

MINUTES
CIVIL RULES ADVISORY COMMITTEE
APRIL 15-16, 2004

1 The Civil Rules Advisory Committee met on April 15 and 16, 2004, at the Administrative
2 Office of the United States Courts in Washington, D.C.. The meeting was attended by Judge Lee
3 H. Rosenthal, Chair; Frank Cicero, Jr., Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht;
4 Robert C. Heim, Esq.; Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.;
5 Judge Richard H. Kyle; Professor Myles V. Lynk; Judge H. Brent McKnight; Judge Thomas B.
6 Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H.
7 Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and
8 Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge
9 Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing
10 Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee.
11 Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style
12 Subcommittee members Judge Thomas W. Thrash, Jr., and Dean Mary Kay Kane also attended.
13 Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee,
14 were present. Peter G. McCabe, John K. Rabiej, James Ishida, Robert Deyling, and Professor
15 Steven S. Gensler, Supreme Court Fellow, represented the Administrative Office. Thomas E.
16 Willging, Kenneth Withers, and Tim Reagan represented the Federal Judicial Center. Ted Hirt,
17 Esq., and Elizabeth Shapiro, Esq., Department of Justice, were present. Stefan Cassella, Esq., also
18 attended for the Department of Justice. Observers included Jim Rooks (ATLA); David Smith
19 (National Association of Criminal Defense Lawyers); Ralph Lindeman; Andrea Toy Ohta; Judge
20 Christopher M. Klein; Peter Freeman, Esq. (ABA Litigation Section); Jeffrey Greenbaum, Esq.
21 (ABA Litigation Section Liaison); and Alfred W. Cortese, Jr., Esq..

22 Judge Rosenthal began the meeting by noting that much hard work had been done since the
23 October meeting, including the February meeting and conference, meetings of the Discovery,
24 Forfeiture, and Style Subcommittees, conference calls, and ongoing drafting.

Minutes

26 The Minutes for the October 2003 meeting were approved.

March Judicial Conference

28 Judge Rosenthal reported that the March Judicial Conference meeting was devoted in large
29 part to budget matters. Few rules matters were on the agenda. But it is likely that in the course of
30 this meeting the Advisory Committee will recommend that the Standing Committee transmit some
31 or all of the rules amendments published last August for approval by the Judicial Conference and
32 submission to the Supreme Court.

Administrative Office Staff

34 The Committee formally recognized Administrative Office staff who support the
35 Committee's work. The staff collectively contribute the essential work that is an indispensable part
36 of the Committee's functioning. The work is always timely, cheerful, and good. Those present to
37 be thanked included Robert Deyling (attorney); Rick White (information technology); Barbara Aron
38 (operations); Peter Kelly (attorney); David Hollenbeck (information technology); Judy Krivit
39 (operations); Dianne Smith (operations); David Van Dyke (information technology); Anne Rustin
40 (operations); and James Ishida (attorney).

41 Special recognition and thanks were expressed for the many and varied contributions made
42 by Professor Steven S. Gensler, the Supreme Court Fellow who will continue to support Committee
43 projects through the summer. His work has been invaluable. He is a great proceduralist and an
44 indefatigable worker.

45 *Administrative Office Report*

46 John Rabiej delivered the Administrative Office Report. There is little to report on the
47 legislative front. The asbestos bill is expected to come up for a vote during the week of April 19;
48 there is no sense how it will fare. The Class Action Fairness Act may come up soon after the
49 asbestos bill, but it has so often failed to come up as predicted that the timing remains uncertain.

50 *Rules Published for Comment in August 2003*

51 **Rule 5.1**

52 Rule 5.1 emerged from public comments on amendments of Appellate Rule 44. The
53 comments showed that the part of Civil Rule 24(c) implementing 28 U.S.C. § 2403 is obscure to
54 many lawyers and perhaps to some judges. Section 2403 requires a court to certify to the Attorney
55 General of the United States or of a state the fact that the constitutionality of an Act of Congress or
56 a state statute has been drawn in question. The purpose of notice is to support the Attorney
57 General's statutory right to intervene. The last part the intervention rule, Rule 24(c), reflects the
58 statute and calls on a party who draws into question the constitutionality of a statute to "call the
59 attention of the court to its consequential duty." Proposed new Rule 5.1 would transfer these
60 provisions to a more prominent place and substantially change them.

61 Discussion began with a question raised by the Style Subcommittee. The Style
62 Subcommittee prefers to adopt a uniform term for referring to federal legislative enactments; the
63 leading candidate at the moment is "federal statute." "Act of Congress" is not in the running.
64 Section 2403, however, refers to an "Act of Congress." The experts in Congress are uncertain
65 whether "federal statute" would cover everything embraced by "Act of Congress." They are
66 confident that "Act of Congress" embraces everything that Congress enacts. Professor Kimble
67 observed that if indeed Rule 5.1 is intended to include things that do not qualify as federal statutes,
68 the rule should use a different term. But it was agreed that "federal statute" is sufficiently broad;
69 the Committee Note should observe that "federal statute" in Rule 5.1 includes anything that would
70 qualify as an "Act of Congress" in Section 2403.

71 A second style question arises from the reference to a paper "drawing into question the
72 constitutionality of a federal statute * * *." This is the language of § 2403, and was deliberately
73 restored to earlier drafts of Rule 5.1. The Attorney General may want to be involved when there is
74 a constitutionally based argument that a statute must be construed narrowly. Professor Kimble,
75 however, defended substitution of "challenge" in later subdivisions, pointing out that the rule caption
76 is "Constitutional Challenge," and asserting that the cases refer to constitutional challenges. This
77 is a convenient shorthand. And subdivision (b) begins by requiring certification of a constitutional
78 challenge under § 2403 — that should show that "challenge" has the same meaning as "drawn in
79 question." In the end, "drawing into question" was accepted in subdivision (a), while "constitutional
80 challenge" was retained in (b). In what will become subdivision (c) — published as (d) — the
81 reference to the court's failure to certify the "challenge" will be changed to avoid the issue: "the
82 court's failure to certify ~~the challenge~~ does not forfeit * * *."

83 A third style question goes to the Style Subcommittee recommendation that the intervention
84 provision published as subdivision (c) should be transferred to become a second sentence of
85 subdivision (b). It was argued that continued exposition as a separate subdivision might better call
86 attention to the question of intervention time, but the transfer was accepted.

87 Turning to the merits of the proposal, a challenge to the dual notice requirement, rejected at
88 the time of the decision to recommend publication, was renewed. Since 1937, the statute has
89 required that the court certify the fact that the constitutionality of a statute has been drawn in
90 question. If certification does not occur as often as it should, we can educate judges to do better;
91 some judges are not even aware of § 2403. It is a mistake to add a party-notification requirement
92 not in the statute. The Michigan State Bar Committee comment opposes the party-notice
93 requirement, and they have it right. The public comment process, moreover, is inherently limited.
94 There are only a few comments; the general approval of the proposal should not carry the day. The
95 party-notice requirement will affect pro se litigants, and pro se litigants seldom offer comments on
96 proposed rule amendments. This is not the best use of the rulemaking process. Court certification
97 should suffice.

98 As a separate matter, it also was protested that although subdivision (c) states that failure to
99 file and serve the required notice does not forfeit a constitutional right otherwise timely asserted,
100 the Committee Note does not comment on this provision. What "right" is it that is not forfeit? That
101 this language is drawn straight from present Rule 24(c) does not justify the failure to comment now.

102 The response on the party-notice requirement was that the Attorney General experiences "a
103 shockingly low rate of notice." The courts as well as the government are helped by early
104 government intervention. Intervention in some cases has been possible only on appeal. That is far
105 too late. Rule 24(c) now says that a party should call the court's attention to the duty to certify.
106 Framing that as notice, and requiring that the notice also be served on the Attorney General by mail,
107 adds very little to the burden now imposed by Rule 24(c). Retaining these provisions in the rules,
108 moreover, is important. Practitioners are more likely to check the rules books for such issues than
109 to scour the statute books.

110 It was suggested that lawyers are "overburdened." The judge is in a very good position to
111 decide whether notice is required. But it was responded that during the early stages of an action, the
112 practitioners understand the case better than the judge does. And the value of early notice makes
113 it important that the party have a duty to give notice.

114 The next question was whether there have been any cases in which a statute has been held
115 invalid without the Department of Justice getting notice? This is the first rule that requires a party
116 to give notice to a nonparty. A lawyer may think it not in his client's interest to give notice. The
117 potential for confusion and burden is great. It is better to educate the judges.

118 The Department of Justice has no organized records to show how often a statute has been
119 held invalid before the Attorney General got notice of the question. It has looked at the 1996
120 Telecommunications Act, which attracted many constitutional challenges. In an overwhelming
121 majority of the cases, the Attorney General did not get notice of the challenge. At least one district
122 court held the statute unconstitutional before the Attorney General got notice. The only opportunity
123 to intervene and argue was on appeal in the Fifth Circuit. And there are more examples of failure
124 to certify before the district court decides; in most of these cases the district court upholds the
125 statute, but the Attorney General has lost the opportunity to help build the trial record.

126 Another example was given of a case in which a defendant asserted First Amendment
127 defenses to sanctions sought under provisions of the wire tap law. The district court held the statute
128 valid without giving notice to the Attorney General. Notice was given only after appeal was taken
129 to the Third Circuit. Eventually the Supreme Court upheld the defendant's position.

130 It was observed that Appellate Rule 44 does not require a party to give notice to the Attorney
131 General. It says that the party must give notice to the circuit clerk; it is the clerk who certifies the
132 fact of the question to the Attorney General. Why should the Civil Rule be different?

133 Another question was what happens if you do not give notice. Is the rule only advisory?
134 Will the court devise a sanction as a matter of discretion when a party fails to give or serve the
135 required notice? And this will be another obstacle for attorneys who accept pro bono appointments;
136 they help the court by accepting appointment, and should not be subjected to unnecessary burdens.
137 It was responded that the rule is not simply advisory. It is on the same footing as many other rules
138 that do not provide specific sanctions. The express provision that bars forfeiture of a constitutional
139 right otherwise timely asserted is important. Explicit recognition of other sanctions is not.

140 A motion was made to adopt a new Rule 5.1 to receive the § 2403 provisions of present Rule
141 24(c), but to delete the requirement that the party serve the notice on the Attorney General. The
142 party need only give notice to the court. Paragraph (a)(2) of the published proposal would be
143 deleted.

144 Discussion of the motion began by asking whether the recommendation to the Standing
145 Committee would be to advance the revised Rule 5.1 for adoption, or instead would be to republish
146 the rule. Republication might be appropriate because observers who approved the provisions of
147 Rule 5.1(a)(2) may have refrained from the seemingly unnecessary gesture of telling the Committee
148 that the published rule got it right. In addition, local district rules that require counsel to notify the
149 Attorney General have been caught up in the Local Rules Project. These local rules are inconsistent
150 with present Rule 24(c). But in informing those districts of the inconsistency, it has already been
151 pointed out that the local rules would become consistent with the national rules if Rule 5.1 should
152 be adopted as published. The Bankruptcy Rules Committee, moreover, has an interest — the 60-day
153 intervention period makes it impossible to adopt Rule 5.1 for contested matters, but it would be
154 adopted for adversary proceedings.

155 The motion to delete 5.1(a)(2) as published, retaining only paragraph (1), was approved, 10
156 yes and 3 no. A motion to recommend republication was approved. The proposed conforming
157 amendment of Rule 24(c) will carry forward in tandem.

158 As a result of these motions, the version of Rule 5.1 proposed for republication would read:

159 **Rule 5.1 Constitutional Challenge to a Statute — Notice and Certification**

160 **(a) Notice by a Party.** A party that files a pleading, written motion, or other paper drawing into
161 question the constitutionality of a federal statute or a state statute must promptly file a Notice
162 of Constitutional Question stating the question and identifying the paper that raises it.

163 **(b) Certification by the Court; Intervention.** The court must, under 28 U.S.C. § 2403, certify to
164 the Attorney General of the United States or of a state that there is a constitutional challenge
165 to a statute. The court must set a time no less than 60 days after the certification for the
166 Attorney General to intervene.

167 **(c) No Forfeiture.** A party's failure to file the required notice, or the court's failure to certify, does
168 not forfeit a constitutional right that is otherwise timely asserted.

169 Following discussion of other matters, a motion was made to reconsider the decision to
170 delete the requirement that a party serve the notice of constitutional question on the Attorney
171 General. The service provision "seems well-intended." In voting to delete this requirement, the
172 movant was concerned that "drawn in question" is not sufficiently pointed. Others who voted to
173 delete were concerned that there is no explicit sanction. But present Rule 24(c) says that a party
174 should call the court's attention to its § 2403 duty and has no express sanction. On balance, Rule
175 5.1 seems useful, including the requirement that the party notify the Attorney General.

176 The motion to reconsider was supported by another member who had voted with the
177 majority. The government's concerns about timely notice deserve to be treated with respect. The
178 duty to serve the notice on the Attorney General by registered or certified mail is slight, given that
179 5.1(a) requires that notice be filed with the court.

180 It was responded that it is enough to have the party notify the court. The court can then
181 certify as the statute requires. But it was rejoined that service by the party comes earlier. That is
182 better. Everyone gains when the government comes in earlier rather than later. And it was further
183 rejoined that giving notice to the court does not ensure that the judge will see the notice promptly.
184 There may be an extended delay before any procedural step is taken that brings the notice to the
185 judge's attention. In addition, the situation of the pro se party is not much aggravated by the service
186 requirement — the notice requirement continues to be imposed on all parties, pro se and represented
187 parties alike.

188 The motion to reconsider was opposed on the ground that once an issue has been argued
189 through, repose should be honored. It was not a close vote. Rule 5.1 should be republished without
190 party service and revisited in light of the public comments on that form. This argument was met
191 with the counter that the Committee is obliged to reach the right decision while it continues to sit
192 in a single meeting.

193 Reconsideration was further opposed on the ground that "we got it right." Practical reasons
194 make it right. It is good to separate these provisions into a new rule and to locate them at a place
195 in the rules where they are more likely to be seen. A party who has a substantial constitutional
196 argument will want the government to come in early, to avoid the delays and burdens that may result
197 from late intervention. When there is a frivolous challenge, on the other hand, there is no need for
198 notice or certification. The court can uphold the statute and move on. Similar comments observed
199 that the district court can function as gatekeeper, refusing to certify an insubstantial question, and
200 avoiding the burden on the Attorney General of receiving notice of questions that will be rejected
201 even before the Attorney General might respond. There will be many cases with "non-serious
202 questions."

203 The concern about inevitably failing constitutional questions was addressed by observing
204 that the Committee Note says that the court can reject the challenge during the period set for the
205 Attorney General to intervene. It also says that the court may grant an interlocutory injunction
206 during this period. Early notice will not add to delay, and often will expedite proceedings. If it
207 would make the notice and service burden seem less onerous to refer to a constitutional challenge
208 rather than the constitutional question, that change might be made. This observation was repeated
209 later: reference to a "challenge" rather than a "question" would "produce more wheat, less chaff."

210 The question of sanctions returned. What is the sanction for failure to honor Rule 5.1
211 requirements? The response was that the situation would be the same as it is today with the Rule
212 24(c) statement that a party should notify the court. But this response was met with the suggestion
213 that a heightened duty — the party must file a notice, and perhaps must serve the Attorney General
214 — may invite heightened sanctions. A different perspective suggested that the court is able to
215 decide the constitutional question without separate notice when the question is raised for decision
216 on the pleadings, by motion, or at trial. But creation of a new duty to notify the Attorney General
217 "creates a greater injury." The Attorney General, moreover, will take seriously a certification from
218 a court.

219 The earlier observation about certification was repeated. In a majority of cases, the
220 Department does not get the required certification. The absence of certification is a real injury even
221 when the challenge is rejected. The Department comes into the action late, perhaps only on appeal,
222 and is unable to shape the trial record. But, it was asked, why then should the Note say that the court

223 can reject the challenge before the Attorney General intervenes? Rejection will deprive the
224 Department of the opportunity to shape the record, just as much as would invalidation before
225 intervention. The Department does not want a 60-day freeze. Its interests are engaged only in cases
226 that involve substantial questions. But how can a Note trump a rule provision that requires a 60-day
227 period to intervene? Should the rule, if reconsidered, be amended to state specifically that a statute
228 may be upheld before intervention? And perhaps also to say that interim relief can be granted before
229 intervention?

230 The motion to reconsider was approved, 7 yes and 6 no.

231 Further discussion began by suggesting that "challenging" be substituted for "drawing into
232 question" in 5.1(a): "A party that files a pleading, written motion, or other paper ~~drawing into~~
233 question challenging the constitutionality of a federal statute or a state statute * * *." It was
234 observed that § 2403 requires the court to certify the fact that constitutionality has been drawn into
235 question; using different words in Rule 5.1 cannot reduce the certification obligation, and the
236 purpose of Rule 5.1 is to support and advance certification. It might do to say "questioning the
237 constitutionality," but it is difficult to find any advantage in that formula over the statutory formula.

