MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 3-4, 2002

1 The Civil Rules Advisory Committee met on October 3 and 4,
2 2002, at La Posada de Santa Fe in Santa Fe, New Mexico. The meeting
3 was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.;
4 Justice Nathan L. Hecht; Robert C. Heim, Esq.; Professor John C.
5 Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Paul J. Kelly, Jr.;
6 Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D.
7 McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal;
8 Judge Thomas B. Russell; and Judge Shira Ann Scheindlin. Professor
9 Edward H. Cooper was present as Reporter, Professor Richard L.
10 Marcus was present as Special Reporter, and Professor Thomas D.
11 Rowe, Jr., was present as Consultant. Judge Anthony J. Scirica,
12 Chair, and Judge Sidney A. Fitzwater represented the Standing
13 Committee. Judge James D. Walker, Jr., attended as liaison from
14 the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of
15 the Standing Committee Style Subcommittee, attended by telephone;
16 Professor R. Joseph Kimble, Style Consultant to the Standing
17 Committee, also attended. Peter G. McCabe, John K. Rabiej, Jeffrey
18 Hennemuth, and James Ishida represented the Administrative Office.
19 Thomas E. Willging, Robert Niemic, Kenneth J. Withers, and Molly
20 Treadway Johnson (by telephone) represented the Federal Judicial
21 Center. Ted Hirt, Esq., Department of Justice, was present.
22 Observers included Francis Fox (American College of Trial Lawyers);
23 Lorna Schofield (ABA Litigation Section); Peter Freeman (ABA
24 Litigation Section); Ira Schochet; and Alfred W. Cortese, Jr.

25 Judge Levi opened the meeting by observing that the Committee
26 has accomplished much this year, but still has much to do. He
27 noted that Robert Heim was present for the first time as a
28 Committee member, but has been a good friend of the committee over
29 the years, often attending meetings and also offering advice to the
30 Class Action Subcommittee.

31 Judge Levi further noted that Mark Kasanin, inconceivably, is
32 concluding service as a member after ten years; the Committee feels
33 profound gratitude for all of his work from 1992 to 2002. The ten-
34 year span of service happened because it was so difficult for the
35 Committee to let go. He participated diligently and to great
36 effect as a committee member, always concerned to find the best
37 answers for the operation of the system and without "carrying a
38 brief" for any particular point of view. He has been a good
39 ambassador to bar groups, and an invaluable liaison to the Maritime
40 Law Association in dealing with the Admiralty Rules. Member
41 Kasanin responded that the Committee's work has been a very
42 worthwhile effort. The Committee has had fine leadership. Members
43 from different backgrounds of experience and perspectives have
44 shared their views and have worked well together. There have been
45 a few disappointments about proposals that could not be carried

46 through to adoption, but some of the things not done may yet
47 reemerge. Much has been accomplished in these ten years.

48 Good news was noted. Sol Schreiber, former member of the
49 Standing Committee and liaison to this Committee, is soon to be
50 married; the Committee expressed its congratulations, best wishes,
51 and sense of joy to a long-time friend. So too, Alfred W. Cortese,
52 Jr., a constant observer, is to marry soon. The Committee extended
53 its congratulations and best wishes to him as well.

54 A certificate of appreciation for ten years of service as
55 Reporter was presented to Professor Cooper.

56 Francis Fox presented a memorial minute to John P. Frank, who
57 passed away in September, replete with quoted "Frankisms." Mr.
58 Frank, one of the country's leading lawyers, was a member of this
59 Committee forty years ago. He continued to pay close attention to
60 the Committee's work, and to provide valuable help. His
61 contributions to the work on class actions informed the Committee
62 throughout the process that led to the amendments proposed for
63 adoption in 2002. Fox first met Frank in 1991, when the American
64 College of Trial Lawyers began an effort to support Rule 11
65 amendments, to "put Rule 11 back in its cage after the 1983
66 amendments." The 1983 changes were designed to encourage more
67 sanctions. They encouraged not only sanctions, but too many
68 sanctions proceedings. In a matter of days, Frank created a
69 coalition of judges and lawyers, marshalling not only facts and
70 evidence but also people. Frank framed arguments as well: "Judges
71 like Rule 11. Lawyers do not. In a world of cats and mice, it is
72 better to be a cat. But Rule 11 is institutionally bad for all of
73 us." In the Rule 23 review, he advised the Committee in 1996 that
74 the settlement class is a perversion. "In my view, this rule has
75 turned the courts into merchants of res judicata, turned courts
76 into 'Uncle Santa Claus for lawyers,' and has done little good for
77 many classes." His institutional memory of the social currents at
78 work that carried the committee to the 1966 amendments of Rules
79 23(b)(1) and (2) was constantly before us. And then "Judge
80 Wyzanski had his flash of genius." He recreated for the Committee
81 the exchanges that led to creation of the opt-out as a protection
82 for members of what became (b)(3) classes, from Wyzanski to Moore
83 to Frank and back. Beyond constant reminders that no one had
84 foreseen what Rule 23(b)(3) would become, Frank provided continuing
85 advice on the danger of unintended consequences. A proposal to
86 permit a preliminary evaluation of the merits as part of a (b)(3)
87 certification determination, for example, was challenged as a
88 horrible idea. It will be difficult to get by without John Frank.
89 We need to reinvent him.

90 Judge Levi noted that Professor Rowe is back with the
91 Committee as a consultant on the style project. He served six
92 years as a member of the Committee. He does the hard work. He was
93 particularly engaged in the discovery work. He sees both the big

94 picture and the details. Professor Rowe responded that it is good
95 to be back with the Committee.

96 *Report on Standing Committee and Judicial Conference*

97 Judge Levi reported that Rules 51 and 53 were approved by the
98 Judicial Conference as consent-calendar items, without discussion.
99 The Rule 23(e)(3) "second opt-out" from a proposed settlement was
100 on the discussion calendar because it was seen to be important and
101 potentially controversial. But it too was approved without
102 difficulty. The New York Times published a favorable article about
103 the class-action proposals on the day following Judicial Conference
104 approval.

105 The Standing Committee discussion of Rule 23 focused primarily
106 on the 23(e)(3) second opt-out. The language was changed to rely
107 on the power to disapprove a settlement that does not, by its
108 terms, provide a second opt-out opportunity. This change leaves
109 the matter unambiguously within party control: the court cannot, by
110 directing a second opt-out opportunity in the notice of settlement,
111 force the parties to accept a settlement that they would not have
112 agreed to if it included a second opt-out opportunity. The
113 Committee Note was shortened and revised to emphasize that lapse of
114 time and changed circumstances are particular reasons for
115 permitting a second opt-out opportunity. The Standing Committee
116 did not want to encourage use of the second opt-out as a means of
117 avoiding doubts about the fairness of the settlement: the trial
118 court should be forced to confront the fairness question directly,
119 without assuaging its doubts by relying on the opportunity to
120 request exclusion.

121 Rule 53 was changed by the Standing Committee by deleting a
122 late-added part of Rule 53(b)(2)(B). The change restored the open
123 direction that the order appointing a master must state "the
124 circumstances — if any — in which the master may communicate ex
125 parte with the court or a party," eliminating the qualification
126 that ex parte communications with the court must be limited to
127 administrative matters unless the court, in its discretion, permits
128 ex parte communications on other matters. Concerns were expressed
129 that the deleted portion might suggest greater room for ex parte
130 communications than is appropriate, and that there might be some
131 intrusion on matters of professional responsibility. Another
132 change restored verbatim the provision of present Rule 53(f) that
133 Rule 53 applies to a magistrate judge only if the order referring
134 a matter to the magistrate judge expressly provides that the
135 reference is made under Rule 53. The Advisory Committee had
136 developed a complex provision addressing appointment of magistrate
137 judges as special masters. The provision was opposed by the
138 magistrate judges association and by the Judicial Conference
139 committee on magistrate judges, and the Advisory Committee acted to
140 delete all references to magistrate judges. In the Standing
141 Committee, concerns were expressed that magistrate judges are

142 routinely appointed as special masters in some districts for
143 certain kinds of cases. Present Rule 53(f) was restored to the new
144 rule as subdivision (i) to address this concern.

145 In all, the Standing Committee meeting went very well.

146 Judge Scirica praised as "brilliant" Judge Levi's presentation
147 of Rule 23(e)(3) in the Judicial Conference. He also noted that
148 the Administrative Office memorandum submitting the Civil Rules
149 proposals to the Judicial Conference was very good, easing the path
150 to the consent calendar. The Standing Committee submitted to the
151 Judicial Conference the Advisory Committee report on minimum-
152 diversity class-action legislation. The Federal-State Jurisdiction
153 Committee also has devoted much time to studying such legislation
154 over the last few years, and continues to take an approach somewhat
155 different from the Advisory Committee recommendations.

156 *Mass Torts Proposals: Bankruptcy and Minimal Diversity*

157 Judge Levi summarized a meeting with representatives of the
158 Judicial Conference Bankruptcy Administration Committee on the eve
159 of the Judicial Conference meeting. The National Bankruptcy Review
160 Commission made proposals to address future mass tort claims in
161 bankruptcy. The Bankruptcy Administration Committee formed a
162 committee to consider the proposals — Judge Rosenthal was the
163 Advisory Committee member of the committee. The central difficulty
164 arose in addressing the question whether the Amchem and Ortiz
165 decisions that have limited the use of Rule 23 in addressing future
166 claimants should apply differently in bankruptcy. The Civil Rules
167 Committee has expressed doubts and reservations about the Review
168 Commission proposals. The Bankruptcy Committee report did not
169 assuage those doubts, in part because the scope of the
170 recommendations was not clear. The recommendations might be read
171 to imply that bankruptcy proceedings should be used to address not
172 only future claims, but also the related present mass tort claims.
173 The September meeting representatives of the Civil Rules Committee
174 were Judge Levi, Judge Rosenthal, Sheila Birnbaum, and David
175 Bernick (a member of the Standing Committee). The Bankruptcy
176 Committee seemed to be persuaded that it would not be wise to
177 recommend that Congress adopt the Review Commission proposals.
178 Rather, they seem likely to advise that the Judicial Conference
179 position should be that if Congress is interested, specified
180 problems must be addressed. The sense of the meeting was that no
181 one knows enough about how these matters are in fact handled in
182 bankruptcy.

183 Judge Levi called attention to the Advisory Committee's
184 earlier conclusion that the problems presented by overlapping,
185 duplicating, and competing class actions in state and federal
186 courts are better addressed by Congress than by Civil Rules
187 changes. But it is not only the devil that lurks in the details —
188 it also is the politics. The Committee has said only that minimum
189 diversity is an approach worth considering. The Federal-State

190 Jurisdiction Committee has responded positively. They have not
191 withdrawn their opposition to pending bills, but do support further
192 exploration of a different approach that would create a new joint
193 federal-state panel to help coordinate parallel actions. The
194 central concept seems to be an augmented version of the Judicial
195 Panel on Multidistrict Litigation, adding state-court judges and
196 recognizing authority to assign cases to state courts as well as to
197 federal courts. This topic was not on the Judicial Conference
198 discussion calendar, but interested groups sent memoranda to the
199 Conference. The Public Citizen memorandum approved the approach
200 taken by The American Law Institute in its Complex Litigation
201 project, looking toward creation of an expanded Judicial Panel that
202 would include state participation. This approach is seen as "more
203 modest" than sweeping minimum-diversity provisions. Whether it is
204 more modest may depend on perspective: it might bring fewer cases
205 to federal courts, but it could raise troubling questions whether
206 Congress can force unwilling states to participate in the panel
207 process or to accept transferred cases. For the present, the
208 important point is to remember that the Committee's only position
209 is that these are questions for deliberation by Congress.

210 *Sealing Orders*

211 The District of South Carolina is considering a local rule
212 that would prohibit entry of an order sealing a settlement
213 agreement filed with the court. Senator Kohl has asked whether
214 this question will be considered in the Enabling Act process. The
215 Administrative Office has responded on behalf of the rules
216 committees that the question will be considered. The questions
217 surrounding this practice would benefit from empirical work. The
218 Federal Judicial Center is beginning to consider the forms of
219 assistance it might provide. The central questions go to the
220 frequency of sealing orders; the reasons that lead parties to wish
221 to file a settlement agreement with the court — and whether filing
222 is undertaken for reasons other than implementation of an agreement
223 that the court's jurisdiction will continue for purposes of
224 enforcing the settlement; how often the public interest in
225 information about the litigation can be satisfied by access to
226 materials in the court file, such as the pleadings, that have not
227 been sealed; and what privacy concerns the parties may have apart
228 from the amount of the settlement. Other questions may arise as
229 well. The questions are highly important, and equally sensitive.
230 This project will demand a significant part of the Committee's
231 attention.

232 *Approval of Minutes*

233 The Committee approved the Minutes of the May 6-7, 2002,
234 meeting.

235 *Style Project*

236 Judge Levi introduced the Style Project by noting that it has
237 come to the Advisory Committee by direction of the Standing
238 Committee. Although the ordinary course is that projects originate
239 in the Advisory Committee, tasks are occasionally assigned by the
240 Standing Committee. This is one of them. The decision has been
241 made that in the rules styling cycle, the time to do the Civil
242 Rules has come.

