

DRAFT MINUTES
ADVISORY COMMITTEE ON CIVIL RULES
APRIL 20, 1995

The Advisory Committee on Civil Rules met on April 20, 1995, at New York University School of Law. The meeting was held in conjunction with the April 21 and 22 Research Conference on Class Actions and Related Issues in Complex Litigation, held by the Institute of Judicial Administration at New York University School of Law. Members of the Advisory Committee also attended the Conference. The Advisory Committee meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, and Judge C. Roger Vinson. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. John K. Rabiej and Mark D. Shapiro represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Observers included Professor Linda Silberman and Professor Samuel Estreicher, Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., Fred S. Souk, Esq., Laura S. Unger, Esq., and H. Thomas Wells, Jr., Esq.

Professor Silberman welcomed the Committee to the NYU School of Law and to the Conference; the welcome was later repeated by Professor Estreicher.

The Committee approved the draft Minutes for the meetings of October 20 and 21, 1994, and February 16 and 17, 1995.

Judge Higginbotham opened the meeting by noting that this is the last in a series of meetings designed to increase the Committee's knowledge of class actions. The history of the 1993 draft was recalled: the Committee had approved it with a recommendation that the Standing Committee approve publication for public comment. During the meeting of the Standing Committee, however, it was decided that the public agenda of civil rules was so full that it might be better to defer action on Rule 23 for a while; particular concern was felt about the impact of the discovery and disclosure amendments then awaiting study and approval by Congress. Since then, rapid developments in the use of Rule 23 to address dispersed mass tort litigation have provided the occasion for further consideration of Rule 23. The settlement plans worked out in different asbestos actions and the silicone gel breast implant action are examples of these developments that have not yet fully played out. Rule 23 was the subject of active study at the Advisory Committee meetings in April, 1994, and February, 1995. Many members of the Committee also attended the March, 1995

Conference on the Federal Rules of Civil Procedure sponsored by Southern Methodist University School of Law and the Southwestern Legal Foundation in Dallas. Research help has been sought from the Federal Judicial Center.

Congress has been examining the large social problems that give rise to a substantial share of the litigation brought as class actions. Although the Committee hopes to be able to coordinate with Congress, and to inform its work just as the work of Congress informs the Committee's efforts, Congress operates on a different time line than the Committee. The Committee, moreover, must maintain its independence and credibility - work on Rule 23 might easily be perceived as arising from particular positions or viewpoints on the larger substantive and social problems, and everything possible must be done to defuse any such perceptions. It is also important to continue to find ways to defeat the common perception that Committee processes are closed to the public; the widespread circulation of the current Rule 23 draft and the efforts to bring experienced class action lawyers into Committee deliberations have provided a beginning. The repeated focus on the current draft at the Institute of Judicial Administration conference also should help.

A report also was provided on the Dallas Conference on the Federal Rules of Civil Procedure. It was observed that the academicians were not much interested in the discussion of pleading and discovery. They tended to assume the continuing wisdom of the 1938 decision to subordinate pleading to discovery. The lawyers who participated in the second day of the conference, however, were more interested in seeing what might be done. Possible means of controlling discovery were discussed, including work underway in Texas to substantially curtail the amount of time that can be spent on depositions, with particularly dramatic limits for cases that involve only damages in small amounts. The possibility of imposing responsibilities on counsel for supervising and certifying the completion of a party's document production also was discussed. Pleading devices that may deserve further study include development of the reply. The Fifth Circuit has found the requirement of a reply helpful in shaping the pleadings with respect to defenses of official immunity, in the wake of tightening restrictions on heightened pleading requirements, and the device might be useful in more general ways. A specific suggestion at the Dallas conference was that some form of statement be required as a supplement to pleadings. The central idea seems to be a statement of position and summary of evidence that does not carry the consequences of pleading but that does illuminate the case in the way that might be expected of a well-conducted Rule 26(f) discovery planning conference. As to a plaintiff, for example, the requirement might be a form of disclosure that requires a statement of the facts the plaintiff expects to prove at trial and summaries of the testimony

that will be used for proof. Defendants would have similar obligations.

This summary developed into discussion of the relationships between pleading, discovery, and judicial management. It was observed by several Committee members that pleading is not very helpful - and at times useless - and discovery at times seems unmanageable, but that increased involvement by a judge can help a great deal. If a judge takes charge of a suit at the very beginning, great benefits follow not only with respect to pleading and discovery but also in the general behavior of the lawyers. Questions of judicial management were viewed from many perspectives, with a common thread in the observation that there are enough formal court rules to support effective management. The problems seem to be not so much a lack of rules as docket pressures, and at times the views of some judges that active management is not desirable. Docket pressures were repeatedly noted; one member judge noted that he once went for three years without a civil trial, and during the same period had a criminal trial on almost every working day. This discussion included accounts of experience with the "rocket docket" system in Virginia, which includes an assumption that each case is an institutional responsibility of the full court. A firm trial date is set for 6 to 8 months after filing. The process can be rushed; it is difficult to get an extension of time, and perhaps occasionally the denials are unwise in relation to the needs of case preparation. The system can be implemented - as it has been - without the need to amend any of the Civil Rules. Experience with a somewhat similar fast track system in California state courts also was noted, with the observation that it seems to work well. It was suggested that perhaps similar docket systems should be tried in half a dozen pilot districts to learn whether they can be successful in other courts that face different circumstances.