238 The question was again characterized as an effort to separate the few serious cases where
239 timely notice is important from the many where it is not.

240 A new observation was made. Some states have statutes that require a party to give notice
241 to the state attorney general. Texas and Pennsylvania are examples. It might be useful to find out
242 how well these statutes work in practice.

243 Then it was asked what happens if the party serves the Attorney General, who does not
244 respond. Then the court certifies the fact of the challenge: can the Department intervene then?

245 And it was suggested that the party service requirement should be deleted. The court will
246 treat this as a 60-day freeze. The Note cannot properly say that the court can dismiss during this
247 period.

248 The Committee was reminded that some districts have local rules that require the party to
249 notify the Attorney General. If Rule 5.1 does not, these local rules will be invalid.

250 Yet another member renewed the observation that the burden of service by mail is slight, and
251 that early notice to the Attorney General will move the case along.

252 A motion was made to table the Rule 5.1 and parallel Rule 24(c) proposals. Time is not
253 available for adequate further discussion at this meeting. The Standing Committee will be informed
254 that these questions are being held for further study.

255 **Rule 6(e)**

256 Rule 6(e) provides three additional days to respond when service is made by mail, leaving
257 a copy with the clerk's office, electronic means, or other means agreed to in writing. The means of
258 counting these additional days has been uncertain. A proposal to amend Rule 6(e) was published
259 to establish that the 3 days are added after the original period. Public comments, however, revealed
260 continuing ambiguity. The Appellate Rules Committee has worked on the same question as framed
261 by the Appellate Rules, and has urged that Civil Rule 6(e) should be adopted in a form that makes
262 it clear that the extension should be counted by rules that give the maximum additional time. This
263 resolution, so long as it is made clear, will conform to lawyers' instincts to seek the longest time
264 possible. And it will do no harm; the times involved are seldom critical for any purpose other than
265 setting a clear deadline.

266 Two specific questions frame the inquiry. Suppose the original period ends on a Saturday.
267 Should Sunday and any intervening legal holiday be counted against the additional 3 days, even
268 though the original period would be extended under Rule 6(a) to the next day after Saturday that is
269 not a Sunday or legal holiday? The Appellate Rules Committee suggests that the 3 days should not
270 start until the original period would end without considering the 3 additional days. Thus if the last
271 day is a Saturday and the following Monday is a legal holiday, the original period expires on
272 Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the final day to act.

273 The second question is illustrated by a period that ends on Friday. Should the following
274 Saturday, Sunday, and perhaps a legal holiday Monday be counted against the 3 additional days?
275 Again, the Appellate Rules Committee recommends that these days should be excluded for reasons
276 similar to the reasons that exclude them in counting periods shorter than 11 days.

277 Discussion of these questions began with support for extending time as liberally as can be
278 done. If the last day is a Friday before Memorial Day weekend, three days are not really given if
279 Saturday, Sunday, and Memorial Day Monday are counted, requiring filing on Tuesday.

280 It was suggested that the rule might be made clear by distinguishing business days from
281 calendar days, but it was responded that the Civil Rules have not used these terms anywhere. The
282 Appellate Rules have adopted the calendar day term, but it would be risky to import it into the Civil
283 Rules without a thorough review of all time provisions.

284 It was agreed that the Civil and Appellate Rules counting procedures should be the same.

285 It was agreed that the purpose to achieve the maximum extension along with clear expression
286 can be achieved by recommending to the Standing Committee adoption of this modified version of
287 Rule 6(e):

288 **(e) Additional Time After Certain Kinds of Service.** Whenever a party must or
289 may act within a prescribed period after service and service is made under
290 Rule 5(b)(2)(B), (C), or (D), 3 days — excluding intermediate Saturdays,
291 Sundays, or legal holidays — are added after the prescribed period would
292 otherwise expire under [subdivision] (a).

293 The Committee Note will be revised, drawing on examples suggested by a draft Appellate
294 Rules Note. Thought will be given to adding a statement that the Rule 6(a) problem of days when
295 the clerk's office is inaccessible is adequately covered by Rule 6(a). Inaccessibility of the clerk's
296 office does not bear on the ability to continue work on the response. Only if the office is
297 inaccessible on the day that ends the extended period should inaccessibility cause a further
298 extension.

299 [After the meeting concluded the draft set out above was circulated to the reporters for the
300 Appellate Rules Committee and the Bankruptcy Rules Committee. The Reporter for the Appellate
301 Rules Committee responded that there had been a failure of communication. The Appellate Rules
302 Committee preferred the counting method contemplated by Rule 6(e) as published: Saturdays,
303 Sundays, and legal holidays count in applying the three days added at the end of the original period.
304 More than three "calendar days" are allowed only if the final day of the three-day extension is a
305 Saturday, Sunday, or legal holiday. If that happens, the extension runs to the next day that is not a
306 Saturday, Sunday, or legal holiday. The Bankruptcy Committee also prefers that approach because
307 it reduces the total time allowed, a matter of some importance in bankruptcy administration. Rule
308 6(e) was revised by deleting "— excluding intermediate Saturdays, Sundays, or legal holidays —
309 ." The revised version was submitted to vote of the Advisory Committee by electronic mail. The
310 revision was approved unanimously and was presented to the Standing Committee.]

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Rule 27(a)(2)

312 The proposal to amend Rule 27(a)(2) is designed to correct an outdated reference to service
313 provisions of former Rule 4 that have no precise analog in present Rule 4. The few public comments
314 supported the proposal. Three style changes were recommended and adopted. As styled, the
315 Committee voted to recommend for adoption amended Rule 27(a)(2) as follows:

316 **(2) Notice and Service.** At least 20 days before the hearing date, the petitioner must
317 serve each expected adverse party with a copy of the petition and a notice
318 stating the time and place of the hearing ~~on the petition~~. The notice may be
319 served either inside or outside the district or state in the manner provided in
320 Rule 4. If that service cannot be made with due diligence on an expected
321 adverse party, the court may order service by publication or otherwise. The
322 court must appoint an attorney to represent persons not served in the manner
323 provided by Rule 4 and to cross-examine the deponent ~~on behalf of persons~~
324 ~~not served and if an unserved person is~~ not otherwise represented. Rule 17(c)
325 applies if any expected adverse party is a minor or is incompetent.

326 It was decided that the Committee Note need not be amended to offer advice on the problems
327 that might arise if a single attorney is appointed to represent unserved persons who may have
328 conflicting interests. The amended rule does not change the present rule in this respect.

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Rule 45(a)(2)

330 The proposal to amend Rule 45(a)(2) was designed to ensure that a nonparty deponent have
331 notice of the method designated for recording the testimony. The Committee voted to recommend
332 the amended rule for adoption, with one style change to conform to the style adopted in the Style
333 Project after Rule 45(a)(2) was published for comment:

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(2) A subpoena must issue as follows:

335 (a) for attendance at a trial or hearing, ~~in the name of~~ from the court for the
336 district where the trial or hearing is to be held;

337 (b) for attendance at a deposition ~~in the name of~~ from the court for the
338 district where the deposition is to be taken, stating the method for
339 recording the testimony; and

340 (c) for production and inspection, if separate from a subpoena commanding
341 a person's attendance, ~~in the name of~~ from the court for the district
342 where the production or inspection is to be made.

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Supplemental Rules B, C

344 The proposals to amend Supplemental Rules B and C were recommended for adoption as
345 published.

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Discovery of Computer-Based Information

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Judge Rosenthal introduced the report of the Discovery Subcommittee proposing rules to regulate discovery of computer-based information. She began by renewing the Committee's thanks to Professor Dan Capra and the Fordham Law School for hosting the hugely successful February conference on discovering computer-based information.

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Discussions have continued "around the country" since the February conference. The Discovery Subcommittee worked hard and continuously to refine the proposals that provided the framework for the February conference. The focus of discussion has advanced from the initial phase in which the question was whether the possible differences between computer-based information and other information warrant adoption of new rules. Now it is recognized that new rules will be helpful. The question has become whether the rules should simply express the better practices that are emerging, or whether an attempt should be made to guide future developments.

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The most immediate question has come to ask whether the time has come to publish proposed rules for comment. Good reasons appear to go forward now. There is a growing demand for rules, reflected in the emergence of local district rules addressed to discovery of computer-based information. A few courts have local rules in place, and several more courts are considering rules. This activity shows that judges and the bar want guidance. These initiatives also present the continuing prospect that adoption of differing local rules by many courts will freeze disuniform practices in place, impeding development of national uniformity. The publication process also is important because public comment is critical. Litigants and lawyers live with these questions in ways that outstrip their ability to educate judges. It may be important to seek comment on thoughtful proposals even though it is not yet clear that they should be adopted as proposed.

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Myles Lynk, chair of the Discovery Subcommittee, provided a further introduction. The Subcommittee has worked deliberately over a period of years. It has heard from all segments of the bar and bench. Many drafts have been considered, revised, and at times rejected entirely. Alternative proposals are presented for discussion; one of the questions to be resolved is whether alternative proposals should be published with respect to some of the areas that seem to deserve adoption of some rule.

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Professor Marcus introduced the specific proposals.

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Rule 26(f) Conference Discussion

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Perhaps the least controversial proposal, long on the table, has been to amend Rule 26(f) to address discovery of computer-based information. The first step would amend Rule 26(f)(2) to add evidence preservation to the topics to be discussed. Various formulations have been considered, looking to "preservation of evidence," or "any issues relating to preserving discoverable information."

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A second step would amend Rule 26(f)(3) by adding a new subparagraph (C) to include computer-based discovery in the subjects of the discovery plan. Subparagraph (C) in its current draft form describes "any issues relating to disclosure or discovery of electronically stored information, including the form of production." (Rule 34(a) proposals would include a definition of "electronically stored information" as a term to be used throughout the discovery rules.) Parallel changes would be made in Form 35 and in Rule 16(b), including in the Report of the Planning Meeting a description of the proposals for handling discovery of electronically stored information and listing provisions for disclosure or discovery of electronically stored information as a permitted subject for a scheduling order. This version of 26(f)(3) is "softer" than earlier proposals. By

390 describing "any issues," it limits the need to discuss to cases in which the parties anticipate
391 discovery of computer-based information. There would be no need to discuss such discovery if it
392 is not expected. But the form of production should be discussed if such discovery is anticipated.
393 Rule 34 proposals to be discussed later highlight the importance of resolving the form of production
394 as early as possible.

395 These initial proposals have been noncontroversial.

396 Another addition to Rule 26(f)(3) would be a new subparagraph (D) addressing privilege
397 waiver. The form in the agenda materials calls for a statement of party views "whether the court
398 should enter an order that facilitates discovery by protecting the right to assert privilege after
399 [inadvertent] production of privileged information." It is likely that this version should be amended
400 at least to include an explicit reference to party agreement, making it clear that the court order
401 should enter only if the parties agree. The reference to "inadvertent" production is uncertain. The
402 topic is deliberately limited to "discovery," excluding disclosure — since disclosure addresses only
403 witnesses, documents, or like information that a party may use to support its position, the problem
404 of inadvertent privilege waiver should not arise.

405 Discussion of these proposals began with the Subcommittee recommendation that
406 26(f)(3)(D) should carry forward the reference to "inadvertent" production. The concern continually
407 expressed has addressed the production of privileged documents without realizing that they are
408 privileged. Belated assertions of privilege after deliberate production of documents known to be
409 privileged have not seemed to merit protection by new rule provisions.

410 The "inadvertent" production question includes the familiar topic of "quick peek" agreements
411 and leads to the more general question whether party agreement should be required. These
412 agreements call for the parties to deliberately allow access to information that may include
413 privileged materials, so that the party who seeks discovery can determine just what information it
414 actually wants to have produced in discovery. Designation of the desired information then leads to
415 privilege screening and logging only with respect to the materials that are formally produced in
416 response to the discovery requests. It is important that the rule require party agreement to these
417 arrangements. A court cannot be authorized to order production of information without the
418 opportunity for thorough privilege screening if a party objects. It may be that party agreement
419 should not be required for other forms of protective orders, such as the "clawback" provisions that
420 allow belated privilege claims after a party becomes aware that privileged materials have been
421 produced. On the other hand, it was observed that parties will resist "clawback" provisions if they
422 are not comfortable enough with the arrangement to agree to it in the particular case. The producing
423 party is the one who is worried about an order to produce on terms that it has not agreed to; the
424 receiving party is worried about surrendering once-produced materials under "clawback" terms that
425 it has not agreed to.

426 The "quick peek" agreement was described as not inconsistent with a rule protecting against
427 inadvertent production. A party providing materials for a quick peek will remove, and log, all
428 materials that are readily identified as privileged. The problems arise with respect to materials that
429 are privileged for reasons that do not readily appear on quick examination.

430 It was agreed that the (f)(3)(D) proposal should be revised to include "agreement of the
431 parties" as an element. It was noted that cases dealing with these agreements seem to arise when
432 parties to other litigation who did not join the protective agreement assert waiver.

433 It was suggested that the rule could be made broader if it did not refer to "inadvertent"
434 production, but instead referred in general terms to party agreements enforced by court order. That
435 would leave the parties free to devise and win court approval of innovative arrangements.

436 But it was asked whether a broad rule would encourage knowing, "advertent" production of
437 privileged materials. The Subcommittee thought the rule should deal with inadvertent production.

438 More generally, it was suggested that the purpose of this proposal, and many like proposals,
439 is to facilitate discovery when a producing party knows the materials may include matters covered
440 by privilege but cannot easily identify them. Allowing preservation of the privilege by one means
441 or another can reduce costs and expedite discovery by supporting less agonizingly thorough
442 privilege screening. At the same time, it may seem inappropriate sermonizing to include in the rule
443 text the words suggesting that the purpose of the agreement is to facilitate discovery.

444 The "inadvertence" question reappeared with the observation that the proposals are not aimed
445 at deliberate "your eyes only" delivery of information. The difficulty of expression arises from the
446 fact that the production is not inadvertent. The producing party knows it is producing the
447 information. What it does not know is that some part of it is privileged. "Unintentional" does not
448 seem to resolve the ambiguity. "Inadvertent privilege waiver" might help, but it also might seem
449 to invoke the decisions that do permit recall of privileged information but only on condition that the
450 producing party worked hard to avoid the production of material not known to be privileged. A
451 simple reference to agreements that "protect against privilege waiver," on the other hand, might go
452 too far in allowing unnecessarily expansive agreements.

453 It was agreed that these problems should be addressed by revising the draft to read:
454 whether upon agreement of the parties the court should enter an order protecting the
455 right to assert privilege after production of privileged information;

456 It was asked whether this language would include production knowing that the information
457 is privileged. One answer was that it does — the parties may deliberately choose to agree on a
458 protected exchange of privileged information to further settlement negotiations. Another question
459 was whether this language would provide protection against arguments for waiver made by persons
460 not parties to the agreement. The answer was that we do not know. Concern was expressed that a
461 rule this broad would encourage slip-shod privilege review. But it was responded that the purpose
462 is to enable the parties to avoid the cost and delay of thorough screening. "We want to go as far as
463 we can."

464 The agreement requirement was further supported by observing that the parties will not agree
465 to an agreement that allows clawback the day before trial. The combined requirement of party
466 agreement and court approval will ensure that the arrangements will be sensible in the circumstances
467 of the particular case. It was agreed that a court indeed has authority to approve such agreements.

468 It was observed that as proposed, the language does not directly forbid entry of an order
469 without party consent. A producing party might request entry of an order to speed up production,
470 despite resistance by the requesting party. The proposal does not take away any court authority that
471 now exists. The reference to "agreement" is confined to the context of party discussion and
472 proposals. The aim is to encourage party cooperation that keeps the case moving. In this context,
473 "consent is the idea." It is good to have these problems addressed early, and the rule focuses party
474 attention on these problems. They may not agree. Without agreement, a party may move for an
475 order despite the lack of consent.

476 It was further observed that the draft approaches the questions of court authority and party
477 agreement indirectly. In itself, it only provides that a discovery plan must state the parties' views
478 and proposals on these questions. Earlier drafts directly authorized "quick peek" orders on
479 agreement of the parties and with court approval. The (f)(3)(D) proposal does not in itself address
480 the law of waiver.

481 The question returned: should a court be able to compel protection without party agreement
482 on terms that preclude effective privilege screening? The fear is that a court might compel "quick
483 peek" revelations over protest and without time to screen out even obviously privileged material:
484 "produce in two weeks." The fact that the order says that privilege will be protected on later review
485 does not adequately protect materials the party would never turn over under a party-planned "quick
486 peek" agreement. And it must be remembered that we do not know whether these orders will protect
487 against waiver arguments by nonparties; that is why we need party agreement.

488 A motion to delete from proposed Rule 26(f)(3)(D) any reference to party agreement failed,
489 5 yes and 8 no.

490 It was agreed that the Committee Note should say that this provision is modest. It does not
491 address the court's authority to make orders absent party agreement. It simply focuses attention on
492 mechanisms that may be adopted by agreement to speed discovery and reduce screening costs.

