MINUTES

CIVIL RULES ADVISORY COMMITTEE

November 12 and 13, 1998

The Civil Rules Advisory Committee met on November 12 and 13, 1998, at the Lodge Alley Inn, Charleston, South Carolina. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Myles V. Lynk, Esq.; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Shira Ann Scheindlin; Andrew M. Scherffius, Esq.; and Chief Judge C. Roger Vinson. Judge David S. Doty, Francis H. Fox, Esq., and Phillip A. Wittmann, Esq., attended as members who had completed their second three-year terms. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Sol Schreiber, Esq., attended as liaison member from the Standing Committee. Judge A.J. Cristol attended as liaison from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred Cortese; John S. Nichols; Fred S. Souk; and Jackson Williams.

Chairman's Introduction

Judge Niemeyer introduced the new Committee members Judges Kyle and Scheindlin, and lawyers Lynk and Scherffius. He noted that Judge Carroll had been reappointed to a second term, and that lawyer Kasanin had been appointed for an extension beyond the end of his second term. He read and presented Judicial Conference Resolutions honoring the service of Doty, Fox, and Wittmann. Judge Scirica also has concluded his time as an Advisory Committee member, having become Chair of the Standing Committee. Doty, Fox, and Wittmann each expressed appreciation of the opportunity to serve on the Committee, and expressed confidence that the Committee's work would be carried on to good effect.

Judge Niemeyer noted that Professor Daniel R. Coquillette, Reporter of the Standing Committee, had been prevented by circumstances from attending the meeting.

Judge Niemeyer then offered the new members some information about Advisory Committee practices. The Rules Committees are "sunshine" committees; meetings are open to the public, and on suitable occasions observers have been offered an opportunity to provide information for consideration in Committee discussions. The full extent of the open meetings commitment has never been fully determined -- the tendency has been to resolve questions in favor of openness. If a quorum of Committee members wish to discuss committee business, the practice has been to treat

the proposed discussion as an open Committee meeting. But subcommittees have met in nonpublic sessions; no subcommittee has had more than five members, and most have only three. And it seems proper for two Committee members to discuss committee work in private. It also is proper to hold Committee discussions in executive session, but the spirit of openness has been honored -- there have been no executive session meetings in the experience of any present Committee member.

Observers at Committee meetings include those who represent clients or identifiable constituencies. It is important

that they attend and know how open the Committee is. It is important to the Committee that they be free, to the extent the pace of deliberation allows, to make observations; their input can help improve Committee work, in much the same way as public comments and testimony. But it also is important to remember that however familiar and friendly the regular observers become, Committee members' relationships with them must "withstand front-page scrutiny."

To be complete, it also is necessary to make open recognition of the spirit that continually guides Committee deliberations. Each member aims for the best possible development of civil procedure. "Our own particular interests must be put aside." Each member comes to the meetings with unique knowledge and experience, and with unique perspectives that have been shaped by this knowledge and experience. The combination of these perspectives and values, drawn from a dozen and more lives in the law, is what makes the Committee process so valuable.

Finally, the new remembers were reminded that the work of the Committee is not self-organizing. The Administrative Office provides invaluable support, particularly through Peter McCabe as Secretary of the Standing Committee and John Rabiej as Chief of the Rules Committee Support Office.

Minutes Approved

The minutes for the March 1998 meeting were approved.

Legislation Report

Judge Niemeyer prefaced the Legislation Report by noting that Congress takes an interest in the Civil Rules. Bills that would change the rules directly are introduced with increasing frequency. The Committee has been impelled to become more interested in these bills. The Administrative Office is the chief agency for keeping track of the developments that warrant Committee attention.

John Rabiej began the Legislation Report by noting that nearly forty bills were monitored during the recently concluded session of Congress. Several of them are likely to be introduced early in the first session of the new Congress.

A Senate bill to undo the deposition recording amendments of 1993 got out of subcommittee this time, and is likely to be introduced again.

Several bills were proposed to provide for interlocutory appeals from orders granting or denying class-action certification. The sponsors were persuaded to amend the bills so that the effect would be only to accelerate the effective date of the new Civil Rule 23(f) that the Supreme Court sent to Congress last spring. Since Rule 23(f) is on track to become effective this December 1, it is not likely that these bills will reappear.

HR 1965, dealing with civil forfeitures, would amend Admiralty Rule C. Although proposed Rule C amendments would address the time provisions of the bill, the bill sweeps across many more forfeiture topics and is likely to be reintroduced.

A bill to subject government attorneys to state attorney-conduct rules passed, but is subject to a 180-day delay that will provide the Department of Justice an opportunity to decide whether it should seek repeal. This topic is closely related to topics that have been considered in the ongoing Standing Committee study of the need for federal rules to regulate the conduct of attorneys who appear in federal court.

An alternate dispute resolution bill was enacted, requiring that every court have some type of ADR system. The choice of ADR systems is left to local rule; the Administrative Office worked with Congress to improve the provisions invoking the local rulemaking power.

Class-action bills have been introduced. They bear directly on class-action practice, removal of class actions from state court, and other matters. Civil Rule 11 would be restructured for class actions by at least one bill. It is likely that many of these bills will reappear.

Offer-of-judgment proposals have been perennial topics of Congressional attention, and seem likely to return.

Report on Standing Committee

Judge Niemeyer reported on the consideration of Civil Rules proposals at the June meeting of the Standing Committee. Discussion of the proposals to publish discovery rules amendments for comment went rather well. There was less enthusiastic support for some of the proposals than for others. It is clear that the vote to approve publication does not represent a commitment by the Standing Committee to recommend adoption of any proposal that emerges unscathed from the public comment process. The Standing Committee did direct a change in proposed Rule 5(d). As proposed by the Advisory Committee, the rule would provide that discovery materials "need not be filed" until used in the action. The Standing Committee directed that the proposal be that the materials "must not be filed" until used in the action. Discussion of the change was rather cursory; it may be that after public comment and testimony, the Advisory Committee should consider whether a strong case can be made for returning to the "need not" formulation.

The proposed one-day, seven-hour limit for depositions was approved for publication by the narrowest margin, a vote of 6 for to 4 against. The reasons for concern are summarized in the draft Standing Committee minutes at pages 27 to 28. There is concern that the limit will not work well, particularly in multiparty cases. There has been favorable experience, however, with an Arizona rule that sets a presumptive 3-hour time limit for depositions. The proposal was made by the Advisory Committee in part because of the complaints of plaintiffs that deposition practice in some courts is being used to impose unwarranted, and at times unbearable, costs. Mr. Schreiber observed that he continues to believe that it would be desirable to supplement the one-day limit with a requirement that documents be exchanged before the deposition. This practice would facilitate the best use of the limited time. There also is concern about the provision that requires consent of the deponent for a stipulated extension of time; deponent consent may become a problem when the deponent is a party, or a person designated to testify for an organization party under Civil Rule 30(b)(6).

The progress of the Mass Torts Working Group also was reported to the Standing Committee.

The Standing Committee also approved publication of proposed amendments to Civil Rules 4 and 12, dealing with actions brought against United States employees in their individual capacities, and to Admiralty Rules B, C, and E.

Discovery

A number of proposed discovery rule amendments were published for comment last August. Hearings will be held in Baltimore in December, and in San Francisco and Chicago in January. The development of these proposals was reviewed, in part for the benefit of new Committee members and in part to inform all Committee members of the steps that were taken by the Discovery Subcommittee to implement the decisions made at the

March Committee meeting.

Judge Niemeyer began the discussion by noting that the discovery effort had been as streamlined as seems possible for a big project. From the beginning, the question has been whether we can get pretty much the same exchange of information at lower cost. After the undertaking was launched by appointing the Discovery Subcommittee, the first step was a January, 1997 meeting with experienced lawyers, judges, and academics. This meeting gave some sense of the areas in which it may be possible to improve on present discovery practice without forcing sacrifice of some recognizable sets of interests for the benefit of other recognizable sets of interests. This small conference was followed by a large-scale conference at Boston College in September, 1997. The conference was designed to provide expression of every point of view, and succeeded in this ambition. In addition to the information gathered at these conferences, empirical work was reviewed. The RAND data on experience under local Civil Justice Reform Act plans were studied, and the Federal Judicial Center undertook a new survey for Committee use. The FJC data proved very interesting. The data, in line with earlier studies, show that discovery is not used at all in a substantial fraction of federal civil actions, and that in more than 80% of federal civil actions discovery is not perceived to be a problem.

The Subcommittee compiled a list of nearly forty discovery proposals for consideration by the Committee. The Committee chose the most promising proposals and asked the Subcommittee to refine these proposals for consideration at the March, 1998 meeting. The refined proposals were further modified at the March meeting, with directions to the Subcommittee to make further changes. The proposals presented to the Standing Committee in June conformed to the Committee's actions and directions. Approval for publication, it must remembered, does not represent unqualified Standing Committee endorsement of the proposals. Even apart from the lessons to be learned from public comments and testimony, the Standing Committee expressed reservations that must be addressed if this Committee recommends adoption of any of the proposals.