243 The project goes back ten years. Judge Keeton, then chair of
244 the Standing Committee, decided that the rules should be restyled.
245 All of the sets of procedural rules include archaic and unfamiliar
246 language. There are provisions that are simply out-of-date. There
247 are many opportunities to clarify opaque language. But style
248 changes can change meaning, even unintentionally. There is a risk
249 that we will excise language that seems no longer useful, and that
250 we will be wrong for failure to remember a use that continues
251 still.

252 The Civil Rules were initially offered as the first style
253 project. After Judge Pointer revised Bryan Garner's restyled
254 version of the Civil Rules, the first approach was to address a few
255 rules after completion of other agenda items at regular meetings.
256 That approach did not work well in the press of competing business.
257 The next approach was to schedule a special meeting devoted solely
258 to style. This meeting at Sea Island, Georgia, has grown in legend
259 to be described as "fabled," or less neutrally as "notorious."
260 The Committee found many ambiguities in the rules confronted at
261 that meeting. The uncertainty of resolving these ambiguities
262 convinced the Committee that the style process would require more
263 time than could be taken from other projects. There are many Civil
264 Rules. They are "surrounded by a sea of case law." Inordinate
265 amounts of time may be required to determine how far all identified
266 ambiguities have been resolved or exacerbated by reported
267 decisions.

268 After the decision to defer the style project for the Civil
269 Rules, the Appellate Rules were restyled. The process went well,
270 and the product has been well received. The Criminal Rules came
271 next; barring last-minute action by Congress, they will take effect
272 December 1, 2002. Those who have viewed the Criminal Rules believe
273 the product is successful. The Chief Justice has concluded that
274 neither the Bankruptcy Rules nor the Evidence Rules should be
275 restyled. The Standing Committee has concluded that the time has
276 come to return to the Civil Rules.

277 The process will begin with the Garner-Pointer draft,
278 including changes adopted in the first stages of the Advisory
279 Committee review. The Style Subcommittee consultants, Professor R.
280 Joseph Kimble and Joseph Spaniol, will suggest revisions of that
281 draft. The suggested revisions will be reviewed by the Advisory
282 Committee Reporter and by Professors Marcus and Rowe. Professors

283 Marcus and Rowe will identify research questions, and may be able
284 to provide answers to some of them, before the package is sent to
285 the Style Subcommittee. The research questions identified at this
286 stage and later typically will involve questions as to the meaning
287 and origin of present rule provisions, particularly those that at
288 first inspection seem ambiguous or unnecessary. The Style
289 Subcommittee will review the package, will resolve style questions,
290 and may identify further research questions for Professors Marcus
291 and Rowe. The resulting package will be sent to the Reporter, who
292 will prepare footnotes that identify issues that remain to be
293 resolved in the Advisory Committee process.

294 The footnoted version will go to one of two Style
295 Subcommittees, to be chaired by Judge Kelly and Judge Russell. It
296 is not clear that anyone really knows what they have agreed to do
297 in committing themselves to this undertaking. It is clear that
298 arduous work must be done in the subcommittees. The subcommittees
299 have been constituted with an eye to other subcommittee
300 assignments, geography, and the balance between lawyers and judges.

301 All of the Civil Rules will be restyled. "We cannot spend a
302 half day on each semicolon. As in many matters, we cannot let the
303 best be enemy of the good."

304 The project will require frequent meetings if it is to be
305 accomplished in a reasonable period. The proposed program calls
306 for four meetings a year: one style subcommittee meets on the first
307 day, the full Committee meets on the second day, and the other
308 style subcommittee meets on the third day. The day of the full
309 Committee meeting will be devoted to continuing work, and such
310 style business as needs the attention of the full Committee.

311 The Civil Rules project will benefit from the experience of
312 the other rules committees. Some of the battles have been fought;
313 the winners and losers are identified. "Must" has replaced "shall"
314 as a term of mandatory duty.

315 John Rabiej reviewed the experience of the Appellate and
316 Criminal Rules restyling projects. The process started in the
317 early 1990s under the leadership of Judge Keeton and Professor
318 Charles Alan Wright. They chose Bryan Garner as style consultant.
319 Garner is author of many authoritative works on legal writing. He
320 restyled the Civil Rules first. Then the process turned to the
321 Appellate Rules from 1994 to 1998; Judge Logan chaired the advisory
322 committee, and Professor Mooney was Reporter. When the Appellate
323 Rules were completed, the Criminal Rules came next. The Criminal
324 Rules process began in 1999; the restyled rules are now before
325 Congress. Judge Davis chaired the advisory committee for the first
326 part of the process, and was succeeded by Judge Carnes. Professor
327 Schlueter was Reporter.

328 The process for the earlier rules efforts began with revision
329 and refining of the Garner draft by the Style Subcommittee. The

330 result went to the advisory committee, then to publication.
331 Comments were reviewed. The advisory committee then adopted a
332 final style version that went to the Standing Committee and thence
333 up the line to the Judicial Conference, Supreme Court, and
334 Congress. The advisory committee work took about three years for
335 each project; the whole process took four or five years.

336 Judge James Parker, who chaired the Standing Committee Style
337 Subcommittee while the Criminal Rules were restyled, described the
338 process around the framework of discussion questions prepared by
339 John Rabiej.

340 The last question was addressed first: did the result justify
341 the effort? "No and yes." "No," if you focus on the project as
342 one yielding short-term benefits. Practitioners must bear a heavy
343 cost in relearning a complete set of restyled rules. The Advisory
344 Committee work on the Civil Rules will stretch out over many years.
345 "Yes," if you focus on long-term benefits, fifteen or twenty years
346 from now. The new rules will unquestionably be more user-friendly.
347 They will ease automated research, even by measures as simple as
348 adding more and better titles and headings for subdivisions and
349 paragraphs.

350 Pride in the quality of the product is important. Professor
351 Wright chaired the Style Subcommittee when it was formed. His
352 writing is wonderfully clear. The question can be illustrated in
353 the familiar comparison of a sturdy compact automobile to a luxury
354 sport sedan. Each does the basic job, but one does it better. The
355 project is more worthwhile if we want the polished end product.

356 The care required to distinguish substantive changes from
357 style improvements will yield a separable benefit. The need for
358 substantive changes will appear, to be addressed separately either
359 as the style project wends along or later when more time is
360 available. Some, perhaps most, changes will need to be deferred.
361 An illustration is provided by Criminal Rule 11. Rule 11 states
362 that "the court" must not be involved in plea negotiations.
363 Different judges interpret the rule differently — some conclude
364 that it prohibits participation only by the sentencing judge, and
365 permits another judge of the same district to mediate plea
366 negotiations. This question was identified in the style project,
367 treated as a matter going beyond mere style, and deferred.

368 As to procedures, the first caution is to make sure that the
369 schedule is not too tight. The next is to avoid assigning too much
370 work all at once to the consultants — Kimble and Spaniol should not
371 be charged with doing a complete rule set all at once. And nit-
372 picking edits should be avoided in the Advisory Committee and
373 forbidden in the Standing Committee.

374 The question whether new procedures should be adopted remains
375 open. The subcommittee structure looks very good. Internet
376 communications can be used more effectively now than ten years ago.

377 Teleconferencing should be considered — there are real benefits as
378 compared to telephone conferences. A teleconference can be used to
379 show a rule and proposed changes on a screen. Simply seeing each
380 other can help. The Appellate Rules were done in large part by
381 telephone, with handwritten edits that were hard to decipher
382 (particularly when transmitted by facsimile). In the Criminal
383 Rules, word processing edits encountered some breakdowns, but
384 overall the process worked. Computerized research can help. In
385 the Criminal Rules, for example, a question arose whether it is
386 better to refer to an "attorney" or to "counsel" — a computer
387 search can quickly identify each place the term is used. The
388 Criminal Rules use eight different ways to describe the government
389 or attorney for the government. Is it necessary to have
390 consistency if everyone understands the word in its context? Yes,
391 consistency is a worthy goal. And other resources can be used. A
392 law clerk, for example, may provide good help.

393 How demanding is the project in time and energy? "Very."

394 Face-to-face meetings generally are more efficient. Telephone
395 conferencing can be a help — so long as you remember the time-zone
396 problems. The face-to-face meetings also have important
397 socializing benefits.

398 How many hours should be scheduled for a single day? It is
399 difficult to say. Some participants prefer a one-day, intense,
400 "get-it-over-with" approach. Two-day meetings are more humane, but
401 they are more difficult to schedule and "there will be departures."
402 (A Committee member who participated in the Sea Island meeting
403 suggested with feeling that "one day is enough.")

404 Would it have helped to stretch the process out over more
405 years? More time probably would yield a better product, but the
406 result may be that the product is never finished. The proposed
407 time series prepared by John Rabiej seems reasonable — it is longer
408 than the time taken for the Appellate Rules or Criminal Rules, but
409 the Civil Rules will be much more difficult.

410 Turnover in Committee membership must be addressed. "You need
411 one driving force to get you through all this." With the Appellate
412 Rules, Judge Logan was the driving force. With the Criminal Rules,
413 Judge Davis initially was reluctant, but became an enthusiastic and
414 driving force. The consultants and researchers should not change.
415 Changes in general Committee membership are not as important.

416 On matters that involve style alone, not meaning at all, the
417 Committee should give almost complete deference to the Style
418 Subcommittee.

419 As to other issues identified in the agenda book: Renumbering
420 the rules will be controversial, causing short-term grief but
421 perhaps yielding long-term benefit. Renumbering deserves some
422 consideration. This question was faced in one part of the Criminal
423 Rules: Rule 60 was the final rule, but was the one that established

424 the title of the rules. The Committee decided simply to abrogate
425 Rule 60 as part of transferring the title to the front. Obsolete
426 terms should be abolished — language does change over time. Our
427 generation would say "I am eager to do that," while many of a
428 younger generation would convey the same thought by being "anxious"
429 to do that. The meaning of "anxious" has changed.

430 It would be wise to enlist a volunteer who could provide a
431 non-lawyer perspective. When Arizona revised its jury
432 instructions, it sought help from jurors. A majority of the jurors
433 thought that "subsequent to" meant "before"; the phrase was
434 eliminated. As to "negligence," a majority chose "inattentive"
435 over "careless"; the word was not dropped, in deference to its deep
436 roots in tradition. A high-school English teacher or someone
437 similar might be a good resource to read draft rules and identify
438 confusing expressions.

439 Judge Parker concluded his remarks by confessing that in
440 retrospect, "I still wonder whether it all was worth it."

441 Professor Schlueter observed that it was very helpful to have
442 Judge Parker attend the Criminal Rules style meetings, most often
443 by telephone.

444 John Rabiej then turned to a more detailed review of the
445 process. The agenda materials include Rule 4 in the form adopted
446 by Bryan Garner. Each rule is divided into boxes corresponding to
447 subdivisions or paragraphs. The text of the present rule is
448 presented on the left side of the page, with the restyled rule on
449 the right. The object is to simplify, clarify, make parallel
450 expressions consistent, remove ambiguities, and avoid substantive
451 changes. The format provides much more "white space," and gives a
452 uniform structure to the rules.

453 The Garner drafting Guidelines have been adopted for all of
454 the sets of rules.

455 When the Garner draft of the Criminal Rules was submitted to
456 the Style Subcommittee, Judge Parker refined the style work and
457 also identified at least one hundred substantive issues. Professor
458 Saltzburg, a veteran of the Criminal Rules process, was retained to
459 find answers to the questions. An example of several questions and
460 responses is included in the agenda book. So it was asked why the
461 rules still refer to "hard labor"; an answer was found in some
462 residual use of boot camps — there was a reason for retaining a
463 seemingly antiquated expression. More generally, the research was
464 helpful in addressing the meaning of provisions that had no readily
465 identifiable meaning or reason.

466 The Style Subcommittee reviewed the research questions and
467 responses, and "gave it their best shot." The drafts then went to
468 the Criminal Rules style subcommittees, who resolved what they
469 could and reported both resolutions and important questions to the
470 full Criminal Rules Advisory Committee.

471 On the Civil Rules, Judge Pointer revised the Garner draft,
472 making many changes and improvements. Some further changes were
473 adopted at the Sea Island meeting, and they too have been added to
474 the draft that will go to the Style Subcommittee.

475 The Appellate and Criminal Rules Committees developed time
476 tables, as will be done for the Civil Rules. They divided the
477 rules into batches, assigned to the subcommittees. In the
478 subcommittees, each rule was assigned to one subcommittee member
479 who became responsible for presenting the rule at the subcommittee
480 meeting and shepherding it through. A primary focus was to search
481 for inadvertent substantive changes, and to discuss the deliberate
482 substantive changes. When deliberate substantive changes seemed
483 desirable, a choice was made whether to classify them as minor
484 changes that could be adopted in the style package and identified
485 in the style Committee Notes, or instead to classify them as so
486 important as to require presentation on a separate track.

