

CIVIL RULES ADVISORY COMMITTEE

MAY 1-2, 2003

1 The Civil Rules Advisory Committee met on May 1 and 2, 2003, at the Administrative Office
2 of the United States Courts. The meeting was attended by Judge David F. Levi, Chair; Sheila
3 Birnbaum, Esq.; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Judge Paul J. Kelly, Jr.; Judge
4 Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent
5 McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and
6 Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor
7 Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present
8 as Consultant. Judge Anthony J. Scirica, Chair, Judge Sidney A. Fitzwater, and Professor Daniel
9 R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended
10 as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing
11 Committee Style Subcommittee, and Style Subcommittee members Dean Mary Kay Kane and Judge
12 Thomas W. Thrash, Jr., attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style
13 Consultants to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Jeffrey
14 A. Hennemuth, and James Ishida represented the Administrative Office. Thomas E. Willging, Marie
15 Leary, and Timothy Reagan represented the Federal Judicial Center. Theodore Hirt, Esq. and Stefan
16 Cassella, Esq., Department of Justice, were present. Professor Francis McGovern participated in the
17 report of the Class-Action Subcommittee. Observers included Lorna Schofield, Peter Freeman, and
18 Irwin Warren (ABA Litigation Section); Jim Rooks (ATLA); Ira Schochet (NASCAT); Barry
19 Bowman (Lawyers for Civil Justice); John Beisner; and Alfred W. Cortese, Jr.

20 Judge Levi opened the meeting by observing that Judge McKnight has been nominated for
21 appointment as a United States District Judge, and wished him a speedy and uninteresting
22 confirmation proceeding.

23 Judge Levi further noted that the terms of some members are set to expire this year, but that
24 all are expected to attend the October meeting. Lavish but deserved praises will be bestowed then.
25 Judge Scirica is scheduled to vacate the chair of the Standing Committee to adjust his schedule to
26 meet the duties of Chief Judge. He brings to mind the story of the High Court judges who,
27 disagreeing about the seemliness of opening a letter to Queen Victoria with "conscious as we are of
28 our own shortcomings," resolved the problem by beginning instead: "conscious as we are of one
29 another's shortcomings." We are not aware of any shortcoming in Judge Scirica or his stewardship
30 of the Standing Committee and earlier service as a member of the Civil Rules Advisory Committee.

31 Judge Scirica replied with a reminder of his near encounter with a rattlesnake during a Civil
32 Rules Committee meeting in Arizona. A judge of another circuit patiently explained that the viper
33 had recognized a Philadelphia Lawyer and extended professional courtesy. The explanation was but
34 one of countless great pleasures in these years of rules committees service.

35 Judge Levi noted that the Supreme Court has sent to Congress the proposed amendments to
36 Civil Rules 23, 51, and 53 recommended by the Standing Committee to the Judicial Conference.
37 The amendments are scheduled to take effect this December 1, absent action by Congress.

38 Judge Levi reported that "minimal diversity" class-action legislation has been pending in
39 Congress for several years, and that there seems to be heightened interest this year. The main bills
40 appear to be S. 274 and H.R. 1115, which are nearly identical. Some provisions in these bills
41 overlap the pending Rule 23 amendments that deal with notice and settlement, and appear to
42 supersede the recent amendment that added the permissive interlocutory appeal provisions of Rule
43 23(f). The provisions that overlap with the pending amendments create the possibility of a
44 supersession nightmare should legislation be enacted before the December 1 effective date of the
45 amendments.

46 Judge Rosenthal observed that the pending bills call for very detailed class-action notices.
47 Even as it would be amended, Rule 23 does not require so much detail. It is difficult to understand
48 how so much information can meet the desire for plain expression.

49 Judge Levi concluded the discussion by noting that in March the Judicial Conference adopted
50 a resolution on minimal-diversity class-action legislation that is consistent with the position urged
51 by the Advisory Committee and Standing Committee last year. The resolution was adopted on a
52 joint recommendation of the Standing Committee and the Judicial Conference Federal-State
53 Jurisdiction Committee. This is the first time the Judicial Conference has recognized that minimal-
54 diversity jurisdiction may prove useful in addressing the challenges posed by overlapping,
55 duplicating, and competing class actions. The Judicial Conference has properly refused to advance
56 more specific suggestions, leaving the details to be developed by Congress.

57 *Minutes*

58 The minutes of the October 3-4, 2002 meeting were approved.

59 *Local Rules Project*

60 The Standing Committee launched the Local Rules Project nearly twenty years ago.
61 Congress was concerned then, and continues to be concerned, about the proliferation of local court
62 rules. Local rules are authorized by statute, 28 U.S.C. § 2071, and have proved very useful in
63 addressing details of practice that are too fine for resolution by national rule and that may
64 accommodate distinctive local circumstances. At the same time, local rules may surprise even local
65 practitioners and often prove confusing to lawyers from other districts. And local rules are adopted
66 without review by Congress. Earlier phases of the Local Rules Project identified several good
67 practices developed in local rules and led to adoption of these practices into the national rules.
68 Problem rules were identified and addressed by the individual districts. The impetus was provided
69 for adopting the requirement that local rules conform to a uniform numbering system developed by
70 the Judicial Conference.

71 After this beginning, the Local Rules Project has once again undertaken a massive catalogue
72 and survey of local rules. Even on a conservative approach to counting, there are nearly 6,000 local
73 rules. Mary Squiers has completed the catalogue and has come a long way with a report that seeks
74 to identify local rules that may be invalid because they violate the command of § 2071, repeated in
75 Civil Rule 83, that local rules must be, as Rule 83 says, "consistent with — but not duplicative of
76 — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075." The first phase of the
77 report focuses on relationships between local rules and the Civil Rules. One hundred forty-six pages
78 of this Report were presented to the Standing Committee in January. The Standing Committee has
79 asked the several advisory committee reporters to review this work, and has asked that the work and
80 the Reporters' comments be presented to the Civil Rules Committee.

81 Discussion of the Local Rules Report began by examining three general areas of inquiry.
82 How far should the Standing Committee pursue perceived inconsistencies between local rules and
83 national rules? What level and type of duplication deserves challenge? How frequently should the
84 Judicial Conference attempt to develop "model" "local" rules?

85 Inconsistency between a local rule and a national rule or statute may be apparent. But few
86 district courts are likely to defy controlling law in this way. Inconsistency is more likely to involve
87 an attempt to limit discretion conferred by a national rule, or more vaguely to interfere with the
88 "spirit" of a national rule. Local rules of this sort may be adopted in response to wide and persisting
89 differences among judges of a single court. Achieving consistency in local practices may be a
90 valuable goal. We may not wish to adopt an approach that challenges every practice that may seem
91 to depart from the subtler implications of national law.

92 Another dilemma arises when a local rule is both inconsistent with a national rule and better
93 than the national rule. One recent episode provides a clear illustration. The Ninth Circuit Judicial
94 Council, surveying local rules within the Circuit, found many rules that authorize a direction to
95 submit proposed jury instructions before trial begins. Those rules are inconsistent with Civil Rule
96 51. But when the Ninth Circuit suggested that Rule 51 should be amended to authorize these local
97 rules, the Advisory Committee concluded that there is no reason for disparity among district courts
98 — and that Rule 51 should be amended to authorize all districts to follow this practice. This
99 amendment is now pending in Congress. An older illustration is provided by the numerical limits
100 on numbers of Rule 33 interrogatories. The Rule 33 limits were adopted after years of experience
101 with different local rules that were at least arguably inconsistent with Rules 26 and 33.

102 The interrogatory limits illuminate another dimension of the inconsistency dilemma. Local
103 rules may provide excellent tests of the desirability of new rules. These tests cannot meet the criteria
104 of rigorous social science. Nonetheless, they can provide information far more valuable than
105 intuition and imagination. The Civil Justice Reform Act reflected a great faith in the value of local
106 experimentation. Not long ago, the Advisory Committee considered amending Rule 83 to permit
107 limited-time experiments with local rules inconsistent with the national rules. The idea was put
108 aside, without finally determining its worth, for fear that it would be inconsistent with the § 2071
109 direction that local rules be consistent with the national rules.

110 Duplication of the national rules also presents some complications. It is indeed undesirable
111 simply to incorporate large portions of a national rule in a local rule — at best much time is wasted,
112 and at worst the omissions may mislead. Inaccurate paraphrasing is at least as bad. Some
113 duplications, on the other hand, may be useful guides. The Report, for example, notes that 24
114 districts direct that their local rules must be construed consistently with the national rules and
115 statutes. Although these provisions duplicate § 2071 and Rule 83, they can be important reminders
116 to practitioners who have not thought to look to those sources or who may fear that the local district
117 is not sympathetic to those constraints. Another example is provided by local rules that state that
118 the local arbitration plan is voluntary. Although the underlying statutes make it clear that arbitration
119 is voluntary, a reminder that the court is aware of this fact can provide useful reassurance.

120 Model rules also present problems. Many difficulties arise if they are drafted by Rules
121 Enabling Act bodies. The full Enabling Act process is bypassed, losing the important contributions
122 made by many different actors. One of the actors bypassed in the model rule process is Congress,
123 a fact that may stir genuine concern both in Congress and the rules committees. Careful
124 development of model local rules, moreover, could distract a rules committee from its central
125 responsibility to attend to the national rules. There even is an inherent contradiction in choosing to
126 work toward uniformity through model local rules, not a national rule.

127 If it is generally unwise for a national rules committee to sponsor a model local rule, the
128 alternatives are even more fragile. Other Judicial Conference committees, or judicial administration
129 officers, act completely outside the national rules-making process. The danger to the national rules
130 is apparent.

131 These observations are not meant to deny any role for model rules. Model local rules may
132 be useful as to topics that are not addressed by national rules and that do not seem likely to be soon
133 addressed by national rules. The model rule on attorney conduct is a good example. Years of study
134 by the Standing Committee's project on Federal Rules of Attorney Conduct show that these
135 questions do not yield readily to national rulemaking.

136 Professor Coquillette noted that the Local Rules Project Report on local civil rules is
137 continuing, and that action will be taken carefully.

138 Judge Scirica explained further that the troubling instances of inconsistency or duplication
139 will be pointed out to the chief district judges. The circuit councils may become involved.
140 Inevitably there will be some disagreements over the findings of inconsistency or duplication. But
141 it seems likely that satisfactory resolutions will be reached in most cases. The Standing Committee
142 is not now asking for formal reactions by the advisory committees, but all advice is welcome.

143 Judge Levi observed that one important problem arises when there is no national rule and an
144 aggressive local rule takes on a complicated and sensitive problem. One example might be posed
145 by the local rule in the District of South Carolina that appears to prohibit sealing any settlement
146 agreement filed with the court. A flat-out bar on sealing would be very troubling, given the
147 compelling reasons for protecting privacy and the occasional need to file a settlement agreement.
148 But the force of the local rule is drawn by another local rule that permits a judge to depart from any
149 other local rule when there is good cause. They do permit sealed settlement agreements to be filed
150 when there is good reason. Another illustration is provided by a local rule that prohibits an attorney
151 who seeks to represent a class from seeking out class members before the class is certified. That
152 direction does not seem inconsistent with Rule 23, which is silent on the issue, but it deals with a
153 very important aspect of class-action practice.

154 Judge Scirica added further cautions about the approach to local rules. The project may
155 identify rules that should be adopted as national rules. On the other hand, the project — like Rule
156 83 and § 2071 — does not deal with "standing orders." Vigorous attempts to cabin local rules could
157 easily drive distinctive local practices into standing orders or even further underground.

158 Professor Coquillette concluded this discussion by stating that it is important to remember
159 that the focus of the Local Rules Project is on assisting the district courts. Mutual education is
160 important.

161 *Legislation Report*

162 John Rabiej noted that the Administrative Office has focused its energy on three areas of
163 legislation: minimal-diversity class-action bills; a Senate "sunshine" bill; and the e-government act.

164 In the class-action area, the Senate Judiciary Committee has reported out S. 274. Action by
165 the Senate could come soon. HR 1115 seems to differ from S. 274 only by retaining a right to appeal
166 a certification decision. The chair of the House Judiciary Committee is interested in pursuing this
167 bill.

168 Senator Kohl has introduced a "sunshine" bill in each Congress for several years. In the past,
169 the bill has been resisted primarily because of its restrictions on Civil Rule 26(c) protective orders.
170 Attention in the Senate is now being focused on sealed settlement agreements. The District of South
171 Carolina local rule has drawn publicity. The Federal Judicial Center is studying the incidence and
172 use of settlement agreements that are filed under seal; a report on the study's progress will be made
173 at this meeting.