Professor Marcus then provided a detailed review of the published proposals and their origins. The Discovery Subcommittee met in San Francisco in April, in conjunction with a conference held by the Judicial Conference Mass Torts Working Group. The revised discovery proposals were then circulated to the full Committee, and the Committee reactions were incorporated in the set of proposals approved by the Standing Committee.

Some preliminary reactions were provided by an ABA Litigation Section Panel during the August annual meeting. The first small set of written comments are starting to come in, including an analysis by the New York State Bar Association that runs more than forty pages. The topics that most deserve summary reminders and updating at this meeting include uniformity; disclosure; the scope of discovery; cost-sharing; and the duration of depositions. These are the topics that are most likely to provoke extensive public comments.

Uniformity. The local rule opt-out provision built into Rule 26(a)(1) in 1993 was not intended to endure for many years. The published proposal deletes the opt-out provision, and indeed proposes to prohibit local rules variations on discovery topics other than the number of Rule 36 requests to admit and the Rule 26(f) "conference" requirement. The proposed Committee Notes contain strong language invalidating local rules that are inconsistent with present and proposed national rules.

There is likely to be much comment about the need for national uniformity as against the value of local rules. Many district judges are strongly attached to their local rules. Some local rules, indeed, may provide practices that are more effective than present or proposed national practices. The strength of the desire for local autonomy is reflected by local rules that purport to opt out of portions of Rule 26(a) that do not authorize local rule departures.

Local rules, however, undercut the national rules regime. They also complicate the handling of cases that are transferred between districts that adhere to different practices. And local rules even complicate life for judges who are assigned to cases in districts away from home.

Disclosure. The disclosure obligations set out in Rule 26(a)(1)(A) and (B) were discussed extensively during the Subcommittee and Committee deliberations. The eventual recommendation limits the disclosure requirement to "supporting" information, not because of any direct ground for dissatisfaction with the 1993 rule but because of the desire to achieve a uniform national practice. Uniform adherence in all districts to the 1993 rule does not seem achievable now. The question remains whether this retrenchment is appropriate. The proposal proved popular at the August ABA Litigation Section meeting. Disclosure is described as information that supports the disclosing party's claims or defenses, drawing from the phrase used to define the scope of discovery. Some uncertainty was expressed at the Standing Committee meeting as to the reach of this phrase -- does it require disclosure of information that will support a party's efforts to controvert a defense? This issue may need to be addressed.

A minority drafting view won significant support in Committee deliberations, and has been pointed out in Judge Niemeyer's memorandum to Judge Stotler inviting public comment, on page 8 of the publication book. This drafting view would require disclosure of information that "may be used to support" the claims or defenses of the disclosing party. This issue should be kept in mind during the comment process and subsequent deliberations.

Proposed Rule 26(a)(1)(E) seeks to address arguments that disclosure is appropriate only in a middle run of litigation. It is too much to ask in "small" cases, and superfluous in complex or hotly contested cases. The approach taken to the complex cases is to allow any party to postpone disclosure by objecting to the process, forcing determination by the court whether disclosure is appropriate for the case. The alternative of attempting to define complex or contentious cases by rule was thought unattractive. The approach for small cases became known as the "low-end" exclusion. It was readily agreed that disclosure often is unsuitable for cases that would not involve discovery in the ordinary course of litigation. The drafting approach has been to attempt to identify categories of cases in which discovery is unlikely and in which disclosure often would be unnecessary work. Inspiration was sought in local rules that identify categories of cases excluded from Rule 16(b) requirements, but the inspiration was mixed -- there are only a few categories of cases that are excluded by many local rules, and there are many categories of cases that are excluded by one local rule or a small number of local rules. After the March meeting, a list of 10 categories was prepared. At the Standing Committee meeting, however, the Bankruptcy Rules Advisory Committee pointed out flaws in two categories aimed at bankruptcy proceedings even before the discussion began. These two categories were withdrawn; the published draft excludes eight categories of cases. These categories are avowedly tentative -- advice is sought on whether all of these cases should be excluded, whether other categories of cases should be excluded, and whether the words used to describe the excluded cases are appropriate. A preliminary review by Federal Judicial Center staff suggests that the proposed list would exclude about 30% of federal civil actions. The exemptions carry over, excepting the same cases from the Rule 26(f) party conference requirement and the Rule 26(d) discovery moratorium.

It was pointed out that the published proposals do not revise Rule 16(b), leaving in place the provision that authorizes local rules that exempt categories of cases from Rule 16(b) requirements. It was recognized that Rule 16(b) could be tied in to the same approach, identifying categories of cases to be excluded. But it is too late to graft this approach onto the current proposals -- separate publication of a Rule 16(b) proposal would be required. And it also is a question whether there is a need for national uniformity in this area that parallels the perceived need for uniformity in disclosure practice. The wide variation that exists among local exemption rules today also may suggest grounds for going slow. It also was observed that it would be risky to go the other way, adopting local Rule 16(b) exclusions into disclosure practice -- districts opposed to disclosure might adopt Rule 16(b) exclusions for the purpose of defeating disclosure.

Returning to the exclusion of "high-end" cases, it was noted that any case can be excluded from disclosure on stipulation of all the parties. It cannot be predicted what fraction of all federal cases may be excluded either by party stipulation or by the process of objection and eventual court order.

Rule 26(a)(1)(E) also would address, for the first time, the problem of late-added parties. An attempt was made to draft detailed provisions for this problem, but the drafting exercise identified too many problems to permit sensible resolution by uniform rule. The published proposal is deliberately open-ended and flexible.

Finally, some early reactions to the broad disclosure proposal were reported. The New York State Bar Association wants a uniform national rule, but a rule of no disclosure at all. A Magistrate Judges group, on the other hand, has urged continuation of the full present disclosure practice, including "heartburn" information that harms the position of the disclosing party.

Rule 26(b)(1) Scope of Discovery. A Committee Note has been written to explain the proposal. The goal is to win involvement of the court when discovery becomes a problem that the lawyers cannot manage on their own. The present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court. Absent court order, discovery is limited to matters relevant to the claims or defenses of the parties. No one is entirely clear on the breadth of the gap between information relevant to the claims and defenses of the parties and information relevant to the subject matter of the action, but the very juxtaposition makes it clear that there is a reduction in the scope of discovery available as a matter of right. There have been some preliminary responses to this proposal. One is that simply because it is a change, it will generate litigation over the meaning of the change. Another, from the New York State Bar Association, applauds the proposal, but urges that the Committee Note state that it is a clear change. And the concept of "good cause" for resorting to "subject-matter" discovery is thought too vague.

Committee discussion urged that the Note not belittle the nature of the change -- this is a significant proposal. But it was urged that the draft Note in fact is strict. Another observation was that any defendant will move that discovery is too broad; the proposal, if adopted, will generate a "huge load of motion practice." Together with the cost-bearing proposal [more accurately called cost-shifting, on this view], thousands of motions will be generated.

Cost-bearing. The published Rule 34(b) language was drafted after the March meeting, in response to deserved dissatisfaction with the proposals offered there. At the Standing Committee meeting, it was asked whether the proposed language adequately describes the intent to apply cost-bearing only as an implementation of Rule 26(b)(2) principles -- whether cost-bearing could be ordered as to discovery that would be permitted to proceed under present applications of (b)(2) principles. The problem of drafting Rule 34 language, indeed the general problem of incorporating this provision specifically in Rule 34, joined with policy doubts to suggest reconsideration of the question whether cost-bearing would better be incorporated directly in Rule 26(b)(2). There was extensive debate of this question at the April Subcommittee meeting, leading to a close division of views. The Rule 26(b)(2) approach would have at least two advantages in addition to better drafting. The Reporters believe that Rule 26(b)(2) and Rule 26(c) now authorize cost-bearing orders; incorporation in Rule 26(b)(2) would quash the doubts that might arise by implication from location in Rule 34. In addition, it is important to emphasize that the cost-bearing principle can be applied in favor of plaintiffs as well as in favor of defendants; there is a risk that location in Rule 34 will stir questions whether the proposal is aimed to help defendants in light of the fact that defendants complain of document production, while plaintiffs tend to complain more of deposition practice. This question is raised in Judge Niemeyer's letter to Judge Stotler, at pages 14 to 15 of the publication book.

It was observed that the arguments for relocation of the cost-bearing provision in Rule 26(b)(2) are strong. The Committee should feel free to consider the matter further in light of the views that may emerge from the public comments and testimony.

An important question was raised at the Standing Committee meeting that may deserve a drafting response. After a court allows discovery on condition that the requesting party pay the costs of responding, the response may provide vitally important information that belies the court's initial prediction that the request was so tenuous that the requesting party should bear the response costs. Should the rule provide a clear answer whether the cost-bearing order can be overturned in light of the value of the information provided in response?

The New York State Bar Association opposes this proposal because it agrees that the intended authority already exists. Adoption of an explicit rule will lead some litigants to contend for -- and perhaps win -- a broader sweep of cost-sharing than is intended.

Some preference was expressed for leaving the proposed amendment in Rule 34. This view was that "there is too much in Rule 26" now; "no one reads all of Rule 26." The most important source of the most extravagantly expensive over-discovery is document production. The explicit cost-bearing protection should be expressed in Rule 34.