The discussion continued along tracks that moved among the three topics of pleading, discovery, and judicial management. The system is built on the assumption of open discovery, ideally managed by lawyers rather than the courts. Lawyers can be made to behave in disciplined ways by setting and adhering to a firm trial date. But some courts are not in a position to be able to enforce firm trial dates. Case loads continue to shift, and will continue to shift in ways that cannot be fully predicted. For the time being, there seems to be a flattening of general civil cases, a slight reduction in the number of criminal prosecutions, and rapid growth in the number of civil actions filed by prisoners that do not challenge the conviction or sentence. Measured by numbers of cases, such prisoner cases account for startling portions of many appellate dockets, and seem to continue to grow as the numbers of prisoners grow.

An observer suggested that the Dallas conference showed that

really experienced lawyers divide on the question whether the problem lies in pleading, discovery, or judicial management, and that the problem probably lies in all three. The relationship among all three should be examined further. The "rocket docket" works beautifully in the Eastern District of Virginia, but it is unique to that court. The rules must be rewritten.

The recurrent suggestion that the rules must be rewritten was recurrently met by the suggestion that the discovery rules have been amended recently, and that it is too early to amend them yet again. One Committee member who expressed a preference for a return to some measure of fact pleading agreed that it is even more important not to change the rules too often. Another member echoed the view that many judges and lawyers agree that we should not change Rule 26 again so soon. This may be true whether the changes involve minor tinkering or fundamental revision.

Robert Campbell stated that the Federal Rules Committee of the American College of Trial Lawyers likely would agree that "the rules aren't broke." They will operate if the courts will enforce them. Lawyers need initial rulings; a Rule 16(b) conference early in the litigation; and a follow-up conference. It helps if the judge is willing to express a view on the nature of the case - whether, for example, it really presents a viable claim under an oft-overused statute.

Another observer noted that the CJRA advisory group in the District of Columbia had studied all these issues, and had not proposed any radical changes. Other districts have developed more dramatic local rules. Much will be learned as information is gathered about experience with the different CJRA plans. Perhaps the most radical suggestion, not implemented anywhere, has been that discovery should be eliminated. On this view, "the system is broke." Massive resources are poured down the drain of civil discovery. Fact pleading, no discovery, and speedy trials may be the better way.

It was suggested again that if the judge has the time and uses it to manage litigation, the problems are controllable. But the problem of judge time must be dealt with. Without sufficient judge time, other reforms are simply spinning the wheels. If indeed it is true - as judges have been taught for years - that the one fair and effective control is setting a firm trial date, why doesn't this happen? If it does not happen because it cannot happen, because judges cannot effectively meet firm trial dates, solutions may lie outside the rules of procedure.

In a more optimistic vein, it was noted that empirical studies of discovery show that in most cases, discovery is not a problem. There is no discovery at all in many cases, and only limited resort to discovery in many more. We must be careful to avoid disrupting a system that works well most of the time in the process of

attempting to cure the problems that arise in a small proportion of all cases.

In a more cautious vein, it was noted that bar associations everywhere are now addressing the problem of lawyer behavior. There is unacceptable behavior by too many lawyers - including a handful who always cause problems, particularly when matched up against each other.

One of the perennial proposals for reform was again advanced, cutting back from the Rule 26(b)(1) permission for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The reference to subject matter would be replaced by limiting discovery to matters relevant to the issues framed by the pleadings. It was recognized that the pleading issues standard would be difficult in cases in which the pleadings do not frame issues - in such cases, discovery would continue to be about whatever discovery comes to be about. One way out of this interdependence with notice pleading might be to define the scope of issues by other means, most likely through Rule 16(b). Rule 16(b) indeed is used to affect and even control the scope of discovery. Initial scheduling orders, combined with Rule 26(f) discovery conferences, may be able to accomplish significant definition of issues and thereby support limitations on discovery.

The argument for narrowing the broad Rule 26(b)(1) scope of discovery was related to the ongoing debates about the scope of discovery protective orders. The availability of effective protection is an essential counterbalance for the broad scope of discovery, particularly as discovery is pushed beyond matters plainly relevant to issues clearly framed in the action. This connection exists not alone as a matter of the quid pro quo considerations that have shaped development of the rules as they stand, but also as an essential protection of privacy. Should ongoing efforts to reduce the effective operation of protective orders succeed in some measure, the need to protect against unwarranted invasions of privacy will substantially strengthen the case for curtailing the scope of discovery.

H. Thomas Wells stated that similar debates are occurring in the ABA Litigation Section. Attention has focused not only on specific pleading, but also on the question whether disclosure might be broadened to include more information about a party's own case. From his experience with three different disclosure rules in the three districts of Alabama, the Rule 26(f) discovery meeting is a good device if there is a good complaint. If the complaint is not well drawn, the meeting is not effective. But it is possible to link the scope of discovery to the pleadings.

This discussion of disclosure prompted the suggestion that perhaps the general scope of discovery should be narrowed to the present scope of Rule 26(a)(1) disclosure.

