. The manner of speech may be tied to electronic filing, for which courts perhaps will be always open apart from power failures or equipment failures. It was concluded that it remains useful to recognize the fiction in the Style rule, which will say that "Every district court is considered always open." The Style Subcommittee can decide whether the tag line for subdivision (a) should incorporate "considered."

Style Rule 77 also presents the question whether some substitute should be found for repeated references to "mesne" process. Present Rule 77(a) refers to issuing and returning "mesne and final process"; Style Rule 77(a) refers simply to "issuing and returning process," and no one has objected to that. Present Rule 77(c) directs that the clerk may issue "mesne process" and "final process to enforce and execute judgments." Style Rule 77(c)(2) separates these as subparagraph (A) — "issue mesne process" — and subparagraph (B) — "issue final process to enforce and execute a judgment." It was suggested that (c)(2) should be revised on the model of (a), combining subparagraphs (A) and (B) into one (A): "issue process." A counter-suggestion was to keep (A) and (B) separate, but revise (A) to "issue intermediate" process. It was noted that Rule 4 process is neither "mesne" nor "final" process, but initial or initiating process, and that Rule 4 has its own provisions for issuing the summons. Rule 4, however, does not seem to complicate the drafting of Rule 77. In the end it was suggested that combining subparagraphs (A) and (B) may make sense, but that this is a matter for final resolution by the Style Subcommittee.

Style Rule 77(d)(1) carries forward the cross-reference to Rule 5(b) that was added to present Rule 77(d) in 2001. It was concluded that the specific reference to subdivision (b) should not be changed.

Rule 78. Style Rule 78(a) omits parts of the present rule that may seem to affect meaning. Earlier versions of Style Rule 78(a) began: "Unless local conditions make it impracticable," and went on to say that the district court must establish regular times and places for hearing motions "often enough to dispatch business promptly." These qualifications were omitted from the current draft on the theory that they have been made obsolete by the widespread shift from master calendars to individual judge dockets. It was protested that nonetheless they have meaning, and should not be deleted. But it was countered that there is no real need for Style Rule 78(a) at all — it orders the court to do something that no courts do. It is individual judges who set times for hearing motions, and this actual practice can be recognized. We have established the proposition that a rule that has lost its apparent meaning to substantially uniform and contrary practice can be changed to reflect reality; Rule 33(c) is a clear example.

It was agreed that Style Rule 78(a) should carry forward as presented. But the Committee Note should be supplemented by a statement that a court that wishes to do so can establish regular times and places for oral hearings on motions. The Note also will observe that most courts have moved away from this practice.

The Committee also approved the Style-Substance Track proposal to amend Rule 78 by deleting the provision that the judge may make an order to advance, conduct, and hear an action. Rule 16, revised repeatedly since Rule 78 was adopted, now covers all of this provision. It was also noted that the tag line for the Style-Substance version of Style Rule 78 should be revised by deleting "other orders."

The second paragraph of present Rule 78, allowing for submission of motions without oral hearing, begins "To expedite its business," the court may make such provisions. Style Rule 78(b) omits this preface. It was suggested that these words establish a limit on the reasons that justify submission without oral hearing; they are more than a mere intensifier, and should be retained. This suggestion was echoed with a lament that the diminution of oral argument is unfortunate, however necessary it may be. But a motion to restore "to expedite its business" failed with one vote yes and eleven votes no.

Rule 79. It was agreed that a late change in Style Rule 79(a)(3) is an improvement: "Each entry ~~Entries~~ must briefly show * * *."

Rule 80. Present Rule 80(c) refers to testimony "at a trial or hearing." Style Rule 80 reverses the sequence to "at a hearing or trial." The theory is that hearings ordinarily come before trials in the sequence of trial-court events. The change was accepted as a matter of style.

Rule 81. Present Rule 81(a)(4) refers, among others, to proceedings under 15 U.S.C. § 715d(c) "to review orders of petroleum review boards." The snag is that § 715 does not provide any name for the review boards. A full description might be "an order denying a certificate of clearance issued by a board appointed by the President or by any agency, officer, or employee designated by the President under 15 U.S.C. § 715j." It was agreed that Style Rule 81(a)(6)(D) should be revised to read: "15 U.S.C. § 715d(c) for reviewing an order denying a certificate of clearance."

Present Rule 81(f) provides that any rule that refers to an officer of the United States includes a district director of internal revenue, a former district director or collector, or the personal representative of a deceased district director or collector. All of these offices have been abolished. There is no substantive right that might be affected by reflecting the disappearance of these offices in Style Rule 81. It was agreed that it is proper to abandon the original Style Rule 81(e) that carried forward the provisions of present Rule 81(f).

Rule 82. No issues required further discussion.

Rule 83. No issues required further discussion.

Rule 84. No issues required further discussion.

Rule 85. No issues required further discussion.

Rule 86. No issues required further discussion.

Style Project: Rule 23

Because class actions are an enormously sensitive area, and because Rule 23 has been recently amended, Rule 23 was considered separately in the Style Project. It was reviewed in subcommittee, and is now ready for its first consideration by the Committee as the final rule in the Style Project.

The sensitivity of Rule 23 has led to retaining many words that might have been changed on a more aggressive styling approach.

Style Rule 23(b)(1)(A) carries forward the language of present Rule 23(b)(1)(A): "inconsistent or varying adjudications with respect to individual class members ~~which~~ that would establish incompatible standards of conduct * * *." "[T]hat" is a remote pronoun, separated from its antecedent "adjudications." But it was agreed that there is no ready fix for the remoteness; no change will be made.