It also was noted that at the Standing Committee meeting, it had been urged that if the target is the complex or "big documents" case, the rule should be drafted expressly in terms of complex cases. It also was feared that the proposal will create a "rich-poor" issue: there will be a marked effect on civil rights and employment cases, where poor plaintiffs will be denied necessary discovery because neither they nor their lawyers can afford to pay for response costs. There have been few cost-bearing orders in the past; no matter what the rule intends, it will be difficult to convince lawyers that they can continue to afford to bring these cases. They will fear that cost-bearing will be ordered in cases where discovery is now allowed.

These concerns were met by responses that Rule 26(b)(2) now says that the court shall deny disproportionate discovery; the cost-bearing provision simply confirms a less drastic alternative that allows access to otherwise prohibited discovery. No one is required to pay for anything; it is only that if you want to force responses to discovery requests that violate Rule 26(b)(2) limits, you can at times obtain discovery by agreeing to pay the costs of responding. All reasonable discovery will be permitted without interference, as it now is under Rule 26(b)(2). Rule 26(b)(2) principles expressly include consideration of the parties' resources; there is no reason to anticipate that poor litigants will be put at an unfair disadvantage. And it has proved not feasible, even after some effort, to define "big," "complex," or "contentious" cases in terms that would make for administrable rules.

Deposition Length. The proposal is to establish a presumptive limit of one business day of seven hours for a deposition. The most frequently expressed concern is that this proposal will prove too rigid, and by its rigidity will promote stalling tactics. The Standing Committee also expressed concern over allocation of the time in multiparty cases; perhaps the Committee Note should be revised to address this concern. The proposal also requires consent of the deponent as well as the parties for an extension by consent without court order. The Committee may well not have thought hard enough about the requirement of deponent consent for cases in which the deponent is a party; perhaps further thought should be given to requiring deponent consent only when the deponent is not a party. It also might be desirable to amend the Note to express general approval of the practice of submitting documents to the deponent before the deposition occurs, so as to save time during the deposition. Among early comments, the New York State Bar Association opposes this proposal for fear that it will promote undesirable behavior at depositions.

Other Matters. Rule 26(f) would be amended to delete the requirement of a face-to-face meeting; recognizing the great values of a face-to-face meeting, however, provision has been made for local rules that require the meeting. The draft Committee Note emphasizes the success of present practice, but recognizes that some districts may be so geographically extended that face-to-face meetings cannot realistically be required in every case.

This Committee recommended publication of a draft Rule 5(d) that would have provided that discovery materials "need not" be filed until used in the action or ordered by the court. The Standing Committee changed the provision, so that the rule published for comment provides that discovery materials "must not" be filed until used in the action or ordered by the court. The discussion in the Standing Committee did not focus special attention on the public access debate that met a similar proposal in 1980. Depending on the force of public comments and testimony on the published proposal, the Advisory Committee may wish to urge reconsideration of this issue.

It was asked in the Standing Committee whether there had been a "judicial impact study" of the proposed amendments. The amendments are designed to encourage -- and perhaps force -- greater participation in discovery matters by the substantial minority of federal judges who may not provide as much supervision as required to police the lawyers who appear before them. But it is not clear whether these judges in fact have time to devote to discovery supervision. It also was asked why the rules should be changed for all cases, if fewer than 20% of the cases are causing the problems. In considering this question, it should be remembered that it is difficult to draft rules only for "problem" cases. And it also should be remembered that figures that refer only to percentages of all cases in federal courts are misleading. There is no discovery at all in a significant fraction of cases, and only modest discovery in another substantial number of cases. Rules changes that nominally apply to all cases are not likely to affect these cases in any event. Lawyers perceive significant problems in a large portion of the cases that have active discovery. It is worthwhile to attempt to reach these cases.

It was suggested that if possible, it would be useful to acquire information -- including anecdotal information, if as seems likely nothing rigorous is available -- about the experiences in Arizona and Illinois with rules that limit the time for depositions. And it was predicted that one effect of deposition time limits will be that documents are exchanged before the litigation, even though there is no express requirement. And even without an express requirement that a deponent read the documents provided, failure to read them will provide a strong justification for an order directing extra time. The potential problems are likely to be sorted out in practice by most lawyers in most cases.

It was noted that discovery is likely to be the central focus of the agenda for the spring meeting.

Mass Tort Working Group

Judge Niemeyer noted that class actions have been on the Advisory Committee agenda since 1991. The Rule 23 proposals published in 1996 generated many enlightening comments that addressed mass torts among other topics. The problems identified by the comments were far-reaching, and often seemed to call for answers that are beyond the reach of the Enabling Act process. The Committee found so many puzzles that it recommended present adoption only for the interlocutory appeal provision that is about to take effect as new Rule 23(f).

The Judicial Conference independently began to consider appointment of a "blue ribbon" committee on mass torts. An entirely independent committee seemed likely to duplicate work already done by the Advisory Committee. It was suggested that the best approach would be to establish a cooperative process among the several Judicial Conference committees that might be interested in the mass torts phenomenon. An initial recommendation was made to establish a formal task-force across committee lines. The Chief Justice reacted to

this suggestion by authorizing an informal working group to be led by the Advisory Committee. Other Judicial Conference committees were invited to participate. Four committees, dealing with bankruptcy administration, court administration and case management, federal-state jurisdiction, and magistrate judges accepted the invitation and appointed liaison members. The chair of the Judicial Panel on Multidistrict Litigation also joined the working group. Judge Scirica accepted appointment as chair of the working group, and Advisory Committee members Birnbaum and Rosenthal also were appointed members. Professor Francis McGovern was appointed as special reporter.

With the indispensable help of Professor McGovern, the working group held three impressive conferences to gain the advice of the most experienced and thoughtful participants in the continual evolution of mass torts practice. The process was stimulated by rough sketches of various possible approaches that were prepared for the specific purpose of providing a launching pad for discussion.

The problems presented by mass torts litigation often seem to invite solutions that cannot be provided by the rulesmaking process. Some of the solutions that have proved attractive even seem to test the constitutional limits of permissible legislation. To take a stylized example, how can our judicial system undertake to resolve the claims that arise when a course of action pursued by five defendants inflicts injury on a million people?

The Working Group has pushed its deliberations to the point of producing a draft report. The report is intended to summarize the information that has been gathered by the Working Group, and to make recommendations for the next steps that might be taken in addressing mass torts problems. No immediate action will be taken; instead, it will be recommended that a new Judicial Conference committee be created to formulate specific recommendations for consideration in the rulesmaking process and by Congress. The constitution of a new committee will be a delicate task, seeking to achieve representation and experience that are as broad as possible without producing a body too large to work effectively and expeditiously. The draft report is presented to the Advisory Committee for consideration and, if possible, for approval, but it remains short of final form. Further work will be required in response to reactions from Advisory Committee members and, to the extent that time allows, from the committees whose liaison members have helped constitute the working group. The hope is that in the end, ways will be found to streamline the mass torts process. But it is a complicated task. February 15, 1999, has been set as the date for transmitting the final and formal report.

Judge Scirica began presentation of the draft report by stating that the working group has been very successful. This pattern of cross-committee deliberation may become a model for future problems. The work of the group was greatly assisted by Professor McGovern's aid in organizing the conferences. Professor Geoffrey C. Hazard, Jr., a member of the Standing Committee, became an important adviser. And important help was provided by Thomas Willging and the Federal Judicial Center studies that are still under way.

The Working Group process of inquiry provided an education for all involved. The lawyers who do mass torts regularly, and a few judges, know far more about the problems than do most others. One problem is that the landscape keeps changing. Each successive mass tort is in some important ways different from the one that came before it. The most difficult problems are presented by dispersed personal injury cases.

Despite the differences, there also are common problems that seem to link most mass torts. One is the "elasticity" phenomenon, occurring as improved means of resolving large numbers of claims invite the filing of still larger numbers of claims. As the sheer number of related claims proliferate, there is a danger courts will come to reward "false positives" -- claims that would be rejected if presented as individual actions, but that become indistinguishable in the press to resolve more claims than any single tribunal can handle effectively. Another problem is the bewildering array of problems that are described as the problems of "maturity." Each mass tort

presents a different range of needs for development of individual cases as a foundation for moving toward aggregated disposition. Premature aggregation can generate pressures that are not easily contained, threatening dispositions that are not fair to anyone involved, not to plaintiffs and not to defendants. Delayed aggregation, on the other hand, can invite waste, unnecessary multiplication of inconsistent results, races for available assets that may overcompensate early claimants while denying any compensation to later claimants. There is a continuing competition between the great traditional value of individual control and the equally important values of efficiency, fairness, and consistency. Reconciliation of the competition is possible only with proper recognition of the point of maturity.

In approaching these problems, it is necessary to understand the incentives to sue or not to sue. Some understanding may be emerging. The difficulty of achieving understanding is underscored, however, by the continuing difference of views among plaintiffs' lawyers. Some believe it best to represent only a small number of individual clients who have strong individual claims. Others believe it best to undertake individual representation of large numbers of individual clients, effectively achieving aggregation through common representation. Still others believe it best to aggregate many claims on other bases, whether by multidistrict proceedings, class actions, or still different devices.