487 The Appellate Rules presented style changes, minor substantive
488 changes, and major substantive changes in a single package for the
489 Judicial Conference. The Criminal Rules presented the style
490 changes (including minor substantive changes) in one package, and
491 major substantive changes in a separate but parallel package. The
492 purpose of the separate tracks was to be prepared with a styled
493 version of the current rule for adoption if the substantive change
494 in the parallel rule were rejected.

495 The timetable for the Criminal Rules package is described in
496 the agenda materials. In a 28-month period they held ten
497 subcommittee and six full committee meetings. Both the Appellate
498 and Criminal Rules Committees adopted an "all deliberate speed"
499 policy.

500 After making assignments to individual members, the
501 subcommittee chair set meeting dates. Although each rule was
502 assigned to one member for presentation, all members reviewed every
503 rule in the package to be considered at each meeting. All comments
504 from subcommittee members were routed through the Administrative
505 Office. Each comment was inserted, identifying its author, on a
506 single master draft. The consolidated master draft went to the
507 full subcommittee meeting. Discussion focused on the comments made
508 by the subcommittee members as reflected on the master draft.

509 The focus of subcommittee discussions was policy issues more
510 than style issues. Often policy issues were identified for
511 discussion by the full Committee. After full subcommittee
512 meetings, the final product was sent to the full committee.

513 Formal records were not kept during the Criminal Rules
514 process. Although notes were taken, the lack of more formal
515 records was a mistake. (Professor Schlueter noted that the Criminal
516 Rules Committee recognized the need to get on with the work.)
517 Records will be kept during the Civil Rules project. The Reporter

518 and consultants will work together to devise the best means of
519 noting all significant decisions. The Reporter will attempt to
520 attend all meetings.

521 Judge Levi noted that although ordinarily the Civil Rules
522 Committee has viewed subcommittee meetings as matters for executive
523 session, the style subcommittees are different. Representatives
524 from concerned groups, such as the American Bar Association, will
525 be welcome to attend.

526 In the Criminal Rules process, Committee Notes were developed
527 only after a styled rule had been considered by the full Committee.
528 In contrast the Civil Rules project will attempt to frame draft
529 notes before Committee consideration, at least to the extent
530 possible within the time between subcommittee meetings and
531 Committee meetings.

532 Both the Appellate and Criminal Rules Committees presented
533 their style drafts to the Standing Committee in two separate
534 packages with the recommendations for publication. Actual
535 publication, however, was deferred so that all rules could be
536 published together. The public comment period for the Appellate
537 Rules was nine months; for the Criminal Rules, the period was six
538 months. The Criminal Rules drew only 20 or so comments on the
539 style package; even the National Association of Criminal Defense
540 Lawyers, an active participant in the rulemaking process, addressed
541 only two or three rules. In addition to the usual thousands of
542 people and groups who receive direct mailings of published
543 proposals, the proposals were sent directly to approximately 100
544 law professors. Even the professors provided few comments.

545 The low level of comments won by the Appellate and Criminal
546 Rules suggests that it may be better to publish smaller sets of
547 rules for comment on a running basis. This is the plan for the
548 Civil Rules.

549 It remains to be decided whether substantive proposals should
550 be separated from style changes in the publication stage.

551 The Criminal Rules packages illustrated the challenges that
552 may be encountered. The Supreme Court rejected one of the changes
553 proposed on the major-substantive-change track, Criminal Rule
554 26(b). The Committee had addressed the constitutional
555 confrontation issue that gave the Court pause. This experience
556 simply reflects the differences of judgment that may attend
557 resolution of specific doubts in any rulemaking enterprise. Quite
558 a different problem arose from the inadvertent omission of a
559 sentence from Rule 16. The difficulty arose because the original
560 Rule 16 version considered by the original style draft was
561 different from a later Rule 16 that superseded the one that
562 persisted through the style process. The Administrative Office
563 legislation staff persuaded Congress to attach a corrective
564 provision to the Department of Justice appropriations bill.

565 Although the bill must be passed at some early time, it has become
566 a Christmas tree. The Administrative Office received a copy of the
567 bill only an hour before it passed the House, and discovered that
568 not only had legislative staff changed all the "musts" to "shall,"
569 it also had changed a Rule dealing with "mental" condition to
570 "medical" condition. The present hope is that these changes can be
571 corrected by a technical amendments rule. But the point remains:
572 correction of inadvertent gaffes will be increasingly difficult as
573 the rules pass from the Standing Committee to the Judicial
574 Conference, to the Supreme Court, and finally to Congress.

575 Judge Scirica commented that he attended the Sea Island
576 drafting meeting while a member of the Civil Rules Committee.
577 Judge Higginbotham concluded after that experience that it was more
578 important to devote the Committee's time to Rule 23 and other
579 pressing subjects. Style could not be done at the same time.

580 The style project was effectively launched after Judge Keeton
581 and Professor Wright met with Chief Justice Rehnquist. The Chief
582 Justice agreed that the style project made sense. It was decided
583 not to do the Bankruptcy Rules or Evidence Rules at any point. The
584 Appellate Rules became the bellwether because they are easiest to
585 deal with. The styled rules were well received by bench and bar.

586 Turning to the Criminal Rules, the method of dealing with
587 substantive changes was considered. The Supreme Court wanted to
588 get all proposals, both of style and substance, at the same time.
589 Judge Davis began guiding the Criminal Rules through the process as
590 a skeptic, but became a strong believer in the project.

591 Last winter Judge Scirica took some restyled Criminal Rules to
592 Chief Justice Rehnquist and suggested that it was a good idea to go
593 ahead with the Civil Rules, recognizing that the project would be
594 more difficult and beset with more pitfalls than the earlier style
595 projects had encountered. One concern was framed by asking what
596 the Civil Rules would look like in 25 years if the project is not
597 undertaken. An opportunity was recognized in the need to examine
598 every rule systematically. Both Professor Hazard and Professor
599 Wright have thought it important to undertake periodic review of
600 all rules. To paraphrase Professor Hazard, it is important to
601 involve professors for ideas, lawyers for knowledge, and judges for
602 responsibility. The project has to be open to input from all.

603 It will be possible to publish subsets of the rules in
604 packages to afford several opportunities to comment in a more
605 manageable framework. But the Supreme Court will want to receive
606 a single package of the entire Civil Rules when the time comes to
607 submit them for adoption. Substantive changes should not be part
608 of the style package. At the same time, it is proper to effect
609 substantive changes when necessary to resolve ambiguity in a
610 present rule.

611 Although it was surprising to have so few comments on the
612 Criminal Rules, the dearth of comment may have resulted from the
613 high quality of the work.

614 Professor Schlueter described the Criminal Rules style project
615 from the Reporter's perspective. Their first exposure to style
616 problems began at the December 1992 Standing Committee meeting,
617 long before the formal project. A very detailed style discussion
618 almost persuaded the Criminal Rules Committee chair to withdraw the
619 proposal; only an on-the-spot revision by Garner, chair, and
620 reporter saved the proposal. "It was not a happy introduction.'
621 But the style project made converts of the Committee.

622 In 1998 the Criminal Rules Committee made a commitment to get
623 into the project and get it done. It recognized that it could not
624 afford to get bogged down in minutiae. When the Committee came to
625 reflect on the experience in 2002, it realized that only a few of
626 those present in 2002 had been present in 1998.

627 "Time is your enemy. You can gain a lot by more time. But
628 there is no guarantee." Getting people interested in revisiting
629 long-ago work from the first phases of a style project "is tough —
630 there may be rebellion." Committee and subcommittee membership
631 will change; if new members are allowed to reopen past decisions,
632 the process may be effectively derailed.

633 Criminal Rules Committee members found the style project a
634 rewarding experience. It felt, at the end, like graduating from
635 college.

636 "Keep your sense of humor. It is essential." We had tense
637 times when Committee members wanted to change a rule they had
638 disliked on substantive grounds for many years.

639 It is critical to retain the advisory committee chair in place
640 for as long as possible. The Chief Justice should be persuaded to
641 extend the chair's term for this purpose.

642 The goal is to send to the Supreme Court a style package, not
643 a substantive change package. The Criminal Rules Committee had
644 major substantive changes to do, and put them on a separate track.
645 It was prepared to drop them if need be. The Department of Justice
646 was much concerned about the style project. "They had won and lost
647 many battles. They feared losing the victories, even as they hoped
648 to reverse the losses." These concerns added to the reasons for
649 putting aside many substantive matters.

650 The Administrative Office — and especially John Rabiej — made
651 the project possible. It was Rabiej, not the Reporter, who kept
652 the authentic master copy. It is difficult for a Reporter to
653 adjust to this loss of "control," but it is essential that it
654 happen.

655 The Criminal Rules Committee really appreciated the
656 subcommittee structure, and particularly the one-person-per-rule
657 assignments of responsibility. Although there are many people
658 looking at each rule, it is a mistake to rely on a multiplicity of
659 eyes to catch up inadvertent omissions. Some one or two persons
660 must bear special responsibility for the completeness and
661 correctness of the entire set.

662 The experience with Criminal Rule 16 underscores the vital
663 importance of making sure that the "left column" is the current
664 version of the rule, not some earlier version copied into the left
665 column when the column is first compiled.

666 Often individual Committee members took on the research
667 issues. "We did not go looking for the issues: they came to us."
668 The Style Committee found ambiguities, which were sent to Professor
669 Saltzburg. The Subcommittee accepted that, but found further
670 ambiguities without intentionally looking for them. The research
671 was spread out. "It has to be."

672 If something is to be taken out from the present rule, it is
673 important to decide the reason for the deletion to enable
674 explanation in the Committee Note.

675 Continuity is important. Style conventions should be
676 identified at the outset, and adhered to. To the extent possible,
677 a choice of preferred terms should be made; in the Criminal Rules,
678 it became necessary at the end of the process to go back to the
679 beginning to redefine the meaning of "court."

680 Deference is important at a number of levels. The Standing
681 Committee today defers to the advisory committees more than in some
682 earlier days. The Criminal Rules Advisory Committee deferred to
683 the judgments of its subcommittees, but did make changes when they
684 seemed good. To some extent, the subcommittee deferred to the
685 single member who was responsible for a particular rule. That
686 worked, and indeed seemed important.

687 The packages presented to the Standing Committee seemed a bit
688 overwhelming. The first 30 rules were presented in one package,
689 the remaining rules later in a second package. The advisory
690 committee attempted to focus the presentation on the problem
691 points.

692 Institutional memory is a problem. It is easy to lose the
693 details. "You should plan." It is not clear whether the best form
694 of record would look like minutes, or like something else. "Time
695 and information management is the key. Keep your papers and
696 notes."

697 When something is deleted from a rule, identify the deletion
698 and explain it in the Committee Note. In deciding whether to delete
699 something, it is wise to defer to the committee that created it:
700 you should assume that there was a good reason, and should not

701 assume that there is no good reason simply because you cannot
702 discover what it was. "There are a lot of cases and tradition."

703 It is difficult to distinguish between "little" substantive
704 changes and style changes. It would have been overwhelming to
705 identify every minuscule change in a Committee Note. The test
706 adopted for identification was whether a rule revision would lead
707 to a change in practice. And boilerplate language was developed
708 for the Note to each Rule: "The language of Rule _ has been amended
709 as part of the general restyling of the Criminal Rules to make them
710 more easily understood and to make style and terminology consistent
711 throughout the rules. These changes are intended to be stylistic.
712 No substantive change is intended." (The final paragraph of the
713 Committee Note to Criminal Rule 1 varied this statement to some
714 extent.) Revisions that seemed likely to work a change in practice
715 were not disqualified from the style package, but were identified
716 in the Note. Major substantive changes, on the other hand, were
717 taken out for separate treatment. An example was video
718 teleconferencing for arraignments.

719 At times a subcommittee would appoint an ad hoc group to
720 address a specific question. One example was the question where a
721 defendant should be taken after arrest when a judicial officer is
722 more readily accessible in a different district.

723 Responding to a question, Professor Schlueter noted that as
724 people looked at the rules, they came up with substantive ideas.
725 This was not a deliberate focus; the project was not viewed as an
726 occasion to reconsider all the rules. There is a cost in
727 frustration, as with the Rule 11 example identified by Judge
728 Parker.

729 And there was a special reluctance to change language that had
730 been mandated by Congress. Changes nevertheless were made on a few
731 occasions.

732 Another Committee member observed that the distinction between
733 style and substance can blur. Clarification can change meaning and
734 practice. Is it proper, within the scope of this project, to tell
735 the Supreme Court that we are changing practice? Judge Scirica
736 responded that the direction is that the Committee should resolve
737 ambiguities — that is properly within the scope of a style project
738 even though it may change meaning. Good judgment is called for.
739 "You will know the major changes."

740 Professor Schlueter added that the Criminal Rules Committee
741 struggled often with this problem. An attempt was made to reduce
742 the potential confusion that could arise from presenting
743 simultaneous "style" and revised "substantive" versions by adding
744 a Reporter's Note to each rule in the style package that had a
745 parallel rule in the substantive track. The Reporter's Note simply
746 directed attention to the parallel substantive rule.

747 Judge Scirica observed that two of the tests that measure the
748 appropriateness of changes in meaning as part of the style package
749 are that it is proper to make noncontroversial changes, and that it
750 is proper to express present practice as it has evolved from an
751 uncertain rule basis.