Present Rule 23(b)(1)(B) refers to adjudications with respect to individual class members that

would as a practical matter be dispositive of "the interests of the other members not parties to the adjudication." The draft Style Rule 23(b)(1)(B) changes this to "the other nonparty members' interests." This formula was challenged, and several substitutes were suggested: "interests of nonparty class members," "other class members," "interests of other nonparty class members," and "absent class members' interests." The phrases that referred to "nonparty" class members were challenged on the ground that they will give rise to arguments about the status of class members as parties or as not parties for such purposes as discovery, intervention, and counterclaims. The underlying problem is that the rule addresses the setting in which no class has yet been certified or defined; it speaks to those who would be members of the putative class if it is certified in terms of the requested definition. It was concluded that the only safe course is to revert to the present rule language, adding a reference to the anticipated independent adjudications that makes it clear that they are adjudications in individual actions: "that, as a practical matter, would be dispositive of the ~~other nonparty members'~~ interests of the other members not parties to the individual adjudications * * *."

The resolutions proposed by footnotes 4, 5, 6, 7, and 8 on pages 19 and 20 of the agenda materials were all approved.

Style Rule 23(d)(1) begins by carrying forward the present rule's reference to "appropriate" orders. It was agreed that this word should be deleted in accord with the general style: "the court may issue ~~appropriate~~ orders * * *."

It was agreed that Style Rule 23(d)(1)(B)(iii) properly carries forward notice to class members of the right to "come into" the action. The same conclusion was reached as to Style Rule 23(d)(1)(D)'s reference to allegations about "representation of absent persons."

Style Rule 23(d)(2) generated substantial discussion. The final sentence of present Rule 23(d) reads: "The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time." Style Rule 23(d)(2) reduces this: "An order under (d)(1) may be combined with an order under Rule 16, and may be altered or amended." The comma separating Rule 16 from the rest of the sentence was attacked as incorrect. It was defended as a separation essential to prevent confusion of the liberal standard for amending a Rule 23(d) order from the demanding standards set for amending a Rule 16 order. It was readily agreed that the standards are quite different. But the method of suggesting the difference was disputed.

The first suggestion was that the comma be deleted, but "also" be added: "with an order under Rule 16 and also may be altered or amended." The next suggestion was that the sentence be made two sentences. One illustration of the second sentence was: "Either order may be altered or amended." Then it was suggested that a single sentence could be preserved by reordering the thoughts: "An order under (d)(1) — which may be altered or amended — may be combined with an order under Rule 16."

Further discussion focused on "as may be desirable from time to time." This language is emphasized in the cases, which focus on the need for flexibility in revisiting Rule 23(d) orders as the case moves along. Flexibility should be encouraged. It was also suggested, however, that most of the cases focusing on flexibility and freedom to change deal with reconsideration of the class certification and class definition under Rule 23(c). It was further noted that Rule 23(c) was recently amended, in part to discourage the occasional practice of tentative certifications. It also was suggested that "the court has to manage the action. We all know that."

Discussion returned to the proposition that the standard for amending a Rule 16 order is more demanding than the standard for amending a Rule 23(d) order. It is useful to make sure that the Rule 23(d) liberality is preserved by the language of Style Rule 23.

It was agreed, 8 yes and 5 no, to restore these words: "altered or amended as may be desirable from time to time." Style 23(d)(2) would read:

> An order under (d)(1) — which may be altered or amended as may be desirable from time to time — may be combined with an order under Rule 16.

It was further agreed that the Style Subcommittee may choose to divide this provision into two sentences.

The Committee Note should state that the Rule 16 standard is different from the Rule 23 standard.

Style Rule 23(e) rearranges the structure of present Rule 23(e), which was adopted on December 1, 2003. Despite the recent adoption of the rule, and despite the potential confusion that may arise from misleading references in the 2003 Committee Note, it was agreed that the rearrangement is an improvement and should be retained. A suggestion that the 2003 Committee Notes be rewritten to reflect the changed designations was rejected. Several other Style Rules change subdivision and other designations; the effort to establish a lengthy concordance in various notes, or separately, runs the risk of incompleteness. To be complete, a concordance should reflect the occasional drastic rearrangements of provisions even within a single present subdivision, and could easily generate more confusion than assistance.

Present Rule 23(f), adopted in 1998, states that a court of appeals may "in its discretion" permit appeal from an order granting or denying class certification. Style Rule 23(f) deletes "in its discretion" as an undesirable intensifier. The deletion was accepted. A substantial body of case law has emerged, clearly establishing the open-ended nature of the discretion and identifying considerations that guide the exercise of discretion. But the Committee Note may explain that the scope of appellate discretion remains unchanged.

Present Rule 23(f) provides for an application made to the court of appeals. Style Rule 23(f) provides instead for a petition filed with "the circuit clerk." It was protested that there is no such thing as a circuit clerk; there is a clerk for the circuit court of appeals. But Appellate Rule 5(a)(1), governing the procedure in the court of appeals, provides for a petition filed with the circuit clerk. The Appellate Rules Committee discussed this phrase at length and adopted it. It was agreed that Style Rule 23(f) should reflect the style of the complementary Appellate Rule.

Style Rule 23(g)(1)(C) says that the court may "direct" potential class counsel to provide information. The Style Subcommittee will decide whether as a matter of global style "direct" should be changed to "order."

It was noted that the standard Style Project Committee Note language should be added after Rule 23.

A motion to submit Style Rules 64 through 86 and Style Rule 23 to the Standing Committee with a recommendation for publication as part of a comprehensive Style package of Rules 1 through 86 was approved unanimously.

Style: Global Issues

The method of expressing cross-references within a single rule has varied throughout the course of the Civil Rules Style Project. Different conventions have been used at different times. Current drafts reflect the most succinct possible method. Three methods seem to be the leading candidates for adoption.