174 The electronic government statute has been enacted. It requires that in a few years the public
175 have access to all electronically filed cases. The judiciary is working on implementing electronic
176 filing; all courts should have the necessary equipment by 2006. The statute requires that all local
177 rules be posted on the court's web site; almost all districts do that now, and post standing orders as
178 well.

179 The electronic government statute also requires the Supreme Court to adopt rules that protect
180 privacy. The judiciary is seeking amendment of the statute provision that requires courts to accept
181 unredacted documents. Some courts now, under Judicial Conference policy, require redaction of
182 social security numbers. Legislation has been introduced to undo the statutory provision, and to
183 delete the requirement to adopt court rules. The Federal Judicial Center is working on these privacy

184 issues, particularly for the Court Administration and Case Management Committee, which has
185 primary Judicial Conference jurisdiction in these matters.

186 The concern with redacted documents arises in part from the Department of Justice's wish
187 to submit unredacted documents as well as redacted documents. It believes that the full unredacted
188 document may become relevant in a later proceeding, and prefers that the court be required to keep
189 it rather than force the parties to keep it.

190 It was noted that the question of filing unredacted documents ties to our agenda item on Civil
191 Rule 12(f). As electronic filing takes over, it becomes increasingly important to define what it means
192 to "strike" a portion of a pleading. It also becomes important to know just what electronic
193 capabilities the court systems have, or can develop.

194 *Style Project*

195 Subcommittees A and B have worked through Civil Rules 1-7.1 and 8-15 respectively. After
196 further revisions by the Standing Committee Style Subcommittee, these rules are ready for
197 consideration by the Advisory Committee. The goal is to approve these drafts with a
198 recommendation to the Standing Committee for publication. Publication, however, need not be this
199 summer. Instead, additional styled rules will be accumulated for publication in a larger package.
200 It may prove desirable to publish a total of three packages over the course of the project. The length
201 of the comment period to be set for each package remains to be decided.

202 Rule 1. Earlier style drafts called for the "economical" determination of every action. The present
203 draft reverts to the present rule, calling for "inexpensive" determination. The change back to the
204 present rule was made for fear that "economical" may change the meaning — indeed, the reason for
205 considering "economical" was the weary belief that few actions are determined inexpensively.

206 The committee decided that "and proceeding" should be added at the end, so the rule will call
207 for the just, speedy, and inexpensive determination of "every action and proceeding." This addition
208 will make the second sentence congruent with the first. The Style Subcommittee suggested that "and
209 proceeding" should not be added because it "doubts whether speed and thrift are as relevant to
210 proceedings as actions." Those doubts themselves seem to reflect a substantive concern. Present
211 Rule 1 calls for these good things in "all suits of a civil nature." That embraces every event that is
212 governed by the Civil Rules. Rule 1 now extends to anything that would be characterized as a
213 "proceeding" rather than an action. One example is a Rule 27 petition to perpetuate testimony before
214 an action can be brought. It was argued that now there are proceedings that are not "suits of a civil
215 nature," so the adoption of "and proceeding" broadens the rule. The proponent of this argument,
216 however, conceded that it is a good thing to broaden the rule in this way, and that the good thing is
217 within the scope of the Style Project. Other proponents of adding "and proceeding" adhered to the
218 view that in fact Rule 1 now applies to all actions and proceedings and it would change its meaning
219 to omit "and proceeding."

220 Style Rule 1 was approved, with the addition of "and proceeding."

221 Rule 2. Style Rule 2 was approved.

222 Rule 3. Style Rule 3 was approved.

223 Rule 4. It was agreed that throughout the rules, it is proper to substitute "minor" for "infant." As old
224 understandings fade, there is an increasing risk that "infant" will be mistaken to mean a person of
225 very young years, not the intended meaning of anyone not yet legally an adult.

226 Style Rule 4(c)(3) reflects a change urged by Subcommittee A. The second sentence now
227 says that the court must direct service by a marshal or by someone specially appointed if the plaintiff
228 is authorized to proceed under 28 U.S.C. § 1915 or § 1916. This expresses the intended meaning

229 better than the original direction that an "appointment" must be made. The new Style Draft was
230 accepted without change.

231 (Later discussion of Rule 12(a)(1)(A)(ii) led to adoption of a motion that Rule 4(d)(3) be
232 amended to conform to an amendment of Style Rule 12: "until 60 days after the date when the
233 request [for a waiver] was sent — or until 90 days after the request [for a waiver] was sent if the
234 defendant was addressed outside any judicial district of the United States.")

235 Rule 4(e) is one illustration of a global question that remains under consideration by the Style
236 Subcommittee. The rules refer in seemingly haphazard fashion to statutes, laws, federal, United
237 States, Constitution and laws, Constitution or laws, and so on. For the time being, the style drafts
238 carry forward the present language, although "United States" is substituted for federal. If further
239 research makes it seem safe, a uniform expression will be adopted.

240 Rule 4 presents puzzling variations in the use of "shall" and "may" in describing the modes
241 of service. Rule 4(e), for example, says that service "may be effected." So does Rule 4(f). Rule
242 4(g), on the other hand, says service "shall be effected." So do Rules 4(h), (i)(1), and (j); 4(i)(2) says
243 "is effected." Professor Rowe's research suggests that the distinctions were deliberate, but that it is
244 difficult to guess what distinctions were intended. The change to "may," "shall," and "is effected by"
245 occurred about ten years ago. The central notion seems to be that the listed methods are the only
246 valid methods of service. There is much to be said for adhering to "must" as the uniform command.
247 But Professor Carrington, who was the Advisory Committee Reporter at the time, recalls clearly that
248 the distinctions were deliberate. The underlying purpose of the distinctions, however, has been lost.

249 It was asked whether the best expression would be: "to serve an individual, a party must,"
250 and so on. That seems less jarring than to say that you must serve an individual — a plaintiff may
251 name multiple defendants, intending to serve some only if others cannot be served. This practice
252 is so well established that the present language is not likely to be read to mean that all named
253 defendants must be served, but clear expression seems important.

254 Professor Kimble suggested that any departure from the present words, whether they be may
255 or must, would be substantive.

256 The Committee voted to adhere to the language of the present rule. Style Rule 4 will reflect
257 "may" or "must" according to the present rule.

258 The Style Draft of Rule 4(e) refers to an individual "who has not waived service." The
259 present rule refers to an individual "from whom a waiver has not been obtained and filed." The filing
260 requirement is substantive and cannot be deleted from the Style Rule. The Committee voted to
261 restore "filed." The Style Subcommittee may develop an expression more graceful than the present
262 rule. One possible alternative is illustrated in the materials: "an individual — other than a minor,
263 an incompetent person, or a person whose waiver of service has not been filed — may be served *
264 * *." This might be further improved, for example by referring to "a person for whom a waiver of
265 service has not been filed," dispelling any implication that the description is limited to a person who
266 has waived service, but whose waiver has not been filed.

267 Other Style Rule 4 questions were discussed. It was decided that Style Rule 4(a)(1)(C)
268 should not be expanded to include a requirement that the summons list an e-mail address — that
269 would be a substantive addition. It also was decided that the rearrangement of provisions in Style
270 4(d)(1) does not create any implication that a plaintiff has a duty to seek a waiver of service. The
271 reference in Style 4(i)(1)(B) to "a copy of each" is clearly limited by context to mean a copy of the
272 summons and of the complaint. No change need be made.

273 Style Rule 4(i)(4), drawing from present Rule 4(i)(3), inadvertently refers to allowing a
274 "plaintiff" a reasonable time to cure a failure to serve. A party other than a plaintiff may need to

275 effect service under Rule 4(i). Style 4(i)(1), (2), and (3) all say "party." In each of three places in
276 (i)(4), this should become "party": the court must allow a party a reasonable time if (A) the party has
277 served either the Attorney General or the United States Attorney, or if (B) the party has served an
278 officer or employee of the United States.

279 With these changes, Style Rule 4 was approved.

280 Rule 4.1. Again, it was noted that the references to a United States "statute" or "law" will be
281 considered further as the Style Project proceeds. The Style Subcommittee was asked to consider
282 whether the caption should be "serving other process," in line with the caption of Rule 5 and the
283 captions for Rule 4 subdivisions.

284 Style Rule 4.1 was approved.

285 Rule 5. The Committee recommended a change in Style Rule 5(a)(1)(E), so it would read: "(i) a
286 written notice, appearance, demand, or offer of judgment, or (ii) a similar paper."

287 It was observed that present Rule 5(a) provides for service "upon each of the parties." Style
288 Rule 5(a) calls for service "on every party." Does "each" mean "every"? Rule 68(a), for example,
289 directs service of an offer of judgment on "the adverse party." Is service required on every party by
290 Rule 5(a)? A committee member stated that in his practice experience, an offer of judgment is
291 served on all parties. The Committee did not make any recommendation on this question.

292 Style Rule 5(c)(1)(B) says that when a court orders that designated pleadings not be served
293 on other defendants, crossclaims and the like "will be treated as denied or avoided by all ~~other~~
294 who are not served * * *." Present Rule 5(c) refers to "other" parties. The Committee agreed that
295 "other" parties should be restored unless the change is clearly justified by showing that there is no
296 change in meaning and that the present meaning is better expressed by "who are not served."

297 Style Rule 5(d)(2)(A) says that a paper is filed by delivering it "to the clerk." The present
298 rule refers to the "clerk of court." It was asked whether an unelaborated reference to "clerk" might
299 be read to mean "law clerk." Professor Kimble noted that the Style Rules refer to "clerk" throughout.
300 It was observed that the Appellate Rules uniformly refer to the circuit clerk. The Bankruptcy Rules
301 refer to the bankruptcy clerk, and Bankruptcy Rule 1001 includes a definition. Further discussion
302 suggested that in this particular instance, there may seem to be a change of meaning if we delete "of
303 court." The Committee voted to restore "of court," but only in Style Rule 5(d)(2)(A). The Style
304 Subcommittee suggested "court clerk." This was discussed as a question of style. "Clerk" can
305 remain in the other rules, at least until they are considered individually.

306 Style Rule 5(d)(2)(B) says that a paper is filed by delivering it to a judge who agrees to accept
307 it for filing. Present Rule 5(e) says that "the judge may permit the papers to be filed with the judge."
308 It was asked whether the change is proper — does it change meaning, and in any event should it
309 suffice to persuade any judge of a multi-judge court to accept a paper for filing when the case has
310 been assigned to another judge? It was observed that the present rule was written before common
311 adoption of individual assignments, and that some courts still do not have individual assignments.
312 A committee member suggested that in practice it may be important to be able to file with the first
313 judge who can be found. The judge's role, moreover, is one that does not interfere with the assigned
314 judge's control of the case: all the judge does is note the filing date on the paper and promptly send
315 the paper to the clerk. There is no risk that by accepting the paper for filing the filing judge is
316 interfering with the assigned judge's authority to determine whether the filing occurred after a
317 binding deadline or was otherwise ineffective. A motion to substitute "the" judge for "a" judge
318 failed.

319 Style Rule 5 was approved.

320 Rule 6. Rule 6(b) is an early illustration of an issue that recurs throughout the Style Project. The

321 present rule says that "the court for cause shown may at any time in its discretion" act in described
322 ways. The Style Rule has restored "in its discretion" after an original omission, and continues to
323 substitute "for good cause" for "for cause shown." The style consultants believe that it is better to
324 rely on "may" to carry all the freight that the present rules express through "in its discretion," "for
325 good cause," "on terms," "if justice so requires," and like terms. "May" suffices to express
326 discretion, and all of the factors that influence an exercise of discretion to do the right thing. Present
327 Rule 8(c), for example, says that the court may treat a mistaken designation as if it were correct "on
328 terms, if justice so requires." Style Rule 8(c) says simply that the court may do so.

329 It was observed that "may" means that there is authority to do something. That does not
330 always mean that the court can refuse to do it.

331 It was asked whether the variations in expression reflect differences of meaning in the present
332 rules. The reply was that many of the present rules provisions were expressly bargained for in the
333 rulemaking process. A further observation was that although the style proponents may be right in
334 theory, these rule provisions have been crafted deliberately and should not all be changed lightly.

335 Looking specifically to Rule 6(b), it was noted that "for good cause" tells lawyers what they
336 need show to persuade the judge to extend time. It is not enough simply to ask. The rule is much
337 used. It should not be changed. The Style draft has it right.

338 Turning to Style Rule 6(b)(2), it was noted that present 6(b) says that the court "may not"
339 extend the time limits set by specified rules. The Style draft says "must not." The committee voted
340 to return to "may not," recognizing that this issue may be revisited on a global basis as the project
341 continues.