A desire was expressed to find out more general information about what is happening, particularly with early experience on disclosure. The Rand study of CJRA plans should help. The Federal Judicial Center is evaluating experience in five "demonstration" districts that include at least one - the Northern District of California - that has adhered to disclosure requirements essentially the same as Rule 26(a)(1). Once these studies are done, it will be time to reexamine the provisions of Rule 26(a)(1) that permit local options on disclosure.

This discussion concluded with the observation the Committee would welcome any study and expression views that might be undertaken by the Federal Rules Committee of the American College of Trial Lawyers or the Litigation Section of the ABA.

Rule 5(e)

A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed on changes to the published draft at the October, 1994 meeting, as described in the minutes for that meeting.

Discussion began by observing that a change should be made in the third sentence of the first paragraph of the published Committee Note. The statement that "the local rule" must be authorized by the Judicial Conference is a misleading summary of the present rule. The Note should say instead that "Use of this means of filing" must be authorized by the Judicial Conference. The reference to "three conditions" also will be changed to "two conditions" rather than worry overmuch about the number of conditions that must be met to permit electronic filing under present Rule 5(e).

Comments on the published draft by the Association of the Bar of the City of New York led to discussion of the availability to the public of papers filed by electronic means. The Committee recognized two quite distinct issues. One issue is whether the right of public access is in any way affected by electronic filing. The Committee agreed clearly and emphatically that electronic filing does not in any way affect the right of public access. This answer is so plain that there is no need to provide any statement in the text of the rule, just as the rules have not had to spell out the right of public access to documents initially filed in tangible form. The other issue is the means of accomplishing actual exercise of the right of public access, recognizing that the public includes people without computer skills and that simply providing a public terminal in the clerk's office will not respond to all needs. It was concluded that this problem is one that should be addressed by a combination of the Judicial Conference standards process and by local rules. The means of access issue is obviously tied to the technical standards for filing, and is as obviously tied to such provisions as local rules

may make for requiring supplemental filings in tangible form.

The Committee was advised that the Administrative Office will attempt to help the Judicial Conference and its committees to draft technical standards quickly. Although it is clear that the amendments would authorize local rules that permit electronic filing before Judicial Conference Standards are adopted, it is possible that the standards will be available soon after the amended Rule 5(e) could take effect, and possibly even by the effective date.

There was renewed discussion of the October decision to delete from the published draft the sentence stating: "An electronic filing under this rule has the same effect as a written filing." The version published by the Appellate Rules Committee provides: "A paper filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules." Concern was expressed that the reference to "this rule" might invalidate filings authorized by local rule, even though filing in compliance with a valid local rule would seem to be authorized by the rule. It was suggested that it would be better to refer to a filing "in accordance with," or "under," a local rule. The belief that the entire sentence is unnecessary was again expressed, in light of the fundamental authorization to file, sign, or verify documents by electronic means. The conclusion of this discussion was that the Chair and Reporter were authorized to coordinate language under the auspices of the Standing Committee to achieve uniform provisions in the Appellate, Bankruptcy, and Civil Rules.

It was agreed that the final two sentences of the published Committee Note should be deleted. These sentences disparaged filing by facsimile means, an enterprise that may be unnecessary if it is right that routine facsimile filing will prove attractive to few courts, but may prove wrong if facsimile filing proves more attractive to many courts than more advanced means of electronic filing.

The suggestion was made by the Eastern District of Pennsylvania, through the court clerk, several judges, and many lawyers, that Rule 5(b) should be amended to permit service by electronic means. The Committee has considered this question recently. Discussion confirmed the earlier conclusion: it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service.

The Eastern District of Pennsylvania also suggested that Rule 77(d) should be amended to permit a court clerk to effect service by electronic means. Although this question has not been considered by the Committee, and seems to pose fewer potential problems than electronic service among the parties, the conclusion

was the same. Greater experience is needed before it will be time to move in this direction.

Rule 9(h)

The final sentence of Rule 9(h) provides: "The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." It is not clear what is meant by the statement that "cases" means "claims." The ambiguity arises in cases that include both admiralty claims and nonadmiralty claims. The Rule may mean that only the admiralty claims qualify for appeal under § 1292(a)(3). But it also may mean that if the case includes an admiralty claim, an order that disposes of any claim in the case and that meets the terms of § 1292(a)(3) can be appealed, even though the claim is not an admiralty claim. The only known case to address the issue squarely is *Roco carriers, Ltd. v. M/V Nurnberg Express*, 2d Cir.1990, 899 F.2d 1292. The court in that case allowed a § 1292(a)(3) appeal by a party who was not involved with any of the admiralty claims in the case, concluding that a pendent party should be able to appeal an order that could be appealed by another party. It found that the order establishing the appellant's liability was "integrally linked with the determination of non-liability" of the party to the admiralty claim.