493 An observer suggested that "production" is not as useful a word for the rule as "disclosure."
494 "Disclosure" would be used not in the sense of Rule 26(a) disclosure, but in the open sense of
495 showing information. A quick peek would be described as disclosure, not formal discovery
496 production.

497 The Committee voted to approve the proposal to add new language to Rule 26(f)(2) along
498 the lines proposed in the agenda materials, but referring to "preservation of discoverable
499 information."

500 The Committee further voted to approve the proposal to add a new Rule 26(f)(3)(C) as
501 shown in the agenda materials.

502 The Committee also approved the revised version of Rule 26(f)(3)(D) set out above, with the
503 corresponding changes in Form Rule 35 and Rule 16(b).

504 One comment was addressed to the draft Committee Note. Line 104 on page 9 of the agenda
505 materials refers to party discussion "whether the information is readily accessible." Accessibility
506 is a recurring subject of debate in discussions of rules about computer-based discovery. But it may
507 be a good word in this neutral description of topics for discussion.

508 **Rule 34(a): "Electronically Stored Information" as Document**

509 The agenda materials, p. 16, lines 316-320, include proposed amendments of Rule
510 34(a)(1)(A) that include electronically stored information in the list of materials discoverable under
511 Rule 34's "document" production provisions:

512 (1) any designated electronically stored information or any designated documents,
513 including writings, drawings, graphs, charts, photographs, sound recordings,
514 images, and other data or data compilations in any medium, from which
515 information can be obtained either directly or after the responding party
516 translates it into a reasonably usable form, * * *

517 Rule 34 seems to be the place for this recognition of computer-based information. The
518 "electronically stored information" term is used throughout this package of proposed amendments,
519 with Committee Note reminders that it has the same meaning when discovery is sought through
520 depositions (most obviously Rule 30(b)(6) depositions), interrogatories, and requests to admit.

521 "Information" is a better word than "data" when referring to electronically stored things. The
522 object of discovery is to acquire information.

523 "Images" are added to the list of discoverable items to ensure that all forms of information
524 are reached. "[I]n any medium" is added in a similar effort to achieve a comprehensive catalog.

525 In addition, Rule 34 is amended throughout to provide for testing and sampling of documents
526 and other information. The Style Project considered adding these words to reflect the need to test
527 — or perhaps to sample — "document" information. Testing the authenticity of a document is a
528 clear illustration. The Style Subcommittees concluded that this change was beyond the reach of the
529 Style Project, but that it seemed desirable.

530 As (a)(1)(A) is drafted, it is not clear whether a request for "documents" would include
531 electronically stored information. The draft does not define electronically stored information as a
532 document, and indeed seems to separate it from documents.

533 The first question was whether embedded and metadata are included in "electronically stored
534 information." This term does not exclude such "hidden" data — information stored in the computer,
535 but not "visible on the screen" in routine use of the application software. To the contrary, embedded
536 and metadata are included. The Subcommittee thought about other terms such as "recorded" or
537 "retrievable," but settled on electronically stored information. If it is stored and can be retrieved,
538 it is discoverable. The decision to make such information discoverable does not mean that it always
539 must be produced. Discovery is limited by all present limits, and also by any new limits that may
540 be adopted to focus specifically on electronically stored information.

541 It was suggested that "in any medium" is a "bad intensifier." But these words were defended
542 as an important part of the project. Technology changes rapidly and unpredictably. We cannot
543 know what will emerge. The point is to ensure that discovery is not defeated by unforeseen gaps
544 in Rule 34 language. It was agreed that "in any medium" should remain in the rule.

545 Style changes were discussed. One would invert the order, so (a)(1)(A) would refer to "any
546 designated documents or any electronically stored information." Or "designated" might even be
547 moved into the preface: "to produce * * * the following designated items * * *." The important
548 thing is to be clear that whatever form the information takes, the duty to produce is shaped by the
549 requesting party's duty to designate.

550 Another style suggestion would restore em dashes to set off the examples: "any designated
551 electronically stored information or any designated documents; ___ including * * * ___ from which
552 information can be obtained * * *."

553 A broader style suggestion was that "document" should be defined to include electronically
554 stored information. It must be clear that a request for "documents" embraces electronically stored
555 information even when the request does not separately refer to electronically stored information.
556 Many reported decisions now say that electronically stored information is a document; why should
557 we not embrace those decisions? Although many judges have become familiar with computer-based
558 discovery, many others still need to be educated in these topics. These observations were met with
559 the concern that the rule should not stretch the definition of document "beyond any natural
560 meaning." A data base, for example, is not much like a "document" in any conventional sense. It
561 is simply a store of data that change continually. What emerges from it depends on what question
562 is put to it. There are no formed "documents" in it. The conclusion was that "all we need is to be
563 clear." The draft is clear. The Committee Note can say that the response to a request for
564 "documents" must include electronically stored information.

565 **Rule 34(b): Form of Production**

566 The form of producing electronically stored information seems to be a frequent source of
567 contention and difficulty. The proposed amendments of Rule 34(b) address these questions in part.

568 The requesting party "may" request a form for production, and the responding party must produce
569 or object. No standard is provided for resolving the objection. If the requesting party does not
570 specify a form of production, the responding party may choose between defined options.

571 The provision for request and objection, with slight modifications from the form in the
572 agenda materials, would read:

573 **(b) Procedure.**

574 **(1) Form of the Request.** The request:

575 (A) must describe with reasonable particularity each item or category of
576 items to be inspected;

577 (B) must specify a reasonable time, place, and manner for the inspection and
578 for performing the related acts; and

579 (C) may specify the form in which electronically stored information is to be
580 produced.

581 **(2) Responses and Objections.** * * *

582 (B) *Responding to Each Item.* For each item or category, the response must
583 either state that inspection and related activities will be permitted as
584 requested or state an objection to the request, including an objection
585 to the requested form for producing electronically stored information,
586 stating the reasons.

587 The first question was whether the requesting party should be required to state a desired form
588 of production. That alternative was rejected by the Subcommittee because the requesting party may
589 not know what is possible, and for that matter may be indifferent between the apparent alternatives.
590 The Rule 26(f) proposals direct the parties to discuss the form of production; agreement often will
591 follow.

592 The provision for situations in which the requesting party does not specify a form of
593 production would be a new Rule 34(b)(2)(D):

594 (D) *Producing the documents or electronically stored information.* Unless
595 the parties otherwise agree, or the court otherwise orders,

596 (i) A party producing documents for inspection must produce them
597 as they are kept in the usual course of business or must
598 organize them and label them to correspond to the categories
599 in the request.

600 (ii) If a request for electronically stored information does not specify
601 the form of production under Rule 34(b)(1)(B), a party must
602 produce such information in a form in which the producing
603 party ordinarily maintains it, or in an electronically
604 searchable form. A party producing electronically stored
605 information need only produce it in one form.

606 Discussion of these provisions began by noting that the reference to "electronically
607 searchable form" was devised by the Subcommittee and may not be the most useful phrase. TIFF
608 and PDF formats are not, or may not be, electronically searchable. It was pointed out that
609 "electronically searchable form" suggests organization in a form searchable by word, concepts, or

610 the like. TIFF images often are accompanied by a data base that is searchable and that leads to the
611 documents. An alternative phrase might be something like "searchable using electronic or
612 automated methods." Or it might be "information recoverable by electronic search methods." Or
613 "electronically searchable form" would be neat. The idea is there, but the expression is tentative.
614 It may prove useful to publish with alternative phrases. This suggestion was approved. The
615 Committee Note can observe that the concept requires that the form be "reasonably" searchable. An
616 observer suggested that the Note also should say that the searchable form need not include
617 embedded or metadata.

618 The reference to the form in which the information is normally maintained seems to
619 emphasize "native format" production, a sensitive subject. Suggestions have been made for a more
620 flexible rule that would allow the responding party to choose any form it wants. One rejected
621 alternative would have permitted the responding party to produce the information "indexed" to
622 correspond to the categories of the request. This alternative was rejected because it might impose
623 great burdens. Library scientists view "indexing" as word-searchable, perhaps not a problem, but
624 electronic discovery professionals think of indexing as a list of documents already there. The
625 proposal advanced here was a balance among options that should be available at low cost.

626 It was asked whether the rule should offer a third option — production of the information
627 printed out. That practice is often followed now. A response was that printed production works in
628 simple cases, but "is not fair in the complex cases." There is no reason to impose the costs of non-
629 electronic searching on the requesting party. "A paper dump can be a huge expense for no reason."
630 The rejoinder was that the rule allows the discovering party to request an electronic form. The limit
631 of this alternative, however, is that the requesting party may not know what forms are available to
632 the producing party. On the other hand, the requesting party can ask for paper production, or the
633 parties can agree on it.

634 The lack of any direction for resolving an objection to the form of production was pointed
635 out. What if the requesting party demands "native format" and the producing party objects? The
636 answer is that the court will decide.

637 **Rule 37(f): "Safe Harbor"**

638 Parties that store vast amounts of information in electronic systems have begged for some
639 form of safe harbor to protect against spoliation charges. Electronically stored information is
640 routinely lost. Loss arises because systems designed for business purposes deliberately delete
641 information on planned terms. Loss also arises as information that has been "deleted" is overwritten
642 in the random and unpredictable operation of the system. Once the prospect of litigation appears,
643 moreover, it is difficult to design a litigation hold that provides assured retention of discoverable
644 information on terms that do not freeze all use of the system.

645 The agenda materials include two alternative forms of a new Rule 37(f) that would provide
646 some limited protection by way of limiting the use of discovery sanctions for failure to produce
647 electronically stored information that was destroyed despite reasonable steps to preserve it. It may
648 be desirable to publish alternative proposals if it is found appropriate to publish any proposal on this
649 topic.

650 The problem has been addressed through discovery sanctions because it has seemed difficult
651 to craft a Civil Rule that imposes affirmative duties to preserve information.

652 One aspect of the drafting difficulty is that often the requested information is "not completely
653 gone." Lengthy and expensive computer forensic efforts may be able to retrieve it — the question
654 often is cost, not total inability to retrieve.

655 Whatever is done, it should be clear that any discovery rule does not address the imposition
656 of sanctions for violating preservation duties imposed by statute or regulation.

657 The first alternative Rule 37(f) draft focuses on reasonable steps to preserve electronically
658 stored information. Examples of reasonable behavior are given. The draft says, among other things,
659 that a person acts reasonably if it preserves information maintained in the usual course of its
660 regularly conducted activities if the information appears reasonably likely to be discoverable in
661 reasonably foreseeable litigation, and by routinely and in good faith operating its electronic
662 information systems, unless it willfully or recklessly deletes or destroys the information. It also
663 provides that a person who acts reasonably remains subject to sanctions if it violates a court order
664 that requires preservation, and might provide that discovery sanctions are appropriate for violating
665 a statute or regulation that requires preservation.

666 The second alternative is more streamlined, focusing directly on reasonable steps to preserve
667 information that the person knew or should have known was reasonably likely to be discoverable
668 in reasonably foreseeable litigation, on normal operation of the information system, and on absence
669 of a court order — or perhaps a statute or regulation — requiring preservation. The focus is on the
670 need to impose a "litigation hold," on ordinary operation of the system, and on court preservation
671 orders. This alternative may not give as much protection to the producing party, in part because it
672 does not seek to supplement the requirement of reasonable steps to preserve by looking for willful
673 or reckless destruction.

674 One important drafting question arises from the extent of the sanction protection. Each
675 alternative begins: "A court may not impose sanctions [under these rules] * * *." If "under these
676 rules" is included, the way is left open to impose sanctions as a matter of inherent power and
677 common-law authority. Spoliation instructions are the most obvious illustration — they commonly
678 are explained in terms that do not draw from Rule 37. (Rule 37(c)(1), which does provide for
679 spoliation instructions, does not reach the present problems.) If this limit remains, the safe harbor
680 is not very comforting. On the other hand, at least the Private Securities Litigation Reform Act
681 includes provisions directly aimed at preserving information for discovery, with "appropriate"
682 sanctions for willful failure. See 15 U.S.C. § 78u-4(b)(3)(C). The Subcommittee does not wish to
683 propose a rule that might supersede this statute or any other like it. Nor does it wish to propose a
684 rule that would become a definition of what sanctions are "appropriate" within the statutory terms.

685 The concern that proposed Rule 37(f) intrudes on the area of spoliation rules was discussed
686 further. The alternative drafts speak to preservation obligations before an action is even filed.
687 Courts do impose sanctions for pre-filing destruction of evidence. But that does not of itself justify
688 a rule that seems to create preservation duties before an action is filed. The Committee has been
689 reminded repeatedly about the dangers of attempting to create an explicit preservation requirement.
690 The reasons for addressing these problems, however, arise from the nature of electronic information
691 storage systems. These systems routinely delete data. Business needs require such designs. The
692 Subcommittee decided that we should not — perhaps cannot — attempt to create direct preservation
693 rules. But there is a need for a safe harbor. It would be good to draft a rule, if it can be done, that
694 offers protection to a party who behaves reasonably, recognizing that reasonable preservation
695 obligations may arise at some point before an action is actually filed.

696 It was observed that if Rule 37(f) is limited to sanctions "under these rules," it may be a null
697 set. The rules do not now provide sanctions directly for destroying discoverable information. There
698 also is a question whether an Enabling Act rule can properly address conduct before an action is
699 filed. Similar questions were raised during the work to develop Federal Rules of Attorney Conduct,
700 and never fully resolved. Generally the Rules take hold with the commencement of an action and
701 apply to events after that. The draft seems to address pre-complaint obligations. It may overlap with

702 obligations imposed by rules of professional responsibility. There is developing spoliation law that
703 addresses pre-filing conduct. But proposed 37(f) addresses discovery, not evidence. And without
704 addressing pre-filing conduct, it would not do very much. It does not impose any affirmative
705 obligation. All it does is to make it clear that a party who undertakes reasonable preservation steps
706 "is better off."

707 It was observed that Rule 37(b) sanctions are limited to circumstances in which a party has
708 violated a court order to provide discovery. Rule 37(f) seems to go beyond that, addressing — and
709 negating — sanctions when there is no court order. But Rule 37(b) addresses the sequence of
710 discovery request, objection or noncompliance, order to provide discovery, and disobedience. Rule
711 37(f) would address failure to comply with a preservation order.

712 An observer suggested that the drafts go too far when they speak of "reasonably foreseeable
713 litigation." The focus should be on the reasonable foreseeability of the action in which discovery
714 is sought. Many enterprises engage in activity that foreseeably will give rise to litigation in broad
715 general terms that do not focus on any specific action — a firm researching a new drug product, for
716 example, can foresee that if the product should one day be marketed there will be later litigation
717 about the product. Even short of that, "reasonably foreseeable" may be too open-ended.

718 Another observer asked what there was in the rule that would prevent an enterprise from
719 designing an information program that automatically destroys everything every few days? The
720 response was that businesses design information systems for their business needs, and business
721 needs require preservation of much information for long periods. A similar question asked whether
722 adoption of some version of Rule 37(f) would cause enterprises to change their retention practices.

723 The focus of the proposals is on the propositions that a party cannot produce what it does not
724 have, but that the obligation to cooperate in discovery entails an obligation to preserve. Courts have
725 imposed spoliation sanctions on parties who have lost electronic information. If information is
726 destroyed before the events giving rise to litigation have occurred, on the other hand, spoliation is
727 not likely to be found.

728 It was asked whether the proposals really add anything to the law. They seem simply to
729 provide guidelines. People frequently express fear of spoliation sanctions, but the cases do not seem
730 to impose sanctions where the proposals would defeat sanctions. On the other hand, the Second
731 Circuit Residential Funding case says that spoliation sanctions may be imposed for negligent
732 operation of the usual information system. Perhaps the problem is not so much imposition of
733 sanctions for negligent spoliation — although the cases are coming up — as it is one of widespread
734 paranoia in government and business that the only way to avoid spoliation sanctions is to "keep
735 everything." The scope of the "litigation hold" is a real concern. Several lawyers, particularly
736 corporate staff counsel, want reassurance that it suffices to address a litigation hold to the sources
737 that are likely to have discoverable information. Rather than create a mirror image of all of the
738 information available throughout the organization, worldwide and on all of countless different (and
739 often incompatible) information systems, they believe they should be protected if the hold preserves
740 information in the sources likely to relevant to the particular litigation.

741 It was noted that a safe harbor of any sort is likely to operate in fact as a preservation rule.
742 "There is a strong gravitational pull." Is the rule intended to command an end to routine destruction?
743 Or, in the version that speaks of preserving information routinely maintained, is it intended to say
744 that once you destroy the information it is no longer maintained? Should we focus instead on
745 information that you do not regularly maintain? Alternative 2 does not have this word trap. The
746 focus should be on the duty to intervene reasonably in the operation of the system.