342 With the change in Rule 6(b)(2), Style Rule 6 was approved.

343 Rule 7. Two Rule 7(a) questions were discussed.

344 First, present Rule 7(a) calls for an answer to a crossclaim "if the answer contains a cross-
345 claim." Style Rule 7(a)(3) omits the limit that the answer contain a crossclaim. Deleting the limit
346 seems to expand the meaning of the present rule, a step not to be undertaken in the Style Project even
347 if it seems a good idea. A crossclaim is not itself a pleading, but under Rule 13(g) is only something
348 that may be set out in a pleading. The problem is that a crossclaim may appear in a pleading other
349 than an answer. If a defendant counterclaims against two plaintiffs, for example, either plaintiff may
350 wish to crossclaim against the other in its reply to the counterclaim. More exotic examples may
351 occur as well. A reply to a crossclaim is a good idea wherever it occurs.

352 Judge Thrash pointed to present Rule 12(a)(2), which states that "[a] party served with a
353 pleading stating a cross-claim against that party shall serve an answer thereto * * *." This existing
354 provision provides ample authority to restyle Rule 7(a) so that it conforms to the direct command
355 to answer a crossclaim no matter what pleading sets it out. The Committee agreed that Rule 7(a)
356 should call generally for an answer to a crossclaim. The Committee Note will explain that deletion
357 of "if the answer contains a cross-claim" is appropriate to reconcile the two rules.

358 A proposal to further revise the structure of Rule 7(a) was referred to the Style Subcommittee
359 for action in time for submission to the Standing Committee in June.

360 Style Rule 7(b) presents a thorny problem. Present Rule 7(b) requires that a motion be in
361 writing, and provides that the writing requirement "is fulfilled if the motion is stated in a written
362 notice of the hearing of the motion." Style Rule 7(b) omits any reference to a written notice that
363 includes the motion.

364 One part of the difficulty is that most courts do not set motions for hearing. That might
365 suggest that there is no need to carry forward a provision dealing with written notice of a hearing.

366 But there are hearings on some motions. Rule 6(d) requires that a written motion and notice of
367 hearing be served not later than 5 days before the hearing. Some efficiency can be gained by
368 preparing and serving a single document with a single caption, statement, and notice of hearing.
369 Several members noted that in many courts it is common to do this in one paper.

370 It was concluded that the Style Draft can stand. The Committee Note will state that the
371 statement about combining the motion and notice of hearing in a single document was deleted as
372 redundant. A single document can serve both purposes without need for an express reminder.

373 Rule 7(b) also illustrates a common question. Present Rule 7(b)(3) states that all motions
374 shall be signed in accordance with Rule 11. Style Rule 7 omits this statement as redundant. Rule
375 11 applies to written motions by its own express terms. It was urged that the cross-reference should
376 be restored. Many people think of Rule 11 as a "pleading" rule. It is useful to remind them that it
377 applies to motions as well. A rejoinder was offered — present Rule 7(b)(3) is confusing, because
378 it seems to imply that all motions must be in writing. Oral motions are proper in some
379 circumstances, as Rule 7(b) expressly recognizes. The cross-reference "is both redundant and
380 infelicitous."

381 The theme was repeated. Rule 11 is valuable. We should not assume that all lawyers will
382 remember that Rule 11 applies to written motions as well as to pleadings. It is valuable to remind
383 them.

384 The same cross-reference question is raised by Rules 8(b) and (e), each of which redundantly
385 reminds the reader that Rule 11 applies to all pleadings. It may be urged that the cross-reference is
386 valuable in each place. Lawyers tend to think of Rule 11 first and foremost as a rule designed to
387 cabin over-eager plaintiffs. Motions, answers, and inconsistent pleadings may each deserve explicit
388 reminders. Each cross-reference, moreover, may reflect specific "deals" that were made in amending
389 each of the different rules. The deals of once-upon-a-time, however, may have faded from memory.
390 There is no need to honor all old compromises after the passions that forged them have disappeared.

391 A particular difficulty was urged with respect to the Bankruptcy Rules. The Bankruptcy
392 Rules have their own "Rule 11." Other rules, however, may incorporate the Civil Rules that cross-
393 refer to Rule 11. These indirect cross-reference incorporations could become confusing in
394 bankruptcy practice.

395 A motion to restore the cross-reference in present Rule 7(b)(3) failed. The explanation in the
396 draft Committee Note included in the agenda materials provides adequate protection.

397 Style Rule 7 was approved.

398 Rule 7.1. Rule 7.1 raises a question of the need to maintain style consistency among the different sets
399 of Rules. Rule 7.1(a) now requires a disclosure statement by a party "to an action or proceeding in
400 a district court." None of these words is necessary. Rule 1 applies the Civil rules to all actions or
401 proceedings in a district court. But the Criminal and Appellate Rules have parallel language. The
402 question whether this redundancy should be carried forward was referred to the Style Subcommittee
403 for disposition.

404 Style Rule 7.1 was approved.

405 Rule 8. Discussion of Rule 8 began with the distinction between "aver" and "allege." For the
406 present, the Style Rules will adhere to the word in the present rule — when the present rule says
407 "aver," the Style Rule will say "aver." And the use of "allege" will be carried forward when it
408 appears in the present rule.

409 Style Rule 8(b)(5) offers a change from the present rule's "lacks knowledge or information
410 sufficient to form a belief," to become "lacks sufficient knowledge or information to form a belief."

411 It was suggested that the language of the present rule is deeply embedded in practice, and approaches
412 "sacred phrase" status. The order of words may have meaning. The Committee voted to restore the
413 language of the present rule.

414 It was noted that Subcommittee B considered a change in Rule 8(c). The draft suggested that
415 "comparative negligence" be added to supplement the increasingly antiquated reference to
416 contributory negligence. Comments on the draft suggested the conceptual superiority of referring
417 to comparative responsibility. Any change was rejected for fear of substantive consequences.

418 Style Rule 8(c)(2) substantially simplifies the present rule. The present rule says that when
419 a party mistakenly designates a counterclaim or defense, "the court on terms, if justice so requires,
420 shall treat the pleading as if there had been an appropriate designation." The Style Rule says simply
421 that the court "may" do so. The Committee, recognizing the global issues involved with the use of
422 "may" to signify discretion and the exercise of discretion by imposing conditions, voted that the Style
423 Subcommittee should redraft the Style rule to include something about "terms" and justice so
424 requiring.

425 The Style Subcommittee also was asked to consider whether to delete "inconsistency" from
426 the caption of Rule 8(d).

427 Style Rule 8 was approved, subject to the Style Subcommittee's reconsideration of 8(c)(2).

428 Rule 9. Style Rule 9(a)(2) provoked renewed discussion of the difference — if any — between an
429 allegation and an averment. The present rule calls for a "specific negative averment." Some
430 Committee members prefer "allegation," including those who have changed their minds on this issue
431 as the Style Project continues. To them, "aver" seems antiquated. Others find a nuanced distinction.
432 Some dictionaries give "aver" a stronger meaning. Garner's dictionary says that "aver" "has its place
433 in solemn contexts — it should not be lightly used." Garner says that "[t]o allege is formally to state
434 a matter of fact as being true or provable, without yet having proved it. The word once denoted
435 stating under oath, but this meaning no longer applies. * * * Allege should not be used as a synonym
436 of assert, maintain, declare, or claim. Allege has peculiarly accusatory connotations. One need not
437 allege only the commission of crimes; but certainly the acts alleged must concern misfeasances or
438 negligence." Some of the uses in the present rules seem questionable. Rule 23.1, for example,
439 describes what the complaint is to allege. But it also requires verification, a level of solemnity that
440 is better matched by aver. If we are to make distinctions at this level, we must be very careful. The
441 only way to make sure that meanings are not changed is to carry forward, as the current Style drafts
442 do, whichever word appears in the present rule. For the time being, the drafts will adhere to the
443 present rule. But this question remains open to further consideration as the Style Project goes
444 forward. "Specific negative averment" will remain in Rule 9(a)(2). But "and" will be changed to
445 "that," or perhaps "which": "a party must do so by [a] specific negative averment ~~and~~ that must state
446 any supporting facts * * *"; or "by [a] specific negative averment, ~~and~~ which must state * * *."

447 The question posed by Rule 9(b) is whether there should be any restyling, beyond changing
448 "shall" to "must." The Style Draft as it stands now seems to do no harm. It was agreed that despite
449 the intense scrutiny that regularly fixes on Rule 9(b), the Style Draft changes are acceptable.

450 Style Draft Rules 9(c), (d), and (e) all simplify the corresponding present rules. The present
451 rules say "it is sufficient to" plead in the described way. The Style Draft says in each place that a
452 party "may" plead in the described way. The change alters the meaning. The present rule says
453 expressly that such pleading suffices. The Style Draft does not. The Committee voted that the
454 sufficiency concept should be restored. The Style version should find a graceful way to say: "It
455 suffices to aver generally," and so on.

456 Rule 9(h)(3) provided the occasion for a reminder that the Style Subcommittee continues to
457 consider the question of cross-references within a single rule. The current Style draft of (3) cross-

458 refers to all of subdivision (h) by saying: "within this subdivision." Alternatives include: "this
459 subdivision (h)"; "subdivision (h)"; Rule 9(h)(1); and still others.

460 With these changes, Style Rule 9 was approved.

461 Rule 10. Style Rule 10(a) includes a change that was not before Subcommittee B: the pleading must
462 have a caption with stating the court's name * * *." It was agreed that the change is a question of
463 style, and some preferences were expressed for adhering to "with."

464 So too, it was agreed that the Style Rule 10(b) change from "To facilitate clarity" to "If it
465 would promote clarity" is a matter of style within the discretion of the Style Subcommittee.

466 Present Rule 10(c) says: "A copy of any written instrument which is an exhibit to a pleading
467 is a part thereof for all purposes." An earlier Style draft dropped any reference to writing or an
468 instrument. Writing has been added back: "An written exhibit attached to a pleading is a part of the
469 pleading for all purposes." Discussion of these changes began by asking whether the word
470 "instrument" is broad enough to cover any written exhibit, or whether dropping "instrument"
471 broadens the meaning of the rule. Is "instrument" used in a narrow sense to denote such documents
472 as a contract or a deed, or does it cover any writing? What about a photograph or a drawing?

473 Turning to "written," it was suggested that it is a good idea to treat nonwritten exhibits as part
474 of the pleading. A videotape of an allegedly defamatory telecast would be an example — the court
475 should be entitled to view the tape and rule that the offending statements were not defamatory. But
476 deleting "written" is a matter of style only if we are confident that Rule 10 now embraces an exhibit
477 in any medium that can be "attached" to a pleading.

478 A motion to delete "written" from the Style rule failed.

479 It was noted that Rule 10(c) does not limit what can be attached as an exhibit. It only
480 addresses the question whether the attachment can be treated as part of the pleading. The most
481 obvious consequence is consideration on a Rule 12 motion without need to convert to summary-
482 judgment procedure. A motion was made to restore two thoughts from present Rule 10(c): "A copy
483 of any written instrument which is an exhibit * * *." It was suggested that "which is an exhibit" is
484 not needed — "a copy of any written instrument attached to a pleading is a part of the pleading for
485 all purposes" says it all. This motion carried, subject to final styling by the Style Subcommittee.

486 With these changes, Style Rule 10 was approved.

487 Rule 11. The present Style Draft of Rule 11(a) restores a present-rule word that had been deleted
488 from earlier style drafts: "Unless a rule or statute specifically states otherwise * * *." The restoration
489 was welcomed. A change in Style Rule 11(b)(1) also was approved, deleting three words:
490 "unnecessary delay or expense ~~in the litigation.~~"

491 Rule 11(c) now provides that the court may impose a sanction "upon the attorneys, law firms,
492 or parties that have violated * * * or are responsible for the violation." Style Rule 11(c) calls for a
493 sanction "on the attorney, law firm, or party that violated the rule." The Guidelines call for drafting
494 in the singular. But that makes it all the more important to restore "any," to make it clear that
495 sanctions may be imposed on each of multiple violators. This is not style alone. A motion to restore
496 "any" was adopted.

497 Present Rule 11(c)(1)(A) introduces the safe harbor added in 1993 by saying that a motion
498 for sanctions "shall not be filed * * * unless." Style Rule 11(c)(2) says the motion "may be filed *
499 * * only if." The Style Rule change was challenged. The emphasis provided by "shall not be filed
500 unless" was important in 1993. Rule 11 is very closely read by the bar. We should be reluctant to
501 change it. Rule 11 is so important that even the "flavor" of present drafting should be protected. A
502 motion to restore the emphasis of "shall not be filed unless" was adopted.