The choice can be illustrated by looking to Appellate Rule 27(a)(3)(B). This subparagraph refers back to the preceding subparagraph by saying that the time[s] to respond to a new motion and

to reply to the response "are governed by Rule 27(a)(3)(A) and (a)(4)." This method is the convention adopted in styling the Appellate Rules and the Criminal Rules. It was adopted after extensive discussion by the advisory committees. They recognized that these cross-references seem ungainly at times, but concluded that this is the clearest available method. This method was used at the beginning of the Civil Rules Style project, and in drafting some recent Civil Rules amendments.

A second approach — the one adopted in the current Civil Rules Style Project drafts — would cross-refer not to "Rule 27(a)(3)(A)," but only to "(A)." This approach saves space; over the course of the many internal cross-references found in several of the Civil Rules, it saves a considerable amount of space. It relies on the proposition that a reader who sees a reference to (A) or to (C) in subparagraph (B) will immediately understand that the reference is to another subparagraph in the parallel series. The concern, however, is that occasional users of the rules may find this bald form of cross-reference confusing. It is not yet a general convention, and will catch some readers off-guard.

A third approach, rather close to common practice in the present rules, is to provide an additional word cue. In Rule 27(a)(3)(B), for example, the cross-reference would be to "subparagraph (A)," not to "(A)" naked. The descriptive word would attach to the highest part of the rule referred to. If Rule 27(a)(3)(B) were to refer to [the nonexistent] 27(b)(2)(A), for example, it would refer to "subdivision (b)(2)(A)." This approach scores high on the elegance scale. It is easily understood — the reader need only track to (b) to know what is a subdivision. But again, it uses words and increases the word count for the entire set of Civil Rules.

Discussion focused on the advantages of adhering to the model used in the Appellate and Criminal Rules. One advantage is that of consistency of style across different sets of rules. That advantage is not an inexorable command — it has been agreed that style conventions need not be frozen by the first style project, but may evolve as further style experience suggests significant improvements. But the advantage is real. In addition, several Committee members thought that this style is the clearest, and is the most "user-friendly." Young lawyers, confronted with a reference simply to (g)(2)(H) will be confused. And computers are completely literal — a search for 27(a)(3)(A) may work better than a search for (a)(3)(A), and surely will work better than a search for (A).

It was protested that when Rule 27(a)(3)(B) refers to Rule 27(a)(3)(A), there is a miscue. The reader will expect that attention is being directed further away than the immediately preceding subparagraph. This protest availed not.

The Committee voted, 13 yes and zero no, to adhere to the full Rule cross-reference convention adopted by the Appellate and Criminal Rules.

Style Rules 1-63 (Apart from 23)

Judge Rosenthal introduced the current drafts of Style Rules 1 through 63 by noting that each rule had earlier been reviewed by a subcommittee and the full Committee. The Standing Committee has approved each for publication as part of a comprehensive Style package of all the Civil Rules. The present review is designed to elicit comments about implementation of the conventions that have been adopted to resolve the "global issues," and to present a final opportunity for pre-publication comment on individual rules.

An observer suggested that Style Rule 23.1(b)(1) should be revised. The present rule requires an allegation that the plaintiff was a shareholder at the time of the complained-of transaction or that the plaintiff's share "thereafter devolved on the plaintiff by operation of law." The Style draft eliminates "operation of," saying only "devolved on it by law." The rule addresses involuntary

acquisitions, such matters as inheritance, or an executor who steps into the shoes of a deceased shareholder, or acquisition of shares through a merger. This thought was echoed by a member who observed that there is a lot of case law on what "by operation of law" means.

The Committee voted to restore "by operation of law."

Another observer suggested that there may be an inconsistency between the notice provisions of Style Rule 23.1 and the provisions of Rule 23(e). Rule 23(e) now requires notice of a voluntary dismissal to class members only if the class members would be bound by the dismissal. This provision was added in 2003, changing the result of several cases that had ruled that notice must be given even if a voluntary dismissal comes before certification and does not bind class members. Rule 23.1, both in present and in Style forms, seems to require notice whether or not shareholders or members would be bound by the dismissal. It was agreed that any inconsistency involves matters of meaning that cannot be addressed in the Style Project. The question is one that may deserve study in the Reform Agenda.

Style document 625, Item 4, describes the global choices made in saying "terms" or "conditions." It includes a suggestion that "terms" be used consistently through Style Rule 62(b), (c), and (h). The Committee approved these choices.

Style 625 Item 5 addresses the use of "undue hardship" and "undue burden." It recommends "undue burden" throughout. The present Style draft uses "undue hardship" in Rules 26(b)(3)(A)(ii) and 45(c)(3)(C)," and "undue burden" in six other rules. But questions have been raised as to substituting "undue burden" for "undue hardship" where it is used now. First is Rule 26(b)(3), the work-product rule. This rule is special, allowing work-product protection to be defeated only on showing that a party cannot effectively present its case without discovery of the protected information. The Style Subcommittee, moreover, has been reluctant to tinker with the discovery rules — they are used constantly, and are litigated frequently. It was agreed that "undue hardship" should remain the term in Rule 26(b)(3)(A)(ii).

Then it was noted that the reporter had acquiesced in changing Rule 45(c)(3)(C)(i) from "undue hardship" to "undue burden." This position arose from the view that although hardship is quite different from burden, the qualification added by "undue" seems to obliterate the distinction. It is difficult to find a meaningful distinction between "undue hardship" and "undue burden." But it was pointed out that "undue burden" seems to imply a balancing process — the weight of the burden is compared to the advantages to be gained. "Undue hardship" may authorize closer attention to the cost to a particular person — a burden that may be due in relation to the possible advantages still may impose an undue hardship on a person ill-equipped to carry the burden. Rule 45 is part of the discovery rules, and should be treated with a measure of respect comparable to the respect paid the rules from 26 through 37.

The Committee voted, 13 yes to zero no, to restore "undue hardship" to Style Rule 45(c)(3)(C)(i).