The prospect of amending Rule 9(h) was discussed extensively at the October, 1994 meeting. Further discussion focused on the desirability of interlocutory appeals. Opinion was divided on the need for § 1292(a)(3), a matter beyond the Committee's authority. Some members believe that interlocutory appeal is a good thing, and that statutory opportunities should be developed in ways that maximize the ability to appeal. Others believe that admiralty cases do not involve any special justification for interlocutory appeal that distinguishes them from other complex litigation. Even some of those who doubted the wisdom of § 1292(a)(3) believed that so long as it is available, it should be made as sensible as possible. They found persuasive the concern expressed in the *Roco* case that interlocutory appeal opportunities that are available to some parties or as to some claims should be equally extended to all.

By vote of 7 to 3, the Committee approved a motion to strike the present final sentence of Rule 9(h) and substitute a new final sentence as follows:

The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h). A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

A Committee Note will be drafted by the Reporter and circulated to members of the Committee for comment.

Rule 26(c)

On recommendation of this Committee, the Standing Committee recommended to the Judicial Conference that it send to the Supreme Court an amended Rule 26(c) that grew out of discussions at this Committee's meeting in October, 1994, and an ensuing mail vote. The Judicial Conference first voted to delete the reference to stipulated discovery protective orders in the proposed Rule 26(c)(1), and then voted to recommit the proposed rule to the Advisory Committee.

Discussion of the apparent reasons for the remand began with the observation that a concerted lobbying effort was directed at the Judicial Conference in the last few days before its meeting. The lobbying addressed only the stipulation aspect of the proposed rule. This viewpoint ran parallel to the aspect of recent legislative proposals that would require specific findings by the court to support every protective order.

It was suggested that in the flurry of last-minute representations, the Conference was not able to fully understand the nature of the proposed rule. This Committee sought a balanced rule that recognizes the present important practice of stipulated protective orders, but that recognizes the interests of nonparties by making clear the right to intervene to seek modification or dissolution. The draft does not require a judge to accept a stipulated order. Among the many analogies to other established practices, Rule 35 physical examinations provide an easy illustration. A court must find good cause before ordering a party to submit to a physical examination. The parties, however, can agree that a party will submit to a physical examination without a court order. In the same way, the parties can agree to exchange information entirely outside the channels of formal discovery. If they choose instead to proceed through discovery, they may agree to submit a stipulated protective order. The court, however, "may" - but also may not - enter the order. In this form, the rule not only recognizes well established current practice. It also recognizes the need to honor the balance struck by the central role of protective order practice in the overall plan of discovery. Discovery has been made very broad, permitting inquiry into vast private areas that would be protected against any other mode of inquiry, public or private. This sweeping reach is tolerable only if means exist for limiting the invasion of privacy to the needs of the litigation. The Committee requested the Federal Judicial Center to study the actual use of protective orders. This study, now nearly complete, shows that stipulated protective orders are common, as are orders based on unopposed motions. Defective products - the focus of much of the current debate - are involved

only in a small minority of protective orders. Civil rights cases are the single most common category of cases involving protective orders, protecting against general access to highly personal information that may relate to nonparties as well as parties.

Discussion of the appropriate next step opened with the reminder that many observers have doubted the need for any amendment of Rule 26(c), and that the Committee has shared these doubts. There is much to be said for the conclusion that it would be better not to pursue amendment further than to risk eventual adoption of amendments that would upset the sensitive balance established by present practice.

Further discussion of the next step noted that concern had been expressed in the Judicial Conference that the proposed amendments varied to some extent from the draft that had been published for public comment. Republication of the proposal in the form submitted to the Judicial Conference may elicit additional comments that can further inform the Committee, either supporting present views or stimulating reconsideration and changes of position. Public comment may illuminate the decision whether to pursue the proposed amendment at all, as well as the more specific issues that surround stipulated protective orders.

It was noted that the Rule 26(c) proposal does not affect access to materials that are used as part of a judicial proceeding. Discovery information submitted at trial, for example, becomes part of the public trial record, subject to sealing only under the quite different standards that apply to trial records. Materials submitted to the court for consideration in connection with any other order likewise become part of the public record, moving free of the scope of a discovery protective order; if use of the materials violates a protective order, that fact may be considered in determining what to do about access, but cannot be controlling.

The Committee unanimously approved a motion to recommend to the Standing Committee republication of the version of Rule 26(c) that was transmitted to the March, 1995 meeting of the Judicial Conference.

At the end of this discussion, it was voted to carry forward for further consideration a draft Rule 5(d) that would regulate agreements to return or destroy discovery materials that are not filed with the court.

Rule 47(a)

The Committee agreed at the October, 1994 meeting to submit to the Standing Committee for publication amendments to Rule 47(a) that would establish the parties' right to participate in voir dire examination of prospective jurors to supplement the initial examination by the court. The Standing Committee discussed the

proposal at its January, 1995 meeting, but deferred action pending deliberation by the Criminal Rules Advisory Committee on parallel changes to Criminal Rule 24(a)(2). Early in April, 1995, the Criminal Rules Advisory Committee approved, by vote of 9 to 2, a draft Criminal Rule 24(a)(2) that - like the proposed version of Civil Rule 47(a) - would require the trial court to permit the parties to supplement the court's examination. There are many drafting differences between the two proposals. Discussion of the drafting differences, and of initial reactions from judges who have seen the Rule 47(a) proposal, led to extended further discussion of the initial proposal.