503 With these changes, Style Rule 11 was approved.

504 Rule 12. Discussion of Rule 12 began by noting that Subcommittee B found many problems in Rule
505 12 that cannot be fixed within the limits of the Style Project. Rule 12(b), for example, says that if
506 a responsive pleading is permitted, a motion asserting any of seven enumerated "defenses" must be
507 made before pleading. But Rule 12(h) says that some of those same defenses may be raised later.
508 This and other internal conflicts seem to present matters of substance. An effort will be made to
509 redraft Rule 12 as a "Reform Agenda" item in time to meet or beat adoption of the Style Rules.

510 The Style Draft of Rule 12(a)(1)(A)(ii) was questioned for clarity and fidelity to the present
511 rule. A motion was adopted to rewrite it: "within 60 days after the request [for a waiver] was sent,
512 or within 90 days after the request [for a waiver] was sent if the defendant was addressed outside any
513 judicial district of the United States." A parallel change should be made in Rule 4(d)(3).

514 The question was raised whether Style Rule 12(a)(3) should be modified to adhere more
515 closely to the present language. The present language, adopted in 2000, refers to suit against a
516 government employee "sued in an individual capacity for acts or omissions occurring in connection
517 with the performance of duties on behalf of the United States." The Style Draft changes this to "acts
518 or omissions occurring in connection with duties performed on behalf of the United States." It was
519 pointed out that the draft language may imply actual performance in a way that the present language
520 does not. This question was dispatched by observing that the analogous provision in Rule 4(i) has
521 been changed by the Style Draft in the same way as Rule 12(a)(3), and no one has objected to the
522 change in Rule 4(i) Rule 12(a)(3), indeed, was amended in 2000 only to parallel the simultaneous
523 Rule 4(i) amendment. The Style Draft stands as it is.

524 Present Rule 12(e) provides for a motion for a more definite statement made "before
525 interposing a responsive pleading." This timing element is missing from Style Rule 12(e). The
526 question whether it should be restored went in two directions. One was the observation that in some
527 courts it is common practice to file both an answer and a motion for a more definite statement. The
528 theory seems to be "this is my answer if I have properly unraveled this incomprehensible complaint,
529 but if I have failed to understand I should have a more definite statement." The other direction
530 suggested that the motion should be made before a responsive pleading, and that this practice so
531 inheres in the rule that the present statement is redundant. To file a responsive pleading is to show
532 that the party can reasonably frame a responsive pleading. After brief further discussion the question
533 was dropped without any motion to change the Style Draft.

534 Subcommittee B originally asked whether an earlier draft of Style Rule 12(h)(3) adequately
535 emphasizes the court's obligation to raise the question of its own subject-matter jurisdiction. The
536 revised Style Draft does nothing to weaken this long tradition, and can stand as it is.

537 With the change in rule 12(a)(1)(A)(ii), Style Rule 12 was approved.

538 Rule 13. Style Rule 13 was approved.

539 Rule 14. The Style Subcommittee was asked to consider whether a few more words may be deleted
540 at the beginning of Style Rule 14(a)(1): ~~After the action is commenced,~~ A defending party may * *
541 *."

542 A style protest was voiced. The second sentence of Rule 14(a)(1) begins with "But." That
543 is jarring. We should avoid it when possible. The Committee did not recommend any change.

544 Present Rule 14(a) allows impleader more than 10 days after serving the original answer only
545 on motion "upon notice to all parties." An earlier Style Draft carried forward the notice provision,
546 but it has been deleted. It was asked whether this explicit reference to the notice requirement that
547 Rule 6(d) attaches to all written motions should be deleted. Third-party practice is confusing and
548 confused. The redundancy with Rule 6(d) has always been there, and it may serve a valuable

549 function as a clear reminder. Perhaps there is no confusion now about the notice requirement, but
550 deletion might lead to eventual confusion. This concern was met with the response that one purpose
551 of the Style Project is to delete redundant cross-references. The Committee Notes will all say that
552 there is no change in meaning. Although there will be an interval in which lawyers compare old rule
553 language to new Style Rule language, courts will be alert to prevent changes of meaning. A motion
554 to restore the notice provision failed.

555 As a matter of style, the Style Subcommittee was asked to consider dividing the lengthy final
556 sentence of Style Rule 14(c)(2) into two sentences.

557 Style Rule 14 was approved.

558 Rule 15. It was observed that in many courts there is no meaning in the provision in Rule 15(a) that
559 cuts off the right to amend once as a matter of course if the action is on the trial calendar. These
560 courts do not have a trial calendar. This question was discussed by Subcommittee B, however, and
561 it was decided that no change should be made. Any change would alter the meaning of Rule 15(a).
562 Some courts still have a trial calendar.

563 It was noted that the final sentence of present Rule 15(d) provides for pleading in response
564 to a supplemental pleading "if the court deems it advisable." Style Rule 15(d) changes "deems" to
565 "considers." The two words feel different. "Deems" seems to imply a finding. "Considers" is a
566 lesser word. No response was made to this observation.

567 The protest about beginning a sentence with "but" in Style Rule 14(a)(1) was renewed by
568 protesting the decision to begin the last sentence of Style Rule 15(d) with "And." There was no
569 reaction beyond the observation that this is modern style.

570 Style Rule 15 was approved.

571 Rules 1-15: With the revisions to be made in some of the rules, the Committee voted to submit Style
572 Rules 1 through 15 to the Standing Committee in June for approval for publication together with
573 such additional Style Rules to be submitted later as will make a convenient package for the first Style
574 Rules publication.

575 *Rule 5.1*

576 28 U.S.C. § 2403 directs a court of the United States to certify to the Attorney General the
577 fact that the constitutionality of an Act of Congress affecting the public interest has been drawn in
578 question. Certification also must be made to a state attorney general when the constitutionality of
579 a state statute affecting the public interest is drawn in question. Certification is not required,
580 however, if "the United States, or any agency, officer or employee thereof" is a party, or the "State
581 or any agency, officer, or employee thereof" is a party.

582 The § 2403 requirement is supported by the final three sentences of Civil Rule 24(c). The
583 first two of these sentences repeat the command of § 2403. The last sentence directs a party
584 challenging the constitutionality of legislation to call the court's attention to the court's
585 "consequential duty."

586 Appellate Rule 44 implements § 2403 in terms that depart in several directions from present
587 Civil Rule 24(c). During the publication period for the Appellate Rule 44 amendment that added
588 Appellate Rule 44(b), expanding Rule 44 to deal with state statutes as well as federal, a United States
589 District Judge commented that the Civil Rules should be amended to provide better notice of the §
590 2403 obligation. The apparent source of concern is that Rule 24(c) is part of the intervention rule,
591 and is more likely to be consulted by a nonparty who wishes to join a pending action than by a party
592 who is framing an action.

593 A draft Rule 5.1 has been prepared to locate the § 2403 obligation in a more visible place in
594 the rules. The draft also addresses the question of establishing parallels with Appellate Rule 44 as
595 part of the continuing quest to increase the concurrence of provisions that address the same issue in
596 different sets of rules. The draft has been revised several times in consultation with Department of
597 Justice staff.

598 The draft presented with the agenda materials expands to some extent the certification
599 obligations imposed by § 2403. Although it duplicates Appellate Rule 44 in some respects, it also
600 departs from Rule 44 in several respects. The Department of Justice believes that the departures are
601 justified by the differences between district-court litigation and appellate litigation. It is most
602 important to ensure notice to the Department at the trial-court stage so that it can exercise the
603 statutory right to intervene and participate in building the record that presents the constitutional
604 questions. Notice at the appeal stage is important primarily in cases that have not already come to
605 the Department's attention.

606 The agenda draft has been sent to the Appellate Rules Committee, but they meet in mid-May
607 and have not had an opportunity to respond to the draft.

608 Although it has been suggested that the Committee Note might describe the reasons for any
609 deviations that are made from Appellate Rule 44, the draft Note does not do that. To the extent that
610 different provisions may be recommended, it should suffice to make the case for differences in the
611 Report to the Standing Committee.

612 Presentation of the Rule 5.1 draft was accomplished by noting the ways in which it departs
613 from § 2403 and the ways in which it departs from Appellate Rule 44.

614 Both the Rule 5.1 draft and Appellate Rule 44 depart from § 2403 in at least three ways.

615 First, each applies to a party who "questions" the constitutionality of a statute. Section 2403
616 applies when the constitutionality of a statute is "drawn in question." There may be a difference in
617 tone and meaning. Constitutional questions frequently are raised in a conditional and subordinate
618 way by arguing that a statute should be interpreted so as to avoid the need to confront constitutional
619 questions that might be raised by alternative interpretations.

620 Second, § 2403 applies only to a statute "affecting the public interest." Both draft Rule 5.1
621 and Appellate Rule 44 delete this restriction, requiring notice when a challenge addresses any Act
622 of Congress or state statute. This expansion of the statutory certification requirement flows from the
623 belief that the Attorney General should be the first to determine whether an act affects the public
624 interest. The court retains control at the stage of determining whether § 2403 establishes a right to
625 intervene.

626 Third, § 2403 does not require notice to the Attorney general if a United States officer or
627 employee is a party. Both Appellate Rule 44 and draft Rule 5.1 require notice when an officer or
628 employee is a party, but is not sued in an official capacity. With respect to an Act of Congress, the
629 United States Attorney General often will have notice under Civil Rule 4(i) of an action against a
630 United States officer or employee in an individual capacity, but not always.

631 Draft Rule 5.1 departs from Appellate Rule 44 in six ways, one of them drawing from the
632 provisions of Civil Rule 24(c).

633 First, draft Rule 5.1 provides greater detail than Rule 44 in addressing the notice that a party
634 must file. The notice must state the question and identify the pleading or other paper that raises the
635 question.

636 Second, draft Rule 5.1 goes beyond the Rule 44 requirement that the notice be filed with the
637 court. It also requires that the notice be served on (or perhaps sent to) the Attorney General. Service

638 would be accomplished in the manner provided by Civil rule 4(i)(1)(B), which calls for certified or
639 registered mail. The draft does not substitute this requirement for the court's § 2403 duty to certify
640 the fact of the challenge to the Attorney General, but adds to it. The Attorney General thus gets
641 notice twice, once from the party who raises the question and once from the court. This dual-notice
642 requirement was drafted because the Department of Justice wishes to make quite sure that notice
643 comes to its attention in timely fashion.

644 Third, adhering to the statute, draft Rule 5.1 provides that the court must certify the question
645 to the Attorney General. Appellate Rule 44 transfers the certification duty to the clerk. (It may be
646 that on appeal it is easier to substitute the clerk for the court because Rule 44, in common with draft
647 Rule 5.1, dispenses with the need to determine whether the challenged statute affects the public
648 interest. The substitution may be complicated, however, by the need to determine whether a United
649 States officer or employee who is a party has been made a party in an official capacity.)

650 Fourth, draft Rule 5.1 explicitly provides that a court that raises a question as to the
651 constitutionality of a statute must certify that fact. Appellate Rule 44 is silent on this question,
652 leaving the matter to interpretation of the § 2403 "is drawn in question" phrase.

653 Fifth, draft Rule 5.1 includes a specific provision for setting a time to intervene. Appellate
654 Rule 44 has no similar provision.

655 Finally, draft Rule 5.1, adapting a provision in Civil Rule 24(c), provides that a party's failure
656 to file the required notice, or a court's failure to make a required certification, "does not forfeit a
657 constitutional right otherwise timely asserted." Appellate Rule 44 has no similar provision.

658 Discussion began by asking whether there is a difference between an "Act of Congress" and
659 a statute, an issue that also was discussed by Subcommittee B in reviewing Style Rule 24(c). The
660 Department of Justice believes that "Act of Congress," the statutory term, is broader than "statute."
661 Even a private bill may affect the public interest. A Joint Resolution is not a statute, but it is signed
662 by the President and has the force of law. The Department prefers to adhere to Act of Congress as
663 the term used in Rule 24(c).

664 The Subcommittee B discussion was explored. Perhaps the least helpful term is "legislation,"
665 which is used in Rule 24(c) in an apparent effort to include both an Act of Congress and a state
666 statute. "Legislation" is not a term used in official documents. It is not used in Title 1. "Legislation"
667 also might refer to a bill that remains unenacted but within the ongoing legislative process.