It also is necessary to remember that there are substantive problems that require us to think about the role of the judiciary.

Among the problems that might be addressed are these: (1) Aggregation -- by what means? At what time, remembering the dangers of premature or tardy aggregation? How far can we distinguish between aggregation for pretrial purposes, for settlement, or for trial? (2) What, if anything, can be done about claims that depend on uncertain science? (3) Limited fund problems may be addressed by the Supreme Court in the *Ahearn* asbestos litigation -- it seems prudent to defer any deep consideration while the decision remains pending, but it would not be prudent to expect that the decision in any single case will resolve all problems. (4) Can means be found to achieve closure for defendants, particularly by settlement -- if you want to settle with all claimants, or nearly all, how can this result be accomplished?

The draft report defines the issues and describes the problems that have been perceived from different perspectives. There are so many perspectives that inevitable tensions emerge in the perceptions -- phenomena that seem problems to some seem opportunities to others. Care must be taken to make it clear that the description of problems does not strike the casual reader as inconsistent. The draft report also notes possible approaches to addressing the problems, but does not make any choices among these approaches.

Throughout the process, there has been a substantial body of consistent advice about the important tools of judicial management. More can be done to avoid discovery conflicts. And many observers believe the time has come to expand the treatment of mass tort litigation in the Manual for Complex Litigation.

In considering possible rules changes, the topic of settlement class actions continually recurs. The *Amchem* decision seems to approve of settlement classes, but the terms of the approval remain uncertain.

In considering possible recommendations for legislation, any successor committee must think carefully about the extent to which a Judicial Conference committee can properly or prudently become involved with legislative processes. Close involvement with legislative committees may be important as a means of teaching important lessons about the problems, but it also threatens to belie judicial independence. In another direction, judicial proposals that bear on substantive choices may impugn judicial neutrality, no matter how far removed from direct involvement with the legislative process. Still, the Judicial Conference has already approved legislative proposals

to amend 28 U.S.C. § 1407, and has approved "single event" mass-tort proposals. The path to be followed is a difficult one.

Professor McGovern took up the discussion, observing that the strong feeling of most participants has been that the only way to understand mass tort litigation is to become involved. The Working Group conferences were organized to show what is different about this litigation, and to identify the problems that have emerged. The conferences worked very well. As work continues, McGovern will meet with three of the liaison committees to gather their reactions to the draft report. The Court Administration and Case Management, Bankruptcy Administration, and Federal-State Jurisdiction Committees all will be involved.

Later in the discussion, Professor McGovern noted that the intent behind the draft report is to be descriptive, not normative. The Working Group has reached a consensus as to "the nature of the beast," and a rough consensus as to the things that at least some people see as problems. The paradigm of litigation is one plaintiff, facing one, two, or three defendants. The procedure is taken straight from the Federal Rules of Civil Procedure. The Pinto cases were tried like this. "Then something happened." The desire arose to achieve efficiencies that are denied by individual case-by-case disposition of each claim that arises from a mass tort. Aggregation was sought for pretrial, and then for trial. Aggregation enables courts to move the cases, to reduce transaction costs, to get more money to the victims, and so on. So, for example, Maryland adopted transfer legislation for state-wide consolidation, and 8,555 asbestos cases were consolidate in one proceeding. As aggregation developed, people realized that aggregation was spurring the filing of still more cases -- the phenomenon referred to as the "elasticity" or "superhighway" (build a superhighway and there will be a traffic jam) problem. And defendants came to hope for closure, to find a procedure that would enable them to resolve all mass tort claims at once and move one. Innovative procedures were adopted in Amchem and Ahearn. And as innovation proceeded, it came to be recognized that aggregation, class actions, and other devices "are not curing everything."

The Working Group inquiry began against this background. The Working Group asked "what are the problems"? If transaction costs are reduced early in the development of a mass tort, we get more cases; if too late, a high price of inefficiency is paid in processing more individual actions or small aggregations than need be paid. And so the quest was for solutions to specific problems. The Working Group remains open to identification of problems not yet identified. It is interested in proposed solutions, recognizing that there will be disagreement even as to what events constitute problems. A catalogue of possible solutions has been considered. But no attempt will be made to recommend solutions, to suggest the relative importance of the problems, or even to determine which of the perceived problems are problems in fact.

Thomas Willging reported on the work being done by the Federal Judicial Center. A draft-in-progress was provided. The work is highly detailed, but can be summarized in three parts.

The first part of the FJC study looks at the individual characteristics of mass torts. In the end, fifty mass torts will be studied. One characteristic is the number of claims presented. In this regard, and others, asbestos litigation has been "decidedly unique." Dalkon Shield and silicone gel breast implant litigation also has yielded hundreds of thousands of claims, but the claims in these cases were generated mostly by judicial processes for giving notice of the litigation. The next group of numbers is far smaller, involving mass torts with 10,000 or 20,000 claims. The claims rate has been studied as the ratio of claims to persons exposed. Remembering that exposure does not equate to injury, the figures seem to suggest that aggregation goes in company with a claim-filing rate greater than ten percent. No causal inference can be drawn from this conjunction -- it is possible that it is aggregation that causes the claim rate to rise, and also possible that it is an independently high claim rate that causes aggregation. Clear proof of causation between the claimed wrong and asserted injuries is another important characteristic that distinguishes mass torts. About two-thirds of the cases studied enjoyed "pretty clear" showings of general

causation. The remaining third did not have clear showings, and tended to drop off (Bendectin, repetitive stress injury) or to settle (Agent Orange).

The second part of the study involves three cases with "limited fund" settlements. One of the major themes of this part is that there is great difficulty in determining the size of the "fund." The Civil Rule 23(b)(1) device as used in these cases provided information far inferior to the information that was presented to the bankruptcy court when one of the proposed settlements failed. The difficulty seems to be that information as to the value of the defendant is presented only by parties who have already agreed on a settlement. In each of the three cases, the information dramatically underestimated the value of the company.

Discussion of the size of the fund pointed out that it is not possible to make meaningful comparisons between the value of a company faced with unresolved mass tort liability and the same company that has achieved resolution of the liability. Acromed, involved in one of the case studies, did not have the money to pay off the tort claims and could not borrow the money. Once a settlement was reached, it was possible to borrow the money; without a means of settlement, Acromed was worthless and the claimants would get little or nothing. With the settlement, the claimants won substantial payments and Acromed was once again a viable company. The problem arises from the difficulty of predicting the value of a company once liability is removed, even if the prediction is made on the basis of the terms offered by a specific settlement. One way of viewing the problem is that a "surplus" is created by the very process of settlement -- allocation of the surplus between the claimants and the defendant not only presents a difficult policy problem, but also turns in on itself as adjustment of the settlement terms affects the post-settlement value of the company.

An illustration of the problem is presented by the Eagle-Picher litigation. Eagle-Picher proposed settlement on the basis of a $200 million fund. The settlement was not approved, and bankruptcy ensued. After six years and $47 million of professional fees, a Chapter 11 plan was approved. The company was sold for $700 million, for the benefit of the claimants. Reduced to present value at the time the $200 million settlement was rejected, the reorganization yielded more than $500 million, or more than twice the original proposed settlement. The court in the bankruptcy case took evidence from lots of experts on the value of the claims and the value of the company. The process cost a lot in professional fees, but the determination, when made, set the stage for disposition.

The third part of the FJC study is a literature review. Of necessity, the review is selective -- a vast literature is developing on mass torts topics. The review will focus on the recommendations for rules or legislation, rather than on the descriptions of the problems.

The ensuing discussion of the draft report wove around two sets of issues. One set involved changes that might be made to improve the report. The other involved the proper role of the Advisory Committee with respect to the Working Group and its report.

One of the first questions addressed to the draft report was whether it is clear that the focus is on a limited set of the cases that might be characterized as "mass torts." The Working Group has not been concerned with the "small-claims consumer" class actions that aggregate large numbers of claims that reflect individually minor injuries. Neither has the Working Group been concerned with regulatory and business wrongs, such as antitrust and securities law violations, that may inflict substantial economic injuries. It was agreed that the report must clearly exclude these class actions from its reach, and suggested that the scope discussion at pages 12 to 13 might emphasize these limits more clearly. The Advisory Committee has explored these topics in depth, and the Working Group has deliberately put them aside.

A related set of questions asked whether the draft report may be too optimistic about present procedures for

handling "single event" mass torts. The draft, on page 25, seems to suggest both that the universe of claimants is clear in single-event torts, and that there is nothing left to the 1966 Advisory Committee Note suggestion that Rule 23 cannot be adapted to mass torts. There may be single-event torts in which the universe of possible claimants is not known. An example was provided by the explosion of a tank car releasing fumes that went for uncertain distances in indeterminate directions. 8,000 claimants have been identified, but it remains unclear how many actually have been affected by the release, and so on.