The Rule 47(a) proposal is seen as part of a package with the proposal, approved by the Standing Committee, to publish for comment a revision of Rule 48 that would restore the 12-person jury. The combined effect of the two proposals could go far toward restoring civil jury trial as a fair and rational means of resolving disputes.

Much discussion was devoted to early reactions from judges who have seen the Rule 47(a) proposal. There is widespread concern that lawyers will take control of the jury selection process, converting it into an opportunity to influence the jury and distort the impartiality that the selection process is supposed to foster. Written response has come especially from judges in the Fourth Circuit, and most particularly from judges in Virginia, but has come from other quarters as well. One committee member reported attending a meeting of chief judges in the Ninth Circuit who, on hearing a description of the proposal, were unanimously opposed. Another reported that several members of the Fourth Circuit had, within the first week after the meeting of the Criminal Rules Advisory Committee, commented negatively on the draft Criminal Rule 24(a).

It was agreed that the early response from judges is likely to be borne out as additional comments come in. Even though the Federal Judicial Center survey in 1994 showed that approximately 60% of federal judges permit direct lawyer participation in voir dire - a sharp increase from the number found in an earlier survey - they are opposed to requiring that participation be permitted. There is not yet, however, any evidence that judges who do not permit lawyer participation have reached this position because of bad experiences with their own initial efforts to permit and control lawyer participation. The opposition may rest in part on concern about interfering with the autonomy of individual judges to adhere to traditional local practices and to methods that work well in their own courts. It also surely rests on concern that lawyers will be difficult to control. The motives of lawyers are to act as advocates, and the impulse to bring advocacy into the voir dire process will have to be cabined by the trial judge.

The opposition of many federal judges will ensure that the Rule 47(a) proposal is controversial. One committee member suggested that if there are problems with present practice, they do not involve a system that is "broke," but only one that is "broke at the edges." Opening the topic is sure to bring controversy. If, as many expect, members of the bar will strongly support the proposed amendment, there is a chance that whatever is done in the Enabling Act process will be taken to Congress. Perhaps the time is not ripe for taking on a controversial topic without demonstrated need.

The concern about controversy was met by the observation that we have not yet heard from the practicing bar. The Committee should not shy away from controversy when there is a real need to be addressed. Many experienced lawyers have told the Committee, directly and indirectly, that there is a serious problem. Voir dire conducted by some judges is simply not adequate to support informed efforts to select an impartial jury. The Committee was unanimous in making the proposal. The Criminal Rules Advisory Committee divided 9 to 2 in favor of the parallel proposal. If the Committee hesitates, the lawyers who have addressed the Committee will return to Congress to renew longstanding efforts to secure legislation. Concerns about expending political capital must recognize that the proposal has been launched, and launched for good reasons.

The need to revise Rule 47(a) was revisited in more general terms as well. The central theme was that the parties have a right to the fairest jury possible. Many lawyers reject the view that court-conducted voir dire is adequate to the task. Particularly on the criminal side, there are many cases in which judges have refused to ask questions that are very basic. Challenges for cause require careful examination that is well-informed by knowledge of the case. We are, moreover, still in the early stages of experience with the new rules that prohibit discriminatory exercise of peremptory challenges. Courts are likely to require articulation of nondiscriminatory reasons to support a peremptory challenge that in turn require support in voir dire examination. There is little reason to fear that party participation will unduly lengthen voir dire if courts conduct effective initial examinations and make it clear that misuse of party examination will be quickly corrected. The FJC study in 1994 shows no more than de minimis variations in the time required for voir dire no matter how examining responsibility is allocated between court and parties. A Committee member reported that a similar conclusion was reached by the National Center for State Courts in an earlier survey. The views of the Criminal Rules Advisory Committee bolster this Committee's original conclusion that there is a real need for reform, and particularly that there is a need to hear reactions to a published proposal.

Discussion of the differences between the Rule 47(a) draft and the Criminal Rule 24(a) draft turned first to the provision in Criminal Rule 24(a)(2) that: "The court may terminate supplemental examination if it finds that such examination may impair the jury's impartiality." This provision, and a parallel provision suggested by the Committee Reporter in earlier correspondence with members of the Standing Committee and the Chair and Reporter of the Criminal Rules Advisory Committee, are intended to make it clear that abusive questioning can be terminated. Some members of the Committee thought it would be desirable to add to Rule 47(a) a new final sentence: "The court may terminate further examination by a party whose examination may impair the jury's impartiality." The need for this provision, however, was questioned. The Rule 47(a) draft explicitly permits the trial court, in its discretion, to set reasonable limits of time, manner, and subject matter. These limits can be invoked as the need arises from misuse or abuse of the right of supplemental examination. This broad general power is more effective than the proposed Rule 47(a) addition or the Criminal Rule 24(a)(2) draft. The Rule 24(a)(2) draft, moreover, may imply undesirable limits on the right to terminate party examination. It seems to require a finding that the examination may impair the jury's impartiality, implying that examination may not be cut off for other reasons. On the other hand, it does not require that examination be cut off even when there is a threat to jury impartiality. It also could be read to provide for termination of examination by all parties, not the offending party alone. Although correspondence with the Criminal Rules Advisory Committee Reporter indicates that the draft was intended to ensure that all parties at least have the opportunity to begin examination, by referring to the power to "terminate," there also was some concern that termination might be ordered at the very outset before the finding of a threat to impartiality could be based on actual behavior rather than anticipated behavior. At the end of this discussion, it was concluded that the best course would be to adhere to the current Rule 47(a) draft. The Committee Note, however, should be fleshed out with an express statement that the power to establish reasonable limits includes the power to terminate further examination by a party who misuses or abuses the opportunity.