747 A third alternative draft was handed out at the meeting. This draft focused directly on the
748 duty to preserve by prohibiting sanctions if the party took reasonable steps to preserve information
749 that was destroyed in the normal operation of its electronic information system. The focus on the
750 duty to preserve was supported. But it was suggested that there is an ambiguity in "information":
751 do you have to preserve a back-up tape, for example, when you do not know whether it has
752 discoverable information? Is this question answered by the limit to "reasonable" steps? A discovery
753 request might be for the e-mail messages of an identified person. The responding party believed that
754 they were preserved, not knowing that the person had deleted them, and recycle the back-up tape
755 innocently. That could be reasonable behavior. Reasonable steps do not always preserve
756 everything. Things slip through. That is the point of the safe harbor.

757 A preference was expressed for "alternative 2, in one form or another."

758 An observer suggested that the focus should be on reasonable steps to preserve, but that
759 sanctions should be available only for willful or reckless destruction. In addition, it is too broad to
760 speak of preserving information "reasonably likely to be discoverable in reasonably foreseeable
761 litigation"; it should be: "when it knew or should have known that the information was reasonably
762 likely to be discoverable in the action." It was responded that there may be situations in which
763 information should be preserved because it is reasonably apparent that it will be discoverable.
764 Negligent failure to preserve should not be within a safe harbor. On the other hand, sanctions may
765 not be appropriate if trivial information is negligently lost. In further response, it was noted that
766 "alternative 1" leaves a gap between reasonable preservation and willful or reckless destruction.

767 An illustration was suggested. A plaintiff claims employment discrimination. The plaintiff
768 interacts at work with a small number of people. Once the claim is made, the employer can foresee
769 litigation. It may be reasonable to preserve electronically stored information relevant to the people
770 who interact with the plaintiff, without preserving all of the employer's electronically stored
771 information. These are "reasonable steps." But what is reasonably likely to be discoverable? The
772 full scope of Rule 26(b)(1)? The plaintiff is employed in the Chicago branch of a company with
773 worldwide operations; focusing preservation on information in Chicago is different from focusing
774 on information in the Shanghai branch, at least if the plaintiff has had no traffic with the Shanghai
775 branch. As to the Chicago information, reasonable preservation may at times require that back-up
776 tapes be preserved. And it was suggested that "house counsel can understand what is reasonably
777 likely to be discoverable."

778 Discussion returned to the difficulty of focusing on when a party should have known that
779 litigation would be brought. Perhaps this thought should be expressed by looking to a pending
780 action or a specific action that is reasonably anticipated. But there is a complication — once
781 information has been preserved for a foreseeable action, there may be a duty to search it to respond
782 to discovery in a different action.

783 Turning to a broader view, it was said that "anything we do will disappoint a lot of people
784 who want more guidance and more protection than we can give them. But this is a response to a
785 discovery problem, and is within the proper province of the discovery rules. There is a lot of
786 concern in the bar with 'gotcha,' with the disproportionate consequences of deleted information."

787 Support was expressed for alternative 2, but with the suggestion that there is a problem in
788 referring to "the normal operation of the person's electronic information system." Many people do
789 not have an electronic information "system." The response was that a "system" exists even for a
790 person who has no document retention or destruction policy at all. The electronic system itself —
791 the software programs that direct the hardware — routinely deletes information. "You do have a
792 system — it is Windows, Linux, whatever." We need an expression that encompasses both the

793 elements of the programs that are designed to delete information according to the user's particular
794 policies and also the elements designed into the programs by the programmers.

795 It could be urged that once the rule requires reasonable steps to preserve it is redundant to
796 refer to loss through normal operation of the system. But it was responded that the emphasis on
797 normal operation gives direction and focus. If you know how your system operates, that bears on
798 what you need do for reasonable preservation. This provision should focus on the problem of
799 automatic destruction that occurs without human intervention at the time of destruction.

800 Another question is whether the "no sanctions" rule should address a "failure to preserve"
801 or a "failure to produce." Since the focus is on discovery sanctions, not creation of a specific
802 preservation duty, the more natural focus is on failure to produce. (It was pointed out that it has
803 been argued that a judge can impose sanctions for failure to produce something that did not exist at
804 the time of the discovery request.)

805 A separate problem was raised in both Rule 37(f) alternatives. Should the rule include an
806 exception so that it does not prohibit sanctions when a statute or regulation requires preservation of
807 information that has been destroyed by automatic operation of an information system despite
808 reasonable efforts to preserve the information? An exception of this sort may erode the value of the
809 safe harbor. Failure to include the exception would not mean that the rule prohibits other authorities
810 from imposing sanctions for violating the statute or regulation. Only discovery sanctions would be
811 barred by making the statutory or regulation violation irrelevant.

812 It was urged that there is a duty to preserve any information that a statute or regulation
813 requires to be preserved. "The duty exists; we should be able to enforce it through discovery
814 sanctions. This is just like failure to obey a preservation order."

815 An observer suggested that the violation of a statute can figure into the determination
816 whether reasonable steps were taken. Referring only to "routine" operation of the system seems to
817 go to the state of the art.

818 The mode of referring to information-preservation statutes and regulations also is a problem.
819 An astonishing welter of statutes and regulations, state and federal, require preservation of enormous
820 amounts of information for purposes that have nothing to do with discovery. At least one statute,
821 however, specifically directs preservation of information for discovery purposes. The Private
822 Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3)(C), directs preservation of relevant
823 documents, data compilations, and tangible objects "as if they were the subject of a continuing
824 request for production of documents from an opposing party under the Federal Rules of Civil
825 Procedure." The statute further states that an party aggrieved by a willful failure to comply "may
826 apply to the court for an order awarding appropriate sanctions." Should we attempt to incorporate
827 only the discovery-specific preservation statutes and regulations, or should all information-
828 preservation statutes and regulations be referred to in the rule? Some of the draft language elevates
829 all statutory duties to the same status as a specific discovery preservation order entered in the
830 particular case.

831 Another question was raised by asking whether the rule should protect against loss of
832 information by normal operation of the system, or instead should be limited to normal "good faith"
833 operation. An observer suggested that "normal" is needed; the addition of "good faith" would be
834 welcome. This issue returned later with the question whether "good faith" adds anything to the
835 requirement that the destruction occur in routine operation of the system.

836 The Rule 37(f) discussion was brought to a point by asking whether a proposal should be
837 published for comment. If yes, drafting decisions will remain to be made. The question was framed
838 by a question whether anything like this is needed. Is there something about computer-based

839 discovery that forces us to act? If the proposal essentially reflects existing case law, is it needed?
840 If it goes beyond existing case law, is it appropriate? The response was that the Subcommittee has
841 worked hard on this proposal. The topic is sufficiently important to warrant publication, so that the
842 public comments can be taken into account in deciding whether to adopt any such rule. Publication
843 is appropriate without taking sides on the final determination whether to adopt any version of a
844 "Rule 37(f)." In further response, it was noted that the current proposal pretty much tracks existing
845 decisions, but there is no way to predict what future decisions will do. It also was pointed out that
846 the problem of automatic destruction is not limited to the huge information systems of huge
847 enterprises. It is a problem for the personal computer at home. "We want to say it's OK to put it
848 on a CD and carry on with family use of the computer." The response in other circumstances might
849 be quite different, including seizing the computer. The home computer is different from the box of
850 letters or other papers at home — people do not understand how their computers routinely delete
851 information. For that matter, surveys repeated over several years have shown that 60% of American
852 businesses do not have routine document preservation procedures, and that staff counsel are not
853 confident that their attempts to effect preservation will work. There is real benefit in reassuring
854 parties that if they respond to litigation reasonably, they will be protected.

855 Two new alternative versions of Rule 37(f) were prepared overnight and were discussed on
856 Friday morning. The general approach of both versions was the same. They focus on automatic
857 operation of a "system," including a single computer as the "system," and on taking reasonable steps
858 to preserve evidence. Neither alternative provides as much protection or direction as some people
859 want. It would be possible to add still more explicit terms: "If a person takes such reasonable steps
860 it may continue to operate its routine electronic information system." Many people at the Fordham
861 conference suggested language similar to this. But it was asked whether this thought should be put
862 in the rule. It seems a truism, and may prejudice specific situations.

863 It also was noted that each of the new alternatives looks to the "failure to produce," not
864 "failure to preserve." At the same time, the first alternative also refers to a failure to preserve, and
865 may be the better alternative for that reason.

866 The first question was whether either alternative really accomplishes anything. When each
867 says that "a court may not impose sanctions if," it also says that if you act reasonably to preserve
868 information and otherwise operate your information system in its routine manner, you are ok. The
869 answer was that Rule 37(f) is a good place to tell people that they must have a litigation hold. This
870 provides valuable guidance beyond anything that appears in the rules now. In addition, the reference
871 to violating a court order "gives an alert to other parties, and supports a Committee Note that a party
872 who wants a more specific preservation order may ask for it." The decision whether to enter a
873 preservation order will be informed by considerations similar to those expressed in the rule, but also
874 may be guided by other concerns.

875 The same concern was repeated: the rule should do more. In the proposed forms it only
876 assures results that would occur anyway — sanctions are not imposed on people who act reasonably
877 to preserve discoverable information. And the reply was the same — the drafts define as reasonable
878 the routine operation of the information system. For that matter, the drafts suggest that sanctions
879 may be appropriate for failure to exercise reasonable care.

880 A renewed attack was launched on the language that implies that reasonable care does not
881 defeat sanctions if the destruction of information violates a "statute or regulation." The contrast to
882 violating "an order in this action" is marked. A specific preservation order gives clear guidance.
883 Violation of a statutory duty owed to someone not a party for purposes that have nothing to do with
884 this litigation will lead to "gotcha" tactics. The structure emphasizes this. Safe-harbor protection
885 is denied if information was deleted in violation of a mining regulation in one state that requires an

886 employer to retain all employment records for ten years, even though deletion occurred
887 automatically after two years, before there was any reason to anticipate the present litigation or for
888 that matter before the events that gave rise to the present litigation. Violation of the duty to the state
889 that adopted the regulation should not control access to the safe harbor. The focus should be limited
890 to a statute that requires preservation for purposes similar to the present action. An example would
891 be an SEC regulation that requires preservation of information that is relevant in an action for
892 securities fraud. Even that may be overbroad if it implies that the existence of the statute puts the
893 world on notice that litigation is foreseeable.

894 So it was asked whether a party who violates an IRS regulation requiring that records be
895 preserved should be outside the safe harbor even if the destroyed records are not those sought in
896 discovery. The answer was that only destruction of information discoverable in the action should
897 lose the protection.

898 In like vein, it was suggested that the effect of a statutory violation on safe-harbor protection
899 is similar to the question whether a statute is intended to create a private remedy. This question is
900 particularly pointed when the statute is not aimed at preserving information for discovery in civil
901 litigation.

902 A related question was whether reasonable behavior should be protected even if a statute or
903 regulation is violated. Suppose discoverable information is destroyed in the routine operation of an
904 information system after a party has taken reasonable steps to preserve it: should the safe harbor be
905 available? One consequence may be an incentive to seek protective orders to provide increased
906 protection against destruction.

907 It was protested that "you cannot give a safe harbor to a law breaker." The PSLRA requires
908 preservation. A statute is as important as an order. But it may be appropriate to limit the reference
909 to a statute or regulation that somehow is "relevant" to the particular litigation. One form would be
910 to look to the statutory violation only if the lost information is relevant to the issues in the action.
911 It should be remembered that denial of a safe harbor does not require that sanctions be imposed. The
912 court still has discretion on the sanctions question, and may refuse to impose any sanction if the
913 statutory violation does not seem important in the circumstances.

914 It was suggested that the reference to violation of an order in the action should be made more
915 precise, referring to an order "to preserve information." And it was asked whether reasonable
916 behavior may be a defense to violation of a preservation order. Suppose a preservation order is
917 entered, the party takes reasonable steps to comply with the order, but the steps fail — the system
918 continues routine destruction of order-protected information. The answer is that the routine
919 destruction is not in the safe harbor. The reasonableness of the attempt to comply will figure in the
920 decision whether to impose a sanction and the choice of sanction, but there is no safe-harbor
921 protection.

922 The question of willful behavior returned. If a party cannot produce destroyed information,
923 and the destruction was not willful, do we want to leave the door open for sanctions even as a matter
924 of discretion? Do we want to allow sanctions whenever the destruction was negligent, as a condition
925 for carrying on routine operation of the information system? Or should we limit sanctions to willful
926 or reckless destruction?

927 Another question renewed the earlier "good faith" discussion. It was suggested that a rule
928 can address a litigation hold only by requiring that it be reasonable. The lack of reasonable care in
929 fashioning a litigation hold is negligence, and good-harbor protection should not be afforded for a
930 negligent attempt. It is very difficult — and probably impossible — to provide simultaneously that
931 a litigation hold affords safe-harbor protection only if it is framed with reasonable care, but also to

932 provide protection if information was destroyed without willful or reckless behavior. An observer
933 suggested that "good faith" should be addressed to the steps to preserve, as one aspect of reasonable
934 behavior. The resolution may be that the standard for safe-harbor protection is reasonable behavior.
935 If the lack of reasonable care — negligence — ousts safe-harbor protection, state of mind is relevant
936 to the decision whether to impose a sanction and the choice among possible sanctions. A merely
937 negligent failure to preserve information that likely was unimportant may escape any sanction.
938 Willful destruction of important information may meet the most severe sanctions.

939 Another recurring question asked whether the Enabling Act supports a rule that addresses
940 preservation before an action is filed. It was suggested that to some extent Rule 11 addresses pre-
941 filing conduct, but noted that Rule 11 regulates conduct directly aimed at filing an action. Operation
942 of an information system before filing ordinarily is not directed to unfiled litigation.

943 The discussion concluded by finding a consensus that some version of Rule 37(f) should be
944 recommended for publication. The Subcommittee will frame specific language that the full
945 Committee will review by mail in time for submission to the June Standing Committee meeting.

946 *Privilege Waiver: Rule 26(b)(5)(B)*

947 In addition to the discovery-conference provisions proposed as Rule 26(f)(3)(D), the agenda
948 materials include the broad suggestion that a joint project on privilege waiver might be undertaken
949 with the Evidence Rules Committee. Independently of any joint project, there is a proposed Rule
950 26(b)(5)(B) for recapture of inadvertently produced privileged information:

951 **(B) *Privileged materials produced.*** When a party produces information without
952 intending to waive a claim of privilege it may, within a reasonable time,
953 notify any party that received information of its claim of privilege. After
954 such notice, the requesting party must promptly return or destroy the
955 specified information and any copies to the producing party, which must
956 comply with Rule 26(b)(5)(A) with regard to the information and preserve
957 the information pending a ruling by the court.

958 This proposal does not address the question whether production has waived a privilege. It
959 merely provides a procedure to address the waiver question when a party turns over information that
960 was not identified as privileged and later realizes that the information was privileged.

961 It was noted that the obligation to return or destroy is meaningless unless it implies an
962 obligation not to use the information. Use is proper only after the requesting party obtains an order
963 to produce, although it may be proper under the rule to rely on knowledge of the produced
964 information in arguing that it is not privileged.

965 A related observation was that the rule could be read to say that the producing party does not
966 lose a privilege until another party gets a ruling that the privilege was lost.

967 It was urged that the rule should go at least this far. Indeed, the rule should go farther unless
968 the Evidence Rules Committee objects. Even if it does not go farther, the rule should say something
969 about waiver — it should say that production is not a waiver. The Texas clawback rule has worked
970 well for several years.

971 It was noted that the proposed rule could operate in conjunction with a "quick peek"
972 agreement and order. Because a quick peek is provided knowingly, the rule properly refers to
973 production without intending to waive and the Committee Note should not refer to inadvertent
974 production.

975 It was asked whether the rule should refer to "person" rather than "party," so as to protect
976 a nonparty who produces material and also to provide recapture from a nonparty who receives
977 privileged information from a party. This issue was taken under advisement. Rule 45 may provide
978 adequate protection for a nonparty. And it may be difficult to justify a rule that reaches a nonparty
979 who receives information from a party apart from requiring the party to use best efforts to recapture
980 the information.

981 The proposal does not affect the burden on the requesting party to persuade the court that the
982 information is not privileged or that the privilege has been waived. So if the applicable rule is that
983 any production is a waiver, regardless of intent or the care taken to protect privileged information,
984 there is a waiver. The rule only recognizes the burden on the requesting party.

985 The Committee approved a recommendation that a Rule 26(b)(5)(B) be published for
986 comment, subject to further style improvements by the Subcommittee and — if feasible — review
987 by the full Committee.

988 The Committee also recommended further work on privilege waiver in tandem with the
989 Evidence Rules Committee.

990 *The Distinctive Burdens of E-Discovery: Rule 34(a) or 26(b)(2)*

991 Many voices have urged, with increasing vehemence, that the burdens imposed by discovery
992 of computer-based information are so distinctive as to require separate protective rules. The agenda
993 materials include alternative proposals allocated to Rule 34(a) or to Rule 26(b)(2). The common
994 question is whether the need for court control should be identified in a way that resembles, but is
995 distinct from, the "two-tier" scope of discovery established by Rule 26(b)(1). Should we require a
996 court order for production of computer-based information that otherwise would fall within the scope
997 of party-managed discovery in Rule 26(b)(1)?