The Committee voted to change Style Rule 9(h)(3) to the form of earlier Style drafts and the present Rule: "~~An action~~ A case that includes * * *."

The Committee considered whether to delete "substantial" from Style Rule 25(d)(1) in keeping with the global convention. It was decided to retain "substantial" because it may be intended to distinguish between substantive rights and procedural rights: "any misnomer not affecting the parties' substantial rights must be disregarded."

Style 625 identifies several uses of "certificate" and "certification." It was agreed that the Department of State should be consulted on the choice between "certificate" and "certification" in

Style Rule 44.

Judge Rosenthal observed that a number of open issues remain in the footnotes to the Style drafts of Rules 1 through 63. Those that have not been raised at this meeting will be resolved by the Style Subcommittee, Judge Rosenthal, the consultants, and the reporter in preparing the final package of rules to be submitted to the Standing Committee with a recommendation for publication. Committee members should offer suggestions to anyone in this group. The Committee approved this method of preparing the final publication package.

By 13 votes yes and zero votes no, the Committee approved transmission to the Standing Committee for publication of the Style package of Rules 1 through 86.

The Committee expressed its congratulations to the Style Subcommittee, the consultants, and Judge Levi for the great progress made in the speedy creation of the Style Package.

Rule 5.1: Notice of Constitutional Challenge

A proposed new Rule 5.1 was published in August 2003. The rule would embrace and substantially change the provisions of present Rule 24(c) that implement 28 U.S.C. § 2403. Section 2403 requires a court of the United States to certify to the United States Attorney General or the Attorney General of any State the fact that the constitutionality of an Act of Congress or state statute has been drawn in question. Certification is designed to implement the statute's further creation of a right to intervene.

Proposed Rule 5.1 goes beyond the requirements of § 2403 in several directions. Section 2403 applies only if the Act of Congress or state statute affects the public interest; Rule 5.1 applies without requiring any determination whether the statute affects the public interest. Section 2403 applies only if the United States "or any agency, officer or employee thereof is not a party." Rule 5.1 applies if a United States or state officer or employee is a party but only in an individual capacity. Section 2403 requires only that the court certify the fact that constitutionality is drawn in question. Rule 5.1 requires that the party drawing the question file a Notice of Constitutional Question and serve the notice on the Attorney General; the court still is obliged to certify the challenge.

The comments on proposed Rule 5.1 were discussed at the April 2004 Committee meeting, and new questions were raised within the Committee. The discussion is summarized in the April Minutes. It was agreed that it is wise to relocate the new provisions away from Rule 24(c), where the implementation of § 2403 has been effectively buried. Present Rule 24(c) calls on the parties to remind the court of its § 2403 certification duty, and it was agreed that the new rule should continue to impose some such duty on the parties. But there was disagreement whether to add to the notice requirement imposed on the party who draws the constitutionality of a statute into question. The published rule requires both that the party file a Notice of Constitutional Question and also that the party serve the notice on the Attorney General. It was agreed that the service requirement be changed to state directly that service is made by certified or registered mail, rather than indirectly by incorporating Rule 4(i)(1)(B). But the Committee first determined to remove any requirement that a party serve notice on the Attorney General. Then the Committee voted to reconsider, and was unable to complete consideration of this issue in the time available.

The April discussion also raised questions about the published provision that required the court to set a time for intervention not less than 60 days from the court's certification to the Attorney General, and about the Committee Note statements describing the activities that might properly continue during the period set for intervention.

All of these questions were brought back for further discussion. It was noted that letters

supporting the published rule had been received from Patrick C. Lynch, Attorney General of Rhode Island, and Ken Salazar, Attorney General of Colorado. Attorney General Salazar noted that a Colorado rule and the state declaratory judgment statute require party notice to the Attorney General, and that this practice works well. Later, it was noted that other attorneys general and the conference of attorneys general support the party-notice requirement.

Committee discussion focused on a discussion draft rule that restores the requirement that the challenging party serve notice on the Attorney General and departs from the published draft in several details. Changes approved at the April meeting were carried forward. The change to a direct statement of the method of serving by certified or registered mail has been noted already. In addition, the published draft would have required notice when an officer of the United States or of a state brings suit in an official capacity; there is no need for notice to the United States or state Attorney General of such actions, and this requirement was dropped.

The discussion draft also specifically addresses action by the court during the period set for intervention. The court may reject the constitutional challenge during this period, but may not enter a final judgment holding the statute invalid. The Committee Note would continue to amplify this provision by describing other permissible actions, such as entering an interlocutory injunction restraining a challenged statute. This Note discussion would have a stronger foundation in the rule with the added rule text.

Following a review of the published draft, attention turned to a letter from Assistant Attorney General Keisler stating in detail the reasons for the Department of Justice's support of the proposed rule. The first concern is that failure to get notice of constitutional challenges is a significant problem. An extreme illustration is provided by the Telecommunications Act of 1996 — it was challenged in 180 cases, but § 2403 certifications were made to the Attorney General in only 13 of those cases. In one of the cases without certification the district court held the statute invalid. Another frequently challenged statute, the Religious Land Use and Institutionalized Persons Act of 2000, yielded a better but still unsatisfactory count. Of some 71 district court challenges, certification was made in approximately 50; in six cases the court upheld the statute without having certified the case to the Attorney General. There are no comprehensive statistics to measure experience across the full range of constitutional challenges, but an incomplete survey found several other cases in which the certification duty was overlooked.

The effect of no notice, or late notice, is that the Department of Justice enters these actions late. Late intervention is a burden on the parties, on the court, and on the Department. Even if a statute is upheld, the Department has lost the opportunity to participate in building the record for appeal.