668 Turning to the double notice requirement, it was noted that the Department prefers that a
669 party be required to serve notice on the Attorney General, not merely to send notice. The
670 Department has an internal mechanism for handling mail that includes return receipts — a return-
671 receipt form of mail is the only added burden resulting from a "service" requirement. Ordinary mail
672 may be lost in the maze, particularly if events recur in which mail must be screened for possible
673 contaminating agents. The dual notice provision is justified. The court's duty to certify is set by §
674 2403. It is appropriate to impose an additional duty on the party. It should be remembered that
675 defendants as well as plaintiffs may raise the constitutional challenge. Some local rules already
676 impose some obligations on a party who raises a constitutional challenge.

677 It was observed that if the rule requires "service" on the United States Attorney General, it
678 also should require service on a state attorney general.

679 Of the three drafts presented in the agenda materials, the Department of Justice prefers the
680 first draft because the more compact second draft is written in a way that may cause confusion over
681 the distinction between a statute and an Act of Congress — Rule 5.1(a) begins by addressing a
682 challenge to an Act of Congress, but 5.1(a)(1) begins "if the statute is an Act of Congress."
683 "[S]tatute" in this setting might be used to narrow the reference to Act of Congress. It was pointed

684 out, however, that this drafting issue could easily be addressed within the framework of the more
685 compact draft.

686 The "official capacity" question was raised by asking about an action against a United States
687 officer or employee in an individual capacity. Commonly the defendant seeks to have the United
688 States assume the burden of defense, and Rule 4(i) requires service on the United States if the suit
689 is in connection with the performance of duties on behalf of the United States. Why should notice
690 be required in such actions? In response, it was noted that even when the Department of Justice has
691 notice, it may decline to assume the defense. At times, unfortunately, an action against an individual
692 employee may arise from a deliberate and clear violation of a plaintiff's constitutional rights. A
693 constitutional question addressed to an Act of Congress might be raised in such an action, and the
694 Department should have notice of it.

695 Turning to a different issue, it was observed that § 2403 speaks of constitutionality "drawn
696 in question." This language seems better than the draft Rule 5.1 reference to a party who questions
697 constitutionality. "Drawn in question" refers more clearly to the conditional arguments often made
698 in support of contending for a particular statutory interpretation. The argument will be that a
699 different interpretation would raise a constitutional problem. "Drawn in question," further, can speak
700 to the court's duty to certify a question when it is the court, not a party, that raises the question. The
701 Department of Justice is aware of the shades of gray that are presented by the "drawn in question"
702 language. There is always a risk that, confronted with a conditional argument addressed to statutory
703 interpretation, a judge will adopt the challenged interpretation and hold the statute unconstitutional.

704 It was pointed out that it is easy to begin the rule in the active voice by addressing "a party
705 that draws in question the constitutionality of" an Act of Congress or state statute. But if the rule is
706 recast to address any action in which constitutionality "is drawn in question," it will be necessary to
707 reframe the provisions that impose a notice duty on a party.

708 It was observed that many cases challenging a statute are filed by pro se parties. Many of
709 them are dismissed without further ado. Drafting must take care not to interfere with the practice
710 of threshold screening. And it was observed that many pro se litigants would love a rule that invites
711 them to serve notice on the Attorney General. If the court dismisses the action at the beginning,
712 there is little reason to burden the Attorney General with notice at all. By way of analogy, note that
713 Rule 4 requires service by the marshal in in forma pauperis actions, but screening at the beginning
714 protects against undue burdens. Screening also should remain useful in cases that present
715 constitutional challenges to statutes. Some help might be found by inquiring into experience under
716 similar state statutes — Pennsylvania, for example, has such a statute. In any event, the Department
717 of Justice recognizes that the draft rule might expose it to notices from sophisticated pro se litigants,
718 and is prepared to assume the burden of reviewing the notices to determine whether intervention is
719 warranted.

720 The Committee Note should point out that the rule does not interfere with the court's
721 authority to dismiss a constitutional challenge before notice or certification to the Attorney General.
722 This formulation may help not only in cases that are dismissed at the very beginning, but also in
723 cases that go forward to a conventional Rule 12 motion to dismiss, to strike, or for judgment on the
724 pleadings. And it seems better than attempting to draft a provision that defers notice until the court
725 has determined that the constitutional challenge has some potential merit. We do not want to impose
726 such an obligation on the court, in part because it might complicate efficient pretrial procedure.

727 A separate question was asked: what should be done if the argument is raised in closing
728 arguments? It was acknowledged that this is a difficult question that is not addressed by draft Rule
729 5.1, and that does not have a satisfactory answer under § 2403 itself. It may be important to direct
730 notice to the Attorney General even if the question arises late in the litigation.

731 The "no forfeiture" provision provoked a question whether a court lacks authority to declare
732 a statute unconstitutional if the § 2403 certification requirement has not been fulfilled. It was noted
733 that the Department of Justice does encounter cases in which it finds out about the ruling only when
734 the case is in the court of appeals. The Department has not seen the argument made that the
735 judgment must be reversed solely for want of statutory certification. But it might argue for remand
736 if there were a need to add to the record.

737 It was agreed that draft Rule 5.1 should not attempt to limit the court's § 2403 duty. The rules
738 are properly addressed to parties more than to a court. But it should suffice to refer in the Note to
739 the court's obligation when the question is raised by the court, not by a party. That provision in the
740 draft can be deleted. The Department of Justice will act on certification of a question raised by the
741 court with the same close attention as on certification of a question raised by a party. But there is
742 no need to require service by the court — a notice sent by a court will not be overlooked.

743 It was asked whether an action must be stayed during the period set for intervention by the
744 Attorney General. The draft rule does not address this point, and does not assume that the action
745 should be stayed. Many pretrial proceedings may and should continue. As in the earlier discussion,
746 one proper action may be to dismiss the constitutional challenge. The central concern is that the
747 court should not act to hold an Act of Congress unconstitutional during the period set for
748 intervention. If the action is dismissed, constitutionality is no longer drawn in question. Section
749 2403 establishes a right to intervene, not an obligation — the district court must be entitled to
750 proceed with many matters before intervention.

751 Another observation was that the draft does not set a time limit for making the certification
752 to the Attorney General. The Department of Justice does not believe that there should be a time
753 limit. In the ordinary case there is plenty of time if a legitimate constitutional question is raised.
754 There is time enough both for continuing district-court proceedings and for setting the time to
755 intervene.

756 Another question addressed to the intervention draft asked whether it should say that the
757 court "may set a time not less than 60 days" for intervention. Should the rule say "must"? It was
758 tentatively decided that "must" is better. But account must be taken of the authority to dismiss a
759 challenge not only before the court's certification but also soon after. Perhaps account also should
760 be taken of the need for immediate action, at least on an interlocutory basis.

761 It was suggested that one way to begin Rule 5.1 would be: "Whenever the constitutionality
762 of an Act of Congress is drawn in question the court must certify that fact to the United States
763 Attorney General under 28 U.S.C. § 2403." If the rule continues to require notice by a party, this
764 language might instead be used in subdivision (b).

765 The Committee voted to approve submission of Rule 5.1 to the Standing Committee with a
766 recommendation for publication if the several revisions directed by the discussion can be
767 satisfactorily implemented in time.

768 *Rule 6(e)*

769 Rule 6(e) provides that when a party is to act within a prescribed period after service, "3 days
770 shall be added to the prescribed period" if service is made under Rule 5(b)(2)(B), (C), or (D). During
771 comments on Appellate Rules amendments designed to integrate the Appellate Rules with the Civil
772 Rule 6(a) provisions for counting time when the prescribed period is less than eleven days, the
773 Appellate Rules Committee was asked to clarify the method of applying the 3 additional days. The
774 Appellate Rules Committee referred the question to the Civil Rules Committee.

775 Several different methods of integrating the three-day addition with Rule 6(a) are possible.
776 As an illustration, one of the times set by Civil Rule 15(a) for pleading in response to an amended

777 pleading is "within 10 days after service of the amended pleading." The three days could be added
778 to the 10 days, converting this into a 13-day period. The result would be to shorten the time allowed
779 to plead, because intervening Saturdays, Sundays, and legal holidays are excluded from a 10-day
780 period but not from a 13-day period. Or the 10-day period could be counted out to the end, and the
781 added three days could be treated as an independent period for Rule 6(a) purposes, so that any
782 intervening Saturdays, Sundays, or legal holidays are excluded. The result in some cases would be
783 an extra-long period. Neither of these approaches seems sensible.

784 The two main choices appear to be to count the three days before the time to respond begins
785 to run, or to count them after the time to respond has otherwise ended. There is an attractive
786 argument that the three days should be counted before the time starts to run. The initial concern was
787 that service by mail may take as much as 3 days to arrive. That concern has been extended to service
788 by electronic means and other means described in Rules 5(b)(2)(B), (C), and (D). This approach
789 results in less added time if service is made on a Wednesday, Thursday, or Friday because the
790 intervening Saturday and Sunday are double counted.

791 The abstract argument for counting the three days at the beginning, however, fails to account
792 for present practice. Informal surveys of practicing lawyers, including discussion at a meeting of the
793 ABA Litigation Section leadership, shows that the overwhelming majority of practicing lawyers
794 routinely add the 3 days after counting the initial period to a conclusion. This reaction represents
795 a natural reading of the "3 days shall be added" language of Rule 6(e). The main reason to amend
796 Rule 6(e) is to establish an authoritative, clear, and uniform answer that lawyers can rely upon. An
797 amendment that conforms to the main course of current practice will be more effective than one that
798 attempts to turn the tide.

799 The proposed Rule 6(e) amendment says "3 days are added after the prescribed period
800 expires." The Committee voted to delete "expires" as redundant.

801 The draft Committee Note includes one paragraph explaining the amendment and a second
802 paragraph that illustrates application of the amendment. Committee members thought the illustration
803 very helpful, provided that it is accurate. District-court clerks will be consulted to ensure accuracy.
804 If the illustration is accurate, it will be retained in the Note.

805 Discussion addressed the common reaction to this and like proposals that the time-counting
806 rules are far too complicated. Lawyers need clear and simple rules that they can rely upon without
807 worry and the risk of miscalculation. Why not eliminate all of the provisions for intervening "dies
808 non" and simply adopt reasonable periods that are extended only if the final day falls on a Saturday,
809 Sunday, or legal holiday? Beyond this common question others lurk. Any time period that runs
810 from service is difficult to administer because the court does not know when service occurs. Filing
811 is a clearer and objective point. Electronic filing, moreover, is causing concern about "midnight
812 filing." And what should be done about calculating a period that is set before, not after a prescribed
813 event? Suppose a rule or order says that a party must act X days before trial, and the Xth day falls
814 on a weekend? Must the act be taken on Friday (or earlier if Friday is a legal holiday), or may it be
815 taken on the first day after that is not a Saturday, Sunday, or legal holiday?

816 These time-counting questions are not unique to the Civil Rules. It was noted that at some
817 point it might be useful for the Standing Committee to create an ad hoc committee that draws from
818 all the advisory committees to address these problems in a comprehensive way.

819 *Rule 27(a)(2)*

820 Rule 27(a)(2) provides that the notice of hearing on a petition to perpetuate testimony must
821 be served on each person named in the petition as an expected adverse party "in the manner provided
822 in Rule 4(d) for service of summons." Rule 4 was amended in 1993. Rule 4(d) no longer provides
823 for service of summons, but instead governs waiver of service. The now superseded cross-reference

824 must be corrected.

825 Correction is not as simple as might seem. The service provisions of former Rule 4(d) have
826 been spread out among Rule 4(e), (g), (h), (i), and (j)(2). Some of the new subdivisions include
827 modes of service that were not included in former Rule 4(d). None of them provided for service on
828 a defendant outside the United States. A choice must be made whether to emulate as closely as
829 possible the modes of service incorporated in former Rule 4(d), or instead to change the permitted
830 modes. The need to make a choice forecloses disposition of this question in the Style Project.

831 The recommended decision is to incorporate all Rule 4 methods of service in Rule 27(a). The
832 object is to get notice to as many expected parties as possible, and to get notice to them in a manner
833 that is reliable and that signifies the importance of the event. As to a defendant in a foreign country,
834 it is important to honor the national sensitivities that are reflected in the Rule 4 service provisions.
835 Rule 27(a) provides sufficient protections both for the petitioner and for the expected adverse parties
836 when service cannot be made with due diligence on an expected adverse party.

837 The committee decided that the cross-reference should be to all of Rule 4.

838 The recommendation to publish this change for comment recognized that the Style Project
839 has not finished its work on Rule 27(a)(2). Some advice was offered on the language that addresses
840 appointment of an attorney to represent expected parties who cannot be served. Present Rule
841 27(a)(2) says the court shall appoint an attorney "who shall represent them, and, in case they are not
842 otherwise represented, shall cross-examine the deponent." Rather than change the first shall to must
843 and the second to may, it was decided that "to" is better in each place: "to represent them, and, in
844 case they are not otherwise represented, to cross-examine the deponent." Of course the Style
845 Subcommittee and the Advisory Committee may ultimately settle on a structure that dictates a still
846 different expression.