998 The first two alternatives would add a new Rule 34(a)(3). One would provide for discovery
999 of information reasonably accessible to the responding party, with additional discovery of
1000 information not reasonably accessible on court order for good cause. The second would provide for
1001 discovery of information routinely maintained in the usual course of regular activities, with
1002 additional discovery of information not routinely accessed or maintained on court order for good
1003 cause.

1004 The argument for locating this provision in Rule 34 is that the problem lies with Rule 34
1005 "document" production. The advantage of focusing on what is routinely maintained is that it may
1006 be more difficult to determine whether information is reasonably accessible. There is a question,
1007 however, whether the reference to information not routinely accessed includes embedded and
1008 metadata. But reasonable accessibility may be a more functional approach. Either way, the idea is
1009 to identify a line separating what is automatically discoverable from what is discoverable only on
1010 order after showing good cause.

1011 Similar variations are provided for Rule 26(b)(2). The first two are framed as a new factor
1012 (iv) in the part framed by the Style version as 26(b)(2)(B). The second two frame the same
1013 alternatives as a new 26(b)(2)(C).

1014 The first view expressed was that the two-tier approach should be framed as part of Rule 34,
1015 and as the version that looks to routinely maintained information. "We need some presumptions"
1016 because "there is so much available." We should require some level of good cause to get to
1017 information that is expensive to retrieve. But we should not link the question to the proportionality
1018 test of Rule 26(b)(2); that would shift the playing field too much. Nor is there any need to cross-

1019 refer, as the drafts to, to Rule 26(b)(2). We all know it is there. At the same time, it was recognized
1020 that "reasonably accessible" is the reason for having a two-tier system.

1021 The rejoining view was that this protection belongs in Rule 26(b)(2) in some form. The
1022 burden of retrieving electronically stored information is not unique to Rule 34 production. An
1023 organization asked to provide deponents who can testify to information known or readily obtainable
1024 by the organization will be charged with an obligation to retrieve electronically stored information
1025 and drill its designated deponents on the information. Any party asked questions by interrogatory
1026 will be obliged to search its electronically stored information in preparing answers — and if we
1027 afford less protection for Rule 33 respondents, discovery requests will shift to interrogatories.

1028 This view was accepted, leaving the question whether the protection should become a new
1029 item (iv) supplementing the three present 26(b)(2) items, or should be stated in a separate
1030 subparagraph (C). Location as a new subparagraph (C) may make it easier to understand, and will
1031 avoid any possible confusion arising from the statement in (b)(2)(B) that the court "must" limit
1032 discovery when item (i), (ii), or (iii) appears.

1033 It was suggested that the focus should not be on how hard it is to get the information —
1034 "reasonably accessible" — but on where a person usually goes to look for things. "Most information
1035 is there."

1036 The two-tier approach was opposed. Recognizing that there is a lot of electronically stored
1037 information, and that retrieval can be expensive, the overriding concern is that we should not shift
1038 the basic assumption of discovery. The system operates on the assumption that a party who has
1039 information should carry the burden of showing reasons why it should not have to produce the
1040 information. The system should not work so that a producing party can avoid this burden by simply
1041 saying "second tier." If the requesting party is forced to show that the information is reasonably
1042 accessible, or to show that the information is routinely maintained and routinely accessed, the
1043 expense and delay can be prohibitive. The motion will require "discovery on discovery," and expert
1044 inquiry and testimony. This will be the only way to show that information in fact is reasonably
1045 accessible. Small plaintiffs will be driven out of court. Adequate protective tools are available now
1046 through Rules 26(b)(2) and 26(c).

1047 Support for the two-tier approach was expressed again in terms of the enormous burdens that
1048 may arise from discovery of electronically stored information. The problem is aggravated by the
1049 phenomenon that such information never — well, hardly ever — really goes away. Ordinarily it is
1050 there if sufficient expense is incurred to search it out. And the problem can be bilateral — motions
1051 are filed against plaintiffs for not producing as well as against defendants.

1052 The opponent of two-tier discovery conceded all of these points, except for the problem of
1053 shifting the burden. The rule should require the responding party to carry the burden of showing that
1054 the information is not reasonably accessible, that further search is too costly. We know that soon
1055 all information will be stored electronically. That shift of information practices should not be used
1056 to shift the burden of justifying nonproduction.

1057 Another advocate of the two-tier approach noted that the typical request "implicates a search
1058 that frequently entails weeks of activity and millions of dollars. There is a ground shift in what is
1059 out there." If the responding party must come forward every time there is a two-tier question, "the
1060 motion will be made all the time. The leverage game will be played this way." It is better to
1061 respond with what is reasonably accessible in the ordinary course of system operation. That will
1062 be enough 95% of the time.

1063 This debate was distilled into the observation that the rule should be more precise about the
1064 allocation of the burden. The producing party will produce. Then the parties go to court. What

1065 happens there? The proposals would require the party resisting discovery to show why it need not
1066 produce. The court can decide on the depth of search, the sources searched, the time to be used, and
1067 perhaps cost sharing. Both sides need to argue the need to produce and the need for protection.
1068 "You have engaged the court. That is the important point." But the current mechanisms to get the
1069 court involved do not seem to be working as well as should be. Adoption of a new (b)(2) provision
1070 may be desirable for reasons similar to the reasons that led to the 2000 amendment that divided the
1071 (b)(1) scope of discovery between party-managed and court-managed discovery.

1072 The opponent of two-tier discovery agreed that basically the proposal would be appropriate
1073 if it does not shift a new burden to the requesting party. But the background is that the proponents
1074 of the rule want to shift the burden.

1075 It was suggested that one remedy might be to add a requirement that the court find the
1076 information is not reasonably accessible. The opponent agreed that this would help.

1077 Then a more explicit suggestion was made that the producing party should have the burden
1078 of showing that the requested information is not reasonably accessible. If that showing is made, the
1079 requesting party would have the burden of showing good cause for production. The opponent
1080 agreed that "that is what happens today." There is a motion to compel or a motion for a protective
1081 order. The initial moving burden is the key.

1082 In allocating the burden, it is important to remember that the responding party is in the best
1083 position to know and to show the burdens of search and access. If a substantial burden is shown,
1084 the requesting party is the one who should carry the burden of showing that the need for discovery
1085 outweighs the burden.

1086 An illustration was offered. An action is brought claiming a nationwide conspiracy since
1087 1994 to fix widget prices. The discovery demand is for "everything about widgets." The responding
1088 party "wants to be able to rely on my regular information system without looking into the attic.
1089 What happens when the requesting party asks me to look into the attic? Do I have to show the
1090 information is not reasonably accessible?" The two-tier approach is appropriate, but the responding
1091 party should be able to respond in the first instance by relying on its normal system.

1092 It was suggested that the most common sequence of events will be that the requesting party
1093 will seek information about the capacities of the responding party's information system, perhaps by
1094 a Rule 30(b)(6) deposition. Then it will move to compel. The responding party will have to respond
1095 to the motion to compel by showing that the information is not reasonably accessible. The burden
1096 would be the same if the responding party took the initiative by moving for a protective order.

1097 A different description led to substantially the same conclusion. The responding party will
1098 routinely state that some information is not reasonably accessible. The parties will confer. If they
1099 fail to agree, there will be a motion to compel, which requires a conference. If they still fail to agree,
1100 the motion will be pressed.

1101 The opponent of the two-tier approach stated that the approach is acceptable if the rule makes
1102 clear that the responding party has the burden of showing that requested information is not
1103 reasonably accessible. Indeed, this approach is likely to be helpful in this form. It will help sort
1104 through what really is available, and how to get it efficiently.

1105 It was suggested that the rule should focus directly on determining whether information is
1106 reasonably accessible, without adding the qualification that it be reasonably accessible "in the usual
1107 course of its regularly conducted activities." This question was left open for later resolution; the
1108 concern was that embedded and metadata may be reasonably accessible, and that focus only on

1109 reasonable availability might have the unintended effect of suggesting routine discovery of such
1110 data.

1111 A motion was approved to go forward with a Rule 26(b)(2)(C), keyed to the reasonable
1112 accessibility of electronically stored information. The rule should explicitly impose on the
1113 responding party the burden of showing that information is not reasonably accessible. Once that
1114 showing is made, the requesting party still could obtain discovery for good cause. And the
1115 redundant cross-reference to Rule 26(b)(2)(B) would be deleted. The new draft will be circulated
1116 to the Committee before submission to the Standing Committee with the recommendation to publish
1117 for comment.

1118 **Interrogatory Response: Rule 33(d)**

1119 The Committee approved recommendation for publication of a Rule 33(d) amendment that
1120 would allow a party to respond to an interrogatory by making electronically stored information
1121 available to the requesting party. The Committee Note emphasizes the application to electronically
1122 stored information of the limits now in Rule 33(d). The burden of deriving or ascertaining the
1123 answer must be substantially the same for either party. The response must specify the records in a
1124 way that enables the requesting party to locate the information as readily as the responding party
1125 could locate it. And there must be a reasonable opportunity to examine the information, which may
1126 require the responding party to provide technical support, information on application software,
1127 access to its computer system, or other assistance.

1128 **Nonparty Discovery: Rule 45**

1129 The Committee approved recommendation for publication of Rule 45 amendments that make
1130 clear the availability of electronically stored information in nonparty discovery. These amendments
1131 also carry into Rule 45 the proposed Rule 34 amendment that ensures that documents may be tested
1132 and sampled as well as inspected and copied. In this dimension, Rule 45 should mirror Rule 34.

1133 *Civil Forfeiture Proceedings: New Supplemental Rule G*

1134 Judge Rosenthal introduced the proposal to adopt a new Supplemental Rule G. Rule G
1135 would govern civil forfeiture actions. It is placed in the Supplemental Rules because many
1136 forfeiture statutes adopt the Supplemental Rules. The draft serves several purposes. It draws
1137 together in one place the civil forfeiture provisions that now are scattered through the Supplemental
1138 Rules. It adds provisions that reflect enactment of the Civil Asset Forfeiture Reform Act in 2000.
1139 Other new provisions reflect developments in the decisional law, including decisions on
1140 constitutional matters.

1141 Separation of Rule G from the remaining Supplemental Rules will enhance both forfeiture
1142 practice and general admiralty practice. Admiralty lawyers have been concerned that interpretation
1143 of common rules provisions may be shaped by responses to the needs of forfeiture proceedings,
1144 distorting the answers that should be given to meet the occasionally distinctive needs of admiralty
1145 proceedings.

1146 Judge McKnight, chair of the Civil Forfeiture and Sealed Settlements Subcommittee,
1147 explained the proposal further. The draft presented for discussion has been hammered out over the
1148 course of a year through many hours of conference calls, a Subcommittee meeting, and multiple
1149 drafts. Indispensable assistance has been provided by the Department of Justice and the National
1150 Association of Criminal Defense Lawyers. The representatives of the Department and NACDL have
1151 participated in the discussions at the highest level of professionalism. Their efforts have helped to
1152 produce a draft that can be recommended for publication.

1153 Discussion followed the order of the Rule G subdivisions.

1154 **Rule G(1)**

1155 Subdivision (1) states the general relationship between Rule G, Supplemental Rules C and
1156 E, and the Civil Rules. Rule G governs any issue that it addresses. There are some issues that have
1157 been left to Rule C or Rule E because those rules provide clear and sound answers. And many
1158 issues are left to the Civil Rules. The Supplemental Rules do not provide a complete, self-contained
1159 system. As one example among many, amendment of pleadings is governed by Civil Rule 15.

1160 **Rule G(2)**

1161 Subdivision (2) governs the complaint. Paragraph (f) requires that the complaint "state
1162 sufficiently detailed facts to support a reasonable belief that the government will be able to meet its
1163 burden of proof at trial." This standard is adopted from decisional law that has used these words to
1164 describe the particularized pleading required in a forfeiture action by Supplemental Rule E(2)(a).
1165 This pleading requirement in turn is integrated with Rule G(8)(b).

1166 **Rule G(3)**

1167 Subdivision (3) governs process directed against forfeiture property. For the first time, it
1168 requires that a court find probable cause before a warrant issues to arrest property that is not in the
1169 government's possession and is not subject to a judicial restraining order. This provision is one of
1170 several that confirm or establish advantages for potential claimants that present rules do not express.

1171 Paragraph (c)(ii)(B) is likely to attract some controversy. Subparagraph (ii) imposes a
1172 general requirement that a warrant and any supplemental process be executed as soon as practicable.
1173 Item (B) authorizes the court to order a different time when the complaint is under seal, the action
1174 is stayed before the warrant and supplemental process are executed, or the court finds other good
1175 cause. The government in fact has been able to file forfeiture complaints under seal or to obtain an
1176 order staying execution. This course is taken when there is a need for prompt filing to satisfy time

1177 limits, but also a need to protect ongoing criminal investigations and investigators or informers.
1178 Potential claimants do not like sealing or stay orders, however, and fear that this implicit recognition
1179 of such orders may encourage courts to enter them. The Committee Note addresses this concern by
1180 stating that the rule does not reflect any independent ground for ordering a seal or stay.

1181 Paragraph (c)(iv) says only that a warrant for property outside the United States may be
1182 transmitted to an appropriate authority for serving process where the property is located. It
1183 deliberately refrains from any attempt to dictate procedures to be followed in other countries. The
1184 United States cannot control, and may not be able to influence, these procedures.

1185 **Rule G(4)**

1186 Subdivision (4) governs notice. Paragraph (a) addresses the traditional method of giving
1187 notice by publication. Paragraph (b) is entirely new, directing that individual notice be directed to
1188 known potential claimants.

1189 The basic requirement of (4)(a) is that the government publish notice within a reasonable
1190 time after filing the complaint. Exceptions are allowed if the property is worth less than \$1,000 and
1191 individual (4)(b) notice has been sent to every person that can reasonably be identified as a potential
1192 claimant, or if the court finds that the cost of publication exceeds the property's value and other
1193 means of notice would satisfy due process. The Committee Note observes that the publication cost
1194 to be considered in this equation is the cost of the least costly method.

1195 As a substitute for traditional newspaper publication, (4)(a) allows publication on an official
1196 internet government forfeiture site. No such site exists now, but when the rule becomes effective
1197 this means of notice is likely to be more effective than newspaper publication. Recognizing that
1198 some individuals lack access to the internet, it is far more common to find that potential claimants
1199 do not in fact read the newspaper where notice is published or do not look to the legal notices.

1200 Paragraph (4)(a)(iv) states the standard for choosing among alternative authorized methods
1201 of publication. The government must select a means reasonably calculated to notify potential
1202 claimants. This standard was retained through several drafts. It was changed in a late draft to
1203 require choice of a means "reasonably calculated to be most effective to notify potential claimants."
1204 This change was undone soon after it was made. Due process is satisfied by selection of a traditional
1205 and customary means that is not less likely to reach potential claimants than other traditional and
1206 customary means. The government has a strong interest in choosing the most effective method so
1207 as to reduce tardy appearances by claimants who argue that a better means of publication should
1208 have been chosen, and does seek to publish by the most effective means. A rule that emphasizes the
1209 need to seek the most effective means, however, is likely to encourage litigation over such claims
1210 as that the government should have chosen one newspaper rather than another, publication in the
1211 district where the action was filed rather than the district where the property was seized, and so on.

1212 For newspaper publication in the United States, the rule gives a choice between three
1213 districts — where the action is filed, where the property was seized, or where property that was not
1214 seized is located. Choice among these alternatives will depend on the circumstances of the specific
1215 case. The alternatives available as to property outside the United States are different, reflecting in
1216 part the concern that some countries may forbid circulation of legal notices relating to United States
1217 proceedings.

1218 Direct notice to known potential claimants is provided by subdivision (4)(b). This practice
1219 is new to the rules, but reflects due process concerns that notice by publication should be
1220 supplemented by direct individual notice when is feasible.

1221 The (4)(b)(ii) provisions for the content of the individual notice include a statement of the
1222 time for filing a claim and the time for filing an answer. These provisions depart in some ways from
1223 the times for claim and answer set out in CAFRA, 18 U.S.C. § 983(a)(4)(A) and (B). The
1224 Committee Note explains that the rule provisions can be reconciled with the statutory provisions,
1225 and are designed to better implement the statutory purposes.

1226 The means of sending individual notice are described in subdivision (4)(b)(iii). The basic
1227 requirement is stated in (b)(iii)(A): notice must be sent by means reasonably calculated to reach the
1228 potential claimant. The Committee Note provides examples. The central dispute is whether the rule
1229 instead should require service of process under Civil Rule 4. The rule resolves this dispute in favor
1230 of a functional approach. This approach does not rely on the belief that notice by publication is
1231 likely to reach all potential claimants in most forfeiture proceedings. Although publication is the
1232 traditional means of notice for in rem proceedings, there is little reason to suppose that it is
1233 particularly effective. Steps taken to seize the defendant property, however, are quite likely to bring
1234 notice home to most potential claimants. There is no tradition requiring formal service, and a
1235 functional approach seems sufficient. As with choosing the means of publication, the government
1236 has an interest in choosing a means of notice that is effective.