Another feature of the Criminal Rule 24(a) draft that drew active discussion was the requirement that a party make a "timely request" to enjoy the right to examine prospective jurors. This limitation was adopted in response to the concerns of a member of the Criminal Rules Advisory Committee who prepares a lengthy questionnaire for prospective jurors, tailored to each individual case, and who believes that in shaping the questionnaire it will be important to know whether the parties plan to examine the jurors. The thought also was expressed that timely advance request might enable the judge to anticipate more accurately the amount of time

that must be set aside for the jury selection process. One member of the Committee initially was attracted to this limitation, but at the conclusion of the discussion joined the unanimous consensus that the limitation is not desirable. In various ways, committee members observed that a timely request requirement will prove only a trap for the unwary. All lawyers will know that they cannot anticipate the need for examination until the court has concluded its own examination. All but the ill-advised or forgetful therefore will make automatic requests that they hope will be timely. The forgetful and the diligent alike, moreover, will be at risk that even an express pretrial request will be found not timely, particularly when there is no attempt to set a clear measure of timeliness. The actual decision whether to undertake supplemental examination, however, will be made only after completion of the court's examination shows whether there is a need for supplemental examination. The result will be that automatic advance requests do not provide any useful information to the court. For that matter, the court itself should be able to anticipate that the nature and extent of supplemental examination will be shaped by the results of its own examination.

The Committee expanded on the October, 1994 discussion of the use of questionnaires as part of the examination of prospective jurors. The values of questionnaires were noted. One committee member noted regular successful experience with questionnaires in state court practice. The answers generally support many challenges for cause. The process can save time; prevent contamination of a jury panel by answers openly given in the presence of other prospective jurors; avoid the embarrassment that can occur when a prospective juror is forced to answer questions in public; and encourage prospective jurors to provide honest answers that might be too embarrassing for public announcement.

Questionnaires, on the other hand, also have a potential for mischief. Just as voir dire examination, they can be used in attempts to select a favorable jury, not an impartial one. Several committee members have had experience with lengthy questionnaires that invade juror privacy across a wide range of topics, designed not to support challenges for cause or intelligent use of peremptory challenges but to support the efforts of "jury consultants" to gerrymander a favorable jury. Inquiries may be attempted into reading habits, religious preferences, political views, and other matters far afield from matters that are properly allowed on voir dire examination.

The discussion of questionnaires concluded with the direction that the Committee Note be expanded to reflect not only the virtues of questionnaires but also the potential dangers.

Robert Campbell stated that the Federal Rules Committee of the American College of Trial Lawyers thinks that the draft Rule 47(a)

properly controls the "tension between court and lawyer." The draft clearly establishes a right only to supplement the court's examination, within limits, not the right to take over. The lawyer will not be permitted to try the case at voir dire. The power to set reasonable limits includes the power to terminate, and need not be supplemented by a possibly limiting separate statement of the power to terminate examination upon demonstrated misuse. The Criminal Rule 24(a) requirement of "timely request" seems dangerous, because it may be used to defeat the right without achieving any significant benefit. The court knows that it has the power to limit, and does not need any advance notice of the intent to exercise the right.

Two changes in the language of the draft rule were then approved by consent. The statement that the parties are entitled to examine prospective jurors to supplement the court's examination was changed to a statement that the court must permit supplemental examination. The reference to reasonable limits "set" by the court was changed to "determined;" the Committee Note should be revised to state that the limits can be determined as examination by the parties progresses, including termination of examination by a party who misuses or abuses the right to examine. The power to terminate examination extends beyond abuses that threaten the ability to seat an impartial jury to include other misuses or abuses, such as unduly confusing, repetitious, or lengthy examination, or examination that threatens unwarranted invasion of privacy.

The Committee further concluded that every effort should be made to get responses to Rule 47(a) as broad and detailed as possible during the course of the public comment period if the draft rule is published.

The Committee was reminded that a recommendation to the Standing Committee for publication represents the Committee's judgment that there is a genuine need to correct present practice, and that the proposal is the Committee's best answer pending consideration of the information gained as the process moves forward. A motion to renew the recommendation of Rule 47(a) to the Standing Committee for publication passed unanimously.