847 *Rule 45(a)*

848 Rule 45(a)(2), which governs a subpoena for attendance at a deposition, does not require that
849 the subpoena state the method for recording the testimony. The deposition notice must state the
850 method for recording, so the deponent will know if the deponent is a party or is sufficiently friendly
851 with a party. The deponent also has notice if another party designates another recording method,
852 since Rule 30(b)(3) requires notice to the other parties and to the deponent. But in other
853 circumstances the deponent may not be aware of the recording method until the time for the
854 deposition. Advance notice may help the deponent to prepare mentally and emotionally. In addition,
855 a deponent may have legitimate concerns about the recording method, leading to a disruptive last-
856 minute request for a protective order.

857 The Discovery Subcommittee recommended that Rule 45(a)(2) be amended to state that a
858 subpoena for attendance at a deposition "must state the method for recording the testimony."

859 The Committee recommended that the Rule 45(a)(2) amendment be published for comment.
860 The Special Reporter, Reporter, and subcommittees will work to adapt all of Rule 45(a)(2) to Style
861 Project conventions in time for presentation to the Standing Committee. The draft Committee Note
862 may be shortened by the reporters and Discovery Subcommittee.

863 *Supplemental Admiralty Rule G*

864 Judge McKnight introduced the report of the Forfeiture Subcommittee. The Subcommittee
865 has met twice by conference call to begin work on the current draft Admiralty Rule G that would
866 govern civil asset forfeiture proceedings. There will be further conference calls, and perhaps at the
867 end a face-to-face meeting. Research has been launched to address difficult issues. The impetus for
868 this project comes from the Department of Justice, making it suitable to ask them to describe it.

869 Stefan Cassella described the evolution of the Rule G undertaking. A working group in the
870 Department of Justice has developed this project. The purpose is to consolidate in one place all of
871 the special procedures that apply to civil asset forfeiture. A similar project led to the adoption of
872 Criminal Rule 32.2, which consolidates in one place all of the special procedures for criminal
873 forfeiture.

874 The reason for placing forfeiture procedures in the supplemental rules for admiralty and
875 maritime proceedings is that many forfeiture statutes provide that procedure is governed by these
876 rules. "It is not an ideal fit." Once there were more admiralty proceedings than forfeiture
877 proceedings. Now there are many forfeiture proceedings. Both admiralty practice and forfeiture
878 practice will benefit from stripping forfeiture provisions out from the current admiralty rules and
879 bringing them together in a single new rule. The terms "claim" and "claimant," for example have
880 developed a distinctive meaning in admiralty practice, while they are used in forfeiture statutes in
881 a different way. Separation will reduce the risks that different concepts will mistakenly be
882 substituted for each other. The process of separating forfeiture practice from admiralty practice
883 began with amendments that took effect in 2000, but more work remains.

884 A new rule will achieve better clarity. In addition, it will address topics not now addressed
885 in the rules, such as expanded venue provisions, forfeiture of property located abroad, notice
886 requirements, and other matters. A new rule can address matters that now are not addressed in any
887 of the rules. And at times it may be feasible to fill in gaps in statutory language.

888 The several provisions of Rule G were then described.

889 Subdivision (1) states the application of Rule G. By incorporating the other admiralty rules
890 for matters not covered by Rule G, this subdivision incorporates the Rule A provision that the Civil
891 Rules apply to the extent they are not inconsistent with the admiralty rules.

892 Subdivision (2) covers the complaint.

893 Subdivision (3) governs service of process, beginning with the arrest warrant. A judicial
894 officer must make a probable cause determination if the property is not already in government
895 possession. The distinctive statutory rules for initiating forfeiture of real property are incorporated.

896 Subdivision (4) governs notice — when it is to be published, and how. Special rules provide
897 for publication as to property located in a foreign country. Publication on the Internet is provided.
898 For the first time, there is a requirement that direct notice be served on any person "who, appearing
899 to have an interest in the property, is a potential claimant."

900 Subdivision (5) covers responsive pleading — what does a claim have to say. The time for
901 filing claim and answer are consistent with the Civil Asset Forfeiture Reform Act. This subdivision
902 also carries forward the admiralty practice that requires that answers to interrogatories served with
903 the complaint be served with the answer.

904 Subdivision (6) governs disposition of property, interlocutory sales, and like matters.

905 Subdivision (7) governs motion practice, including motions to suppress, standing issues,
906 release for hardship, motions to dismiss, and excessive fines issues.

907 A question was asked about internet publication. It was noted that traditionally publication
908 has been in newspapers, but that the statute does not specify the medium. More people have access
909 to the internet than to any particular newspaper. The Department of Justice is considering the
910 establishment of a web site that would list all property subject to forfeiture proceedings.

911 The requirement that a claimant file two separate documents, first a claim and then an
912 answer, was addressed by noting that the statutes require both.

913 It was asked whether Rule G(8) expands the right to jury trial. It says that any party may
914 request jury trial — does the government now have a right to jury trial? The Department of Justice
915 believes that the government does have this right.

916 Discussion turned to a summary of the significant issues raised by draft Rule G. The issues
917 noted were identified by drawing from two lengthy sets of comments submitted by the National
918 Association of Criminal Defense Lawyers.

919 In order of Rule G subdivisions, the first issue that has provoked protest may be subject to
920 resolution without much difficulty. Supplemental Rule E(2)(a) now requires that the complaint in
921 an in rem action "state the circumstances from which the claim arises with such particularity that the
922 defendant or claimant will be able, without moving for a more definite statement, to commence an
923 investigation of the facts and to frame a responsive pleading." Draft Rule G(2)(v) carries forward
924 the particular pleading requirement, but omits the reference to a need to move for a more definite
925 statement. The omission arose from a suggestion that the reference to a motion for a more definite
926 statement is unnecessary, not from an attempt to change the meaning.

927 Draft Rule G(2)(c) carries forward the provision of Rule C(6)(c) that allows interrogatories
928 to be served with the complaint. The Department of Justice believes that early discovery of issues
929 that bear on standing to file a claim is important. Defense lawyers, on the other hand, fear that
930 massive initial discovery requests may intimidate potential claimants, deterring them from filing a
931 claim. Actual use of this procedure seems to vary from one district to another. It is possible that the
932 Department's interests can be satisfied by providing a later time for serving interrogatories — one
933 possible point would be after a claim is filed — or by limiting the nature of the issues that can be
934 inquired into by interrogatories served before the time otherwise allowed by the Civil Rules. In part,
935 these issues tie to the standing and related issues that begin with Draft Rule G(5).

936 G(3)(b)(ii)(A) and (C) provide that the warrant to seize property must be executed as soon
937 as practicable unless the complaint is under seal or the action is stayed. Questions about this
938 provision are really challenges to the propriety of sealing the complaint or staying proceedings after
939 the complaint is filed. The Department of Justice believes sealing and stay orders are necessary at
940 times to reconcile the needs of ongoing investigations with requirements for prompt filing.
941 Limitations problems may require prompt filing. More exotic needs arise from the statute that allows
942 all electronic funds to be treated as fungible for a period of one year, but that requires specific tracing
943 of funds credited to an account more than one year before filing. But disclosure of the forfeiture
944 proceeding may jeopardize an ongoing investigation or risk the very lives of undercover
945 investigators. The challenge to this position is that filing and then sealing the complaint or staying
946 the proceedings does not serve the purposes of the underlying statutes.

947 The Internet notice provision in Draft Rule G(4)(a)(v) also has drawn challenges. Internet
948 notice as such is welcomed. But defense advocates also want print publication.

949 For the first time, Draft Rule G(4)(b)(i) provides for service of notice of the action and a
950 complaint on a person who, appearing to have an interest in the property, is a potential claimant.
951 G(4)(b)(ii) provides that service is to be made "in any manner reasonably calculated to ensure that the
952 notice is received, including first class mail, private carrier, or electronic mail." Although this is the
953 first assurance of notice to be established by rules, adversaries argue that service should be made
954 under Civil Rule 4.

955 Standing issues generate by far the greatest controversy. Draft Rule G(5)(a)(i) limits standing
956 to contest the action to "a person who asserts an ownership in the property." This provision is
957 avowedly designed to change present law. Several courts of appeals have ruled that claim standing
958 is established by any interest that satisfies the minimal Article III injury-cause-redress tests. The
959 Department of Justice is dissatisfied with these decisions. The reasons for dissatisfaction tie also

960 to the motion-practice provisions in Draft Rule G(7)(b) and (d). The story begins with a change
961 made in 2000 by the Civil Asset Forfeiture Reform Act. Until 2000, the government carried the
962 initial burden by showing probable cause to forfeit the property. The claimant then had the burden
963 of showing by a preponderance of the evidence that the property was not forfeitable or showing a
964 defense. CAFRA now imposes the burden on the government to prove by a preponderance of the
965 evidence that the property is forfeitable. If the government fails, it cannot retain the property unless
966 it initiates a new forfeiture proceeding. The property must be returned to someone, and often the
967 claimant will be the only person to receive it. The government believes that it should not be forced
968 to the burden of proving forfeitability at the behest of someone who has no real interest in the
969 property. The task of proving forfeitability may be difficult. The proof, moreover, may reveal
970 information that jeopardizes continuing investigations or the identity of informants or undercover
971 officers. In addition, the claim may be filed by a mere nominee for the purpose of concealing the
972 owner's identity. The government illustrates its concern by pointing to several cases. In one, a drug
973 conspirator drove an automobile to a rendezvous with another conspirator and an undercover officer.
974 The driver locked the car and handed the keys to the co-conspirator, who in turn handed them to the
975 undercover officer. The Third Circuit assumed that the conspirator who acted to transmit the keys
976 had standing because he had "possession" of the automobile by possessing the keys.

977 This concern with standing is expressed also in Draft Rules G(7)(b) and (d). G(7)(b) allows
978 the government to move at any time before trial to strike a claim and answer for failure to establish
979 an ownership interest in the property subject to forfeiture. The emphasis on "to establish" seems
980 designed to require the claimant to offer sufficient evidence to meet a summary-judgment test.
981 G(7)(d) allows a party with an ownership interest to move to dismiss the complaint "at any time after
982 filing a claim and answer." This provision is designed to defeat the ordinary right to file a Rule 12(b)
983 motion to dismiss before answering, and may be tied to the Draft Rule G(5)(b) provision that any
984 objection to in rem jurisdiction or venue must be stated in the answer or will be waived.

985 These interlaced provisions are challenged on the basic ground that many interests other than
986 "ownership" interests should support standing to claim. CAFRA establishes the "innocent owner"
987 defense in 18 U.S.C. § 983(d)(6), and defines "owner" for this purpose to include one who has a
988 leasehold, lien, mortgage, recorded security interest, or valid assignment. It also includes a bailee
989 if the bailor is identified and the bailee shows a colorable legitimate interest in the property. This
990 example is used to support the broader argument that any possessory interest should suffice. If
991 property has been taken from a person's possession, or if a person has a right to possession, that
992 should suffice to claim the property if the government cannot establish forfeitability.

993 Some objections also have been made to the Draft Rule G(7)(a) provision that a party with
994 standing to contest the lawfulness of the seizure may move to suppress use of the property as
995 evidence at the forfeiture trial. The theory is that suppression should be for all purposes, not merely
996 trial use.

997 Draft Rule G(7)(e) addresses another new issue that has emerged from case law. It
998 establishes a procedure for seeking mitigation of a forfeiture under the Excessive Fines Clause of
999 the Eighth Amendment. The challenge to this provision rests on the assertion that the draft seeks
1000 to establish a procedure that Congress refused to adopt when it enacted CAFRA.

1001 Following this summary it was noted again that the Forfeiture Subcommittee will plan further
1002 meetings by conference call or in person, and may seek more detailed discussion of Rule G at the
1003 October meeting. The Admiralty Rules do not come often before the Committee. When they are
1004 considered, the Department of Justice and the Maritime Law Association have provided important
1005 help. Former committee member Mark Kasanin and the Maritime Law Association believe that it
1006 is a good idea to separate forfeiture procedure from the other admiralty rules. This is important
1007 work. It also is controversial work and will be complicated. Some of the controversies are likely
1008 to be ironed out, but other areas are likely to remain controversial when the rule moves ahead to

1009 publication and comment.

1010 *Sealed Settlements*

1011 The subcommittee that is working on forfeiture also is working on the questions that arise
1012 when parties to an action seek to file a settlement agreement under seal. The Federal Judicial Center
1013 has agreed to study this practice.