1237 Later subparagraphs address the means of notice in specific settings. The first, (4)(b)(iii)(B),
1238 allows notice to the attorney representing a potential claimant with respect to the seizure of the
1239 property or in related proceedings. The Committee Note observes that this means should be used
1240 only when it reasonably appears to be the most reliable means. The requirement that the attorney
1241 be representing the potential claimant in a matter related to the forfeiture seeks to limit such notice
1242 to circumstances that make it reasonable to rely on the attorney to transmit notice to the claimant.

1243 Substantial debates surrounded the next subparagraph, (b)(iii)(C). This provision requires
1244 that notice sent to a potential claimant who is incarcerated be sent to the place of incarceration. The
1245 problems that surround such service are explored from the due process perspective in *Dusenbery v.*
1246 *U.S.*, 534 U.S. 161 (2002). The government should be responsible for identifying the correct prison.
1247 But it cannot be responsible for the practices each prison adopts for internal distribution of legal
1248 mail. Potential claimants may be incarcerated in state prisons, local jails, and even lock-ups. There
1249 are 20,000 forfeitures a year. In 80% of them, at least one potential claimant is incarcerated.
1250 Incarcerated claimants "have every incentive to deny receiving notice." The government can
1251 produce prisoner-signed mail log books or similar proofs for persons in federal prisons, but often
1252 cannot for those in other prisons. It cannot be held responsible for policing the mail distribution
1253 policies of state agencies, as the Seventh Circuit has recently recognized. Even drafting the rule to
1254 require mail with a return receipt would be a mistake. The receipt would be signed by a prison
1255 official, providing no information whether the notice in fact reached the potential claimant. For that
1256 matter, in some circumstances notice may be accomplished by other means — personal service
1257 occasionally is used when the claimant appears at a hearing in a related proceeding. NACDL
1258 believes that the rule should require that the notice actually get to the prisoner, by means that require
1259 the prisoner to sign for it. The *Dusenbery* decision only establishes the minimum due process
1260 requirements, and by a bare majority at that. "We should do better. There are a lot of cases like
1261 this."

1262 Discussion of notice to incarcerated claimants began by asking whether sending notice to
1263 counsel bypasses these problems; the answer is that (iii)(B) is intended to provide that notice to
1264 counsel suffices. The NACDL observer urged that at a minimum, the rule should require notice
1265 both to counsel and to the potential claimant, but it was responded that this would be a burden, and
1266 a reminder was provided that for some time NACDL opposed any opportunity to rely on notice for
1267 counsel.

1268 The discussion continued by asking whether an affidavit of service should be required. The
1269 government recognizes that an affidavit of mailing would make sense on moving for default. But
1270 it was argued that failure of any claimant to appear in an in rem forfeiture proceeding does not afford
1271 the same assurance that is provided by failure of a personally served defendant to appear in an in
1272 personam action. The lack of a claimant is a more important signal that notice may not have been
1273 effected. This observation led to the question whether the Committee Note should say something
1274 about "default." It was observed that the government does not have to move for default if no claim
1275 is made in an administrative proceeding, but recognized that Rule G applies only to judicial
1276 proceedings. It seems better not to venture beyond the observations already made in the draft Note.

1277 The problem of notice to an incarcerated person was summarized by suggesting that the draft
1278 provides the least unsatisfactory answer to a terribly difficult problem that has no good answer. Rule
1279 G cannot fix the problem of establishing reliable means of notice to people in state prisons.

1280 **Rule G(5)**

1281 Subdivision (5) governs claim and answer. The time for filing a claim is set by the
1282 individual G(4)(b) notice if notice was sent to the claimant. If direct notice was not sent but notice
1283 was published, the draft sets the claim deadline as 30 days after final publication of notice. The draft
1284 will need further work in one respect. If notice is published on an official internet site, there may be
1285 no "final publication." The options to be considered include 30 days after the thirtieth consecutive
1286 day of internet publication, or perhaps 60 days after the first of 30 consecutive days of internet
1287 publication.

1288 The (5)(b) provision sets the time to answer or to file a motion under Rule 12 within 20 days
1289 after filing the claim. As noted with Rule 4(b)(ii)(C), this provision modifies to some extent the
1290 provisions of 18 U.S.C. § 983(a)(4)(B). The government has urged that the time to file an answer
1291 should not be suspended by filing a Rule 12 motion, arguing that it needs information from the
1292 answer to help frame any motion to strike the claim for lack of standing. But under (5)(a)(i)(B) the
1293 claim itself must state the claimant's interest in the property, and the Rule 12 motion and litigation
1294 of the motion should reveal any additional information needed. This prospect is advanced by the
1295 special interrogatories provided in subdivision (6).

1296 **Rule G(6)**

1297 Subdivision (6) reflects, but narrows, the special interrogatory provisions of Supplemental
1298 Rule C(6)(c). The plaintiff in an admiralty action may serve interrogatories with the complaint;
1299 answers are due with the answer. Such extensive interrogatories are not needed in forfeiture
1300 proceedings; subdivision (6) is a clean illustration of the circumstances that distinguish the needs
1301 of admiralty practice from the needs of forfeiture practice. The special interrogatories authorized
1302 by (6) are limited to the claimant's identity and relationship to the property. The purpose is to
1303 facilitate early framing of the question whether the claimant has claim standing. The special
1304 interrogatories are described as "under Rule 33" to ensure that they count in applying the
1305 presumptive numerical limits of Rule 33. It has been protested that the time allowed by the draft to
1306 serve these interrogatories — up to 20 days after a claimant's motion to dismiss — is too long. So
1307 too it is protested that the government does not need the allowed 20 days after the interrogatories
1308 are answered to respond to the motion to dismiss. But these times seem reasonable in relation to the
1309 ordinary pace of litigation and the competing demands that often face United States Attorneys.

1310 **Rule G(7)**

1311 Subdivision (7) is drawn — but also departs — from provisions for preserving and disposing
1312 of property in Supplemental Rule E(9) and (10).

1313 Subdivision (7)(a) addresses preservation of property. As presented, it spoke to property not
1314 in the government's actual possession and also to property subject to precomplaint restraint.
1315 Discussion began by observing that the examples in the Committee Note included lis pendens as an
1316 example of precomplaint restraint; it was observed that a lis pendens notice is not filed until the
1317 complaint is filed, and asked why it should be included. After agreeing that lis pendens notices
1318 should not be used as examples, discussion turned to the broader question whether there is any need
1319 to address property subject to precomplaint restraint. It was agreed that there is no need; these
1320 words will be deleted.

1321 Paragraph (b) addresses sale of property. One of the grounds for sale listed in subparagraph
1322 (i)(A) is "diminution in value." The government is concerned that it be able to realize maximum
1323 value for property that may depreciate while the forfeiture proceeding remains pending. The rule
1324 does not require sale, but recognizes discretion — for example, the court can refuse to order sale,
1325 despite declining value, if the claimant can show an emotional attachment to a 1994 automobile.
1326 There must be good cause to order sale for diminishing value, as implied by (i)(D). A motion was
1327 made to delete "diminution in value." A claimant may have strong interests in market timing —
1328 when is the best time to sell shares of stock that fluctuate in value? — or emotional and family
1329 attachments to a home. The motion passed by vote of 8 for, 4 against. The Committee Note will
1330 be amended to state that diminution in value may establish "other good cause" for sale.

1331 Paragraph (b)(i)(C) provides for sale of property subject to a mortgage or taxes on which the
1332 owner is in default. This provision has proved difficult; the difficulties are reflected in the draft
1333 Committee Note. It was suggested that the Note would be improved by deleting the sentence
1334 stating: "In any event it is not always fair to require a claimant to continue payment commitments
1335 made in the expectation of ongoing use of the property." This sentence seems gratuitous advice.
1336 Beyond that, it was agreed that the rule provision should remain. There are circumstances in which
1337 sale seems appropriate to protect a mortgagee or tax authorities, or to facilitate disposition of
1338 property subject to frivolous claims.

1339 **Rule G(8)**

1340 Subdivision (8) governs motions.

1341 Paragraph (a) deals with a motion to suppress use of the property as evidence. It says that
1342 "a party with standing to contest the lawfulness of the seizure under the Fourth Amendment may
1343 move to suppress use of the property as evidence." The reference to standing is meant to avoid
1344 confusion between standing to make a claim in the forfeiture proceeding and the separate concept
1345 of standing to contest admissibility. The government also is concerned that if the rule does not refer
1346 to the Fourth Amendment, arguments will be made that the rule creates an exclusionary rule broader
1347 than the Fourth Amendment; an example might be an argument that the property must be suppressed
1348 as evidence because the warrant was not served as promptly as Rule G(3) requires. But it was asked
1349 whether the rule can and should deny standing to make a Fifth Amendment suppression argument,
1350 or an argument based on a statutory violation that requires suppression. Although the government
1351 recognizes that Fifth Amendment violations and some statutory violations have been held to require
1352 suppression, it believes that these theories have not yet been recognized in forfeiture proceedings.
1353 But it was responded that the rule should not presume to exclude these grounds for suppression. It
1354 was agreed that "under the Fourth Amendment" should be deleted, so that a motion to suppress can
1355 be made by "a party with standing to contest the lawfulness of the seizure." The Committee Note
1356 will say that the rule does not create a basis for standing that does not otherwise exist.

1357 Paragraph (b) deals with a motion to dismiss the complaint. Subparagraph (ii) states that a
1358 complaint may not be dismissed on the ground that the government did not have adequate evidence
1359 for forfeiture when the complaint was filed. Earlier drafts tracked the language of 18 U.S.C. §

1360 983(a)(3)(D): "No complaint may be dismissed on the ground that the Government did not have
1361 adequate evidence at the time the complaint was filed to establish the forfeitability of the property."
1362 The government views this subparagraph as an essential part of an interwoven compromise set of
1363 provisions. There is a problem in the categories of forfeiture proceedings excluded from § 983 by
1364 § 983(i)(2) — such matters as "legacy customs cases," IRS forfeitures, the International Emergency
1365 Economic Powers Act, and a few others. The Ninth Circuit, and one or two others, have adopted
1366 a rule that in these actions exempted from § 983, "pre-CAFRA law" applies. The government must
1367 have probable cause when the complaint is filed; if not, the action must be dismissed even though
1368 the government can establish probable cause at the time of dismissal. The possible collision
1369 between Rule G(8)(b)(ii) and this approach in some courts to CAFRA-exempt cases might be
1370 avoided by prefacing (ii): "In an action governed by 18 U.S.C. § 983(a)(3)(D), a complaint may not
1371 be dismissed * * *."

1372 It was asked whether Civil Rule 11 is violated if the government initiates a civil forfeiture
1373 provision without probable cause. The answer is reflected in G(2)(f), part of this integrated package.
1374 (2)(f) requires that the complaint state sufficiently detailed facts to support a reasonable belief that
1375 the government will be able to meet its burden of proof at trial. The dispute among the circuits for
1376 pre-CAFRA cases was resolved by § 983(a)(3)(D). The statutory concept is carried forward in the
1377 rule.

1378 The NACDL observer stated that the Third and Eighth Circuits have adopted the Ninth
1379 Circuit view for non-CAFRA cases. The Third Circuit has adhered to this view in a post-2000
1380 decision. Other courts go the other way or have identified the question without answering it. 19
1381 U.S.C. § 1615 and the Fourth Amendment require the Ninth Circuit view — there must be probable
1382 cause at the time of seizure, and so there also must be probable cause at the time of filing a forfeiture
1383 action. 18 U.S.C. § 983(c)(2) parallels § 983(a)(3)(D) — it is true that the government does not
1384 have to have sufficient evidence to establish forfeitability at the time of filing, but it must have
1385 probable cause.

1386 The government views this as a fundamental point. CAFRA resolves the argument in the
1387 government's favor, not in favor of claimants. If the complaint pleads facts as required by Rule
1388 G(2)(f) there is no need to establish probable cause. "A complaint does not seize the res. G(3)
1389 requires that the government show probable cause for a warrant to seize the res."

1390 It was observed that this debate raises issues not familiar in the civil procedure arena. We
1391 are speaking of the sufficiency of the complaint, and the argument seems to be based on a motion
1392 to suppress evidence packaged as a motion to dismiss. The legislative history is said to refer to
1393 summary judgment, reflecting a concern about the use of summary-judgment motions to contest
1394 probable cause at the time of filing.

1395 It was asked what harm could flow from a rule that simply mimics the statute? But, for that
1396 matter, what use does such a rule serve? The government believes that even a rule that simply tracks
1397 the language of the statute and that applies only to proceedings independently governed by the
1398 statute will do some good.

1399 The Committee approved a motion to revise (b)(ii) to incorporate the exact language of §
1400 983(a)(3)(D).

1401 A second motion was made to delete the final sentence of (b)(ii): "The adequacy of the
1402 complaint is governed by the requirements of subdivision (2)." The government opposed the
1403 motion, stating that this sentence is necessary to ensure that subdivision (2) has its intended force.
1404 A Committee member agreed: "this is a truism, but it may as well remain." The opposite view was
1405 expressed — nothing in (8)(b)(ii) changes subdivision (2), so we do not need the final sentence. The

1406 only effect it might have is to support a government argument that subdivision (2) shows there is
1407 no need to establish probable cause at the time of filing the complaint. This argument renewed the
1408 discussion of 19 U.S.C. § 1615 and the pre-CAFRA probable cause debates. That debate can
1409 continue in cases not governed by § 983(a)(3)(D), but Rule 8(b)(ii) should not leave the door open
1410 for argument that the debate is affected by the rule. In almost all cases, a complaint that satisfies
1411 G(2)(f) can be drafted only if there is probable cause. The motion to strike the last sentence failed,
1412 5 yes and 7 no. the Committee Note will say that the Rule takes no position on any question outside
1413 § 983(a)(3)(D).

1414 With style changes, Rule G(8)(b)(ii) will read:

1415 (ii) In an action governed by 18 U.S.C. § 983(a)(3)(D), the complaint may not be
1416 dismissed on the ground that the government did not have adequate evidence
1417 at the time the complaint was filed to establish the forfeitability of the
1418 property. The sufficiency of the complaint is governed by subdivision (2).

1419 Paragraph (d) addresses petitions to release property pending trial. Earlier drafts sought to
1420 defeat any resort to Criminal Rule 41(g) to accomplish release outside Rule G, and to defeat any
1421 petition for release in an action exempted from CAFRA by § 983(i). Research undertaken for the
1422 Subcommittee indicated that there may be some room to rely on Rule 41(g) in special circumstances,
1423 and that in some circumstances there may be room for an argument that due process requires a post-
1424 deprivation hearing. The Subcommittee determined that it would be inappropriate to attempt to
1425 resolve by rule the issues that remain open in these areas. A later draft that sought to avoid taking
1426 any position was challenged, however, on the ground that a position was implied in the attempt to
1427 take no position. The Subcommittee concluded that these provisions, once presented as
1428 subparagraphs (iii) and (iv), should be deleted.

1429 A motion was approved to recommend publication of Rule G and conforming changes in
1430 Supplemental Rules A, C, and E, subject to Subcommittee resolution of drafting issues identified
1431 in footnotes presented with the agenda materials.

1432 *Style Subcommittee A*

1433 Judge Russell and members of Style Subcommittee A reported on Style Rules 38 through
1434 53, minus Rule 45. Rule 45 was styled in conjunction with the discovery rules. Discussion was
1435 framed by Style 487, including the discussion footnotes.

1436 Rule 38. The revisions shown in text and approved in notes 1 through 3 were approved.

1437 A possible change in subdivision (d) was discussed but not adopted. The change would have
1438 revised the style draft as follows: "A party waives a jury trial unless its demand is properly served
1439 and filed. A proper demand ~~that complies with this rule~~ may be withdrawn only if the parties
1440 consent." Although "properly demanded" is used in Style Rule 39(b), concern was expressed that
1441 in Rule 38(d) "proper" might implicate the determination whether there is a right to jury trial.

1442 Rule 39. The Style Subcommittee accepted the suggestion that Rule 39(b) be written: "Issues on
1443 which a jury trial is not properly demanded ~~under Rule 38~~ are to be tried * * *."

1444 Rule 40. note 1 asks whether the Style Rule should address notice requirements. It was decided to
1445 leave the Style text as it is, retaining note 1 to point out the issues for the Standing Committee. The
1446 Style-Substance Track will include a proposal to revise Rule 40 in ways that will moot this issue.

1447 Rule 41. The Committee agreed that it is appropriate to add references to Rules 23.1(c) and 23.2 to
1448 Style Rule 41(a)(1)(A) for the reasons expressed in the Committee Note.

1449 Words were removed from 41(a)(1)(A)(i) as an unnecessary intensifier: "a notice of
1450 dismissal ~~at any time~~ before the adverse party serves * * *."

1451 The change from "instance" to "request" identified at note 2 was approved.

1452 The second sentence of 41(a)(2) was changed to read: "If a defendant has pleaded ~~served~~ a
1453 counterclaim before being served with the plaintiff's motion to dismiss, the action ~~must not~~ may be
1454 dismissed ~~against~~ over the defendant's objection ~~unless~~ only if the counterclaim can remain pending
1455 for independent adjudication."