The second observation offered by the Department of Justice was that there is little reason for concern about imposing on the parties an obligation to notify the Attorney General. Rule 24(c) already states that a party challenging the constitutionality of legislation should call the court's attention to the certification duty. Adding a requirement that the party also notify the Attorney General is a small incremental burden. A party who brings an action against the United States to declare a statute invalid perforce gives notice to the United States. The effect of an invalidating judgment in litigation among others is similar, and a similar notice requirement is appropriate. Seven districts have adopted local rules that require party notice, and there is no indication that they impose undue burdens. Thirty-six states have adopted some form of the Uniform Declaratory Judgment Act, which requires that a party serve the attorney general with a copy of any proceeding that asserts the unconstitutionality of a statute, ordinance, or franchise. In addition 18 states have statutes that require party notice in any type of case, and 7 other states have party notification rules that apply at the appeal stage. These statutes have not provoked complaints of undue burden.

As a general matter, it was urged that party notice will more often advance efficiency, not impede it. Party notice often will reach the attorney general well ahead of court certification, and may prompt earlier intervention.

The third Department of Justice suggestion was that it is better to set a specific 60-day intervention period in the rule. If the rule is changed to say expressly that the court can reject the constitutional challenge during the intervention period, the rule and the Committee Note will make it clear that proceedings can continue. The intervention period need not delay the progress of the action. The Department will benefit from a 60-day period because it has internal processes designed to concentrate in a few persons the final decision whether the United States should intervene. These questions arise regularly, come from all parts of the country, and uniform national control is essential but also time-consuming.

General discussion began by asking whether a provision requiring a reasonable time to intervene would work. It was responded that a general provision of this sort might work, but that the proposed expansion of subdivision (c) ensures that district-court proceedings will not be delayed by a set 60-day period. The Department will benefit from an assured 60 days. And the concern about delay is further assuaged by the fact that the Department often is able to file its brief with the motion to intervene.

It was suggested that it would be better to state the time to intervene as a reasonable period no greater than 60 days. Or the time might be a reasonable period no less than 60 days. But further support was offered for the flat 60-day period.

A different perspective was offered. A comprehensive survey of local rules shows that when national rules call for action within a reasonable time, there is a strong tendency for related local rules to set a specific time. A uniform specific time in the national rule will be useful.

This part of the discussion concluded by agreeing that the rule should say: "The Attorney General has 60 days after the certification to intervene." Later discussion, however, modified this provision to set the time as 60 days after the earlier of party notice or court certification, as described below.

The question whether the challenging party should notify the Attorney General was reopened. The need may be reduced by the simple relocation of the rule to a place that will draw attention. Courts will be less likely to fail the duty to certify the challenge. The burden on the party, moreover, is untoward. Perhaps the present experience that courts do not always certify arises from failure of parties to honor the present Rule 24(c) behest that they call the court's attention to the certification duty. At any rate, sophisticated attorneys now frequently provide direct notice to the Department and find it difficult to elicit a reaction. The response may well be: We cannot tell you what we will do. Go ahead and file the challenge and we will decide. "Notice to the Department does not do much good."

One response was that in Pennsylvania state courts parties are required to notify the state Attorney General of challenges to a statute. This practice works very well in Pennsylvania, and apparently works well in other states. The local federal district rules also seem to work. The burden is slight. The modest increase in the party's burden is far outweighed by the benefit of notice. A challenge to an Act of Congress is a serious matter. The United States has a substantial interest, and should have notice. "This is a sensible way to move the action forward, to bring the right parties before the court at the right time."

It also was suggested that an anomaly will arise if party notice is not required on challenging a statute of a state that requires party notice to the attorney general when the challenge is made in a state court. A state should not be less well protected when its statute is challenged in federal court.

There is a separate question about the consequences of a party's failure to give the required notice. Will delay ensue when belated notice is given, or when the Department intervenes? What if the Department intervenes after judgment? If we assume that notice has desirable effects, why not state a consequence for failure to give notice? The "no forfeiture" provision proposed in subdivision (d), carried forward from present Rule 24(c), may not fix the problem. It was responded that other procedure rules impose obligations without defining specific sanctions for nonobservance. The most likely consequence is that failure to give notice will slow the action down a bit. And the most likely means of enforcement is that the first time the issue is raised, perhaps at a pretrial conference, the court will direct that notice be given.

The need to worry about consequences for failure to give notice was addressed to pro se cases. Forma pauperis actions are screened, but not other pro se cases.

Other issues also were raised. Section 2403 requires certification only when the Act of Congress or state statute affects the public interest. Rule 5.1, both as published and in the discussion draft, omits this limit. The Committee Note explains that the Attorney General should have the opportunity to determine whether to argue that the public interest is affected. Eliminating this requirement also relieves the court of any sense that it must draw fine distinctions in deciding whether to certify the challenge. Appellate Rule 44(a), moreover, has eliminated the "public interest" element. It is desirable to maintain consistency among the rules in this respect.

The published draft and discussion draft carry forward the no-forfeiture language of present Rule 24(c), stating that failure to serve the required notice, or the court's failure to certify, do not forfeit "a constitutional right" otherwise timely asserted. It was objected that "right" smacks too much of a legal conclusion — we do not know whether there is a right until the question has been decided on the merits. It was concluded that "right" should be changed to "claim or defense."

The provision for notice by certified or registered mail was questioned on the ground that it is obsolete now, or will be in the near future. Provision should be made for notice by electronic mail. This provision in the rule will encourage Attorneys General to develop electronic mail boxes for this specific purpose, greatly facilitating the speed of notice and immediate attention to it. It was agreed that the method of service should be expanded by adding a provision allowing service by sending notice to any electronic mail address established by an attorney general for this purpose. It was further observed that with the CM/ECF system, a court could set up its system to send notice to the Attorney General automatically when a Notice of Constitutional Question is filed, reducing still further the slight burdens imposed by the service requirement.