It was suggested that the discussion at draft pages 15 to 22 could be taken out of context, and misused. It should be made even more clear that this portion -- and indeed all of the report -- is a reflection of concerns, not findings of fact.

The reference to the *Ahearn* litigation on page 19 might seem to imply some view on the merits of questions now pending before the Supreme Court. The reference should be reworded to make it clear that no view of the merits is implied.

Another concern was that there is not enough clarity in the Part V division between issues that might profitably be addressed by a successor committee and more long-range issues. The discussion of attorney fee issues, for example, is separated from the discussion of professional responsibility issues. Science issues may deserve a different presentation.

It was agreed that the Part V discussion of solutions that might be explored should be reorganized, deleting any ordering by suggested sequences of consideration. At the same time, it is proper to recognize that some proposed solutions require much more further study than others -- the "bill of peace" proposal for resolving science issues is an example of a matter that is so innovative that it requires more careful review than more familiar extensions of current practices. So attorney issues may be brought together, as could science issues, aggregation issues, and so on.

One of the many proposals in the appendix materials is expansion of federal-court power to enjoin state-court proceedings by amending 28 U.S.C. § 2283. This suggestion might deserve explicit mention in the report.

Another set of issues identified by the draft report involves professional responsibility problems. When a single lawyer represents many claimants, the settlement process often generates pressure to participate in the allocation of settlement amounts among different clients. The difficulty of responding to these pressures is mentioned in the draft report, and perhaps can be emphasized by presenting in one place the various issues with respect to appointment, compensation, and conduct of attorneys.

It was asked why there should be any recommendation for consideration of "science" issues, now that the Evidence Rules Advisory Committee has published proposals to amend the rules dealing with expert testimony. The response was that there remain real problems in dealing with scientific issues in some mass torts, and that the Evidence Rules proposals do not deal with these distinctive problems. One illustration is the difficulties that may arise when two or more courts each appoint panels of experts to consider the same issues. The "general causation" issue is of critical importance in some mass torts, and it is very difficult to define the proper time to move toward a single determination that will bind all future cases. The Court Administration and Case Management Committee is working on some of these issues, with support from the Federal Judicial Center. The draft report should make it clear that it is addressing only the need for further study of expert evidence in mass-tort cases, not a broader range of topics.

Another illustration of a specific mass-tort evidence problem arises from the question whether there should be

one Daubert - Rule 104(a) hearing when there are multiple cases. Some judges are doing this. One issue is what advice the Manual for Complex Litigation should provide. In the breast implant litigation, Judge Jones in Oregon and Judge Weinstein in New York had very different Rule 104(a) approaches, and Judge Pointer in the MDL cases had still a different approach. It may be that competition of this sort is a good thing, at least up to a point. But the question seems to deserve further study.

Pursuing the "science" issues, it was noted that there is a "tension" between different parts of the draft report. Page 36 refers to the risk of conflicting scientific determinations, but other parts refer to the risk of premature aggregation. Without aggregation, there will be conflicting determinations in the cases that in fact present difficult science issues. Delay is a problem, and moving too fast is a problem. The tension should be recognized more explicitly. And it should be emphasized that there is no ready formula -- that each mass tort will present a different sort of uncertainty, and will be best handled by means different from those best adapted to the mass torts that have gone before. It also was urged that page 54 seems to involve issues that are beyond the reach of the Advisory Committee, involving issues better addressed by the Evidence Rules Committee. And the idea of an "issues class" to resolve science issues only, leaving all other issues for disposition in some other form of proceedings, is novel. It was recognized that there is no intent to carry the Civil Rules Committee into the realms of evidence. The recommendation for creation of an ad hoc committee contemplates that the ad hoc committee will identify topics for further consideration by appropriate bodies. Congress will be the appropriate body to study many of the likely solutions to mass-tort problems, while different rules advisory committees are likely to be appropriate for other possible solutions. The multi-committee approach is reflected at pages 56 and 58 of the draft report. It is important to emphasize that the recommendation is for a committee that will commend proposals for further consideration in the channels customarily followed for each type of proposal. "We cannot be too specific" in making this clear.

Pages 44 to 45 of the draft report focus on Rule 23 and settlement classes. It might help to supplement this discussion by referring to the "maturity" factor in the draft Rule 23(b)(3) that remains pending in the Advisory Committee.

Another pending Advisory Committee proposal is to amend Rule 23(c)(1) to provide for class certification "when practicable," not "as soon as practicable." This proposal could have a direct link to the maturity issues, including a direct link to settlement-class issues.

Discussion turned to the portions of the draft report that deal with the relationship between the rate of filing claims and the actual rate of injury. One view is that use of aggregation devices such as class actions leads to a significant increase in the rate of filing claims. In discussing this view, it should be made clear that an increase in rates of filing is not necessarily a bad thing -- when the result is to provide compensation to those who have legitimate claims, it seems like a good thing. The problem is a problem only when the confusion and difficulty of resolving individual issues in a large aggregated proceeding facilitates awards to those who do not have legitimate claims. This problem is often referred to as the "false positives." And it is very difficult to know what the real claiming rate is -- many settlements reward people who are not at all injured, and many claimants are "signed up" merely to hold their place in case injury does eventually develop. As difficult as it is to measure or compare filing rates, however, it may be important to make the point that we do not generally litigate all of society's wrongs. The possibility that aggregation devices can reduce the transaction costs of resolving individual claims in mass torts, increasing the rate of filing, deserves mention.

It was further observed that the difficulty of measuring claims rates depends in part on the setting. There are studies that have generated reasonably solid figures, particularly in the medical malpractice field. The Federal Judicial Center now being completed looks to claims rates in relation to the number of people exposed to an

injury-causing condition or event; this information does not of itself describe the claims rate in relation to the number of people actually injured.

Another suggestion was that the Working Group continually heard the advice that it is common to focus on the last mass tort that was litigated, obscuring the need to approach each new mass tort with a close look for the differences that require different procedures. This advice may deserve greater prominence in the report.

After noting that the Working Group "did a great job of getting its arms around the problem," it was asked what might be the "end game"? If further study does not yield a final solution, where will an ad hoc committee go? How can those involved in further study "let go"? It was responded that the purpose is to address the things that can be seen to be problems and that at least seem susceptible of useful recommendations. One example would be the desire to find a means of facilitating final closure of all -- or nearly all -- claims in a mass tort. It will not be possible to control all changes in the dispute-resolution process. But, to take another example, Rule 23 is a remarkably powerful tool; it may be that it can be adapted to the needs of mass torts, perhaps in conjunction with reforms of other procedures, jurisdictions, or powers that must be addressed outside the Civil Rules Committee and outside the Enabling Act process. Other rules changes may appear to be profitable subjects for study by the Advisory Committees. A growing body of information can be gathered to support an expanded treatment of mass torts in the Manual for Complex Litigation. "We can do little things. It is worthwhile to attempt more." There is no hope that every problem will be solved, only a judgment that the risk and cost of further work are warranted by the prospect that some useful recommendations will emerge. Some solutions, even if desirable, may not be realistic -- a specialized "mass torts" court, for example. "There is no silver bullet." As to grand solutions, "we must be prepared to fail." But even if specific solutions do not emerge, the process itself will yield valuable educational benefits that, indirectly, will contribute to the gradual evolutionary process that will continue to advance our approaches to mass-torts litigation.

The second focus of discussion was identifying the proper role of the Advisory Committee in relation to the Working Group report. The Working Group is a novel entity, created under the leadership of the Advisory Committee. The Advisory Committee meeting was scheduled for mid-November for the special purpose of providing the opportunity to review an advanced draft of the Working Group report. The novelty of the situation, however, leaves room to debate whether the Advisory Committee should decide whether in some way to adopt the report.

One approach is that leadership entails the responsibility to review the report to determine whether it can be endorsed by the Advisory Committee. Another approach would be to approve the recommendation that an ad hoc Judicial Conference committee be appointed to carry on the work begun by the Working Group, and to transmit the report without specifically endorsing the report.

A possible reason for limiting the role of the Advisory Committee is that the Committee has not had much time to review the draft report. The draft report summarizes a great deal of information that was gathered by the Working Group, and it is difficult for Advisory Committee members who were not part of the Working Group to assimilate all of this information.

A more expansive role for the Advisory Committee was supported on the ground that the report makes only one recommendation -- that the problems arising from mass-tort litigation deserve further study by a new committee specifically appointed for this purpose. There is reason to hope that progress can be made toward finding solutions, and there is an even better foundation than before for concluding that the work can be done only by a body that draws from the support of many traditionally separate bodies.

The length and detail of the draft report should not mislead discussion of these issues. The report is drafted to distill the fruits of the working group's efforts into a form that will prove most helpful to a successor committee. This form also will help to educate the important and relevant constituencies about the problems and the need to pursue the problems. The report does not consist of "findings" or "recommendations" for action. The Advisory Committee can do no more than approve the report as a clear description of the mass-torts phenomenon as it has been experienced, along with the problems that have been identified from all perspectives of the phenomenon and the solutions that have been proposed.