1456 The change recommended in note 4 was adopted: "may move to dismiss the ~~an~~ action or any
1457 claim against it."

1458 A suggestion was made to divide 41(a)(2) into subparagraphs, in a fashion similar to
1459 41(a)(1). Professor Kimble responded that one-sentence divisions generally are not favored. There
1460 has been an unfortunate tendency in recent rules to divide too far. The question is purely a matter
1461 of style, to be resolved by the Style Subcommittee.

1462 It was asked whether the final words of 41(b) could be changed from "operates as" to "is"
1463 an adjudication on the merits. The change was rejected. The effect of the reference to an
1464 adjudication on the merits is confusing and confused in the decisions. For example, the rule says
1465 that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits. But it is
1466 well established that a dismissal for want of jurisdiction establishes issue preclusion on the
1467 jurisdiction question that was decided. "Operates as" at least has the virtue of suggesting that
1468 something may have the effect of an adjudication on the merits even when it is not.

1469 It was agreed that the text at note 5 should remain as presented — "may stay the proceedings
1470 until the plaintiff has complied."

1471 Rule 42. No issues arose.

1472 Rule 43. No issues arose.

1473 Rule 44. The change back from "authenticates" in earlier style drafts to "evidences," as explained
1474 in note 1, was approved. "Proved" in 44(a)(2)(C)(ii) will be changed to "evidenced" as suggested
1475 in note 4: "allow the record to be proved evidenced by * * *."

1476 "Otherwise" will remain in 44(a)(1) and (2) as flagged by notes 2 and 3.

1477 Brief discussion determined once again that the cross-reference at the end of 44(b) is
1478 properly to Style 44(a)(2)(C)(ii). The present rule allows admission of a written statement that there
1479 is no record or entry in a foreign record if the statement complies with the requirements for "a
1480 summary." The requirements for a summary are described in Style (a)(2)(C)(ii).

1481 Rule 44.1. The Style draft provides for notice of an issue of foreign law "by a pleading or other
1482 written notice." It was suggested that "notice * * * by notice" is awkward. It was agreed to
1483 substitute "writing": "by a pleading or other ~~written notice~~ writing."

1484 Rule 46. It was noted that the choice between "a party who" and "a party that" is a global issue.

1485 Rule 47. Present Rule 47 provides that the parties or their attorneys may supplement the court's
1486 examination of prospective jurors "by such further inquiry as [the court] deems proper." Style 47(a)
1487 refers to "additional questions." This expression may imply that the court has to review and approve
1488 specific questions. It was urged that "further inquiry" should be incorporated into the style draft.
1489 One likely resolution: "must permit the parties or their attorneys to make any further inquiry it
1490 considers proper, or must itself ask any of their additional questions it considers proper."

1491 Rule 48. No issues arose.

1492 Rule 49. It was agreed to delete "several" from Style (a)(1)(B): "submitting written forms of the
1493 ~~several~~ special findings * * *."

1494 Present Rule 49(a) calls for instructions necessary "to enable the jury to make its findings."
1495 Style 49(a)(2) directs the court to "instruct the jury so it can make its findings." Committee
1496 members agreed that "enable the jury" has a different sense. The Committee made a "strong
1497 recommendation" that "to enable" be restored. Whatever choice is made, the same term should be
1498 used in Style 49(b)(1): "must instruct the jury ~~as needed for it to~~ enable it to render a general verdict
1499 * * *."

1500 Deletion of "such" from (a)(3) as recommended at note 3 was approved.

1501 Deletion of "appropriate" from (b)(1) as recommended at note 1, p. 19, was approved.

1502 Style 49(b)(3)(A) tracks present 49(b) in addressing the situation in which answers to
1503 interrogatories are consistent among themselves but one or more is inconsistent with the general
1504 verdict. Present 49(b) says the court may enter judgment "in accordance with" the answers. Style
1505 49(b)(3)(A) says the court may enter judgment "according to the answers." It was asked whether
1506 this should be judgment "on the answers," the expression used in Style (b)(2) for entering judgment
1507 "on the verdict and answers" when they are consistent. "According to the answers" was defended
1508 on the ground that the interrogatories may not be complete — Rule 49(b) does not require that
1509 interrogatories address every issue necessary to decision. No change will be made.

1510 Rule 50. It was agreed to restore "during," so Style 50(a) will begin: "If a party has been fully heard
1511 on an issue during a jury trial * * *."

1512 The Committee approved addition to Rule 50(d) of the statement that the appellate court may
1513 direct entry of judgment on reversing denial of judgment as a matter of law. This addition fits within
1514 the limits of the Style Project because this authority has been recognized by the Supreme Court.

1515 Rule 51. Present and Style Rule 51(b)(3) say that the court "may instruct the jury at any time after
1516 the trial begins and before the jury is discharged." Loren Kieve suggested that "after the trial begins
1517 and" be deleted. Discussion of this suggestion pointed out that trial begins when the jury is sworn,
1518 or so it may seem. It is clear in criminal prosecutions that jeopardy attaches when the jury is sworn.
1519 Perhaps it is not so clear whether for some purposes a civil trial begins before a jury is sworn. The
1520 purpose of adding this language to the completely revised Rule 51, which took effect only last
1521 December 1, was to encourage trial judges to consider initial and interim instructions in complex
1522 cases. "Pre-instructions" can be important. The Committee decided that this question is a matter
1523 of style, not substance; an advisory motion to delete "after the trial begins and" failed, 5 yes and 6
1524 no.

1525 Style 51(a)(1) refers only to "jury instructions," rather than instructions "on the law" as in
1526 present Rule 51. Deletion of "on the law" was defended with the observation that jury instructions
1527 cover many matters other than the substantive law that governs the merits of the decision. These
1528 matters still are matters of "law," but perhaps it is better to delete "on the law" as Style Rule 51 does.
1529 The Style Subcommittee concluded that this deletion would not create any confusion as to the
1530 judge's authority to comment on the evidence. Although treatises often discuss comments on the
1531 evidence in conjunction with Rule 51, that is a matter of organizational convenience reflecting the
1532 fact that neither the Civil Rules nor the Evidence Rules refer to this common-law tradition.

1533 Style 51(c)(2)(B) says that an objection is timely if "a party, after not being informed of an
1534 instruction or action on a request * * * objects promptly * * *." It was suggested that this is

1535 awkward. It would be better to say "A party that was not informed * * * objects promptly * * *."
1536 Although this suggestion was seconded, the Committee concluded that the issue is one of style.

1537 Style Rule 51(d)(2) says the court may consider a plain error "regardless of whether the error
1538 has been preserved as required." The Committee agreed that "regardless of whether" changes the
1539 substance of present Rule 51(d)(2). Plain-error review is reserved for cases in which the error has
1540 not been preserved as required. If the error has been preserved as required, the limits of plain-error
1541 review do not apply. Rule 51(d)(2) will be restored to the present form: "A court may consider a
1542 plain error in the instructions affecting substantial rights ~~regardless of whether the error has that has~~
1543 not been preserved as required by (d)(1)." The Style Subcommittee may choose to revise this to "A
1544 court may consider a plain error in the instructions that has not been preserved as required by (d)(1)
1545 if the error affects substantial rights."

1546 Rule 52. Style Rule 52(a)(4) presents a global style question. Present Rule 52(a) says that a master's
1547 findings are "considered as the findings of the court" to the extent that the court adopts them. Style
1548 52(a)(4) says they are "considered the court's findings." The choice between "deemed" and
1549 "considered" may turn on the extent of fiction involved. "Deemed" would be used when something
1550 is a pure fiction. "Considered" would be used when there is some element of reality about treating
1551 one thing as some other thing that it is not. Under new Rule 53(g), a master's findings are reviewed
1552 de novo unless the court approves an agreement among the parties to review only for clear error or
1553 to accept the findings as final. Thus a master's findings may in fact be superseded by court findings;
1554 a master's findings adopted on de novo review are in fact the court's findings. Review for clear
1555 error adopts the findings as if the court's findings, so they may be considered the court's findings
1556 even though they are not. Adoption without any review still could be found to embrace the findings
1557 in some sense. All of this is for resolution according to the global convention ultimately adopted.

1558 Style 52(a)(6) carries forward the provision that a judge's findings are reviewed for clear
1559 error "whether based on oral or documentary evidence." The Committee recalled that this provision
1560 was deliberately added to emphasize that the clear-error rule applies, albeit in different fashion, even
1561 when the appellate court has before it the very same paper basis for decision that the trial court relied
1562 upon. But a trial-court decision may be based on evidence that is neither oral nor documentary.
1563 There may be a view of premises, and often tangible things are considered. The Committee
1564 concluded that the clear-error rule applies now to such decisions, so that the Style Project can
1565 change Rule 52(a)(6) to read: "Findings of fact, whether based on oral or ~~documentary~~ other
1566 evidence, must not be set aside unless clearly erroneous * * *."

1567 As a matter for future reference, not present consideration in the Style Project, it was asked
1568 whether Rule 52(a), as carried forward in 52(a)(3), creates an undesirable implication that it may
1569 be appropriate to make findings of fact in deciding a motion for summary judgment. This question
1570 may fit in with an eventual reconsideration of Rule 56 — one perennial suggestion is that Rule 56
1571 should require a statement of the facts that are found beyond genuine issue and of the reasons why
1572 they warrant summary judgment.

1573 The Committee Note points out several elements of the Style changes. Style 52(a)(3)
1574 expands the statement that findings are not necessary in deciding motions to reflect the fact that rules
1575 other than Rule 52(c) require findings on motions. Style 52(a)(5) makes explicit the conclusion that
1576 a party may object to findings on a decision to grant or refuse an interlocutory injunction even
1577 though the party did not request findings, or did not object to the findings or take similar measures.
1578 Finally, the former reference in Rule 52(c) to judgment "as a matter of law" has been deleted to
1579 avoid any confusion with the standards that govern judgment as a matter of law in a jury trial. A
1580 Rule 52(c) judgment on partial findings is the de novo factfinding responsibility of the trial judge.
1581 The Committee approved these statements in the Note.

1582 Rule 53. The changes flagged by note 2 on page 29 and note 1 on page 31 were approved. The
1583 change from "stipulate" in present 51(g)(3) to "agree" in Style 51(g)(3) involves a global issue to
1584 be resolved globally.

1585 Style Substance. Style Subcommittee A reported on reactions to some of the Style-Substance
1586 proposals that involve rules within Subcommittee A's purview. The proposal to delete present and
1587 Style Rule 4(k)(1)(C) was approved, subject to reconsideration if Professor Rowe's research should
1588 show any reason to reconsider. The reference to a "United States" statute in the Committee Note
1589 will be changed to "federal statute."

1590 The proposal to move beyond telephones alone in Rule 16(c)(1) was approved: "the court
1591 may require that a party or its representative be present or reasonably available by ~~telephone~~ other
1592 means to consider possible settlement."

1593 The relationship between Rule 36(b) and Rule 16 has been uncertainly expressed in both the
1594 present rule and the Style rule. It is proper to make this change: "~~Subject to Rule 16(d) and (e), t~~The
1595 court may permit withdrawal or amendment of an admission that has not been incorporated in a
1596 pretrial order if it doing so would promote the presentation of the merits of the action and if * * *."

1597 Discussion of Style Rule 40 showed the reasons why it is desirable to revise the first sentence
1598 to read: "Each court must provide by rule for scheduling trials ~~without request or on a party's request~~
1599 ~~after notice to the other parties.~~ * * *"

1600 *Style Subcommittee B*

1601 Judge Kelly presented the report for Style Subcommittee B for Rules 54 through 63,
1602 including parallel recommendations on the Style-Substance Track.

1603 Rule 54. The Committee approved the change in Style Rule 54(d)(2)(D) flagged by note 1: "the
1604 court may refer issues concerning relating to the value of services * * *."

1605 Professor Marcus was assigned to research the relationship between Rule 54(d)(2)(C) and
1606 new Rule 23(h). New Rule 23(h) (1) provides that a motion for an award of attorney fees in an
1607 action certified as a class action must be made by motion under Rule 54(d)(2), "subject to the
1608 provisions of this subdivision." Rule 23(h)(1) has timing provisions different from Rule 54(d)(2),
1609 reflecting the different circumstances of class actions. Professor Marcus's research concluded that
1610 there is an inconsistency between present Rule 54(d)(2)(C) and present Rule 23(h)(1) that was
1611 overlooked when Rule 23 was revised. The new provisions of Rule 23(h)(1) prevail, making it
1612 proper to fix the dissonance in the Style Project by deleting the reference to class members from
1613 Rule 54(d)(2)(C).

1614 Professor Marcus also pointed up another conflict between present Rule 54(d)(2)(C) and
1615 Rule 23(h). Rule 54(d)(2)(C) allows "a party" to make adversary submissions on an attorney-fee
1616 motion. Rule 23(h)(2) allows only a class member or a party from whom payment is sought to
1617 object to the motion. This provision was deliberately adopted to bar objections by other parties —
1618 a nonsettling defendant, for example, would not be allowed to object to an award of attorney fees
1619 against a settling defendant. Here too, the newer Rule 23(h)(2) governs. This consequence of
1620 adopting Rule 23(h)(2) should be reflected in the Style Project. Both changes can be reflected in
1621 Style 54(d)(2)(C): "Subject to Rule 23(h), ~~On~~ on request of a party ~~or class member,~~ the court must
1622 give an opportunity for adversary submissions on the motion * * *." The Committee Note will state
1623 that "The adoption in 2003 of Rule 23(h) limits the application of Rule 54(d)(2)(C) to class actions.
1624 This effect is reflected by adding the reference to Rule 23(h)."

1625 The Committee approved the Committee Note explanation of the Rule 54(b) change that
1626 deletes the requirement that there be "an express direction for the entry of judgment." The
1627 continuing requirement that there be an express determination that there is no just reason for delay,
1628 coupled with actual entry of judgment, satisfies the rule's purposes.

1629 Rule 55. Present Rule 55(a) provides that the clerk shall enter a default when a party "has failed to
1630 plead or otherwise defend as provided by these rules." Style Rule 55(a) deletes "as these rules
1631 provide." The Committee approved the deletion as proper within the Style Project. The cases show
1632 that the clerk may not enter default when a party has done something that counts as defending, even
1633 though it is not in a manner provided by the rules.

1634 Rule 56. Discussion of Style Rule 56(c) overlapped a suggestion made for the Style-Substance
1635 Track. Present Rule 56(c) directs that a summary-judgment motion "be served at least 10 days
1636 before the time fixed for the hearing." Style Rule 56(c) changes this to "at least 10 days before the
1637 hearing day." The Style-Substance Track suggestion would change this to "at least 10 days before
1638 it is submitted for decision."

1639 Support was expressed for referring to the time the motion is submitted for decision. That
1640 addresses the functional need. Summary-judgment motions often are decided without a formal
1641 "hearing." It was pointed out that the Fifth Circuit, responding to Texas state practice that required
1642 an actual hearing, has ruled that the motion can be heard at any time after 10 days.

1643 A different approach was suggested, looking to the functional problem by allowing 10 days
1644 to respond to the motion.

1645 Support also was expressed for "at least 10 days before the hearing."

1646 But it was pointed out that most districts have local rules establishing time limits for
1647 summary-judgment proceedings. The Style Project should not do anything that would interfere with
1648 those local rules. If anything is changed, the rule also should be changed to expressly authorize the
1649 local rules that now exist.

1650 It was further suggested that the time provisions in present Rule 56 "are a mess. They need
1651 fixing far beyond anything that can be accomplished in the Style Project." The subject will prove
1652 controversial.

1653 The present rule found support — why not continue to say "the time fixed for the hearing"?
1654 It was protested that ordinarily no time is fixed for the hearing. Another Committee member
1655 observed, however, that this corresponds to the "return date," a common aspect of practice in some
1656 courts. And an observer responded that this language is good because it supports the practice of
1657 providing an actual hearing, not a mere submission for decision. "'Heard' means something. Why
1658 change to submission?"

1659 Concern was expressed about leaving the rule as it is. The rule is "unconnected to the real
1660 world." Submission for decision seems proper, or else a direct focus on the time to submit opposing
1661 affidavits. That might be expressed by adding "during which time the opposing party may serve
1662 opposing affidavits."

1663 It was asked whether the court can shorten the 10-day period. The answer appears to be that
1664 although interim relief can be granted to meet emergent circumstances, the time for considering
1665 summary judgment cannot be accelerated absent agreement or waiver.

1666 It was concluded that Style Rule 56(c) should carry forward the present rule, with a small
1667 change of expression: "at least 10 days before the day fixed set for the hearing." This topic will be
1668 removed from the Style-Substance Track.

1669 In Style Rule 56(d)(2), it was agreed that the expression should be "interlocutory summary
1670 judgment may be entered on ~~the issue of liability~~ alone * * *."

1671 In Style Rule 56(e)(1), the Style Subcommittee had decided to retain "affirmatively" —
1672 affidavits must "affirmatively show that the affiant is competent to testify * * *." But after
1673 discussion it was concluded with the Style Subcommittee's concurrence that "affirmatively" can be
1674 deleted as unnecessary. It suffices to say that the affidavit must show that the affiant is competent
1675 to testify.

