OBSERVATIONS FROM THOSE INVOLVED IN THE RULE MAKING PROCESS OVER THE YEARS

EXECUTIVE SUMMARY

MODERATOR:
Dean David F. Levi, Duke University School of Law

PANELISTS:
Judge Anthony Scirica, U.S. Court of Appeals, Third Circuit
Judge Patrick Higginbotham, U.S. Court of Appeals, Fifth Circuit
Professor Paul Carrington, Duke University School of Law
Professor Daniel Coquillette, Harvard/Boston College
Professor Arthur Miller, New York University School of Law

This panel addressed how the rules and the rule-making process have functioned historically, looked toward the future of the rule-making process, and reacted to some of the discussions from throughout the conference.

Professor Paul Carrington:

Professor Carrington first related the history of the Rules Enabling Act. He asserted that the Act was the product of efforts by the ABA to seek national uniformity in the rules governing federal court practice, and was strongly opposed by politicians who wanted "federalism" in federal court rules. The Act required an agreement among all three branches of government in its creation. Professor Carrington noted that the point of the Act was to simplify the litigation process – it merged law and equity and lowered pleading requirements to notice pleading. Discovery changed as well; it had to be amplified following implementation of notice pleading. The Act was based upon the political ideal that many laws should be enforced by private plaintiffs, whom Congress sometimes rewarded for their efforts with treble damages. In 1966, the Act was modified to allow aggregation of small claims under the class action rule. Notably, this change was approved by business and corporate leaders who didn't see the consequences of the rule for their own interests. Professor Carrington observed that changes to the rules began in the 1980s, as caseloads increased, the number of judges increased, and complaints about the cost of litigation appeared. He noted that complaints about litigation costs, according to Judge Learned Hand, had existed since the time of Hammurabi's Code and would continue for as long as courts exist.

Professor Carrington recalled the checkered history of the mandatory disclosure provision, which was approved by the committee, the Judicial Conference and the Supreme Court. The House of Representatives voted 385-0 against the rule, but the Senate failed to act within the required six months, so the rule was approved by default. The rule proved less revolutionary than was either

feared or hoped. Professor Carrington suggested that litigation costs have been more driven by the billable hour than by anything in the Civil Rules. The billable hour, he said, creates incentives for delays and excessive discovery. He also expressed concern with the Twombly and Iqbal decisions, saying that they work against the role of private plaintiffs in the system. He suggested that Congress should speak to this issue and reaffirm the role of those private plaintiffs in the enforcement of law.

Professor Daniel Coquillette:

Professor Coquillette, who currently serves as the reporter to the Standing Committee, thanked the conference leadership and Duke Law School for hosting the conference. He then noted three major areas of change that he had observed since becoming reporter on the Standing Committee. First, he noted the impact of technological development on the courts and the legal system. Technology is advancing very quickly and bringing with it a number of important issues that the rules must consider. He specifically mentioned the examples of e-discovery, with its attendant costs, and electronic filing, which can potentially expose personal information to web searchers. Second, Professor Coquillette discussed the specialization and fragmentation of the Bar, which has consequences for trans-substantive and trans-national procedure. He suggested that states must act as laboratories to help determine the most efficient ways to handle these issues. Finally, Professor Coquillette identified the political context of the Rules Committees and the Rules Enabling Act as important, and noted the hazy line dividing substance and procedure. After complimenting the committees' effectiveness, he encouraged members to be deliberate in their dealings with Congress. He said that the committees need Congress's help to be as effective as they can, and that communication with staffers and representatives is crucial for success.

In concluding, Professor Coquillette expressed confidence in the leadership of the committees and confidence in the committees' ability to handle the issues within their areas of competency. He admonished conference attendees to "be political in the best sense of the word, and avoid being political in the worst sense of the word," and emphasized that transparency, in the form of conferences and open discussions of rule changes, is the key to long-term success.