It was urged that when he authorized appointment of the Working Group, the Chief Justice asked that it report. The draft report is precisely the kind of report that is most useful to show the need for further work, and to suggest the means of undertaking the task. The need for further work seems clear. The Advisory Committee can ensure that nothing is overstated, and -- as demonstrated by the many specific suggestions for revision -- improve the product.

Further comments from Advisory Committee members can be worked into the draft report up to November 18, or possibly a few days later. After that, the draft will be circulated in its then-current form to the liaison committees. Further comments on that draft can be received up through the end of December.

After this discussion, a motion was made and seconded to approve the Working Group recommendation that a successor ad hoc committee be appointed, and to transmit the Working Group report. It was observed that this approach seemed timid in light of the nature of the report -- that the Advisory Committee had enjoyed sufficient opportunity to review and discuss, and would have sufficient opportunity to suggest further revisions, to warrant more positive action now. It will be clear that the report is not making any proposals or recommendations beyond creation of a new committee. Deferring action for vote by mail ballot seems unnecessary.

Following this discussion, the motion to transmit the report was withdrawn with the consent of the seconder. A motion was then made that the Advisory Committee approve the report, subject to continuing editorial revisions and with changes made to reflect the Advisory Committee discussion at this meeting. There is to be no further vote by the Advisory Committee, although "wordsmithing" contributions from all members will be welcomed. A new draft will be circulated to the Advisory Committee for this purpose. The motion was adopted by 14 votes for and 2 votes against. (The vote total reflected participation by the members whose committee terms have concluded, since the report will reflect their participation in the process throughout the year.)

The vote to approve includes approval of the suggestion that the Chief Justice will be given an opportunity to indicate whether the approach being followed in the draft report reflects the nature of the report that he has expected to receive. Committee members were reminded that suggestions for change in the next draft will be due by the end of December.

Agenda Subcommittee Report

Justice Durham presented the report of the Agenda Subcommittee. The report is the beginning of an undertaking to reinvigorate the program for review and disposition of docket matters. The Committee has pursued several large projects in recent years, and has found it difficult to keep abreast of the more focused matters that regularly come to it. More regular review is planned for the future.

The memorandum presented for this meeting reviews docket items that have no further action listed and that appear to be matters that can either be scheduled for consideration at a 1999 meeting or be removed from the docket. It is not a complete review of all matters still pending.

Some items on the docket are listed as "deferred indefinitely." These items involve matters that the Committee does not want to reject, but that seem better accumulated for consideration as parts of larger packages. Rule 4, for example, regularly draws suggestions for improvements. It would be easy to act on service-of-process issues every year. A comprehensively revised rule took effect in 1993, however, and it has seemed wise to gather suggestions for reform over a period of several years. When it seems possible to undertake a broad review of experience under the new rule, these items can be considered as a package. Rule 81 is another illustration. A number of issues have accumulated around Rule 81, and with the proposal on Copyright Rules on the agenda for this meeting, the time may have come to clean up several Rule 81 matters in one package. Even then, Rule 81 presents questions that involve the relationship of the Civil Rules to the Habeas Corpus - § 2255 Rules that are being considered by the Criminal Rules Committee. Action on Rule 81 now will result in a significant prospect that a later Rule 81 proposal also will be needed. But perhaps the later proposal can catch up with the present proposals for publication in August 1999.

Focusing on specific proposals to amend Rule 4, it was suggested that the Subcommittee could combine two approaches. Some of the proposals might be put into a "cumulative minor changes" category, to be held for action when the rule seems ripe for a general review. Other proposals may deserve to be rejected without further study. The Subcommittee will take a closer look at all of the pending Rule 4 proposals to determine which proposals may fit into which category.

Proposals to amend Rule 5 are accumulating. The proposals generally center on electronic filing, notice-giving, and service. The Standing Committee has a technology subcommittee that is coordinating these issues across all of the advisory committees. The Civil Rules technology subcommittee is working with the Standing Committee subcommittee. Other Judicial Conference committees also are working on these topics. There are ten pilot courts doing electronic filing, and another court doing it on its own. The pilot districts are finding "rules problems" as they implement their programs. Rule 5 and consent of the bar have made the programs possible. But there are problems. The chief problem is service; pending Bankruptcy Rules amendments would allow electronic service. These topics will be reviewed with the advisory committee reporters during the January Standing Committee meeting. These issues are difficult, and the process of dealing with them will draw out for a long time. The Committee voted to refer these docket items to the Technology Subcommittee.

A proposal has been made to amend Rule 12 to provide that an official immunity defense must be raised by dispositive pretrial motion, and cannot be raised for the first time at trial. This proposal would be inconsistent with the rules that allow amendment of the pleadings, and would defeat the power to grant judgment as a matter of law on an official immunity defense. A motion to reject this proposal was adopted by unanimous vote.

The committee also voted unanimously to reject proposed amendments to Rule 30. One would require that persons be allowed to make audio tapes of courtroom proceedings. The other sought to allow orders that would protect a deponent against harassment, orders that already are authorized by Rule 30(d)(3).

Another proposal suggested amendment of Rule 36 to forbid false denials. The Committee rejected this proposal, noting the adequacy of the present sanctions for false denials.

Rule 47 would be amended by another proposal to eliminate all peremptory challenges in civil actions. Peremptory challenges in civil cases are authorized by 28 U.S.C. § 1870; see also § 1866(b)(3). There may be good reasons to reconsider peremptory challenge practice in light of the difficulties that surround efforts to prevent discriminatory uses. But the questions do not seem so urgent as to undertake a project that would require deliberate use of the power to supersede a statute. The Committee voted to delete this topic from the docket,

recognizing that Congress may wish to take it up and that future circumstances might justify further consideration by the Committee.

A question about the role of the district clerks as agents for service of process under Civil Rule 65.1 was removed from the docket in light of the action taken by the Committee at the March meeting.

The Committee agreed that other agenda items should be reviewed by the Subcommittee. It further suggested that the subcommittee should review future items that arise and determine the proper place on the agenda for these items by recommending rejection, scheduling for prompt consideration, deferment, or such other disposition as might seem desirable.

Automation

Automation topics returned for further discussion. The Committee hopes to benefit from monitoring the activities of the Bankruptcy Rules Advisory Committee in this field.

It was suggested that the short-term solution may be to continue to rely on local rules. In the long run, it will be necessary to go through all the rules to make sure that they are compatible with emerging electronic practices. Courts have been successful in reaching sensible adaptations of the rules to meet current needs. But service remains a big current problem. People are continuing to effect service by paper because there is no authority for electronic service.

One of the incidents of electronic storage is that there are complete records. Nothing can ever be erased -- if changes are made in an electronic docket, the systems retain both the original version and the revised version. There are many ways to ensure that paper records are the same as electronic records. "The talk is machine-to-machine. It is a different way to do things." The accommodations required to meet these differences will be worked out over a period of several years.

Reliance on experimentation in pilot districts is likely to provide much valuable information. There also is a risk, however, that the advanced districts will become entrenched in different ways of doing things, creating difficulties for future attempts to adopt uniform protocols. The Judicial Conference is working on Guidelines for electronic filing, and has interim standards that all districts seem to follow.

Electronic filing is creating genuine concerns about privacy. Although the records made available electronically are the same as the records that could be examined by visiting the clerk's office, the greatly enhanced ease of access may lead to far greater use. Bankruptcy practice, for example, makes all the records available through the Internet, including tax returns, banking records, and the like. There may be a point at which it is better to limit access to people whose interests are so significant as to prompt a visit to the courthouse.

It seems likely that the Committee will have to focus on these issues in the relatively near-term future.

Rule 83

The topic of Rule 83 amendments was introduced by noting that local rules can undermine national uniformity and national policy. The Judicial Conference has pursued a policy to unify and to monitor local rules developments. But there is still great deference to the circuit judicial councils. 28 U.S.C. § 332(d)(4) requires that each judicial

council "periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title." "Each council may modify or abrogate any such rule found inconsistent in the course of such a review." Some judicial councils actively pursue this mandate. Others honor it sporadically if at all. The local rules committees in the 94 different districts generally are active. Each seeks to adopt rules that work in the local district. These 94 local rules sovereignties can, however, adopt rules that impinge on important policies. The 6-person civil jury emerged from local rules, and has taken root with such tenacity that the recent effort to restore the 12-person jury foundered in the Judicial Conference. The practice of limiting the number of Rule 33 interrogatories began in local rules long before it was adopted in the national rule.

The Standing Committee and the Civil Rules Advisory Committee have had ongoing projects to study local rules. The Standing Committee is attempting to encourage hold-out districts to conform to the uniform numbering system, as required by Rule 83. There also is an attempt to clarify the distinction between local rules and "standing orders" that may take on all the characteristics of local rules but that do not emerge from the local rulemaking process.

It was observed that many local rules problems took root in the Civil Justice Reform Act, which encouraged development of local rules. The local CJRA committees took their responsibilities seriously, and sought to develop better procedure rules that might become patterns for national reform. Now the national rulesmaking bodies are encouraging retrenchment.

It is evident that the questions presented by local rules cannot all be addressed quickly. The topic will remain a long-range agenda item even while individual issues are addressed and resolved. The best approach to many problems is likely to be education aimed at the district courts.