A final suggestion was that those who are responsible for developing the civil cover sheet should consider adding a box that directs attention to Rule 5.1. This strategy will not do much to bring notice home to defendants who raise constitutional challenges, but it would help.

It was suggested that discussion draft 5.1(a)(1) should be revised to expand the Notice of Constitutional Question. Present Rule 24(c) calls on the party to notify the court of the § 2403 certification duty. It was agreed that if this provision is to be added, the language would be: "stating the question, identifying the paper that raises it, and calling the court's attention to its certification duty under 28 U.S.C. § 2403." Support for the provision was found in concern that simply filing the Notice of Constitutional Question will not actually bring the notice to the court's attention. With electronic filing systems, judges get daily electronic notices of hundreds of events. Some judges never see the notices, unless they say "motion." Others depend on their case managers to sort through the notices. But it seems undesirable to address this level of detail in a national court rule. Filing the Notice should suffice to call the court's attention — adding more words to the Notice is not likely to make any difference in drawing the court's attention to the Notice, and once the Notice has come to the court's attention the certification question is sufficiently identified. In the end, this

provision was removed from the motion to approve the discussion draft with a number of changes.

Discussion then turned to the combined effect of the party-notice requirement and the time to intervene. It was urged that the time to intervene should run from the Notice, if Notice is given earlier than the court's certification. Time periods generally run from party notice.

An immediate response was that if the intervention period is tied to the Notice of Constitutional question, it should not be tied to service of the Notice. The time of service can be difficult to determine. If electronic service is adopted, moreover, filing and service will be virtually simultaneous. Filing is a better trigger.

It was asked whether the Attorney General's interests are sufficiently protected by setting the intervention period to the earlier of party notice or certification. Court certification suggests that the court is taking the question seriously — that it is not inclined to dismiss the challenge without further consideration. That may influence the Attorney General's evaluation of the need to intervene. It was responded that the party notice should provide sufficient information to make an informed decision whether to intervene.

The problem of tying intervention time to the party Notice was approached from a different angle. A time period that runs from certification has a clear point of reference; there is no need to determine the time of service, and no need to worry about the need to specify a time for service after filing that ensures that the Attorney General actually receives the notice early in the intervention period. There is a further advantage in looking to certification. Section 2403 requires the court to certify the question and permit the United States to intervene. What happens if the court certifies the fact of the challenge more than 60 days after the party notice? There is no reason to consider exercising the Enabling Act authority to supersede the statute. Section 2403 probably requires the court to allow intervention after certification unless Rule 5.1 is intended to supersede. Why create a rule that may cause confusion about supersession, and — if there is no supersession — will be at odds with the statute?

Discussion continued by accepting a motion that the rule provide that the court may enlarge or reduce the 60-day presumptive intervention period. Turning to the event that triggers the intervention period, it was urged that the period should run from the earlier event of notice or certification. The parties can move to enlarge or shorten the period. Failure to rely on the earlier event will result in delay. This suggestion was met by renewal of the arguments that it is simpler to rely on certification to begin the intervention period. What is the purpose in requiring certification if the time to intervene runs from notice? Notice is made to take over the role of certification whenever it occurs earlier, and it is not likely that certification will come first. In many cases, indeed, the court may not be aware of the action for some time after the Notice is filed. The expanded version of Rule 5.1(c) ensures that the court can continue to act during the intervention period, doing everything it otherwise might do apart from entering a final judgment invalidating a statute. In response, it was suggested that the period should run from the party Notice as a reward for filing the Notice.

This discussion prompted the suggestion that Rule 5.1(a)(2) should direct that the Notice be "filed and served." Rule 5.1(a)(1), however, directs filing. There is no need to repeat the command to file.

A renewed suggestion that intervention time should run from the court's certification was met by a motion that time should run from the earlier of party notice or certification. It was noted that the Department of Justice does rely on the certification as an indication that the court takes the constitutional challenge seriously. It was further noted that the concern about delay can be met by the parties — they can urge the court to certify promptly. But it was suggested that some judges may not be interested in prompt certification; when parallel cases involve overlapping constitutional

challenges, some judges may prefer that the challenges be resolved by other courts and delay certification to give the other actions a head start.

The motion to set intervention time from the earlier of the Notice of Constitutional Question or the court's certification passed, 8 votes yes to 6 votes no.

A polished draft Rule 5.1 will be prepared and circulated for review and vote by electronic mail.

The Committee did not discuss the question whether the cumulative effect of the changes to be made from the published proposal make it desirable to republish the revised rule for further comment.

Electronic Government Act Template Rule

Section 205(c)(3) of the E-Government Act of 2002 directs exercise of the Enabling Act rulemaking authority to adopt rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability * * * of documents filed electronically." Because the Appellate, Bankruptcy, Civil, and Criminal Rules are involved, the Standing Committee has created a subcommittee chaired by Judge Fitzwater to coordinate work by the several advisory committees. Professor Capra, Reporter for the Evidence Rules Committee, is the Lead Reporter for the Subcommittee. A template rule was prepared, and was revised extensively after a productive Subcommittee meeting in June 2004.

The June Template Rule provided the focus for discussion. Professor Capra noted that the goal of the work is to achieve as much uniformity as possible among the several sets of rules. The Subcommittee hopes to help guide the advisory committees toward this end.