752 Professor Kimble suggested that there is a continuum of
753 infinite shading. At one end are matters that seem pure style:
754 should we refer to an "attorney fee" or to an "attorney's fee"?
755 Seemingly similar matters may not be so pure — the rules refer
756 often to an "opposing party," but also refer to an "adverse party."
757 Is there a difference? An intentional difference? If the
758 Committee reaches a confident conclusion that there is no intended
759 difference of meaning, it might adopt a consistent style convention
760 and not identify the change in the Committee Note. Another example
761 of the minor change questions is whether to delete the requirement
762 that a Rule 4 summons bear the court's seal.

763 Judge Levi expressed concern that the very concept of "minor"
764 substantive changes could undermine the credibility of the project.
765 And it is important not to waste Committee time on marginal
766 substantive changes. Many of these things could be deferred for
767 attention after the style project is concluded.

768 Professor Schlueter noted that ultimately Judge Davis, Judge
769 Scirica, and the Administrative Office agreed that consensus and
770 concessions must be made in order to get the style package to the
771 Supreme Court. "The key is to decide how much time to spend on the
772 components. If extensive discussion is required in subcommittee,
773 let go of the question."

774 Judge Scirica agreed. "You are going to have to decide to
775 leave some ambiguities as you find them." Judge Levi also agreed,
776 noting the Criminal Rule 11 question whether a judge who will not
777 be imposing sentence can mediate plea negotiations — "there is a
778 conflict in the case law. Let the issue continue to percolate in
779 the courts, or put it on the separate substantive track."

780 Professor Schlueter noted that Professor Kimble "came in
781 late." He was asked to go through the entire Criminal Rules
782 package, and did. The Committee had been feeling a sense of
783 impending relief and release, but he found a lot of inconsistencies
784 the Committee had missed. Some of them caused real consternation.
785 At times the "do-overs" are necessary. But "honor the committee's
786 weariness."

787 Professor Kimble suggested that it is critical to follow an
788 authoritative set of style guidelines. It would be wise to adopt
789 them formally. And it would be useful to state them in an
790 Introductory Note to the style package. Part of the conventions
791 should be to adopt Bryan Garner's Dictionary of Modern Legal Usage.
792 This makes life easier not only in drafting but in later
793 application of the rules.

794 We need in every way possible to head off unintended changes
795 of meaning. The boilerplate language denying changes of meaning
796 should be in the Committee Note for each rule.

797 It is wise to defer to the Style Subcommittee. Deference
798 should approach the level of presumption on issues of pure style.
799 If you decide to say "can" to mean "is able," do not look back.
800 "After a certain point you run out of steam." Do not readdress
801 issues already resolved, but recognize that new perspectives and
802 insights may emerge as you progress through the rules.

803 The advantages of the style project will far outweigh the
804 disadvantages. You will make mistakes. The mistakes will be
805 corrected with time.

806 And remember that improving style will inevitably improve
807 substantive meaning in many ways.

808 Professor Schlueter stated that once an issue has been
809 consciously resolved, whether by vote or consensus, it is important
810 to regard it as res judicata. Revisit the decision only for good
811 reason.

812 There are many things that can distract attention. It is
813 important to establish a specific deadline for submission to the
814 Supreme Court. The timetable can be set by working backward from
815 that date. The deadline and timetables give power to committee
816 chairs to force a conclusion of discussion.

817 This discussion of past experience was followed by
818 presentation of a set of "overarching issues" identified as growing
819 out of the experience. Because much of the discussion followed the
820 order of the agenda materials, the agenda memorandum is adopted as
821 the minutes of the discussion with occasional interpolations to
822 reflect such discussion as there was:

823 **CIVIL RULES STYLE PROJECT: INTRODUCTORY QUESTIONS**

824 Some of the generic questions that will recur throughout the
825 Style Project can be anticipated. They range from simple needs for
826 consistency to more important issues. The examples that follow are
827 not ranked in order of importance, frequency of probable
828 appearance, or interest. All deserve some attention. Specific
829 examples — many of them drawn from a first review of Rules 1
830 through 7 — will be used to illustrate the choices.

831 *Structure*

832 The structure of the whole Civil Rules package is at times
833 eccentric. Summary judgment is a pretrial device, but it appears
834 as Rule 56 in the chapter dealing with judgments. It might make
835 better sense to locate it after the discovery rules and before the
836 trial rules. Rule 16, for that matter, occupies an odd place
837 between the pleading rules and the party- and claim-joinder rules.
838 For that matter, the counterclaim, cross-claim, and third-party

839 claim rules seem to fit better between Rule 18 and Rule 19 than in
840 their present place. Do we have any appetite for restructuring the
841 whole?

842 One advantage of restructuring would be that we would be free
843 to adopt, at least for the time being, a set of whole-number
844 designations. No more Rule 4.1, 23.2, or (eccentrically) Rule 71A.
845 We would no longer need to jump from Rule 73 to Rule 77.

846 These proposals almost inevitably will be defeated by the
847 familiarity of Rule 56, Rule 13(a), and so on. The conservative
848 inertia that has slowed procedural reform applies to the small as
849 well as the large. And now we have a further argument: nothing can
850 change, not ever, because that will foul up computer searches.

851 A much smaller-scale version of the structure question will
852 arise when good style would rearrange subdivisions within a rule,
853 or perhaps combine two or more subdivisions. If we combine
854 subdivision (b) with subdivision (c), do we continue to describe
855 subdivision (d) as (d), showing (c) as "abrogated," or do we re-
856 letter (d) as new (c)?

857 Probably it is too late to consider the designation of
858 subparts. Our limit has been Rule 15(c)(3)(D)(ii): (c) is
859 subdivision, (3) is paragraph, (D) is subparagraph, and (ii) is
860 item. Occasionally a rule might be easier to follow if we had
861 further designations, if after the subparagraph (D) we could have
862 one more sequence of numbers and letters. But there are several
863 arguments against adding further designations. One is conformity
864 to other sets of rules. Another is the need to find words to
865 describe them: sub-subparagraph is unattractive, and the
866 alternatives are at least as unattractive. Still another arises
867 from the indent style we have adopted; it is helpful to set each
868 smaller item in further from the left margin. But by the time we
869 get to items we are already left with very short lines. Still
870 further insetting could lead to minuscule lines.

871 [The question whether to redesignate rule subdivisions
872 provoked some discussion. One purpose of the project is to advance
873 clarity by providing a clear structure. Clear structure will
874 involve physical layout, more white space, and more frequent use of
875 sub-parts: a single subdivision may be broken into paragraphs, a
876 paragraph may be broken into subparagraphs, and so on. The present
877 rules often combine quite distinct propositions in a single
878 subdivision or paragraph; clarity will be improved by establishing
879 separate subdivisions or paragraphs. Additions will require
880 renumbering. This course was often chosen in the Appellate Rules.
881 Further discussion pointed to the Garner-Pointer draft of Civil
882 Rule 4(b), which makes many separations of material previously run
883 together. This example demonstrates that the rule should be to do
884 whatever makes good style sense.

885 [It was asked whether the advantages of preserving familiar
886 designations deserve some weight: should a change be made if it
887 seems only a little better? In the Criminal Rules project, there
888 was some major reorganizing. But they chose to work around the
889 problems that arise when the present designation seems too well-
890 known to change. An illustration in the Civil Rules might be Rule
891 13(a).

892 [A related question is illustrated at several places in the
893 Civil Rules, among them Rule 80(a): since 1948, subdivision (a) has
894 been carried forward only to show that it has been abrogated. The
895 Criminal Rules Committee decided against preserving present
896 designations when the only purpose is to avoid carrying forward an
897 otherwise deleted subdivision. But there may be occasions when it
898 is better to carry forward the designation for an abrogated part in
899 order to preserve a related and well-known designation: Style
900 should not be the occasion for redesignating Rule 12(b)(6). One
901 alternative might be to show a former designation in brackets for
902 a lengthy period — for example, if summary judgment were to be
903 relocated as a pretrial device, it might be designated as "Rule
904 39.1 [Former Rule 56]." The Criminal Rules Committee did something
905 like this in the Committee Notes. Another alternative would be to
906 request that publishers include conversion tables with the rules.]

907 *Sacred Phrases*

908 It has been accepted that we must not tinker with some sacred
909 phrases in the rules. "Transaction or occurrence" must be used to
910 define the relationships that make a counterclaim compulsory under
911 Rule 13(a). One challenge will be to be sure that we recognize all
912 of the phrases that have taken on such settled elaborations that we
913 must not attempt change in the name of style.

914 This approach raises the question whether we can forgive
915 ourselves for not asking why variations are introduced on these
916 familiar phrases. "Transaction or occurrence" persists in Rule 14,
917 but in Rule 15(c)(2) it becomes "conduct, transaction, or
918 occurrence." By Rule 20 it expands to "transaction, occurrence, or
919 series of transactions or occurrences." What subtle distinctions
920 are implied?

921 *Definitions*

922 Definitions presented recurring tests in the Criminal Rules
923 style project. As later rules were styled, the committee was
924 driven to consider again, and yet again, the definitions adopted in
925 earlier rules. There are more definitions in the Civil Rules than
926 many of us realize. Rule 3 defines what it means to "commence" an
927 action. The Rule 5(e) tag line is "Filing with the Court Defined,"
928 but the rule does not really define filing — it directs how filing
929 is to be accomplished. At the same time, it does define an
930 electronic "paper" as "written paper." Rule 7 defines what is a
931 "pleading." Buried in Rule 28(a) is a definition of "officer" for

932 purposes of Rules 30, 31, and 32. The Rule 54(a) definition of
933 "judgment" presents questions so horrendous that we abandoned any
934 attempt even to think about them in the recent revision of Rule 58.
935 The District of Columbia is made a "state" by Rule 81(e), "if
936 appropriate." Rule 81(f) sets out a curiously limited definition
937 of "officer" of the United States (including, at least on its face,
938 a beginning that includes reference to an "agency," followed by a
939 definition only of "officer"). Other definitions may lurk in the
940 Rules. We may be stuck with the ones we have, except to the extent
941 that we are prepared to make substantive amendments as part of the
942 process. But at least we should be wary of adding new definitions.
943 And perhaps we need to consider the need to reduce reliance on
944 definitions.

945 *"Legacy" Provisions*

946 Old Practices Abolished. The Civil Rules have abolished many
947 earlier procedural devices. The generic question is whether it is
948 necessary to forever continue to abolish these things. Specific
949 answers may vary.

950 Rule 7(c) is an example: "**(c) DEMURRERS, PLEAS, ETC., ABOLISHED.**
951 Demurrers, pleas, and exceptions for insufficiency of a pleading
952 shall not be used." We could spend some time debating whether
953 devices are "abolished" by a rule that says only that they shall
954 not be used. But why not abandon this subdivision entirely? Even
955 if someone decides to describe an act as a demurrer rather than a
956 Rule 12(b)(6) motion to dismiss, a 12(c) motion to strike an
957 insufficient defense, a Rule 50(a) motion for judgment as a matter
958 of law, or whatever, the court is likely to understand and respond
959 appropriately.

960 A more familiar example is Rule 60(b), but it may be more
961 complex. The final sentence says: "Writs of coram nobis, coram
962 vobis, audita querela, and bills of review and bills in the nature
963 of a bill of review, are abolished, and the procedure for obtaining
964 any relief from a judgment shall be by motion as prescribed in
965 these rules or by an independent action." This one does abolish
966 something. We may wonder whether there is much risk that a modern
967 lawyer will think to reinvent these archaic procedures. Perhaps
968 there is — the criminal law crowd continues to have questions about
969 the persistence of coram nobis relief. However that may be, the
970 last part of the sentence is a specific direction: relief from a
971 judgment must be sought by motion or by independent action. We may
972 need to keep that (and perhaps to note that an appeal — surely
973 neither a motion as prescribed in these rules nor an independent
974 action — is not what we mean by "relief from a judgment"?).

975 A less familiar example is Rule 81(b), which abolishes the
976 writs of scire facias and mandamus.

977 Old Distinctions Superseded. Less direct means may be used to
978 supersede old practices. Rule 1 is a fine example: "These rules

979 govern the procedure in the United States district courts in all
980 suits of a civil nature whether cognizable as cases at law or in
981 equity or in admiralty * * *." "Suits"? "of a civil nature"?
982 "cases" at law or in equity or in admiralty? The Style version
983 uses "civil action" to replace suits of a civil nature, drops
984 "cases," and raises the question whether we still need say "whether
985 arising at law, in equity, or in admiralty." Merger of law and
986 equity was accomplished in 1938; admiralty was brought into the
987 fold in 1966. Is there a risk that the merger will dissolve
988 without continued support? Whether or not we continue it, is
989 "civil action" good enough? A very quick look at the subject-
990 matter jurisdiction statutes that begin at 28 U.S.C. § 1330 shows
991 that "civil action" is the most common expression. But § 1333
992 refers to "any civil case of admiralty or maritime jurisdiction";
993 § 1334(a) refers to "cases" under title 11; § 1334(b) refers to
994 "civil proceedings arising under title 11"; § 1337 refers to "any
995 civil action or proceeding"; § 1345, covering the United States as
996 plaintiff, refers to "all civil actions, suits or proceedings"; §
997 1346(a)(2) — the Little Tucker Act — refers to "[a]ny other civil
998 action or claim against the United States"; § 1351 refers to "all
999 civil actions and proceedings" against consuls, etc.; § 1352 refers
1000 to "any action on a bond"; § 1354 to "actions between citizens of
1001 the same state"; § 1355 to "any action or proceeding; § 1356 to
1002 "any seizure"; § 1358 to "all proceedings to condemn real estate";
1003 and § 1361 to "any action in the nature of mandamus" [this one is
1004 an interesting contrast with the abolition of mandamus by Rule
1005 81(b)]. New Rule 7.1(a) refers to an "action or proceeding."
1006 Perhaps that is the phrase that should appear in Rule 1.