It was noted that the American Bar Association Litigation Section is launching a local-rules project. The scope of the project remains to be finally determined -- it is recognized that the whole topic is too big for a single project.

The Standing Committee has asked the several advisory committees to consider adoption of a uniform effective date requirement for local rules, subject to an exception allowing immediate effect to meet special needs. The Appellate Rules Committee has recommended a proposal that sets December 1 as the effective date and allows a different effective date if there is "an immediate need for the amendment." Going beyond the effective date question, the Appellate Rules proposal also would prohibit enforcement of a local rule "before it is received by the Administrative Office of the United States Courts."

In preparing a Rule 83 draft analogous to the Appellate Rules proposal, it seemed wise to expand the range of inquiry. A local circuit rule need be reported only to the Administrative Office; a local district rule must be reported as well to the circuit judicial council. At a minimum, adherence to the Appellate Rules model would prohibit enforcement before a local rule is received by both the Administrative Office and the judicial council. It also may be desirable to consider other constraints, if only as a means of stimulating more consistent patterns of review among the judicial councils. At the same time, it must be recognized that there is a political difficulty in cutting back on established local enterprises and structures. The discussion draft reaches far, and perhaps too far. The expanded draft would require the Administrative Office both to publish local rules by means that provide convenient public electronic access and also to review local rules for conformity to acts of Congress and the national rules of procedure. If the Administrative Office concludes that a local rule does not conform, it is to report its finding to the district court and to the judicial council. A district court could not enforce a rule reported by the Administrative Office until the judicial council had acted to approve the rule.

A question of Enabling Act authority is raised by the proposals to establish a uniform effective date and to suspend enforcement for specified events. 28 U.S.C. § 2071 establishes the power to establish local district-court rules. Section 2071(b) provides that a local rule "shall take effect upon the date specified by the prescribing court." Section 2071(c)(1) provides that the local rule "shall remain in effect unless modified or abrogated by the judicial council of the circuit." A national rule that specifies a uniform effective date would be inconsistent with subsection (b), and a national rule prohibiting enforcement until stated conditions are satisfied apparently would be inconsistent with subsections (b) and (c)(1). The obvious argument to circumvent this problem draws from the supersession clause in § 2072 -- after a Federal Rule of Procedure takes effect, "[a]ll laws in conflict with such rule[] shall be of no further force or effect." But there is a cogent argument that §§ 2071 and 2072 should be read *in pari materia*, as part of an integrated set of rulemaking provisions. The statutes accord to district courts a power to adopt rules consistent with the national rules that is outside the power to supersede except by a national rule that addresses the same topic as the local rule. Of course the statutes also could be read to require that a local rule be consistent with a national rule that prescribes a uniform effective date or otherwise directly regulates local rulemaking. The answer does not seem entirely clear. But without a clear answer, real care must be taken in approaching these issues.

One response to the question of relative authority might be to amend Rule 83 simply to recognize the power of the district court to set the date, but to suggest a uniform date. This device would set a target, perhaps with the effect of a presumption, and avoid the need to decide whether a mandate could be established by national rule.

Another response was that a rule adopted by the Supreme Court and accepted by Congress must trump any local rule.

The immediate rejoinder was that to the contrary, a national rule cannot control the local rulemaking process in defiance of § 2071. More important, the proposal is a bad idea. Local rulemaking takes a long time. It is difficult even to get the judges of a district together, particularly if they sit in different places. The judges must consider, then await reactions from the local advisory committee, and eventually conclude the process. Two or three years may be used up. If the process reaches a conclusion in mid-December, or January, or February, it is too long to have to wait for the following December 1. There is no reason for uniform deadlines.

This view as echoed by the simple question: why do we need a uniform date?

The need for a uniform date was expressed as part of the questions of access. It would be helpful to have a means of ensuring that copies are provided to the Administrative Office and judicial council, and of encouraging judicial-council review. A single uniform date can be helpful as part of that package of reforms.

A variation on this view was expressed with the observation that local rules are most important when they are used in a dispositive way. The most important single thing to ensure is that all litigants can have assured access to all local rules for their district in a single, central place.

A related observation was that many of the bodies of local rules run to great length, and that it can be difficult to find the relevant rules. Not all districts have yet conformed with the uniform numbering requirement.

Similar comments suggested that a single annual effective date is not particularly important, but that it is important that there be clear and ready access to local rules. Some districts do not themselves know what their local rules are, even while other courts reprint their rules on a regular basis.

It was asked whether it would be better to allow a local rule to take effect 60 days after the rule is filed with the

Administrative Office. Administrative Office representatives responded that the result would be a lot of calls asking about local rules. As a practical matter, it would be better to require that a rule be posted in a way that makes it "available to the world" -- electronic means would be best.

Discussion turned to the "strong form" draft Rule 83(a)(1). This was the draft that prohibits enforcement until 60 days after the district court gave notice of a local rule to the judicial council and the Administrative Office, and until the rule has been made available to the public by convenient means that include electronic means. The draft also requires the Administrative Office to publish all local rules by means that provide convenient public access, and also to review all local rules. The Administrative Office would be required to report to the district court and the judicial council a rule that does not conform to Rule 83 requirements; the report would suspend enforcement of the rule until the judicial council gave approval. The question of power to adopt these requirements in face of § 2071 was renewed. It also was pointed out that there may be an implicit conflict with § 332(d)(4): judicial councils are required to review local rules, but there is no provision for suspending a local rule until the judicial council actually acts.

It was pointed out that several judicial councils have asked for resources and other assistance to help in reviewing local rules.

A suggestion was made that the distinction between an effective date and enforcement may help in addressing the § 2071 question. Rule 83 could be drafted solely in terms of enforcement, recognizing that a local rule is in effect but prohibiting enforcement by penalizing a party for failure to comply. A uniform starting point would be convenient, and might be achieved by barring enforcement until December 1 following the effective date.

Further support for a uniform effective date was expressed by noting that there is a "comfort factor" in knowing when to look for new rules. On the other hand, the need for still more regulation of the local-rule process may not be so great as to justify the intrusion.

A similar opinion was offered that a uniform effective date would be a convenience, but that the genuinely important questions are uniformity, conflict with the Federal Rules, and sound content.

The experience of the discovery proposals was urged as important grounds for caution. Even in the early part of the comment period, complaints are being heard that the local rule option should be preserved. Adoption of something like the Administrative Office report-and-moratorium proposal will be very difficult to sell. The apparent conflict with § 2071 is more important than anything that could be achieved by adopting a uniform December 1 effective date. If the discovery proposals should be adopted, moreover, many districts will be obliged to review their local rules to come into compliance with the new discovery rules -- the occasion can be seized to support more thorough review of local rules.

Discussion continued with the observation that this is a delicate subject, best debated in the Standing Committee with all the advisory committees around the table. Or perhaps the course of wisdom would be to ask Congress to look at the problems: Congress has shown strong interest in local rules in the past, and might well be willing to take on these issues.

Support then was voiced for the draft postponing enforcement until a local rule has been sent to the Administrative Office and judicial council, and has been made fully available to the public. But the suggestion that the Administrative Office could force judicial council review by a notice that suspends a local rule was resisted.

One possible method to encourage review both by district courts and by judicial councils would be to require a

"sunset" provision for all local rules. It was pointed out, however, that this provision would almost certainly conflict with § 2071(c). Congress would have to be asked to modify the statute.

The uniform effective date question was reopened by a suggestion that it might be more palatable to provide two or more effective dates in each year -- as June 1 and December 1, or perhaps at the beginning of each calendar quarter.

Other local rules topics then were raised. It was asked whether it would be useful to create model local rules. It was pointed out that past efforts in this direction have not met great success. But model rules might provide continuity of format, high intrinsic quality, and still other advantages. The Maritime Law Association has drafted model local admiralty rules, and is optimistic that the rules will win widespread adoption.

Another observation was that good judges view their local rules as aids for attorneys, not as obstacles to be overcome. Often they are treated as "suggestions," clues on good procedure that will not turn into traps to be sprung on the unwary.

It was asked why all of these problems might not better be addressed by the Local Rules Project of the Standing Committee. Concern was expressed that the project needs additional financial support before it can do much more.

Brief comments were made on the report that the Standing Committee had rejected a proposal to establish a limit on the number of local rules, but by a very narrow margin. There are several points in the Civil Rules that seem to invite adoption of local rules -- indeed, even the discovery proposals create a new local-rule option in Rule 26(f). A number limit could quickly run into real difficulties in complying with the Civil Rules and any similar requirements in the other rules. The limit proposal, however, does suggest a mood of impatience with continuing local rules problems.

Following this discussion, the Committee voted unanimously to present a report to the Standing Committee in these terms: the two drafts of Rule 83 considered at this meeting would be presented for discussion, with stylistic improvements that had been suggested by the Reporter. The question of statutory authority and the possibility of seeking legislation should be presented without any recommendation by this Committee. As to the uniform effective date, June 1 should be added as a second appropriate date.