The Reporter was directed to report to the Chair and Reporter of the Criminal Rules Advisory Committee the Committee's reasons for going forward with the language of Rule 47(a) rather than adopting the language of proposed Criminal Rule 24(a). In addition to the differences discussed in detail, several other matters were noted. Rule 24(a) refers to the "preliminary" voir dire, a word that may seem to subordinate the importance of the court's primary responsibility for effective voir dire examination; the Committee prefers to avoid this possible implication. Rule 24(a) speaks in the first sentence of "examination of the trial jurors," rather than prospective jurors; if this term is appropriate for some

reason of criminal practice, such as the need to distinguish grand jurors from trial jurors, there is no parallel need in civil practice. Rule 24(a) states that the court must permit the defendant or the defendant's attorney to examine prospective jurors, language that may create an impression that a defendant who is represented by an attorney nonetheless may conduct the examination in person. Rule 24(a)(1) omits reference to the court's discretion in describing the power to set reasonable limits on the supplemental examination; the explicit Rule 47(a) reference to limits set "by the court in its discretion" was adopted to assuage fears that efforts to control party behavior would become the occasion for intrusive appellate review and reversal. The appropriate course may be to publish both draft rules for comment in their present forms, facilitating public reaction to these and perhaps other differences of drafting.

Rule 23 Study

Thomas Willging provided a brief report on the progress of the Federal Judicial Center study of Rule 23 to supplement the partial draft report that was provided with the Committee materials and the presentation to be made at the IJA Conference the following day. He noted that data collection in the Northern District of Illinois and the Southern District of Florida will be completed in May and June. They hope to have a final report by the end of summer. Among the preliminary findings of experience in the Northern District of California and the Eastern District of Pennsylvania, he noted that class certification is granted in only about half of the cases brought on for certification, and that defendants often are successful in winning partial or complete dismissal under Rule 12(b)(6) or by summary judgment.

Legislative Activity

A report was provided by the subcommittee of Committee members Doty, Vinson, and Wittmann, chaired by Scirica and reported by Rowe, dealing with the procedural aspects of pending securities legislation. It was suggested that the central issue at the outset will be whether Congress shares the view of the SEC that private actions are essential to protect the integrity of the securities markets. If Congress disagrees with this view, it is likely to make many substantive changes and blend procedural changes in with them. If Congress shares this view, on the other hand, it may find less sweeping means of addressing any abuses that it may find in present patterns of private enforcement. At least some of the problems that Congress is addressing deal with matters within the reach of the Rules Enabling Act. The Committee can provide for such matters as a threshold showing on the merits as a prerequisite to class certification; permissive interlocutory appeal from certification rulings; means of regulating races to file class actions; and perhaps the specific pleading standards of Rule 9(b).

As to such matters, and others within the Committee's reach, it will be important to discover whether the Committee and Congress can and should find means of working together.

Laura S. Unger described several of the concerns of Congress, with particular emphasis on the perspectives of the Senate, where she works. It does not seem likely that Congress will want to defer to the SEC and the rules committees, but the committees of Congress would like to be able to gain the advantage of rules committee knowledge and experience just as they gain much advantage from working with the SEC. There is considerable frustration with lax pleading, races to the courthouse, and the cost of discovery while motions to dismiss remain pending unresolved. There is a desire to find a way to force institutional investors, who typically have the largest stakes, to opt in or out of securities class actions. Such a system likely would encourage the institutions to opt out of weak actions, greatly reducing the incentives to bring weak actions. At the same time, it would encourage the institutions to opt into strong actions, preventing them from getting a free ride on the efforts of others and perhaps contributing valuable information to the progress of the action.

This concern with weak actions was echoed in the Committee. It was noted that the problem is with actions that pass the hurdles of Rule 11 frivolousness, motions to dismiss for failure to state a claim, and motions for summary judgment, but that nonetheless are quite weak.

Miscellaneous Rules

Rule 4. Suggestions have been made from various sources for amendments of the 1993 version of Rule 4. In addition to earlier proposals, proposals this time suggested revision of Rule 4(d)(2) to provide for use of the waiver-of-service procedure against the United States as defendant; revisions of subdivisions (e) and (f) in some indeterminate manner to improve service on foreign governments; and amendment of Rule 4(m) to specify a clear error standard for reviewing the determination whether good cause has been shown for a failure to effect service in timely fashion. The Committee concluded that it is too early to consider further amendments of Rule 4. The various suggestions should be accumulated for joint consideration in a few years.

Rules 8, 9, 12: Particularized Pleading. It has been suggested that the rules be amended in some way to restore the "heightened pleading" requirement that was prohibited by the decision in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 1993, 113 S.Ct. 1160. The Committee noted that it has considered this specific question and has concluded that it would be premature to address it before lower courts have had an opportunity to develop practice further in light of the *Leatherman* decision. It also noted that the combined topics of pleading and

discovery continue to occupy the Committee on an ongoing basis.

Rule 12. A suggestion has been made that a new rule be adopted that "would require that dispositive motions by defendants in civil rights cases on grounds of qualified immunity be filed and ruled upon prior to the commencement of trial." The Committee concluded that this suggestion is not sound. Other defenses may be raised for the first time at trial, under the liberal amendment policies of Rule 15, and there is little reason to distinguish official immunity defenses.

Rule 15(a). Rule 15(a) establishes the right to amend a pleading to which a responsive pleading is required that endures until the responsive pleading is served. The result is that a motion to dismiss does not terminate the right to amend as a matter of course, while an answer that includes grounds that might have been advanced by motion does terminate the right to amend. It has been suggested that it is not clear why a motion and an answer should have different consequences for this purpose. The suggestion was advanced from the perspective of urging that a responsive motion should cut off the right to amend just as an answer does. Brief discussion included the observation that leave to amend is almost never denied unless the underlying claim is patently frivolous. The Committee concluded that this topic should be carried on the agenda for further discussion, including consideration of alternatives that would expand the right to amend as a matter of course, treat responsive motions in the same way as responsive pleadings are now treated, establish tighter limits on the right to amend as a matter of course, or abolish the right to amend as a matter of course.