1007 <u>Familiar Terms and Concepts.</u> Rule 4(*l*) provides for "proof of
1008 service." The Garner-Pointer draft says service must be proved to
1009 the court. Why abandon a familiar and well-understood term,
1010 substituting a phrase that may generate arguments that a different
1011 process is contemplated? There may be times when we should not
1012 abandon a well-understood term simply because it somehow seems
1013 archaic.

1014 Familiarity goes beyond language to concept. Justice Jackson
1015 put it well: "It is true that the literal language of the Rule
1016 would admit of an interpretation that would sustain the district
1017 court's order. * * * But all such procedural measures have a
1018 background of custom and practice which was assumed by those who
1019 wrote and should be by those who apply them." *Hickman v. Taylor*,
1020 1947, 329 U.S. 495, 518 (concurring). As time moves on, however,
1021 the shared background of custom and practice may fade away.
1022 Reading a rule today, we may fail to understand the intended
1023 meaning, and in rewriting seemingly clear language effect a change.
1024 An illustration is the provision in Rule 19(a) that a necessary
1025 party plaintiff "may be made a defendant, or, in a proper case, an
1026 involuntary plaintiff." It is easy to pick this illustration
1027 because it is familiar — the understanding that the "proper case"
1028 is much more restricted than the words might indicate has been

1029 preserved. The more meaningful illustrations will be those that we
1030 overlook because the original understanding has been lost. The
1031 ignorant assumption of a new meaning and its expression in
1032 contemporary style may be an improvement, but it still will be a
1033 change.

1034 [Brief discussion began by asking what harm lies in deleting
1035 antique provisions. A safeguard could be provided by establishing
1036 an appendix of materials to self-destruct in a period of perhaps
1037 twenty years if no use is found; this ploy will be considered. The
1038 Criminal Rules chose the path of deleting apparently antiquated
1039 material, stating in the Committee Note that the material is no
1040 longer needed.]

1041 *Ambiguities*

1042 The most common lament during the fabled Sea Island Style
1043 Festival was that time and again, ambiguity engulfs the meaning of
1044 a present rule. What to do?

1045 An obvious approach is to exhaust the research possibilities
1046 that may dispel the ambiguity. If a clear present meaning is
1047 identified, the only remaining challenge is to express it clearly.
1048 How frequently this approach should be taken, all the way to the
1049 bitter and often disappointing end, is debatable. If indeed we
1050 find many ambiguities, we might slow progress more than we care to
1051 endure. The alternatives begin with identifying the ambiguity, and
1052 explaining in the Committee Note what has been done. One approach
1053 will be to carry the ambiguity forward — we do not know what it
1054 means, and we do not care to invest the energy to decide what clear
1055 meaning is better. Another approach will be to imagine a good
1056 clear answer and adopt that. No doubt each of these alternatives
1057 will be adopted in circumstances that seem appropriate.

1058 Rule 4(d) — a relatively new rule — provides illustrations
1059 that tie to the discussion of Rule 4. The last sentence of (d)(2)
1060 refers to a plaintiff "located within the United States." (d)(3)
1061 refers to a defendant "addressed outside any judicial district of
1062 the United States." Rule 4(e) speaks of service "in any judicial
1063 district of the United States." Rule 4(f) refers to "a place not
1064 within any judicial district of the United States." Is there a
1065 difference between "within the United States" and "in any judicial
1066 district of the United States"? Are United States flag vessels,
1067 embassies, or other enclaves "within the United States" but outside
1068 any judicial district? Puerto Rico clearly is within a judicial
1069 district of the United States: is it within the United States?
1070 What subtle thoughts inspired these various phrases?

1071 Rule 4(h)(1) is another illustration. Service on a
1072 corporation may be made by delivering process to "any other agent
1073 authorized by appointment or <u>by law</u> to receive service of process
1074 and, if the agent is one authorized <u>by statute</u> to receive service
1075 and the statute so requires, by also mailing a copy to the

1076 defendant." Is there a difference between "by law" and "by
1077 statute"? One possibility is that "by law" refers to federal law,
1078 while "statute" refers to the many state statutes on serving a
1079 corporation; see 4B Federal Practice & Procedure § 1116. Another
1080 possibility is that "law" is a broader reference to all manner of
1081 laws.

1082 [Discussion of ambiguities and inconsistencies began with the
1083 suggestion that it is better to assume that the original drafters
1084 knew what they were doing. But it was responded that successive
1085 committees may inadvertently confuse original meanings and create
1086 inconsistencies. Another champion of the earlier drafters agreed
1087 that we should assume they knew what they were doing, but
1088 recognized that often it will be necessary to consult history to
1089 guess what it was that they knew they were doing. It must be
1090 recognized that in drafting rules, just as in legislative
1091 processes, ambiguities may result from deliberate choice. Policy
1092 disputes that cannot be resolved at the drafting stage are put off
1093 for resolution in application. When policy disputes of this
1094 character emerge in the styling process, it may again be wise to
1095 carry the ambiguity forward without change, and perhaps without
1096 comment in the Committee Note. There will be occasions, on the
1097 other hand, when it is clear that inconsistencies are no more than
1098 inconsistent style choices — it makes no difference in meaning
1099 whether we say "the court in which" or "the court where."]

1100 *Substantive Change*

1101 There will be many occasions when a rule seems to cry out for
1102 substantive change. The answer can be direct when Advisory
1103 Committee capacity allows: the rule is revised in the ordinary way,
1104 adopting current style conventions. Rule 56 is a good example. We
1105 have long deferred the project to reopen Rule 56 following the
1106 Judicial Conference rejection of revisions that were slated to take
1107 effect along with the 1991 Rule 50 amendments. Simply restyling
1108 present Rule 56 and deferring the project still further until the
1109 entire Style Project is completed seems a shame.

1110 Other changes of meaning may well be relatively trivial, and
1111 well within the charge given to the relevant style subcommittee.
1112 In this context, there is no meaningful line between resolving
1113 ambiguity and substantive change. Rule 27(a)(2) provides a good
1114 example. Rule 27(a)(2) now provides that notice of the hearing on
1115 a petition to perpetuate testimony must be served "in the manner
1116 provided in Rule 4(d) for service of summons and complaint." Rule
1117 4 has been revised, and Rule 4(d) now provides for waiver of
1118 service. A look at current Rule 4 presents a puzzle. It is
1119 tempting to cross-refer to all of Rule 4, but that course may
1120 entail a change of meaning as to defendants in other countries.
1121 Something must be done, and any choice may change the meaning. (A
1122 brief note is included in the October agenda materials.)

1123 Such "small" changes present a question touched upon by Judge
1124 Higginbotham at the January 2002 Standing Committee meeting. He
1125 suggested that the style project presents the opportunity for "many
1126 small changes aimed at coherence and consistency, while bigger
1127 problems continue to be agitated." Is it proper to undertake a
1128 relatively large number of "small" changes that go beyond what can
1129 be justified in the name of style alone?

1130 *Redundant Reassurances*

1131 Time and again, we persuade ourselves that it is wise to add
1132 words we believe to be unnecessary. The purpose may be to
1133 anticipate and forestall predictable misreadings — predictable
1134 because we do not trust people to apprehend the "plain meaning," or
1135 because we do not trust people to admit to a plain meaning they do
1136 not like. Instead, the purpose may be to provide reassurance.
1137 Rule 4(j)(2), for example, provides for "[s]ervice upon a state,
1138 municipal corporation, or other governmental organization subject
1139 to suit * * *." There is no need to add "subject to suit": Rule 4
1140 prescribes the method of service, and does not purport to address
1141 such matters as Eleventh Amendment immunity or "sovereign"
1142 immunity. But these words protect against arguments that Rule 4
1143 somehow limits sovereign immunity, and reassures those who fear
1144 that the arguments will be made. Should we adopt a general policy
1145 that prohibits intentional redundancy? That sets a high threshold?
1146 Or that permits whenever at least a few of us fear that language
1147 plain to us may not be plain to all?

1148 *Integration With Other Rules: Style*

1149 How far are we bound to adhere to style conventions developed
1150 in the Appellate Rules and hardened in the Criminal Rules? The
1151 Standing Committee has long favored adopting identical language for
1152 rules that address the same subject unless a substantive reason can
1153 be shown for distinguishing civil practice from some other
1154 practice. But the approach has been relatively flexible: at times
1155 justification can be found in the view that somehow the civil
1156 problem feels different. The "plain error" provision in revised
1157 Civil Rule 51, for example, was redrafted in a number of steps that
1158 culminated in adoption of the plain error language of Criminal Rule
1159 52. But the Committee Note states that application of the rule may
1160 be affected by the differences between criminal and civil contexts.
1161 Would it be better to adopt deliberately different language when
1162 different meanings may be appropriate, even though we cannot
1163 articulate the differences?

1164 The question whether accepted style can continue to evolve is
1165 separate, and troubling. Unshakable stability has great virtue.
1166 But continued improvement is possible, and will be inevitable
1167 unless we erect an impermeable barrier. At first the Supreme Court
1168 did not want us to adopt new style conventions as we amended rules
1169 before taking on the Style project. Now we are writing "must" into
1170 rules with abandon. And we seem to be living well enough with the

1171 blend. How far should we attempt to adopt clear rules at the
1172 beginning, and adhere to them without fail unless we are prepared
1173 to revisit all of the earlier drafting?

1174 *Integration With Other Rules: Content*

1175 Rule 5(a) now requires service of every "designation of record
1176 on appeal." Appellate Rule 10 is a self-contained provision
1177 dealing with the record on appeal; it includes a service
1178 requirement; and it does not seem to require designation. There
1179 may be archaic provisions like this that have to be weeded out.
1180 This prospect does not seem to present any distinctive policy
1181 question: we simply must be alert to the risk.

1182 *Internal Cross-References*

1183 Current editorial suggestions raise the question whether we
1184 are in the middle of another change in cross-reference style.
1185 Within the last few years we have been trained to cross-refer by
1186 full reference to "Rule 15(c)(2)," even in Rule 15(c)(1)(3): "if
1187 the requirements of Rule 15(c)(2) are satisfied and * * *," not "if
1188 the requirements of paragraph (2) are satisfied and * * *." I had
1189 supposed that this was because we were not confident that all
1190 readers can easily remember the distinctions between subdivisions,
1191 paragraphs, subparagraphs, and items. It also simplifies the
1192 question whether we should cross-refer to Rule 15(c)(1)(A), to
1193 subdivision (c)(1)(A), to paragraph (1)(A), or to subparagraph (A).
1194 After getting over initial shock, there is a good argument for
1195 adhering to "Rule 15(c)(2)."

1196 *Committee Notes*

1197 One of the central difficulties of the style enterprise is
1198 that new words are capable of bearing new meanings. Advocates will
1199 seize on every nuance and attempt to wring advantage from it. In
1200 the first years, the effort often will be wilful: the advocate
1201 knows what the prior language was, knows what it had come to mean,
1202 and knows that no change in meaning was intended. As time passes,
1203 memory of the style project will fade. New meaning will be found
1204 without any awareness of the earlier language or meaning. In part
1205 that will be a good thing: substantive changes will be made because
1206 the new meaning is better than perpetuating the old. We cannot
1207 effectively prevent that process, and we may not wish to. But the
1208 Committee Notes are a vehicle for attempting to restrain these
1209 impulses. No doubt the Notes will vanish from sight, and with them
1210 the reminders they might provide. How far should we elaborate on
1211 the limited purposes of style changes in each Note? Is it best
1212 simply to note the more important of the ambiguities consciously
1213 resolved? Should there be a prefatory Note that somehow is

1214 expected to carry forward with the entire 200X[1] body of restyled
1215 Rules?

1216 The style project may justify a new approach to the rule that
1217 we cannot change a Note without amending the Rule. The involuntary
1218 plaintiff provision of Rule 19 is an example. This provision has
1219 a history that suggests a very narrow application. The face of the
1220 rule, however, has no apparent limit. Any attempt to revise the
1221 rule will encounter grave difficulty. But it might be sensible to
1222 attempt to reduce the occasions for inadvertent misapplication by
1223 explaining in the Note that no change has been made in the
1224 inherited language because it is difficult to state the intended
1225 limits, but that it is important to remember the intended limits.
1226 (Part of the difficulty lies in figuring out just what the intended
1227 limits were or are; it may be impolitic to say that in a Note.)