One general question is raised by subdivision (e). The background assumption, based on the policies developed by the Committee on Court Administration and Case Management (CACM), is that ordinarily nonparties have full access to electronic case files. It makes no difference whether access is sought from a computer terminal in the courthouse or from a computer half a world away. Subdivision (e) in its present form qualifies this assumption in actions for benefits under the Social Security Act. The parties are allowed full electronic access to the court file, and nonparties are allowed full access from the court's on-site computer. But nonparties are not allowed "remote electronic access" to anything more than the docket and the court's "opinion, order, judgment, or other disposition." The Department of Justice recommends that this exemption be expanded to include immigration cases that involve immigration benefits, detention, or removal. CACM has responded by recommending a "compromise provision." This provision would begin by exempting the administrative record in immigration cases from electronic filing until a system is perfected for redacting the administrative record at the time it is prepared. Electronic filing, with redaction, would be required for all documents prepared for original filing in the district court or court of appeals. The Department of Justice could accept the CACM proposal, but believes that immigration cases should be treated in the same way as Social Security cases. There are tens of thousands of immigration cases every year, and many of them find their way to the courts. The records commonly include great amounts of intensely private information. This may be particularly true in asylum cases. Some courts are swamped with immigration cases; they account for an astonishing portion of the Ninth Circuit docket, and a large portion of the Second Circuit docket. The rule will be less complicated if it treats social security and immigration cases the same way.

Professor Capra supported the Department position to the extent of suggesting that immigration cases either should be treated in the same way as social security cases or should not be given any special treatment. The middle road is not attractive.

It was suggested that the immigration bar will likely provide useful commentary on the desirability of the proposal for limited access. One special concern arises from projects to study the actual implementation of the immigration laws. Academic inquiry will be much easier with full electronic access from a remote location, and may be possible only on that basis. Template subdivision (e) provides that a court may allow remote access to the full file by remote means, but perhaps that is not protection enough.

The Committee was asked to consider three approaches to immigration cases. The first was the "compromise" suggested by CACM; this approach was rejected. The second was to treat immigration cases in the same way as social security cases; the third was to say nothing about immigration cases in the rule. The Committee voted, with one abstention, to treat immigration cases in the same way as social security cases.

One judge asked why social security cases are given special treatment. Much of the information initially protected by the template rule is revealed in the opinion deciding the case. But it was agreed that not all of the information is revealed in the opinion, and agreed that the most sensitive and intimate information is most likely to be omitted from the opinion.

Judge Fitzwater expressed the Subcommittee's hope that the advisory committees will adopt specific rules. The Subcommittee will try to offer its help as a resource on global issues. Work has begun on the assumption that the committees should accept the policy choices already recommended by CACM and adopted by the Judicial Conference. Departures should be undertaken only on finding strong justification.

One question specific to the Civil Rule is whether a minor's name should be redacted to initials only, as provided by Template (a)(2). The Bankruptcy Rules Committee has limited the redaction requirement by adopting it for adversary proceedings and contested matters unless the minor being identified is the debtor in the case. If the minor is the debtor, full identification is necessary. It was observed that minors may be parties to litigation that is really brought and driven by their parents. And they may be parties to other forms of litigation that involve horrific events. The full name of the party may be important to the other parties, but the circumstances may call for denial of public access. There is no real risk that a party will not be able to identify its adversaries — if for some unusual reason the parties cannot agree to exchange the necessary information outside court filings, the court can order exchange on appropriate terms.

A general question facing all the rules is posed by subdivision (f). This subdivision allows the court to limit or prohibit remote electronic access by nonparties to protect against widespread disclosure of private or sensitive information that is not otherwise protected by redaction under subdivision (a). The present draft may be longer than necessary to express the thought, but the central question is whether this is a desirable additional protection. The courts undoubtedly have authority to limit access without this express provision. But it helps to make the authority clear and to remind the parties. This thought was expanded by the observation that there is a big difference between allowing electronic access at the courthouse and allowing electronic access to anyone anywhere in the world. The template rule does not protect the last four numbers of social security, tax identification, or financial account numbers. Those four numbers alone are frequently used in requests to verify identity for telephone or on-line transactions. Diligent combing of court files could facilitate extensive identity theft. Some states may conclude that even this much remote electronic access is too much. But the Subcommittee has proceeded on the assumption that it is too late to reconsider the CACM decision to generally allow remote electronic access to anything that is accessible at the courthouse. Subdivision (f) may be all the more important in light of that basic starting point.

This concern about remote electronic access was met by the observation that as the PACER

system operates today, remote access is allowed only with a password. Access is not available to random web surfers. At the same time, attorneys are advised to be careful about filing sensitive information. The Template Rule Committee Note repeats this advice.

In the end, the Committee concluded that subdivision (f) is clearly acceptable.

A separate question asked whether the categories of information protected by redaction should include home addresses. Earlier drafts called for disclosure only of the city and state of residence. The Bankruptcy Rules Committee believes that bankruptcy practice needs full home addresses. CACM spent a long time on this question, and concluded that generally redaction is not necessary. The Subcommittee has suggested that the Criminal Rules Committee may want to protect this information. But there has been a value judgment by CACM that generally redaction is not appropriate. At the same time, defendants in notorious cases may need protection. Individual defendants in securities or corporate implosion cases involving widespread public injury, for example, may be besieged by unhappy citizens if their home addresses are readily available in the files of high-profile litigation. Protection against remote electronic access under subdivision (f) may be some help, but perhaps greater protection is needed.

An observer asked how this system is expected to work. If only the redacted paper is filed, how do other parties know what is intended? Part of the answer is that the rule does not require that an unredacted copy be filed. Subdivision (b) grants permission to file an unredacted copy under seal, but only if a redacted copy also is filed. To this extent it relies on the authority provided by § 205(c)(3)(A)(iv) to adopt court rules that make the sealed copy "in addition to[] a redacted copy in the public file." But subdivision (b) does not require that an unredacted copy be filed. The problem is addressed directly by subdivision (c) for cases in which a party elects to file a sealed reference list that describes full "identifiers" and associates each with a redacted identifier that is used in the filed papers. Presumably other parties will have access to the reference list, and will readily identify the redacted information. (And perhaps other parties will be able to adopt the first reference list, although that would create difficulties with the right to amend the reference list.) If there is no subdivision (c) reference list, a party who genuinely does not understand what is intended by any part of a redacted filing should be able to find out. Normally the filing party can be expected to provide the information directly to other parties. If cooperation is withheld, the court can decide whether there is reason to maintain confidentiality even among the parties.