Professor Arthur Miller:

Professor Miller first thanked the committee chairs. He described his experience with the amendment of the class actions rule in 1966. He suggested that the drafters were focused more on Brown v. Board of Education and the Civil Rights Acts than other potential consequences of the rule, and noted that rule-makers can never know the future. In his view, committee members have focused on systemic solutions rather than their own economic or other interests, and left their clients at the door in order to work effectively together. Professor Miller discussed the rising concerns over cost and delay in the late 1970s and early 1980s, and the amendments to

Rule 11 and Rule 16 which came in response. Case management and early judicial supervision have now been in place for almost 30 years, but still may not be enough. He encouraged all conference attendees to continue to work on such issues to improve the process, advocating that a change in culture—causing district judges to take an even more active role in discovery and other aspects of a case—would require combined efforts from judges, the Federal Judicial Center, bar organizations, and legal educators. He also pointed out that rules cannot do all the work on their own, but must be supported by the participants.

Professor Miller echoed Professor Carrington's concern over the Twombly and Iqbal decisions, and favored a legislative effort to roll back those decisions and allow the civil rules committee to work on those issues. He complimented the empirical work that had been presented at the conference, but said that empirical work could only count what can be counted. He questioned how one could compare the value of a civil rights case that was dismissed over a procedural issue to the value of reduced litigation costs for corporations. The rules, he said, were built on an access and private enforcement model, and Twombly and Iqbal threatened those values. He warned lawyers to beware of making the pretrial process too complex and creating friction within the rules. In conclusion, he expressed concern over the evolution of the legal system from a trial system to a pre-trial system, and eventually to a pleading system. Such changes, he said, hurt the value of the system in our democracy.

Judge Anthony Scirica:

Judge Scirica began by stating that there is work to do in judicial education and judicial management, but that the tools and means to complete that work exist. He disagreed that Twombly and Iqbal were unfounded exercises of the Court's authority. Those cases involved judicial law-making, as did Conley v. Gibson. He agreed with the Court's statement that context matters in pleadings. Judge Scirica described how one of the traditional functions of judges involved law-making, which was mostly incremental but occasionally bold. As an example, he noted the constitutionalizing of criminal procedure in the 1960s and 1970s. Changes in civil procedure, he said, have been less bold, but evolutionary over time. Judge Scirica analogized the situation to changes in the federal sentencing guidelines, which caused significant problems until the Court's decision in Booker returned some discretion to trial judges. He suggested that Twombly and Iqbal are likely not the last word either.

Judge Scirica praised the district courts for acting responsibly on motions to dismiss, and added that courts liberally allow amendments to pleadings. He also praised the committees for acting responsibly by holding conferences like this one, commissioning studies, and communicating effectively. The goal of the rules, he said, is a level playing field. He discussed efforts to change the rules and complimented Congress for generally deferring to the rules committees. He expressed the hope that Congress would restrain itself from directly amending pleading

standards. In concluding, Judge Scirica said that the Rules Enabling Act has functioned very well, and he applauded efforts by the committees to better the system through the rules. He noted that the Rules Enabling Act is structurally sound and carefully administered; it has resulted in thoughtful rule-making.

Judge Patrick Higginbotham:

Judge Higginbotham began by discussing the amendment process for the changes to the class action rule in the 1990's. He noted how the rule-makers went beyond Washington, DC, and reached out to law schools during the process, and despite numerous interest groups objecting to many of the proposals, an important change in the form of immediate appellate review of class certification passed. Judge Higginbotham re-affirmed Professors Carrington and Miller's concern about the importance of private enforcement of public and legislative norms. As a historical example, he described the privateer arrangement used before the United States had a Navy. He discussed how the privateer system was one of the key reasons for the development of federal district courts.

Judge Higginbotham suggested that discovery is about more than just efficiency and management – it is the implementation of fundamental values about access. He expressed concern over the disappearing civil trial. Without trials, he said, district courts are just dispute resolution centers, a very different institution than courts of law. He stated that taking away trials takes away the metric against which settlements and agreements are measured. Judge Higginbotham said that while the discovery rules were intended to get information out and resolve cases faster, the important question is whether the rules have succeeded (and thereby reduced the need for trials) or whether the rules have become an obstacle to trials themselves and thereby hurt rather than helped the process. He strongly recommended that trial judges "reset" the destination of litigation from pre-trial disposition back to trial. Without this focus, there would be no relevant standards for discovery. Judge Higginbotham described the trial not as a historical relic, but as a key piece of the legal system and the democratic society. The public, open courthouse was historically the center of the community and acted as the people's court. It should not, he argued, be turned into just another bureaucracy.

Judge Higginbotham concluded by urging conference attendees to act affirmatively, saying that time alone will not take care of these issues.