1228 [It was noted that in the Criminal Rules, Committee Notes were
1229 not modified unless a rule was modified. At times a statement was
1230 added to a Note that an issue was considered without, in the end,
1231 acting on it. The Standing Committee deleted some of these
1232 statements.]

1233 *Forms*

1234 What should we do about restyling the forms? Many of the
1235 forms use antique dates for illustration — perhaps the most
1236 familiar is the June 1, 1936 date in Form 9. That date recurs
1237 throughout the forms. Fixing that is easy enough. Perhaps style
1238 changes are also desirable. But here again we may face substantive
1239 concerns. The most obvious example is the Form 17 complaint for
1240 copyright infringement, which has not been amended since 1948 —
1241 long before the transformation of copyright law by the 1976
1242 Copyright Act. There are similar grounds for anxiety about the
1243 Form 16 complaint for patent infringement, and some others. The
1244 Forms could be left for last. Or an attempt could be made to bring
1245 them into the regular process — most of them would attach to the
1246 bundle of Rules 8 through 15.

1247 *Statutory References*

1248 The Rules occasionally refer to specific federal statutes.
1249 The "applicability" provisions of Rule 81 provide many examples.
1250 The risks of this practice are apparent — it may be difficult to be
1251 sure that the initial reference is accurate, and statutes may
1252 change. But there may be real advantages. Specific statutory
1253 provisions may be the least ambiguous means of expression,
1254 particularly in the Rule 81 statements that identify proceedings
1255 that do — or do not — come within the Rules. The Criminal Rules
1256 Committee suggested that specific references might be helpful in
1257 pointing toward the proper statute, saving research time and

[1] A note of optimism here.

1258 reducing anxiety. Perhaps we can do no better than to resolve to
1259 be careful about this practice.

1260 *Further Process Discussion*

1261 More general discussion following the "overarching issues"
1262 focused on the flow of style work through the many groups and
1263 stages involved, and on the timetable proposed for the project.

1264 To the extent possible, it will be important to have the
1265 Reporter and consultants provide initial reviews and answer
1266 research questions before the Style Subcommittee considers a rule
1267 set. The Style Subcommittee consultants, Kimble and Spaniol, will
1268 send their edits of the Garner-Pointer draft to Reporter and
1269 consultants. The Styling Subcommittee should be presented with the
1270 reactions of Kimble and Spaniol to the style suggestions made by
1271 the Reporter and consultants, along with the research questions and
1272 answers already available. The Style Subcommittee will identify
1273 additional research questions for the consultants. All of these
1274 materials will go to the chair of the Advisory Committee and the
1275 chairs of the Advisory Committee Style Subcommittees. Every
1276 subcommittee member will review all of the rules in the package
1277 being considered by that subcommittee, and send suggestions to John
1278 Rabiej. Rabiej will produce a single integrated document that
1279 incorporates all of the suggestions. This document, including
1280 footnotes prepared by the Reporter to identify the issues, will
1281 then go to the style subcommittees for discussion at a meeting. It
1282 is anticipated that the style subcommittees will emulate the
1283 Criminal Rules model, assigning each rule in a package to a single
1284 subcommittee member who will be responsible for guiding discussion
1285 of that rule.

1286 The draft timetable, aiming at final submission to the
1287 Standing Committee in June 2008, looking toward an effective date
1288 on December 1, 2009, was discussed. The most ambitious part of the
1289 timetable appears at the beginning. It is important, however, to
1290 get the project in gear. Recognizing that the dates can be
1291 adjusted, the timetable was accepted as a desirable goal.

1292 *Class-Action Subcommittee Report*

1293 Judge Rosenthal began the report of the Rule 23 Subcommittee
1294 by observing that although there is ground for serious debate over
1295 the directions that might be taken by continuing work on Rule 23,
1296 the debate is not yet ripe. We await Supreme Court action on the
1297 amendments currently proposed. If the amendments are adopted, we
1298 will want time to see how they work.

1299 Although this is not the time to propose further changes, the
1300 protests that have been voiced since the Committee took up class-
1301 action work in 1991 continue unabated. Many observers assert that
1302 serious problems remain. Some of the problems may prove amenable
1303 to Rule 23 revisions. The most fundamental task would be to start
1304 over with Rule 23, as John Frank often urged, but there is no

1305 apparent wish to do so. We should, however, remain open to
1306 suggestions on any aspect of Rule 23.

1307 One set of pressing problems has been taken off the table.
1308 The Committee has decided not to pursue rule-based solutions to the
1309 problems of state-court class actions that duplicate and compete
1310 with actions in federal court. This topic is not likely to be
1311 reopened unless Congress fails to find a solution.

1312 Standards for certifying settlement classes deserve continued
1313 examination, with help from the Federal Judicial Center. In 1996
1314 a new Rule 23(b)(4) on settlement classes was published for
1315 comment. Further consideration was deferred in 1997 after
1316 certiorari was granted in what came to be known as the Amchem case.
1317 Extensive comments were provided on the published proposal. Many
1318 of the comments expressed fear that settlement classes would foster
1319 collusive deals that favor class counsel at the expense of class
1320 members — the fear that courts would enter deeper into the market
1321 for the sale of res judicata. Another concern was that lowering
1322 the bar for certification of settlement classes not only would
1323 encourage more class actions but also would wash over to lower the
1324 standards for certifying classes for trial. But suggestions
1325 continue to be made that the Committee should consider standards
1326 for certifying settlement classes. The guidance provided by Amchem
1327 and Ortiz may not suffice. There is a fear that some cases will go
1328 to state courts where settlement is easier. Others note that
1329 although many class actions continue to be settled in federal
1330 courts, that is because the courts are not really doing what Amchem
1331 requires. In addition, it is said that to the extent that Amchem
1332 and Ortiz make settlements more vulnerable, objectors win increased
1333 leverage and take unfair advantage. Still others believe that
1334 Amchem has not had any significant deterrent effect on settling
1335 cases that <u>should</u> be settled. There are many cases that invoke
1336 Amchem; perhaps the lower courts have found that indeed they are
1337 free to do what should be done. Amchem requires scrutiny of
1338 adequate representation and lack of conflicting interests. It
1339 requires close consideration of any attempt to settle future
1340 claims. Future claims, however, are a discrete phenomenon
1341 encountered in a small set of cases.

1342 All of these considerations show the need for empirical
1343 inquiry. Do Amchem and Ortiz prevent settlement of cases that can
1344 and should settle on appropriate terms? If proposed Rule 23(e)
1345 takes effect on December 1, 2003, we will have additional support
1346 for increased scrutiny of settlements. That may reduce the
1347 riskiness of settlement classes.

1348 If we do come to consider a settlement-class rule, one
1349 approach would be to go beyond Amchem in permitting certification
1350 for settlement of a class that could not be certified for trial.
1351 Another approach would be simply to clarify the statement in Amchem
1352 that a case can be certified for settlement if the only problems

1353 that defeat certification for trial arise from manageability
1354 concerns — as observed by the dissent, the meaning of this Amchem
1355 statement is not entirely clear. The effect of choice-of-law
1356 problems, for example, might be seen as a matter of manageability;
1357 it also might be seen as something more profound. The effort might
1358 be something like the recent Evidence Rule 702 revisions to absorb
1359 the practices that emerged from the Daubert and Kumho decisions on
1360 admitting expert testimony.

1361 The Subcommittee asked the Federal Judicial Center to assist
1362 in determining the effects of Amchem and Ortiz on settlements. The
1363 Center has done a study, directed by Thomas Willging and Robert
1364 Niemic. The review of filing and settlement rates has been
1365 completed; they are now working on the design of questionnaires to
1366 be used to elicit specific information from attorneys about the
1367 reasons for choosing between state and federal courts.

1368 Robert Niemic led the presentation of the FJC study. The
1369 numerical-empirical phase was designed to test the predictions:
1370 What has happened to filings of federal class actions, particularly
1371 those that do not involve securities law? To removals? To
1372 settlements? To dismissals?

1373 It would have been good to include state class-action filing
1374 statistics in the study. Data, however, are not available. The
1375 study does not reveal what has happened in state class-action
1376 filings. There may have been a dramatic increase, as some have
1377 hypothesized. There may not. We cannot tell.

1378 The data for the study represent 82 federal districts; the
1379 data for the remaining 12 districts were insufficient. The study
1380 covered the period from January 1, 1994 to June 30, 2001. Prisoner
1381 cases and pro-se attempts were not included (a pro se litigant
1382 cannot represent a class).

1383 The data include 1,648 lead class actions that emerged from
1384 intradistrict consolidations; 192 lead class actions that emerged
1385 from interdistrict MDL consolidations; and 13,197 "unique" class
1386 actions that did not result from transfer or consolidations. This
1387 method of counting eliminates duplicate filings — the 1,648
1388 intradistrict lead class actions, for example, gathered together a
1389 total of 8,335 separate class actions. The 192 interdistrict and
1390 MDL lead class actions provide a more dramatic illustration — they
1391 drew together 4,182 member class actions.

1392 A time-series analysis was done of these filings. The
1393 analysis showed very few correlations that are statistically
1394 significant. And such statistically significant correlations as
1395 were found to not demonstrate causation: it is not possible to
1396 conclude whether either the Amchem or Ortiz decision actually
1397 caused any of the trends observed. There are many factors other
1398 than these two Supreme Court decisions that affect the rate of
1399 class-action filings. The change after Ortiz, for example, was an

1400 increase in filings — not the change anticipated in launching the
1401 study. So filings went down in the period after Amchem, but it
1402 cannot be determined what causal influence Amchem exerted, if any.
1403 Something went on that is statistically significant if we go back
1404 to six months before the Amchem decision.

1405 The rates of class-action filings are quite similar to the
1406 filing rates for all actions in federal court.

1407 Personal injury and property damage class actions combined —
1408 with personal injury actions dominating in all periods — rose from
1409 a filing rate of 30 at the beginning of the study to a rate greater
1410 than 80 at the end.

1411 Removals quadrupled over the study period.

1412 For all class actions other than securities, there was about
1413 a doubling of the filing rate over the study period. Filing rates
1414 remained reasonably steady after the Amchem decision.

1415 Diversity filings and removals more than doubled; "the line is
1416 reasonably straight."

1417 Settlements and dismissals were counted over the period within
1418 two and one-half years of filing. For that reason, the counting
1419 stopped with January 1, 1999. There was little change in the rate
1420 from 1994 to 1999 in considering rates over six-month intervals.
1421 The pattern is more erratic if considered over one-month intervals.

1422 There was an abrupt decrease in securities class-action
1423 filings after the 1995 legislation, as expected. But there was an
1424 increase both before and after the 1998 legislation; it is
1425 difficult to guess why there was an increase before 1998.

1426 In short summary, class-action filing activity decreased after
1427 Amchem and increased after Ortiz.

1428 Discussion of the FJC report began with the observation that
1429 some lawyers believe that the Ortiz decision caused many companies
1430 involved in the third and fourth waves of asbestos litigation to go
1431 into bankruptcy. If it can be known, it would be important to know
1432 whether bankruptcies could have been avoided under a different
1433 class-action regime. What is left now is to re-do the same
1434 settlement after limited-fund class treatment is denied, providing
1435 an opportunity to opt out. Another member agreed that "those who
1436 are knowledgeable think Ortiz caused the recent round of asbestos
1437 bankruptcies." It would be difficult, however, to gather sound
1438 empirical information on this subject. Lawyer interviews might
1439 provide some answers, but the results would not be rigorous.

1440 It also was observed that the more general questions about the
1441 effects of the Amchem and Ortiz decisions cannot be answered
1442 without knowing what is happening in state courts. We hear
1443 anecdotes that plaintiffs are going to state court, but nothing
1444 more than anecdotes.

1445 A draft of the survey instrument that will be used to gather
1446 information from plaintiffs who filed in federal courts was
1447 discussed. A different instrument will be used for cases that were
1448 removed from state court. The purpose is to go behind the filing
1449 data compiled for the first phase of the FJC study to explore how
1450 the Amchem and Ortiz decisions figured as factors in attorney
1451 decisions on court selection. So in cases removed from state
1452 court, the FJC will talk to the lawyer who chose to file in a state
1453 court and to the lawyer who decided to remove to a federal court.
1454 The survey instruments will be sent to lawyers in all the cases in
1455 the data base that were removed from state court.

1456 The survey instruments posit a wide range of factors that may
1457 influence the choice of court. Have the right factors been chosen?
1458 One response was that many lawyers believe plaintiffs choose state
1459 courts because they dislike the Daubert limits on expert testimony
1460 — perhaps that should be made a specific item in the survey.

1461 Noting that the survey proposes to ask about lawyers'
1462 perceptions of favoritism in state or federal court, it was asked
1463 whether lawyers would respond openly to such questions. The first
1464 suggestion was that the "not applicable" column in this set of
1465 questions was confusing. It was further observed that it is
1466 important to avoid an appearance of shopping for answers that will
1467 reflect unfavorably on state judges. Attention to the phrasing of
1468 the question is important. The first sentence in this item,
1469 referring to favoritism "(including bias)" might be eliminated.