One clear problem that has not been addressed arises from trial transcripts. It may be self-defeating to redact trial testimony, and often it will be difficult. The status of trial transcripts as "filed" or not "filed" is unclear. It seems clear enough that a trial transcript is filed when it becomes part of the process of preparing a record for appeal. Similar questions arise with respect to trial exhibits — many courts do not now require that they be filed, but others may require filing. And the gradual adoption of electronic trial recording may lead to electronic imaging of trial exhibits. Further information is needed to support a coherent approach to trial transcripts and exhibits. The committees should work further on these questions.

Further discussion of the question whether minors' names should be redacted to initials led to a different question. Subdivision (g) provides that a party may waive protection of its own information by filing the information without redaction. Does this override the provision of subdivision (a) that allows a court to override redaction of the listed forms of information? This question in turn led to the observation that the "unless the court orders otherwise" provision in subdivision (a) seems calculated to authorize greater disclosure, and does not address greater protection.

The greater protection question in turn led to the question whether the Template Rule limits the court's authority to order protection under other rules or as a matter of inherent power. The

Template Rule is deliberately not designed to address the general questions of sealing court records or access to trial. It does not address such other rules as the discovery protective order provisions in Rule 26(c). Rule 16 also may be a source of protective authority. But subdivision (a) might seem to imply a presumption that it is proper to disclose a minor's initials, the last four digits of a social security number, and so on. There may be legitimate needs for protection, and some litigants may be willing to seek advantage from another party's fear of injury from disclosure of even redacted information. It was agreed that a paragraph should be drafted for the Committee Note to address this concern, stating that the new rule does not imply any limitation on the exercise of other sources of protective authority.

Filed-Sealed Settlement Agreements

Tim Reagan presented a succinct reminder of the major findings of the FJC study of sealed settlement agreements. A survey of 288,846 civil cases found 1,270 cases — 0.44% of the total — with filed and sealed settlement agreements. They are rare. In almost all of these cases, the rest of the court file remained open and revealed any information about the litigation that might be a matter of public interest. Examination of a number of sealed agreements that became available for examination, moreover, showed that the settlement agreements themselves do not include any information of general public interest. They deny liability and state the amount of money to be paid, nothing more.

The Committee approved, without dissent, a motion to ask Leonidas Ralph Mecham to send a letter to Senator Kohl describing the Federal Judicial Center's work and advising that the Advisory Committee will continue to monitor court practices but does not intend to propose any new rules at this time.

Spring Meeting

Judge Rosenthal observed that the spring meeting will be busy with the need to consider public comments on the rules published for comment last August. The electronic discovery rules in particular are likely to generate extensive comment. But it also is desirable to begin planning for work to be done as the discovery and style projects wind down.

One category of future work will involve matters of the sort that traditionally move directly between the Advisory Committee and the Standing Committee. Some possible topics are noted in the agenda materials. There is a thoughtful proposal to study developing practices in taking Rule 30(b)(6) depositions of organizations. The longstanding proposal to adopt a rule that directly addresses the practice of securing "indicative rulings" from district courts while an appeal is pending seems useful. The ABA Litigation Section already has expressed approval of a Rule 48 amendment to cover jury polling. The Style Project has generated a number of ideas for a "Reform Agenda." One of these ideas revives longstanding proposals to reconsider the entire package of pleading rules, whether for small changes or perhaps for more comprehensive revision. It even may be time to revive the Simplified Procedure project, in part because developing experience with discovery of computer-based information may make a simplified alternative system more attractive to more litigants.

A second category of future work will involve other advisory committees. Every time a proposal dealing with the rules for counting time is published, one or more observers lament the confusions that inhere in the time rules and urge that a comprehensive revision be undertaken. It would be a great benefit to the bar if a uniform and clear set of time-counting conventions could be adopted for all of the rules sets. The task, however, will be complicated. It may invite reconsideration of the times presently allowed to take various actions. A change in the method of calculating periods of less than eleven days, for example, would virtually force reconsideration of the periods themselves.

A second trans-committee project involves the evidence rules that linger on in the Civil Rules. There is a plausible argument that all evidence rules should be located in the Evidence Rules; the provisions in the Civil Rules may be seen as a simple residue of the days before the Evidence Rules were adopted. Some of the Civil Rules provisions, moreover, seem inconsistent with the Evidence Rules — Rule 32, for example, seems to permit use of deposition testimony in some circumstances not authorized by the Evidence Rules. And some of the Civil Rules provisions may escape much attention — Rule 65(a)(2), for example, provides that evidence taken at a preliminary injunction hearing becomes part of the record on the trial and need not be repeated at trial. Working out the details of this project may prove difficult, particularly if the committees disagree on which rule should be favored in reconciling inconsistencies.

All Committee members indicated that both the time-counting and the evidence rules projects are worthy subjects for future work.

Before the Spring meeting, a memorandum will be circulated suggesting items for deletion from the standing (and growing) agenda, with the opportunity to nominate any of them for discussion at the meeting.

Committee members were asked to consider priorities. Which projects are more pressing? Should the long-deferred project to revise the Rule 56 summary-judgment procedures be taken on at last, either to address relatively minor matters such as the brevity of the periods provided for responding to a motion or to undertake more thorough revisions to reflect long experience with local rules?

The date for the Spring meeting will be set soon, most likely for some time in April.

Respectfully submitted,

Edward H. Cooper
Reporter