1014 Timothy Reagan provided an interim progress report on the FJC study. The study is focused
1015 on agreements that are filed with the court — confidential settlement agreements are common, but
1016 the study is not directed to those that are not filed with the court.

1017 One phase of the study has been completed. Marie Leary has collected state statutes and
1018 local district rules. The state statutes tend to forbid sealed agreements with public agencies. Florida
1019 prohibits sealed agreements that conceal a public hazard. Sealing is often associated with good
1020 cause. Some rules require weighing interests, or implementation of the least restrictive alternative
1021 that accomplishes the desired protection. Some place time limits on sealing. Michigan prohibits
1022 sealing the order that directs sealing. The District of South Carolina prohibits filing settlements
1023 under seal. The Eastern District of Michigan says that a filed settlement agreement must be unsealed
1024 after two years, but the court staff find this difficult to implement because there is nothing in court
1025 records to designate which sealed materials are settlement agreements. Time limits on keeping
1026 sealed agreements are common, but seem to be motivated by storage concerns — return to the parties
1027 or destruction often are accepted alternatives to unsealing.

1028 The study of the actual incidence of filed and sealed settlement agreements in federal courts
1029 is based on all cases terminated in 2001 and 2002. The study has been completed for seventeen
1030 districts.

1031 The most common reason to file a settlement agreement is to facilitate enforcement. Filing
1032 may occur when the settlement is reached, but also occurs as an attachment to a motion to enforce
1033 a settlement. Occasionally a court transcript of a settlement conference is filed and sealed. Many
1034 cases involve minors and require court approval of the settlement.

1035 It is common to seal the amount paid in settlement. At times trade secrets or other
1036 confidential information are protected.

1037 Commonly the complaint is not sealed in the cases that accept sealed settlements for filing.
1038 Of 209 cases with sealed settlements, 3 (two of which were consolidated) sealed most or all of the
1039 record.

1040 Public hazard may be involved in 10% to 15% of the cases with sealed settlements. Other
1041 people beyond the parties may be at risk.

1042 The FJC study is not finished, but already has produced interesting results. Filed, sealed
1043 settlements seem to occur in a small proportion of federal cases.

1044 An appendix to the interim report describes the cases on which information has been obtained
1045 to date. Some of them involve problems of the sort that give rise to concern about public hazards.
1046 But in most of these cases the file materials that are not under seal will reveal the nature of the
1047 perceived hazard. This is true of several of the product-defect cases described.

1048 It was noted that public media are directing attention to sealed settlements. Concerns are
1049 expressed about dangerous products, bad doctors, and other risks. This subject deserves serious
1050 attention and work. The FJC work already is providing a solid basis for evaluating what federal
1051 courts are doing.

1052 The state statutes and local district rules are in themselves good models to provoke

1053 consideration of a possible national rule. They address such topics as the standard to order sealing;
1054 the physical method of sealing; notice before deciding whether to seal; challenges by nonparties; the
1055 duration of the seal; and whether some kinds of agreements — such as those made with public
1056 entities — should never be subject to sealing.

1057 It was noted that in Texas a settlement agreement involving a matter of public interest is
1058 always open. Anyone with standing can seek access. Indeed many of the state statutes that deal with
1059 public bodies seem to deal with all settlement agreements, not only those that are filed with a court.

1060 A related confidentiality problem was described. Settlement agreements often require return
1061 of discovery materials and impose confidentiality obligations. The parties have used public
1062 processes to get the information, Rule 5 bars filing discovery materials before use in the action or
1063 court order, and the public interest is thwarted by destruction. The issue is not the need to reveal
1064 how much money the plaintiff got, but preserving the discovery information. This, however, is a
1065 different problem than the filed-and-sealed settlement agreement that is the sole focus of the current
1066 project.

1067 In response, it was noted that a court may be asked to enforce an agreement to return or
1068 destroy discovery materials. The motion and all supporting materials are filed under seal.

1069 It was noted that most settlement agreements are not filed. The parties simply stipulate to
1070 a dismissal with prejudice. If court review and approval of the settlement is required, the parties may
1071 file and seek to seal. There may be trade secrets involved. It is not clear that we need a rule.

1072 The FJC study shows that it is common to find a court retaining jurisdiction for 60 days after
1073 the parties announce settlement. Then the settlement agreement is filed under seal as part of a
1074 motion to enforce the settlement.

1075 The discussion concluded by noting that any approach to a rule dealing with sealed
1076 settlements must be sensitive to substantive issues. And there also may be questions of attorney
1077 conduct.

1078 *Discovery of Computer-Based Information*

1079 Professor Lynk delivered the Discovery Subcommittee report on discovery of computer-
1080 based information. At the October meeting the Subcommittee had thought that it might work toward
1081 draft rules for consideration at this meeting. The questions continue to evolve at a rapid pace,
1082 however, and it seems better to establish a clear rationale before going forward to the initial drafting
1083 phase.

1084 A letter prepared by Professor Marcus was sent out to 250 persons and groups, inviting
1085 comments on e-discovery and rule language. Twelve responses were received. Because some of the
1086 responses were from organizations, it is clear that more than twelve people were involved. The
1087 responses were mixed. Some readers will be tempted to conclude that by and large it is defendants
1088 who think there is a problem in defining what should be produced, what depth of search is required,
1089 and so on, while it is plaintiffs who say that this topic is not suitable for rulemaking.

1090 Further information was gathered at a meeting of the American Bar Association Litigation
1091 Section leadership.

1092 Following an intensive October 2002 meeting, the Sedona Conference prepared a report and
1093 recommendations in March. Ken Withers of the Federal Judicial Center attended the meeting that
1094 was held to discuss the report, which may be amended in light of that debate.

1095 The Federal Judicial Center has logged continuing education courses in electronic discovery.
1096 There are many and lengthy programs, with many sponsors. Since January 2001 there have been an

1097 average of more than two a week. The very emergence of this cottage industry suggests that there
1098 are problems that deserve attention.

1099 The ABA 1999 Civil Discovery Standards address these problems. The need for Standards
1100 again suggests that there is a rules gap to be filled.

1101 Local district rules also are emerging to address these questions. The emergence of local
1102 rules also suggests that the national rules are unclear or incomplete. Texas led the way in state-court
1103 rules.

1104 The Discovery Subcommittee met in March by conference call. The meeting identified seven
1105 specific areas of research as the most promising topics to consider for draft rule provisions.
1106 Publication of proposed rules, if they progress to that stage, will attract and focus comment.

1107 Professor Marcus described the seven areas to be studied, noting that the work is beginning
1108 without specific rules proposals in mind.

1109 One group of proposals is for rules that tell the parties to discuss discovery of computer-
1110 based information at the beginning of an action. The Rule 26(f) conference is an obvious occasion.
1111 Rule 16(b) and Form 35 also might be amended. Simply directing discussion by the parties may be
1112 more useful than attempting to provide greater specificity.

1113 A second group of proposals would amend Rule 26(a)(1) to require disclosures about each
1114 party's computer information systems. It may be desirable to require this form of disclosure before
1115 the Rule 26(f) conference in order to support intelligent discussion at the conference. Such early
1116 disclosure also may be useful to remind lawyers of the need to find out at the beginning what
1117 information resources a client has, and to help lawyers impress on clients the importance of drawing
1118 on those resources.

1119 A third set of proposals address the definition of what is a document. There are some models
1120 to study. These issues tie to the question of heroic efforts — does deleted information count as a
1121 "document" if it is possible to retrieve it by special means? Are back-up tapes "documents"?

1122 The form of production presents the fourth group of issues. Hard copy? The electronic
1123 version — and if so, in what form (and does software go with the production)? There are many
1124 databases of information that is constantly evolving, and that produce a "document" only in response
1125 to specific questions put at a specific moment. Often it is not feasible to produce the data base, but
1126 is feasible only to put the questions and deliver the response.

1127 "Heroic efforts" frame a fifth and much-discussed group of issues. Most litigation does not
1128 justify a demand that every party do everything that is possible to retrieve information that is not
1129 readily retrievable by means that track the ordinary course of business. It would be possible to begin
1130 with an assumption that no heroic effort is required, but to allow a judge to order it. The Texas rule
1131 looks to information reasonably available in the ordinary course of business. The ABA Standards
1132 treat this as a question of cost bearing, imposing special expenses on the requesting party.

1133 Inadvertent privilege waiver presents a sixth issue, one that is not unique to discovery of
1134 computer-based information. The Committee last considered this question in October 1999,
1135 studying two different approaches for paper documents. This topic may deserve general study,
1136 remembering that 28 U.S.C. § 2074(b) requires affirmative action by Congress to give effect to a rule
1137 creating, abolishing, or modifying an evidentiary privilege.

1138 The seventh topic identified for study is particularly complex. Many firms that expect to be
1139 asked for information in discovery want a "safe harbor" rule that tells them what information they
1140 must preserve. People that expect to ask for information want rules that assure that reasonable
1141 preservation measures will be taken. Creating a rule to address these concerns has never been

1142 attempted for paper documents. It will be difficult to attempt for computer-based information.

1143 The Discovery Subcommittee has worked with these issues for more than three years. The
1144 time has come to attempt drafting.

1145 Professor Lynk noted that the result is not prejudged by undertaking to draft possible rules.
1146 The drafting process itself will be very helpful in demonstrating what may be possible.

1147 Brief discussion asked whether the "safe-harbor" project might attempt to define both what
1148 must be preserved and the time when the obligation to preserve arises. Many corporations have
1149 information policies. Whether it is feasible to offer useful guidance in court rules is unclear; record-
1150 retention policies are shaped by many concerns, including direct commands. The SEC, for example,
1151 has imposed explicit retention requirements for e-mail messages on some firms. It was noted that
1152 a court rule might attempt to create indirect incentives for record retention by creating consequences
1153 for information destruction. But great care should be taken in framing rules that address pre-filing
1154 activities.

1155 The Discovery Subcommittee may have a meeting to review preliminary drafts before
1156 bringing them to the Committee. And at some point it may be useful to have an invitational
1157 conference. The Chicago conference on the Rule 23 proposals following publication in 2001 was
1158 helpful. An organized conference can be a valuable complement to the public comments and
1159 hearings.

1160 *Class-Action Subcommittee*

1161 Judge Rosenthal reported that the Class-Action Subcommittee is deliberately taking time
1162 before returning to the study of settlement classes. One reason for delay is to await emergence of
1163 the current Rule 23 amendments from Congress. Another is to see what comes of the pending
1164 minimal-diversity class-action bills. Information continues to be gathered on the impact of the
1165 Amchem and Ortiz decisions on the ability to certify settlement classes. Alternatives to the
1166 settlement-class proposal published in 1996 will be studied.

1167 Professor Francis McGovern reported on the progress of attempts to find a legislative
1168 solution to asbestos litigation, with the thought that there may be some general lessons for settlement
1169 classes or some procedure akin to settlement classes.

1170 Four legislative proposals are now converging into a single bill that may emerge in a week
1171 or two.

1172 One bill is the long-pending "criteria" bill. This bill would alter state law, denying
1173 adjudication of no-symptom cases. It would affect aggregation.

1174 A second bill would establish a defined contribution trust fund. The model is close to the
1175 Ortiz settlement. Those suffering the worst illnesses would be compensated first. If the funds
1176 available in one year are not adequate to compensate all claims, the lower-ranked claims will spill
1177 over to future years.

1178 A third model adopts a distribution plan that sets a specific sum for each asbestos disease.
1179 The amount of contributions from businesses and insurers would be set to pay all claims.

1180 A fourth model is "§ 524(g) without bankruptcy." Section 524(g) now permits bankruptcy
1181 relief. It requires a 75% vote in favor of a plan. Each asbestos victim is assigned one vote, weighed
1182 at \$1. A future claims representative is appointed. The result usually is that tort claimants emerge
1183 owning 51% of the debtor. The debtor emerges free from any liability for asbestos injuries.
1184 (Experience with the Manville Trust helps to shape this. The trust kept getting new contributions,
1185 creating a "catch 22" situation in which the victims owned most of Manville and added contributions

1186 in effect came from the victims themselves.) This proposal would allow § 524(c) protection without
1187 bankruptcy. Judge Schwarzer made a similar proposal many years ago, calling it "product-line
1188 bankruptcy."

1189 An asbestos study group of manufacturers, insurers, plaintiffs' lawyers, and the AFL-CIO
1190 is working toward a coalescence of these approaches. The current outline calls for \$5 billion of
1191 annual contributions; defined benefits; and protection of the kind that § 524(g) gives to companies
1192 that have gone into bankruptcy. They contemplate an Article I court to oversee the trust fund; a
1193 claims administrator; payments from both manufacturers and insurers, perhaps balanced 50/50; and
1194 defined tiers of contribution. The system would entirely displace the tort system, achieving finality.