1470 The ABA representatives might be asked both to review the
1471 survey questions with an eye to considering how lawyers are likely
1472 to understand them, and also to consider whether other questions
1473 might be added.

1474 The Federal Judicial Center also has continued to work on its
1475 model class-action notices. Todd Hillsee, who testified on earlier
1476 drafts, has volunteered to participate on a pro bono basis, and has
1477 offered real improvements in putting the FJC content into an
1478 attention-getting format.

1479 Judge Rosenthal concluded the class-action discussion by
1480 observing that the FJC information will help the Subcommittee in
1481 deciding whether to recommend to the full Committee whether work
1482 toward further Rule 23 amendments should be resumed. There may be
1483 no justification, in light of developing case law, for going
1484 forward. Or reasons may appear for going forward. If there is to
1485 be further work, however, it does not seem likely that the time has
1486 come to pursue further the concept of opt-in classes, whether for
1487 small claims or for large claims.

1488 *Discovery Subcommittee*

1489 Professor Lynk reported on the Discovery Subcommittee meeting
1490 during the first day of this Committee meeting. Four agenda items
1491 were discussed.

1492 Judge Irenas has suggested adoption of rules changes to
1493 support more general use of a "de bene esse" deposition practice
1494 that he has found useful. With consent of the parties and court
1495 authorization, videotaped depositions can be taken shortly before
1496 trial to be used in place of live witness testimony. Examination
1497 and cross-examination of the witness would proceed as at trial, not
1498 in the quite different modes common in depositions taken for
1499 discovery purposes. All objections to admissibility would be made
1500 at the deposition. Objections are reviewed by the court before
1501 trial, to enable editing of the deposition to delete inadmissible
1502 portions. This process may make more work for the judge, but it
1503 can make it much easier to schedule a trial. The subcommittee
1504 discussed the question on the assumption that such trial
1505 depositions could be taken only with the consent of all parties,
1506 but did not explore that issue. It also wondered whether the
1507 question is as much one to be considered by the Evidence Rules
1508 Committee as the Civil Rules Committee — there is a rather
1509 eccentric allocation of trial issues between the two sets of rules.
1510 And concern was expressed about encouraging non-live testimony.
1511 The only decision for the present has been to ask the Evidence
1512 Rules Committee to comment on the question. (In response to a
1513 question, it was observed that the concern with the Evidence Rules
1514 was not with any specific Rule of Evidence, but with the more
1515 general question of the mode of presenting evidence at trial. The
1516 reason for considering rules amendments is that there is no express
1517 authority for this practice, and there are a number of points at
1518 which present rules seem inconsistent with it — it seems to work
1519 only because all parties consent. But it can be done now; one
1520 judge observed "we do it all the time." It also was observed that
1521 the Subcommittee did not go into the problems that will arise when
1522 a party, having participated in a videotape trial deposition, is
1523 disappointed with the results and wants to substitute live trial
1524 testimony. The conclusion was that the question will be put to the
1525 Evidence Rules Committee. No one is suggesting a rule that would
1526 authorize this practice over dissent of any party.)

1527 The question of disclosing "core work-product" under the
1528 expert-trial-witness provisions of Rule 26(a)(2)(B) has been posed
1529 by the New York State Bar Association. Most Subcommittee members
1530 have believed that any information disclosed to an expert trial
1531 witness as a basis for shaping opinions to be expressed at trial is
1532 subject to disclosure and exploration at deposition. The
1533 disclosure Rule and Committee Note seem to contemplate this result,
1534 but are not entirely clear. Lower courts have disagreed, although
1535 perhaps a majority of the reported decisions think disclosure is
1536 required. This topic could be considered without reopening the
1537 entire area of work-product protection. Some Subcommittee members
1538 believe that disclosure is not wise. The proper rule is not
1539 immediately apparent. The Subcommittee will continue to explore
1540 the question, and will reach out to bar groups for further
1541 information on general practice and suggestions about desirable
1542 practice.

1543 Another question is whether a nonparty deponent should be
1544 notified that a deposition is to be videotaped. There have been a
1545 few cases in which a "high profile" witness has won a protective
1546 order barring videotaping for fear that the tape may be used for
1547 inappropriate invasions of privacy. The general nonfiling rule may
1548 reduce the privacy concern to some extent, although use of the
1549 deposition in the proceedings will lead to filing. Apart from
1550 special interests in privacy, there is an interest of fairness to
1551 the deponent, who may need to prepare emotionally for a performance
1552 "on camera." The Subcommittee agreed unanimously that a rule
1553 amendment is appropriate. A proposed amendment will be brought to
1554 the full Committee, perhaps at the January meeting.

1555 Finally, an old proposal for use of written testimony at trial
1556 was revisited because of the connection to the de bene esse
1557 deposition proposal. A draft Rule 43(a) was prepared that would
1558 authorize part of a trial on written materials with the consent of
1559 all parties and the court's approval. Some district judges are
1560 doing this in nonjury cases. The Subcommittee discussion began
1561 with uncertainty whether this trial issue is a proper matter for
1562 consideration by the Discovery Subcommittee. It is not clear in
1563 any event whether this practice should be encouraged by adopting an
1564 express rule. The Subcommittee, however, will continue to study
1565 the issue. But there will be no suggestion that this practice
1566 could be employed over objection by a party who prefers trial with
1567 live witnesses.

1568 All agreed that the Discovery Subcommittee should proceed as
1569 planned.

1570 *Computer-Based Discovery*

1571 The agenda materials include a letter from Professor Marcus to
1572 "interested others" asking for advice on the prospect of making
1573 rules specifically aimed at discovery of computer-based
1574 information. The mailing list is extensive; Kenneth Withers
1575 provided much help in compiling it. But the list can be
1576 supplemented. Because there will be duplications, it is desirable
1577 to suggest additional recipients to the Discovery Subcommittee.

1578 The Discovery Subcommittee plans to make recommendations at a
1579 spring meeting in 2003 with respect to new proposals. It may prove
1580 desirable to have a Subcommittee meeting to help shape proposals.

1581 Molly Johnson and Kenneth Withers reported on the FJC
1582 Qualitative Study of Issues Raised by The Discovery of Computer-
1583 Based Information in Civil Litigation. They noted that Meghan A.
1584 Dunn is a third author of the study, and that Thomas Willging
1585 provided invaluable help.

1586 The Discovery Subcommittee was consulted in looking for in-
1587 depth illustrations of how these issues play out in particular

1588 cases. The Study was divided into three parts — a survey of
1589 magistrate judges, a survey of computer consultants, and ten case
1590 studies.

1591 Magistrate judges were selected for surveying because the
1592 Subcommittee thought they are likely to have more experience with
1593 computer-based discovery issues than district judges have. In
1594 addition, there is an e-mail list that makes it easy to reach all
1595 magistrate judges. They were asked about their experiences,
1596 including types of cases and the types of issues that had come up.
1597 They also were asked to suggest cases that might be good for in-
1598 depth study.

1599 The survey of consultants was designed to supplement the
1600 survey of magistrate judges. The rate of return was disappointing:
1601 75 experts were addressed, but only 10 usable responses emerged.
1602 Among the problems were timing — the survey was sent out just
1603 before September 11, 2001; responses received in free form that
1604 could not be translated to the survey format; and confidentiality
1605 agreements with clients.

1606 The researchers also reached out the Defense Research
1607 Institute, the American Trial Lawyers Association, and others for
1608 nominations of cases to be considered for in-depth study.

1609 The case study sought cases recently closed or settled in
1610 federal courts in which at least the judge and one attorney were
1611 willing to participate in the study. The first step was study of
1612 the case file. Then the participants were interviewed. The
1613 interview protocol was designed to facilitate cross-case
1614 comparison.

1615 The results of the case study cannot be taken as completely
1616 representative of federal-court experience. The participants were
1617 mainly magistrate judges; it is possible that district judges
1618 encounter different case types and problems. The focus was on
1619 cases with problems that came to a judge; there are many cases that
1620 do not present such problems. The study involved interviews with
1621 only ten judges and seventeen attorneys; the number is too small to
1622 ensure full representation.

1623 The magistrate-judge survey showed that three out of five who
1624 responded had encountered computer-based discovery problems. (The
1625 three-out-of-five number is taken from a sample limited to
1626 magistrate judges who do discovery work.) The case types that most
1627 frequently generated problems were individual-plaintiff employment
1628 cases, general commercial cases, and patent or copyright cases.
1629 The employment and general commercial cases are relatively frequent
1630 in overall case filings. The problems in patent and copyright
1631 cases are disproportionate to overall case filings, but it may be
1632 that these cases generate a disproportionate share of general
1633 discovery disputes as well as computer-based discovery disputes.

1634 Sixty-nine percent of the magistrate judges identified as an
1635 "issue" that the case involved a computer consultant or expert;
1636 they did not say whether this was a cause of problems, a relief
1637 from problems, or a neutral factor. Privilege waiver, on-site
1638 inspection, requests for sharing retrieval costs, and concerns
1639 about spoliation were other problems that "led the pack." But again
1640 there is no basis in the study for comparing the frequency of these
1641 problems to cases involving discovery of other sorts of material.

1642 In the case studies, the judges and attorneys were asked
1643 whether it would be useful to amend the discovery rules to account
1644 for computer-based information. Seven of the ten judges did not
1645 favor rule changes. Twelve of the seventeen attorneys did favor
1646 rules changes. A majority of the participants thought that the
1647 present rules had no effect on their cases.

1648 Specific rules changes suggested by more than one participant
1649 included a rule that the court can designate the form of production
1650 — this seems particularly important in directing production in all-
1651 electronic form if the records are kept that way. The rules might
1652 provide for early data-preservation orders, entered before the
1653 scope of discovery is determined: this is done under the current
1654 rules, but a specific rule would help. It was suggested that Rule
1655 26(a) disclosures, Rule 26(f) discovery plans, and Rule 16 pretrial
1656 orders should be directed to consider computer-based discovery
1657 directly. And it might be possible to clarify the extent of the
1658 obligation to review computer records for discovery responses.

1659 The case studies show that many judges are willing to use
1660 their powers to manage discovery. One judge developed a
1661 questionnaire for all of a party's employees exploring the extent
1662 to which they used e-mail for business purposes. The same judge
1663 scheduled a one-day "computer summit meeting" to help set the
1664 directions of discovery. The parties may be ordered to provide
1665 frequent reports on the progress of discovery. Another judge
1666 provided for discovery of e-mail "headers" alone, not the body of
1667 the messages, for purposes akin to a privilege log: the headers
1668 reveal the sender, recipient, time, and subject of the message.
1669 This information can be used to channel further discovery.

1670 Many of the case-study participants thought that judges and
1671 attorneys need more education.

1672 The FJC education system has provided every federal judge an
1673 opportunity to attend a conference on computer-based discovery.
1674 Many FJC publications devote increasing attention to these issues.
1675 Speakers and materials have been provided for circuit and district
1676 conferences. And, working with the Federal Bar Association, a kit
1677 has been prepared for local seminars. The kit includes a DVD
1678 demonstration in which Committee Member Judge McKnight presides
1679 over five problem presentations. Federal Bar Association chapters
1680 will have these kits, and every district court chief judge. The
1681 kit can support a program with a local panel. The FJC web site

1682 will soon provide resources.

1683 The FJC has compiled information from more than 180 CLE
1684 conferences on computer-based discovery. Arrangements will soon be
1685 made to provide access to this data base for every Civil Rules
1686 Committee member.

1687 The National Center for State Courts is pursuing a research
1688 project parallel to the FJC efforts, based on focus groups of
1689 judges. The FJC is cooperating in this study.

1690 A working group of the Sedona Conference will formulate the
1691 views of defense attorneys. The ABA Section of Science and
1692 Technology Law is preparing a treatise. And groups of records
1693 managers and information technology professionals are creating
1694 programs. Many special-interest bar groups also have programs.

1695 No specific rules proposals have yet emerged from these
1696 multifarious projects.

1697 *"Rule 5.1" — Intervention Notice to Government*

1698 Civil Rule 24(c) implements the provisions of 28 U.S.C. § 2403
1699 that direct that a court give notice to the United States Attorney
1700 General when the constitutionality of a federal statute affecting
1701 the public interest is drawn in question, and likewise give notice
1702 to a state attorney general when a state statute is challenged.
1703 Appellate Rule 44 implements the statute in somewhat different
1704 terms. A "mailbox" suggestion that the Civil Rules might be made
1705 parallel to the Appellate Rule has been supported by the Department
1706 of Justice on the ground that there still are a worrisome number of
1707 cases in which notice is not provided.

1708 One source of difficulty with Rule 24(c) may arise from its
1709 location in the general intervention rule: it is more likely to be
1710 noticed by parties who are thinking of intervention possibilities
1711 than by parties who are focusing only on challenging a statute.
1712 The drafts that have been prepared to illustrate possible changes
1713 accordingly have been designated provisionally as a new Rule 5.1.

1714 The Department of Justice has suggested several revisions of
1715 the first draft. Responses to those suggestions were not reviewed
1716 in time to support further development by the Department. The topic
1717 is not yet ripe for consideration by the Committee.