1676 Another change at the end of Style Rule 56(e)(1) was accepted: an affidavit may be
1677 supplemented or opposed by "~~further~~ additional affidavits."

1678 "[P]romptly" was deleted from Style Rule 56(g): the court must promptly order the
1679 submitting party to pay * * *."

1680 The Committee approved the Committee Note explanation of the Style decision to change
1681 "shall" in present Rules 56(c), (d), and (e) to "should" in the places that say the court "shall" grant
1682 summary judgment. "Must" would be inaccurate in light of the well-established doctrine that there
1683 is discretion to deny summary judgment even though the summary-judgment papers show there is
1684 no genuine issue of material fact. The Committee also approved the Note observations that courts
1685 should seldom exercise this discretion.

1686 Rule 57: The Committee approved this change in the Style draft: "A party may demand a jury trial
1687 ~~may be demanded~~ under Rules 38 and 39."

1688 Rule 58: Present Rule 58(b) separates paragraphs (1) and (2) with "and." The Committee agreed
1689 with the Style Subcommittee that this should be changed to "or." These two paragraphs set out
1690 alternatives.

1691 Rule 59: No issues arose.

1692 Rule 60: A global issue was noted for this change in Style Rule 60(b)(1): the court may relieve a
1693 party or ~~a party's~~ its legal representative * * *." This is part of the choice whether to refer to a party
1694 as "who" or "it, that."

1695 Present Rule 60(b) states that all Rule 60(b) motions "shall be made within a reasonable time,
1696 and for reasons (1), (2), and (3) not more than one year after the judgment * * *." It is clearly settled
1697 that the "reasonable time" requirement may require that a motion be made in less than one year. The
1698 one-year limit is a maximum that closes off any opportunity to argue that it is reasonable to move
1699 after more than one year, but does not ensure that any time up to one year is reasonable. Style Rule
1700 60(c)(1) says "A motion under (b) must be made within a reasonable time — and, for reasons (1),
1701 (2), and (3) within a year — after entry of the judgment * * *." Doubt was expressed whether this
1702 version clearly communicates the present meaning. No change was made, but room was left for the
1703 Style Subcommittee to change to "for reasons (1), (2), and (3) within no more than a year * * *."

1704 The final sentence of present Rule 60(b) begins: "Writs of coram nobis, coram vobis, audita
1705 querela, and bills of review and bills in the nature of a bill of review, are abolished * * *." Style
1706 Rule 60(d) deletes all of this sentence. The draft Committee Note refers to the phenomenon that
1707 although Rule 60(b) purports to abolish these writs, they have not disappeared completely.
1708 Occasionally a federal court relies on federal practice principles to address particularly distressing
1709 circumstances through one of these writs. See *Ejelonu v. INS*, 355 F.3d 539, 544-548 (6th Cir.
1710 2004). And lawyers familiar with state-court uses of these writs may attempt to carry the state
1711 practice over to federal court. Pro se litigants, moreover, frequently pick up on references to these
1712 writs and apply for them. The suggestion that the abolition should be restored was met by the

1713 protest that it would be a shame to continue forever with this backward-looking fixation on practices
1714 long buried. But it was responded that it is in fact forward-looking to anticipate continued resort
1715 to these writs and to provide a clear abolition in the rule rather than rely on a Committee Note that
1716 will be overlooked or deliberately ignored. A motion to restore the abolition was adopted, 10 yes
1717 and 1 no. The Style Subcommittee will decide whether the abolition should be placed in Style Rule
1718 60(d) or should become an independent subdivision (e).

1719 Rule 61. No issues arose.

1720 Rule 62. Present Rule 62(c) says that the court may suspend, modify, restore, or grant an injunction
1721 during the pendency of an appeal "upon such terms as to bond or otherwise as it considers proper
1722 for the security of the rights of the adverse party." Style Rule 62(c) renders this as "on terms for
1723 bond or other terms that ~~the court considers proper~~ to secure the adverse party's rights." This
1724 rendition was questioned on the ground that it implies that the terms must in fact secure the adverse
1725 party's rights. It is clearly settled that injunction bonds need not provide adequate security. Indeed,
1726 it is settled that a court may conclude that no bond should be required although there is a significant
1727 risk of substantial injury. The seeming style change may in fact change present meaning. It was
1728 responded that although present practice is in fact as described, present practice is a misreading of
1729 the present rule's language. The rejoinder was that the Style Project then should carry forward with
1730 language that supports the present misreading. The discussion concluded without making any
1731 recommendation.

1732 Style Rule 62(c)(2) has been progressively brought closer and closer to the language of the
1733 present rule. The current proposal is: "(2) by the assent of all its judges, as evidenced by their
1734 signatures." The difficulty has been that the present rule seems to say that all three members of a
1735 three-judge court must agree before the court can act on issues relating to an injunction pending
1736 appeal. There are real questions whether that is a wise rule, and whether in any event an Enabling
1737 Act rule can purport to circumscribe the authority of a two-judge majority of a three-judge court.
1738 The Committee agreed to accept the proposed language.

1739 Rule 63. After substantial discussion, Subcommittee B agreed to the Style Subcommittee's proposal
1740 to change the description of a judge's unavailability to proceed with a case. Present Rule 63
1741 addresses a judge who "is unable to proceed." Style Rule 63 refers to a judge who "cannot" proceed.
1742 But the caption of Style Rule 63 continues to refer to a judge's "inability" to proceed. The
1743 dissonance between the change in the rule text and the failure to change the caption was challenged.
1744 But the Style draft was defended on the ground that continued use of "inability" in the caption shows
1745 that "inability to proceed" means the same thing as "cannot proceed." The question why the
1746 language of the rule had been changed was raised. The Committee recommended to the Style
1747 Subcommittee that the language of the rule be changed back to conform to the present rule: "If the
1748 judge who commenced a hearing ~~cannot~~ is unable to proceed, * * *."

1749 Style-Substance. In addition to Rule 56(c), Style Subcommittee B addressed the proposal to amend
1750 Rule 24(a)(2) on the Style-Substance track. This proposal reflects a widespread belief that the
1751 threshold for intervening under Rule 24(a)(2) should be the same as the criterion for joining a party
1752 under Rule 19(a)(1)(B). Rule 19 describes a nonparty who claims an interest relating to the subject
1753 of the action. Rule 24(a)(2) describes a nonparty who claims an interest relating to "the property
1754 or transaction that is" the subject of the action. Deleting these words from Rule 24(a)(2) would
1755 make it conform to Rule 19. But the cases do in fact rely on this language in present Rule 24(a)(2).
1756 Deleting it seems a subject too serious to be added to the list of "clearly right" changes suitable for
1757 the Style-Substance track. The Committee agreed to remove this proposal from the Style-Substance
1758 Track.

1759 Style Subcommittee B had no concerns about any of the other Style-Substance Track
1760 proposals for rules that have been its responsibility in the Style Process.

1761 *Rule 50(b): Foundation for Post-Verdict Motion*

1762 From the beginning in 1938, Rule 50 has permitted a post-verdict motion for judgment
1763 notwithstanding the verdict only if the moving party had moved for a directed verdict at the close
1764 of all the evidence. This requirement was carried forward when the terminology was changed to
1765 "judgment as a matter of law." The cases continue to agree that a post-verdict motion generally
1766 cannot be supported by a motion made during trial but before the close of all the evidence. At the
1767 same time, the substantial number of reported appellate opinions that continue to wrestle with this
1768 requirement show that lawyers all too often forget to renew earlier trial motions at the close of all
1769 the evidence. Some of the opinions permit modest relaxations of the requirement, inviting still
1770 further appeals attempting to resurrect failures to comply punctiliously with the requirement.

1771 The Rules 15 and 50 Subcommittee proposed to amend Rule 50(b) to allow a post-verdict
1772 motion for judgment as a matter of law to be supported by any motion for judgment as a matter of
1773 law made during trial under Rule 50(a). This proposal rests on the conclusion that a motion made
1774 during trial serves the functional needs that have been urged to support the close-of-all-the-evidence
1775 requirement, and at the same time avoids unnecessary procedural forfeitures. A motion made during
1776 trial alerts the opposing party to the claimed inadequacy of the evidence and affords a clear
1777 opportunity to supplement the evidence. The trial motion also alerts the court to the opportunity to
1778 simplify the proceedings by granting judgment as a matter of law on all or part of the case before
1779 submission to the jury. Because these important functional needs are satisfied, the Seventh
1780 Amendment also is satisfied.

1781 As a matter of style, it was explained that it seems better to refer expressly to a motion for
1782 judgment as a matter of law made "under subdivision (a)." Both present Rule 56 and Style Rule 56
1783 refer to granting summary judgment when the moving party is entitled to "judgment as a matter of
1784 law." The Subcommittee considered and rejected the possibility that a post-verdict motion might
1785 be supported by arguments made to support a pretrial motion for summary judgment. A post-verdict
1786 motion under Rule 50(b) should be clearly limited to grounds urged at trial.

1787 The Committee recommended this amendment for publication. There was not time to
1788 discuss the Committee Note, which may be shortened before the rule is presented for publication.

1789 The Subcommittee also presented without recommendation another proposal to amend Rule
1790 50(b). Original Rule 50(b) set the time limit for seeking a judgment n.o.v. as 10 days after the jury
1791 was discharged if a verdict was not returned, but was later amended to set the time to renew a
1792 motion for directed verdict as 10 days after the entry of judgment. This change conformed Rule
1793 50(b) time limits to the time limits set in Rules 52 and 59. But it seems to allow an extraordinarily
1794 long time to move if the jury fails to return a verdict. It would be foolish to permit a motion after
1795 a second trial to rely on the inadequacy of the record at the first trial. After a second trial the
1796 sufficiency of the evidence should be measured by the record at the second trial. For that matter,
1797 it would be disruptive to permit renewal of a motion made during the first trial on the eve of the
1798 second trial. When the jury has failed to agree, it seems sensible to restore the time limit to 10 days
1799 after the jury is discharged. Any motion after that would be a motion for summary judgment before
1800 the second trial necessitated by the first jury's failure to agree. The moving party could rely on the
1801 first trial record to support the Rule 56 moving burden; if the trial record shows that the opposing
1802 party does not have sufficient evidence, summary judgment will be granted unless the moving party
1803 is able to supplement the trial record with sufficient evidence to create a jury issue.

1804 This proposal has lingered for several years on the Committee agenda. The Subcommittee
1805 could not make time to consider it, but presented it without recommendation in the thought that it
1806 is better to consider at one time any likely Rule 50(b) amendments.

1807 One consequence of the lack of Subcommittee deliberation immediately appeared. The draft
1808 prepared for Subcommittee consideration expressed the separate time limit as follows: "or if a
1809 complete verdict was not returned by filing a motion no later than 10 days after the jury was
1810 discharged." Rereading this language, however, suggested a possible problem: when a jury returns
1811 a partial verdict, the time limit should apply only to those issues on which the jury has failed to
1812 agree. Matters resolved by the verdict should be governed by the general provision geared to entry
1813 of judgment. One suggestion was that the rule should read: "or — if the motion addresses a jury
1814 issue not decided by the [a?] verdict — no later than 10 days after the jury was discharged." The
1815 Subcommittee will consider this language further.

1816 The Committee approved a recommendation to publish this second Rule 50(b) amendment
1817 for comment in a form to be resolved by the Subcommittee.

1818 As a matter of style, it was suggested that the final sentence of Rule 50(b) be revised:
1819 "Alternatively, the movant may ~~alternatively~~ request a new trial or join a motion for a new trial
1820 under Rule 59 * * *." This suggestion was resisted. It seems to describe the new trial motion as an
1821 alternative to the renewed motion for judgment as a matter of law. The emphasis instead should be
1822 on the new trial as alternative relief — the movant's first request is for judgment as a matter of law,
1823 with a new trial as a less desirable alternative.

1824 *Rule 15*

1825 The Rules 15 and 50 Subcommittee has concluded that the Committee agenda is too fully
1826 occupied by more pressing matters to support present consideration of proposals to amend Rule 15.
1827 Although some of the proposals seem simple, they raise may difficult issues that cannot be resolved
1828 without extensive deliberation. The Committee agreed that the Rule 15 proposals should be carried
1829 on the agenda for consideration in the future.

1830 *E-Government Act*

1831 Judge Fitzwater chairs the Standing Committee E-Government Act Subcommittee. He
1832 introduced the questions raised by the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899,
1833 2913, 44 U.S.C. 101 note. Section 205 requires any document that is filed electronically to be made
1834 available online. Paper documents may be converted to electronic form; if converted, they too must
1835 be made available online. Section 205(c)(2), however, provides that a document shall not be made
1836 available online if it is "not otherwise available to the public, such as documents filed under seal."
1837 Section 205(c)(3) requires the Supreme Court to prescribe Enabling Act Rules "to protect privacy
1838 and security concerns relating to electronic filing of documents and the public availability * * * of
1839 documents filed electronically." Section 205(c)(3)(A)(iv), finally, provides that any Enabling Act
1840 rule that provides for redaction of information shall provide that a party who wishes to file an
1841 otherwise proper document containing such information may file an unredacted document under
1842 seal. The unredacted and sealed document "at the discretion of the court and subject to any
1843 applicable rules issued [under the Enabling Act] shall be either in lieu of, or in addition[,sic] to, a
1844 redacted copy in the public file."

1845 The Judicial Conference Court Administration and Case Management Committee has worked
1846 hard to develop initial responses to the E-Government Act. Their recommendations have been made
1847 the basis for the initial recommendations of the E-Government Act Subcommittee. Professor Capra,
1848 Reporter for the Evidence Rules Committee, has been designated lead reporter for this project. He
1849 has prepared a template rule to be considered by each of the advisory committees. The Standing

1850 Committee hopes that the advisory committees will consider the template both to determine whether
1851 the template might be improved in ways that apply to all the sets of rules and also to determine
1852 whether special needs dictate departures from the template for a specific set of rules. Professor
1853 Schiltz has prepared a refined version of the template, and the materials submitted to the Civil Rules
1854 Committee reflect still further variations. The advisory committee reporters will confer with the E-
1855 Government Act Subcommittee in conjunction with the June Standing Committee meeting.

1856 One illustration of the ways in which specific concerns may arise under a particular rules set
1857 arose in conjunction with this meeting. When Department of Justice lawyers reviewed the agenda
1858 materials, they suggested that the template rule makes no sense for civil forfeiture proceedings.
1859 Civil forfeiture procedure requires public notice of many things that the government would be
1860 required to redact from court filings. It seems clear that significant work will need to be done to
1861 study and resolve this concern.

1862 The advisory committees also will have a second responsibility. Each set of rules must be
1863 reviewed to determine whether revisions should be made in addition to adoption of a general E-
1864 Government Act rule. The materials submitted for this meeting include not only a proposed "Rule
1865 5.2" based on modifications of the general template but also a long list of Civil Rules that might be
1866 considered for possible revision.

1867 Discussion began with an observation that the problems considered at a recent meeting of
1868 Chief District Judges show that it will be important to move as rapidly as possible toward a new rule.

1869 It also was noted that the rather ambiguous statutory provision for routine filing under seal
1870 is a real problem. An amendment has been proposed to Congress, and there are hopes that it will
1871 be approved at this session. The prospect that the statute establishes a general right to file under seal
1872 is troubling on at least two scores. The practical burden on court clerks will be staggering. And the
1873 tradition of public access, sought to be carried forward into an era of electronic filing, could be
1874 substantially reduced.

1875 The burdens of complying with even simple redaction requirements may be far greater than
1876 appears on casual contemplation. Discovery materials, for example, are to be filed only when used
1877 in the proceeding or ordered by the court. But does that mean that at that time they must be redacted
1878 to expunge home addresses, the names of minors, all but the last four digits of financial account
1879 numbers, and so on? Lawyers already are reacting to these concerns by reframing the questions put
1880 at deposition and so on. But care must be taken to ensure that nothing has slipped in execution.

1881 It had been hoped that the several advisory committees would be able to take action on E-
1882 Government Act Rules proposals during the fall 2004 meetings. As continued study continues to
1883 suggest new problems, however, it appears that it may be necessary to consider these rules both in
1884 the fall and again during the spring 2005 meetings. Proposals advanced for publication at the June
1885 2005 Standing Committee meeting will be timely for publication in August 2005, the likely
1886 publication date even if proposals were advanced for the January 2005 Standing Committee meeting.
1887 Work will continue.

1888 *Federal Judicial Center Study: Sealed Settlement Agreements*

1889 Tim Reagan presented the final Federal Judicial Center Report on sealed settlement
1890 agreements filed in federal courts. The study surveyed 288,846 civil cases in 52 districts. It found
1891 1,272 filed and sealed settlement agreements. In 97% of those cases, the complaint was not sealed,
1892 leaving open public access to information about the subject of the action. Study of the few actions
1893 in which both complaint and settlement were sealed suggested that only a very few cases involved
1894 matters likely to be of general public interest.