Rule 23(e). A suggestion that Rule 23(e) should be amended to develop further the court's responsibilities in approving class action settlements was met with the conclusion that this topic is one of the central matters being studied in the ongoing study of Rule 23. It will continue to be a major topic in developing possible revisions of Rule 23.

Rule 26(a). A plea has been received to repeal present Rule 26 in favor of the version that was replaced on December 1, 1993. The Committee concluded that it is too early to consider such proposals. Experience with Rule 26 and local variations will be a major focus of the ongoing study of local Civil Justice Reform Act plans. Further study will be undertaken on completion of the study.

Rule 39(c). The question has been raised whether a court should be required to state by the beginning of trial whether a jury will be treated as an advisory jury as to any matter that does not involve a constitutional or statutory right to jury trial. The Committee

concluded that no reason exists to undertake amendment of the rule at this time.

Rule 43(f). Rule 43(f) provides that a court may appoint an interpreter, but does not address the question whether there are circumstances in which a court should be required to appoint an interpreter. An interpreter may be necessary not only to enable the trier of fact to understand a witness, but also to enable a party to understand a witness. It has been suggested that appointment of an interpreter may be required by the Americans With Disabilities Act, the Rehabilitation Act of 1973, or more general principles of due process. The Committee concluded that before considering these questions further, an effort should be made to find out more about present practices that may supplement the bare text of Rule 43(f). The topic will remain on the agenda for consideration at a future meeting.

Rule 56(c). Rule 56(c), on its face, establishes implausible time periods for notice of a summary judgment and response to the motion. Many courts have adopted local rules establishing more sensible periods, and also providing procedures that require specification of the facts claimed to be established beyond genuine issue and identification of supporting materials. It may be time to adopt uniform national standards. The Committee concluded that this topic should be set for further discussion on the agenda for the fall meeting.

Rule 60(b). A plea was received to amend Rule 60(b) "to provide that where the prevailing party in a judgment, order or proceeding, cites that judgment in any other proceeding as evidence of its position, the parties to such other litigation shall be entitled to challenge the basis and result of such judgment, order or proceeding as if they had been parties thereto." The Committee was unable to discern the purpose or impact of the proposal, and concluded that it does not deserve further consideration.

Rule 81(c). It has been pointed out that Rule 81(c) continues to refer to the "petition" to remove an action from state court. The procedure for removal has been changed from a petition to a notice of removal. The Committee agreed that revision is appropriate, but also concluded that minor technical matters of this sort may better be accomplished by legislation than by the lengthy Rules Enabling Act process. It was concluded that the appropriate procedure is to accumulate proposals of this sort, to be submitted to the Standing Committee for recommendations to Congress.

Copyright Rules of Practice. The Copyright Rules of Practice have not been considered since 1966. In 1966, the Committee expressed doubts about "the desirability of retaining Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to

require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief." It refrained from acting at that time because Congress had begun the deliberative process that led to enactment of the 1976 Copyright Act. The 1976 act includes discretionary impoundment procedures, 17 U.S.C. §503(a), that seem to be inconsistent with the Rules of Practice. These Rules are unfamiliar territory to present members of the Committee. The topic will be carried forward on the agenda while additional means of information are sought.

Admiralty Rules B and C. It has been proposed that Admiralty Rule B should be amended to adopt the reduction of the requirement for service by a Marshal that was recently made in Rule C. This proposal will be set on the October agenda with specific language to show the change.

Next Meeting

Rule 23 revisions will form the major item for discussion at the fall meeting. The meeting probably will be set in October. The period from October 19 to 21 has been ruled out. Every effort will be made to select the dates that create as few conflicts as possible for presently known schedules of Committee members. The site will be Tuscaloosa, Alabama.

In preparing for discussion of Rule 23, the Committee should work throughout the summer in exchanges that focus on gradually more specific proposals. This process will help to decide whether any revision should be attempted, whether drastic changes are desirable, or whether modest reforms are worthwhile and the limit of prudent proposals. A docket of proposals will be prepared by the Reporter, beginning with lists of topics that seem certain to warrant further discussion and other topics that will warrant further discussion only if Committee members believe that is desirable. Some of the "no-discussion" items may include suggested amendments that can be considered at the October meeting without further correspondence over the summer. Once a list of topics for summer discussion is created, more specific questions will be framed for continued collegial exchange, for a self-study process that will not attempt to reach any specific decisions. The thought is that focusing for the first time on a detailed draft at a meeting, without advance preparation, will not provide a solid foundation for effective progress. Although it is hoped that a detailed draft rule can be provided for consideration, perhaps even for recommendation by the end of the meeting to the Standing Committee for publication, the draft itself will be intended to focus the results of the summer exchanges, not to preempt further

detailed discussion and revision. Detailed language will facilitate discussion, without freezing it.

Respectfully submitted,

Edward H. Cooper, Reporter