1195 There is an optimistic feeling that the various interested groups may be able to agree. The
1196 insurers are anxious that insurance company payments be set in proportion to the reserves that have
1197 been set aside. The AFL-CIO likes the idea. There is some ongoing debate about the level of
1198 contributions — the manufacturers and insurers think the total should be \$90 billion, while plaintiffs
1199 want \$140 billion. (Differences at this level are likely to be worked out in a range from \$100 to \$110
1200 billion if other issues are resolved.) The plaintiffs' bar is split, with the mesothelioma-cancer bar
1201 upset with caps. ATLA thinks the system makes sense. There is a 25% limit on attorney fees
1202 (though 25% of \$100 billion or so adds up to a considerable sum).

1203 Although the proponents are optimistic, the opponents think this approach can be blocked.
1204 There is not much time to act before the politics of the 2004 election cycle take over.

1205 What might all of this suggest for Civil Rule 23 reform? The 75% approval requirement in
1206 § 524(g) is a lot like an opt-in class. Perhaps a similar class-action rule could be developed, allowing
1207 class disposition only if most class members choose to opt in. The fen-phen settlement has survived
1208 Amchem-Ortiz; some claimants are outside the settlement, and the defendants seem to accept that.
1209 Massive though not universal support from plaintiffs may suffice to free us from Amchem-Ortiz.
1210 And the approach saves us the burdens of litigation.

1211 There are "some obvious constitutional problems" to be confronted. Legislation rather than
1212 Enabling Act rules reform may be necessary. But it is important to find a vehicle to resolve mass-
1213 tort cases. It is very cumbersome to undertake settlements on a company-by-company, plaintiffs'-
1214 firm-by-plaintiffs'-firm approach.

1215 It would be possible to adapt the opt-in approach by disaggregating into subclasses based on
1216 injury type. As compared to present § 524(g) practice, it would be possible to weight votes by
1217 severity of injury.

1218 It was noted that the present system gives great power to the lawyers who represent
1219 unimpaired claimants — they have a lot of votes, and you have to give them a lot of money to get
1220 their votes. But this phenomenon may be qualified by the observation that "the aggregation is among
1221 the lawyers": The bulk of mesothelioma cases are held by lawyers who also have the bulk of the
1222 unimpaired cases. Account also should be taken of the proposition that there should not be an
1223 incentive to find more cases to have more votes.

1224 This opt-in settlement-vehicle approach might well be limited to mature torts where there is
1225 a strong basis for assuming liability.

1226 It was suggested that it would be difficult to create a rule that applies to cases other than
1227 personal-injury cases.

1228 On a separate issue, the Federal Judicial Center reported briefly on the current stage of its
1229 study of the factors that influence plaintiffs and defendants to choose between state and federal
1230 courts. 2,100 survey instruments have been sent to lawyers in 1,000 cases. 569 responses are in
1231 hand, and a "dynamite" letter has been sent to encourage more responses. Data-gathering will close

1232 at the end of May. The ABA Litigation Section was helpful in testing the survey.

1233 The Class-Action Subcommittee will continue its work.

1234 *Rule 50(b)*

1235 One Rule 50(b) proposal has held a place on the agenda for a few years. A new proposal has
1236 been advanced by the Committee on Federal Procedure of the Commercial and Federal Litigation
1237 Section of the New York State Bar Association. The new proposal addresses the requirement that
1238 a renewed motion for judgment as a matter of law after a jury verdict be supported by a motion made
1239 at the close of all the evidence. This requirement was built into Rule 50(b) in 1938 as part of the
1240 process of fictionalizing the Seventh Amendment requirements that at first seemed to prohibit
1241 judgment notwithstanding the verdict and then permitted judgment n.o.v. if a proper ritual was
1242 observed. It was carried forward, albeit in somewhat obscure language, in the 1991 amendments.

1243 The current proposal is to amend Rule 50(b) to permit a post-verdict motion to be based on
1244 any pre-verdict motion for judgment as a matter of law that satisfies Rule 50(a).

1245 After 65 years of fiction, it cannot be said that the Seventh Amendment requires the current
1246 procedure unless some clear functional need can be found. In attempting to explain the persistence
1247 of the rule, courts regularly rely on the desire to be sure that the party opposing the motion has had
1248 clear notice of the asserted deficiency in the evidence. Clear notice may lead to the offer of sufficient
1249 evidence. Notice also affords a court the opportunity to seize the advantages that occasionally attend
1250 direction of a verdict on part or all of a case before submission to the jury. In addition, clear notice
1251 makes it easier to resist a verdict-winner's argument that rather than judgment notwithstanding the
1252 verdict there should be a new trial that affords an opportunity to supply sufficient evidence.

1253 The argument for revising Rule 50(b) runs in two directions. First, the clear-notice function
1254 can be — and commonly is — served by means other than a motion at the close of all the evidence.
1255 Second, the present rule is frequently overlooked in the flurry of activity at the close of trial, creating
1256 a risk that judgment must be entered on an unsupported verdict.

1257 These observations have prompted many appellate opinions to struggle with attempts to
1258 mollify the seemingly rigid close-of-all-the-evidence rule. The most common event is that a
1259 defendant moves for judgment as a matter of law at the close of the plaintiff's case and forgets to
1260 renew the motion at the close of all the evidence. Omission of the later motion is most likely to be
1261 forgiven if the trial court expressly took under submission the motion made at the close of the
1262 plaintiff's case and if the defendant offered very little evidence before the close. The language of
1263 the opinions is not always consistent, even within a single Circuit, and relief is not often granted
1264 from the close-of-the-evidence requirement.

1265 Amendment of Rule 50(b) deserves careful study. The central question is whether the party
1266 opposing the post-verdict motion is sufficiently protected by a motion made before the close of all
1267 the evidence. Protection seems to be provided by any motion that satisfies Rule 50(a), which permits
1268 a motion for judgment as a matter of law "[i]f during a trial by jury a party has been fully heard on
1269 an issue." A motion that satisfies Rule 50(a) should provide ample notice of the asserted evidentiary
1270 failing, and a motion before the close of all the evidence provides a better opportunity to cure the
1271 failure. A post-verdict motion under Rule 50(b) can be supported only by grounds urged in support
1272 of the pre-verdict motion, avoiding the risk of unfair surprise.

1273 Discussion began with the observation that lawyers are very concerned about the close-of-all-
1274 the-evidence requirement. Some tape reminders to the counsel table. There is so much going on at
1275 the close of trial that this is a real issue — the problem is not so much that some lawyers are unaware
1276 of the requirement as that knowledge does not always translate into a reflexive renewal of an earlier
1277 motion when there are many other urgent tasks to accomplish. There is a natural instinct not to

1278 repeat a motion that has already been made, particularly if the court has carried the motion forward
1279 or has suggested that the question should be decided after the verdict.

1280 Another reason for neglecting the Rule 50(b) limit is that local state practice may be different.
1281 In Texas, for example, a post-verdict motion can be made without support in any pre-verdict motion.

1282 One question that will need to be tended to arises when the decision whether to grant
1283 judgment as a matter of law is affected by evidence introduced after the Rule 50(a) motion. It is
1284 clear that if all of the evidence in the trial record supports the jury verdict, the verdict must stand
1285 even though judgment as a matter of law would have been appropriate at the time the Rule 50(a)
1286 motion was made. Such is the clearly established rule when an "erroneous" denial of summary
1287 judgment is followed by a trial that supplies jury-sufficient evidence. But it is more difficult to know
1288 what to do if the Rule 50(a) motion should properly be denied when made, but should be granted on
1289 the basis of later evidence that must be believed by the jury even though unfavorable to the party
1290 opposing the motion. If the evidence was obviously unfavorable, there may be sufficient notice to
1291 alleviate any concern that a later motion would alert the party opposing the motion to the need to
1292 provide additional evidence. But that may not always be so.

1293 Employment-discrimination cases often create Rule 50(b) issues because of the burden
1294 shifting that results from making a prima facie case, followed by the defendant's explanation of the
1295 employment action. The defendant's explanation often provides evidence unfavorable to the
1296 plaintiff, and at times it may be evidence of a quality that the jury must believe. The "pretext"
1297 argument becomes entangled with all of this.

1298 The Rule 50(b) proposal will be carried forward for further consideration at the October
1299 meeting.

1300 *Indicative Rulings: Rule "62.1"*

1301 The Appellate Rules Committee referred to the Civil Rules Committee a proposal by
1302 Solicitor General Waxman to adopt a rule articulating the "indicative rulings" practice that has been
1303 adopted by most circuits.

1304 The problem addressed by this proposal arises most frequently when an appeal is pending
1305 from a truly final judgment that is intended to leave no further occasion for district-court action. A
1306 party seeks to vacate the judgment by motion under Rule 60(b). Most circuits rule that because the
1307 judgment is pending in the court of appeals the district court lacks jurisdiction to grant the motion.
1308 But they allow two sorts of action by the district court. The district court may deny the motion,
1309 clearing the way for the appeal to proceed without complication. Or the district court may indicate
1310 that if the court of appeals is inclined to remand the action, the motion would be granted. The court
1311 of appeals then can decide whether to remand for further district-court proceedings.

1312 Although this practice is well established in most circuits, three reasons were offered to
1313 support adoption of a new court rule. First, there is some variation among the circuits. Some courts
1314 will not allow a district court to deny a Rule 60(b) motion unless the case is remanded. There is no
1315 reason for disuniformity; a uniform national rule seems desirable. Second, many lawyers are not
1316 aware of the proper practice, which seems to be well-known only to veteran appellate lawyers and
1317 the courts of appeals. Third, the occasions for district-court motions have increased since the
1318 Supreme Court ruled that a court of appeals need not automatically vacate a district-court judgment
1319 that is mooted by a settlement pending appeal. Settlement pending appeal often is possible only if
1320 the district-court judgment is vacated. Settlement often is desirable. It is useful to have a clear
1321 procedure that directs the parties to move in the district court for a ruling that the district court will
1322 vacate the judgment if the case settles and is remanded from the court of appeals.

1323 These questions arise most frequently under Rule 60(b), but it does not seem sufficient to

1324 react by amending Rule 60. Rule 60(a) now permits correction of a clerical error during the
1325 pendency of an appeal if the district court acts before the appeal is docketed, and also allows
1326 correction after the appeal is docketed "with leave of the appellate court." This model might be
1327 extended to Rule 60(b), or varied. But these questions also arise in other settings. One setting arises
1328 on § 1292(a)(1) appeals from interlocutory orders granting an injunction, whether a preliminary
1329 injunction or a permanent injunction issued in continuing proceedings. Civil Rule 62(c) allows the
1330 district court to "suspend [or] modify" the injunction, but some courts of appeals have ruled that the
1331 district court cannot vacate the injunction. By its terms, Rule 60(b) applies to relief from a "final
1332 judgment." Still further complications may arise from judgments that are appealed under § 1291,
1333 but that are "final" only by the courtesy of such doctrines as the collateral-order rule. Collateral-
1334 order appeals from interlocutory orders denying official immunity are common. Rule 54(b)
1335 establishes open-ended authority to revise the district-court ruling, and there is no reason to invoke
1336 the much more limited provisions of Rule 60(b). The purpose of permitting appeal, indeed, is to
1337 spare the defendant the burdens of pretrial and trial proceedings; action by the district court pending
1338 appeal can serve that purpose. An independent rule thus seems desirable.

1339 Discussion began with the observation that these questions do not arise frequently, but that
1340 they are a mess when they do arise. A clarifying and uniform rule would be useful. Many district
1341 judges do not recognize that their own circuit permits them to deny a motion pending appeal.

1342 It was further noted that the court of appeals may prefer to retain jurisdiction to proceed with
1343 the appeal after the district court takes the indicated action. This course is particularly useful when
1344 the district court intends to amend the judgment without further extensive proceedings. It may be
1345 useful to add a provision for retained jurisdiction to the draft rule.

1346 Drafting also must take care to ensure that a new rule is not misread to establish a new
1347 category of motion for relief from a judgment.

1348 Draft Rule 62.1 will be carried forward for further consideration at the October meeting.

1349 *Next Meetings*

1350 The next regular meeting of the Advisory Committee was set for October 2-3 at a place to
1351 be determined.

1352 Style Rules 26-37 and 45 are proceeding at a rate that should make it possible to schedule
meetings of Subcommittees A and B toward the end of August or early September.

Respectfully submitted,

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Reporter