1718 One specific issue was noted. Section 2403 directs the court
1719 to certify to the Attorney General the fact that a challenge to a
1720 federal statute has been made. Appellate Rule 44 supplements this
1721 by directing a party who makes the challenge to notify the circuit
1722 clerk, and then directs the clerk to certify the fact of the
1723 challenge to the Attorney General. It has been suggested that
1724 although the statute imposes the notice obligation on the court,
1725 the Rule should impose a parallel obligation on the party. If the
1726 party must notify the court, as in Appellate Rule 44, it is simple
1727 enough to require that the notice also be sent to the Attorney

1728 General. Although the result would be duplicating notices to the
1729 Attorney General unless we are prepared to discard the statutory
1730 requirement that the court certify the fact of the challenge, the
1731 double notice may be valuable.

1732 The Rule 5.1 draft includes several departures from Appellate
1733 Rule 44. Because of the general policy that parallel provisions in
1734 separate sets of Rules should be parallel, the need to work with
1735 the Appellate Rules Committee will be explored.

1736 As with many other ongoing projects to amend the rules, this
1737 project will be on a separate track from the style track.

1738 *Rule 6(e): "3 days shall be added to the prescribed period"*

1739 The Appellate Rules Committee has pointed out the ambiguity of
1740 the provision in Civil Rule 6(e) that directs that when service has
1741 been made under Rule 5(b)(2)(B), (C), or (D), "3 days shall be
1742 added to the prescribed period" for responding. The ambiguity
1743 arises from the interplay between this provision and the Rule 6(a)
1744 provision that intervening Saturdays, Sundays, and legal holidays
1745 are excluded in computing a time period that is less than 11 days.
1746 This ambiguity has not been ironed out in the reported cases, which
1747 take different approaches.

1748 An additional three days are provided to recognize that there
1749 may be some delay when service is made by mail, by deposit with the
1750 court clerk, or by electronic means or other means agreed to by the
1751 parties. This purpose is served most clearly by providing that the
1752 prescribed period begins three days after service is made, or else
1753 by providing that it ends three days later than it otherwise would
1754 end. Either approach avoids the absurdities that may arise from
1755 alternative constructions.

1756 In some circumstances it makes a difference whether three days
1757 are added at the beginning or the end of the period, at least when
1758 the prescribed term for responding is less than 11 days after
1759 service.

1760 It was agreed that the most important consideration is to
1761 achieve a clear statement that eliminates any ambiguity.

1762 The central argument for starting the prescribed period three
1763 days after service is made — e.g., by mailing — is that the purpose
1764 is to reflect the fact that as many as three days may be needed for
1765 delivery. And clear, simple drafting is possible.

1766 Some of the lawyers suggested that they had assumed that the
1767 three days are added at the end of the period. In some
1768 circumstances this will give a greater extension of time than would
1769 result from starting the period three days late. It was urged that
1770 if this version can be drafted clearly, it is better to achieve
1771 clarity on terms that conform with the mode of current practice.
1772 Absent any clear reason for making one choice or the other, it is
1773 better to adopt the approach that will cause least disruption

1774 during the period when many lawyers will continue to adhere to old
1775 habits without considering a new rule provision.

1776 It was asked why the problem should not be solved by undoing
1777 all of the complicated calculation rules and expanding the periods
1778 that now seem too brief unless we exclude weekends and holidays and
1779 add time when in-hand or at-home service is not made. This
1780 question is frequently asked in discussion of these problems, and
1781 has always been resisted. The reasons for resistance are not
1782 entirely clear. One problem may be the difficulty of rethinking
1783 all of the relevant time periods and setting new, longer, but still
1784 arbitrary periods. Another may be that the present system works to
1785 set shorter periods in many situations than would result if general
1786 periods were set with an eye to accommodating all situations.
1787 However that may be, no support was voiced for taking up this
1788 chore.

1789 The American Bar Association representatives volunteered to
1790 conduct an informal survey of Litigation Section leaders to
1791 determine whether there is any common understanding in practice.

1792 Alternative Rule 6(e) drafts will be presented at a 2003
1793 winter or spring Advisory Committee meeting, one starting the
1794 period three days late and the other ending the period three days
1795 late.

1796 *Rule 15(c)(3)*

1797 In *Singletary v. Pennsylvania Department of Corrections*, 3d
1798 Cir.2001, 266 F.3d 186, the court invited this Committee to
1799 consider an amendment of Rule 15(c)(3) identified in an earlier
1800 Committee agenda item. The problem arises from the provision that
1801 allows relation back of an amendment changing the party or the
1802 naming of a party against whom a claim is asserted when, among
1803 other things, the new party had notice that but for some "mistake"
1804 concerning the identity of the proper party, the action would have
1805 been brought against the new party. Several courts of appeals have
1806 agreed that when a plaintiff is aware that the plaintiff cannot
1807 identify an intended defendant, there is no "mistake." The problem
1808 has arisen in a variety of settings. A common illustration is
1809 provided by a plaintiff who believes that police officers have used
1810 excessive force against the plaintiff but who cannot identify the
1811 police officers to sue. A direct approach to this problem would be
1812 to add a few words to Rule 15(c)(3): "but for some mistake <u>or lack</u>
1813 <u>of information</u> concerning the identity of the proper party * * *."

1814 The apparently easy amendment may not be so easy. The cases
1815 that evoke sympathy are those in which a plaintiff has made
1816 diligent efforts to identify the proper defendant within the
1817 limitations period, but has failed. There is less reason for
1818 concern when a plaintiff simply waits to file on the last day of
1819 the limitations period and then sets about identifying a proper
1820 defendant. If this omission is to be addressed, the amendment is
1821 not quite so simple.

1822 If Rule 15(c)(3) is to be amended, it also must be asked
1823 whether some of its other apparent problems should be addressed.
1824 Truly perplexing puzzles are posed by the 1991 amendment that set
1825 the time for getting notice to the new defendant as "the period
1826 provided by Rule 4(m) for service of the summons and complaint."
1827 Unraveling these puzzles will be difficult, in part perhaps because
1828 they do not appear to have caused any general problems in actual
1829 practice.

1830 Yet other questions might be addressed. Rule 15(c)(3) has
1831 never been used to address the problems that arise from changing
1832 plaintiffs after a limitations period has expired; these problems
1833 are not much less difficult than the problems that attend changing
1834 defendants. Counterclaims might be addressed. Still other
1835 clarifications seem desirable.

1836 A more fundamental set of questions also besets Rule 15(c)(3).
1837 Rule 15(c)(1) allows relation back of an amendment whenever
1838 relation back is permitted by the law that provides the statute of
1839 limitations applicable to the action. The sole purpose of Rule
1840 15(c)(3) is to permit relation back when the statute cannot be
1841 interpreted to permit it. This result may seem at odds with the
1842 Enabling Act provision that a rule must not abridge, enlarge, or
1843 modify any substantive right.

1844 Brief discussion noted that "Doe" pleading in California is
1845 disruptive, posing real problems for the courts. It may be used
1846 for cases in which the plaintiff knows the identity of an intended
1847 defendant but does not know whether there is a cause of action.

1848 But it also was noted that the "lack of information" provision
1849 would address a real problem. There are many cases in which a
1850 diligent plaintiff is not able, without the help of discovery, to
1851 identify a proper defendant. These questions are of interest not
1852 only to plaintiffs but also to judges, municipal entities, and many
1853 others.

1854 These problems are difficult. It may prove desirable to
1855 appoint a subcommittee to consider them in greater depth before the
1856 Committee considers them further.

1857 *Rule 68*

1858 A proposal to amend Rule 68 was included in the consent
1859 calendar items. The proposal was to make the rule more effective
1860 by allowing plaintiffs to make offers; providing sanctions when a
1861 plaintiff rejects an offer and then wins nothing; making it clear
1862 that the clerk can enter judgment as to part of a multiparty or
1863 multiclaim case; and increasing sanctions by allowing an award of
1864 expenses (although not attorney fees) in addition to costs.

1865 It was noted that "Rule 68 has been with us for a long time."
1866 The earlier consideration bogged down in elaboration of a
1867 complicated proposal to establish a limited provision for attorney-

1868 fee sanctions. In its present form, Rule 68 "is an embarrassment."
1869 We should either get rid of it, or we should reform it. California
1870 practice has an offer-of-judgment provision that is used regularly
1871 because it "has teeth" in the form of a discretionary award of
1872 expenses, not attorney fees. Expenses for expert witnesses can be
1873 a "huge weapon" in encouraging settlement. Plaintiffs as well as
1874 defendants can make offers. The device is useful after judgment as
1875 well as before trial — expense sanctions are traded away for
1876 dismissal of an appeal.

1877 It was observed that any proposal that includes attorney-fee
1878 sanctions will produce strong reactions.

1879 It was asked whether an improved Rule 68 should address the
1880 issue-preclusion effects of a judgment based on an offer of
1881 settlement. One possibility would be to permit an offer that
1882 includes an agreement on issue preclusion as a means of making
1883 settlement more nearly equivalent to victory at trial.

1884 It was decided to carry the Rule 68 questions forward for
1885 consideration at a later meeting.

1886 *Admiralty Rules*

1887 Rule B: Admiralty Rule B(1)(a) provides for attachment in an in
1888 personam admiralty action. Attachment serves two purposes. It can
1889 establish quasi-in-rem jurisdiction in an action that cannot be
1890 supported by personal jurisdiction. It also provides security.
1891 The security function can be served even in an action supported by
1892 personal jurisdiction because B(1)(a) attachment is available even
1893 when a defendant is subject to personal jurisdiction, so long as
1894 the defendant is not "found" in the district. A defendant is
1895 "found" only if subject to service in person or through an agent.
1896 This circumstance makes it important to fix the moment for
1897 determining whether a defendant can be "found" in the district. A
1898 defendant not found in the district when an demand for attachment
1899 is made may seek to appoint an agent for service so as to avoid
1900 attachment. Two courts of appeals have ruled that the
1901 determination should be made at the moment when a verified
1902 complaint praying for attachment is filed. It was suggested at a
1903 Standing Committee meeting that Rule B should be amended to reflect
1904 these rulings. The Maritime Law Association has joined in
1905 supporting the recommendation.

1906 Discussion noted that the Rule B concept of finding a
1907 defendant in the district does not depend on temporary absence — a
1908 defendant generally to be found in the district is not subject to
1909 attachment simply because absent for a day.

1910 It also was noted that there may be special reasons for
1911 affording a special pre-judgment security remedy in admiralty
1912 cases: "enforcement of a personal judgment may be more difficult,
1913 more often."

The proposed amendment was recommended to the Standing Committee for publication, aiming toward adoption in the ordinary course.

Rule C: Admiralty Rule C(6)(b)(i)(A) has recently been amended as part of the process that separated forfeiture proceedings from true maritime proceedings in many parts of the Supplemental Rules. Unfortunately, unthinking parallelism with the provisions adopted for forfeiture led to inclusion of a provision that has no meaning. As adopted, a person who asserts a right of possession or an ownership interest in property that is the subject of an admiralty in rem action must file a verified statement "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4)." The difficulty is that Rule C(4) requires publication of notice only if attached property is not released within 10 days after execution of process. Because notice does not even begin until 10 days after execution of process, there cannot be any situation in which Rule C(4) notice is completed earlier than the execution of process.

This drafting oversight is easily corrected: "within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or * * *."

It was asked whether this change should be pursued without publication, as a technical amendment. Immediate correction would be helpful to protect practitioners against the waste of time entailed in a fruitless effort to find meaning for the material proposed to be stricken. Publication, on the other hand, will do the same job: the admiralty bar is small, and pays attention to these matters. Publication of the proposal will call attention to the issue and resolve it effectively in practice. Publication, indeed, can be accomplished earlier than an amendment could be made with no publication — the seemingly longer process may in fact provide earlier effective relief. Since the Rule B proposal is appropriate for publication, this proposal may better be published as well.

Proposed Rule G: The Department of Justice has proposed that all the explicit Supplemental Rules provisions for civil forfeiture proceedings be stripped out of Rules A through E and gathered together in a new Rule G. The Maritime Law Association position is that this approach is appropriate so long as nothing is done to alter procedures for maritime cases; there is some uncertainty whether it would be better to make Rule G entirely self-contained, or whether instead to permit it to incorporate by reference any provisions in Rules A through E that may be useful to supplement its explicit provisions.

Drafting in this sensitive area is not a simple matter. After several revisions of the initial draft, a polished version was circulated for comment to the National Association of Criminal Defense Lawyers and an American Bar Association section. The

1962 National Association of Criminal Defense Lawyers was active in
1963 commenting on the forfeiture provisions in the Criminal Rules,
1964 pursuing its comments to the level of the Judicial Conference, and
1965 responded to the Rule G draft with lengthy, detailed, and
1966 thoughtful comments. The Admiralty Rules Subcommittee will be
1967 reconstituted as a forfeiture rule subcommittee for the purpose of
1968 considering the best ways to consider these comments, and whether
1969 to reach out to other groups for further comments. It is difficult
1970 to predict whether this process can lead to a draft ready for
publication by the time of the spring 2003 meeting.

Respectfully submitted,

Edward H. Cooper
Reporter