Copyright Rules: Related Rules 65, 81

Action with respect to the Copyright Rules of Practice has been deferred because of concern that revision or repeal might be misunderstood in other countries. Appropriate congressional staff members have been informed of the continuing need to address the Copyright Rules, and understand that the Advisory Committee, having deferred, will move ahead. This fall, Congress has acted on pending treaties and implementing legislation. The International Intellectual Property Alliance, which had urged delay while these matters were pending in Congress, has now concluded that this recent action makes it appropriate to go ahead with the Copyright Rules Proposal. The Committee concluded that the time has come to recommend publication of appropriate amendments.

As discussed at earlier meetings, the interplay between the Civil Rules and the Copyright Rules is itself a problem. Civil Rule 81(a)(1) provides that the Civil Rules do not apply to copyright proceedings "except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court * * *." The Copyright Rules of Practice were adopted under now-repealed provisions of the 1909 Copyright Act. Rule 1 of the Copyright Rules adopts the Rules of Civil Procedure to "[p]roceedings under section 25 of the Act of March 4, 1909, entitled 'An

Act to amend and consolidate the acts respecting copyright' * * *." On the face of things, there are no procedural rules to apply in proceedings under the 1976 Copyright Act. This problem could be corrected readily by amending Copyright Rule 1 to refer to proceedings under the 1976 Act. The special Copyright Rules enabling statute was repealed as redundant following enactment of the general Enabling Act, 28 U.S.C. § 2072; § 2072 provides ample authority to continue the Copyright Rules if that seems desirable.

The Copyright Rules themselves present problems far deeper than the technical failure to revise Rule 1 following enactment of the current copyright law. Copyright Rule 2, adopting special standards of pleading for copyright cases, was abrogated in 1966. The Civil Rules Advisory Committee also recommended abrogation of the remaining Copyright Rules, which deal with summary seizure of infringing items and the means of producing infringing items. In 1964, the Advisory Committee concluded that the summary seizure provisions were inconsistent with emerging due-process concepts of no-notice seizure. The Advisory Committee also noted, however, that the Standing Committee might wish to postpone action on the remaining Copyright Rules in light of the prospect that Congress might soon revise the 1909 Copyright Act. The Standing Committee voted to defer action. The topic has not been addressed between 1964 and the recent decision to revisit the issue.

The 1964 prediction has been proved out by later Supreme Court decisions. As described in the agenda memorandum, the Copyright Rules provisions for no-notice prejudgment seizure almost certainly violate current due-process standards. The Copyright Rules also seem inconsistent with the statutory impoundment provision enacted in 1976, 17 U.S.C. § 503(a). Section 503(a) gives the court discretion whether to order impoundment, and discretion to establish reasonable terms. The Copyright Rules provisions do not reflect this discretion. At least as measured by published opinions, lower federal courts have recognized the invalidity of the Copyright Rules and have resorted instead to the temporary restraining order provisions of Civil Rule 65. No-notice seizure remains available, but a judge must make a pre-seizure determination that there is good reason for acting without notice to the alleged infringer.

The best means of ensuring strong copyright protection is to repeal the obsolete Copyright Rules and to make explicit in Rule 65 the availability of Rule 65 procedures in copyright impoundment. This action should reassure foreign countries that the United States indeed is honoring its treaty commitments to provide effective protection for the intellectual property rights embraced by copyright.

The American Intellectual Property Law Association has urged that repeal of the Copyright Rules and amendment of Rule 65 might well be accompanied by adoption of seizure provisions that parallel the Trademark Counterfeiting Act of 1984, 15 U.S.C. § 1116(d). The Association recognizes, however, that adoption of such measures as seizure of evidence may be a matter better left to Congress. The Committee concluded that no attempt should be made to include such provisions in the Civil Rules.

The Rule 65 proposal in the agenda materials would add a new subdivision (f): "**(f) Copyright impoundment.** This rule applies to copyright impoundment proceedings under Title 17, U.S.C. § 503(a)." The Reporter suggested that the draft might be amended to delete the explicit reference to the present statute. Two reasons were advanced for this proposal. The first was the ever-present concern that adoption of a specific statutory reference may require amendment of the rule if the statutory scheme is changed. The reference to copyright impoundment proceedings seems clear without adding the statutory provision. The second was a matter of speculation. It is conceivable that a circumstance might arise in which a copyright impoundment is available outside § 503(a). Materials might be prepared in the United States, for example, that do not infringe any United States copyright, but that are intended for infringing use in another country in violation of a copyright in that country. If seizure were attempted in this country, a court should be free to determine whether seizure is appropriate without any concern for negative implications from Rule 65(f). A motion to delete the reference to §

503(a) was adopted by unanimous vote.

A motion to recommend publication of proposed Rule 65(f) as amended passed by unanimous vote.

A motion to recommend repeal of the Copyright Rules was passed by unanimous vote. A draft Supreme Court order will be presented to the Standing Committee for the Standing Committee's determination whether there is any need to recommend a particular form if the Copyright Rules are, in the end, to be abrogated.

Two forms of an amended Rule 81(a)(1) were presented. Both forms delete the provision restricting application of the Civil Rules to copyright proceedings, and also deleted as superfluous the present reference to mental health proceedings in the United States District Court for the District of Columbia. The District of Columbia Court Reform and Criminal Procedure Act of 1970 transferred mental health proceedings formerly held in the United States District Court to local District of Columbia courts. The broader form also modified the reference to proceedings in bankruptcy, making it clear that the Civil Rules apply in bankruptcy proceedings when the Federal Rules of Bankruptcy Procedure make them applicable.

The bankruptcy rules incorporation issue was discussed briefly. It was agreed that when a district judge manages a bankruptcy proceeding outside the bankruptcy court, the bankruptcy rules and civil rules apply as appropriate.

A motion to recommend publication of the broader form of Rule 81(a)(1) passed unanimously. The proposed rule would read:

(a) ~~To What p~~Proceedings to which the Rules Apply~~icable~~.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681~~.~~ or ~~They do not apply~~ to proceedings in bankruptcy, except as the Federal Rules of Bankruptcy Procedure make them applicable ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~.

* * * * *

[It should be remembered that in May 1997 the Committee determined that the next "technical amendments package" should include a revision of Rule 81(c) that would conform to changes in statutory language. All present references to the "petition for removal" should be changed to the "notice of removal." See 28 U.S.C. § 1446. The Standing Committee will be advised of this action, for its determination whether to include Rule 81(c) in the publication of Rule 81(a) for comment, or instead to hold this change for action by other means.]

Rule 53

Civil Rule 53 has kept a holding place on the Committee docket since 1994, when a full-scale revision of the rule was briefly considered. The Committee concluded in 1994 that although there may be many ways in which present Rule 53 fails to reflect or regulate the contemporary uses of special masters, there were no indications that pressing problems were caused by the lack of a guiding rule. The court of appeals decision in the recent Microsoft litigation suggests that there may be good reason to undertake further review.

The more general reasons for studying Rule 53 continue unchanged. Special masters are being used for extensive pretrial and post-judgment purposes that simply are not reflected in Rule 53. Court-appointed experts seem at least occasionally to be set to chores outside the apparent scope of Evidence Rule 706, serving as judicial advisers as well as courtroom witnesses. More exotic appointments of advisers also appear from time to time. "Examiners" may be appointed. All of these functions relate closely to duties undertaken by magistrate judges, and there is a need to clarify the relationships between the occasions for relying on magistrate judges and the occasions for appointing private citizens to assist with judicial functions.

These problems are difficult. An initial difficulty will lie in attempting to form a clear picture of the seeming wide variety of present practices. Professor Farrell has explored some of these issues, but much work remains to be done if it is possible to do more.

It was suggested that the general feeling in 1994 seemed to be that lower courts seem to be muddling along pretty well even without any guidance in Rule 53. Unless there is a real problem, there may be no need to undertake a major task that might produce a rule that still fails to capture and regulate all actual and desirable practices.

The need for study was justified on the ground that the use of special masters has changed dramatically since the Supreme Court's LaBuy decision greatly discouraged the use of masters for trial purposes. Masters are discharging many important duties without any real guidance in the rules.

Judge Niemeyer proposed appointment of a Rule 53 Subcommittee. The Subcommittee would be asked to report in the fall of 1999, in sufficient detail to provide a foundation for extensive discussion. Many people are interested in this topic, and the Subcommittee would be free to draw on advice from them. It also will be appropriate to ask the Federal Judicial Center to undertake any study that can be designed in consultation with the Subcommittee. The Subcommittee's task will be to make a recommendation whether Rule 53 reform should be pursued; there is no expectation that it must propose reform. It remains appropriate to conclude that the burdens and risks of amending Rule 53 are greater than the probable benefit of the best amendments that might now be devised. "We cannot attempt to make all rules perfect." The Committee approved this proposal.

Rule 51

Civil Rule 51 came to the docket as a result of the Ninth Circuit's review of local rules for conformity with the national rules. Many districts in the Ninth Circuit have local rules that require submission of requests for jury instructions before trial begins. These rules seem inconsistent with Rule 51, which provides for requests "[a]t the close of the evidence or at such earlier time during trial as the court reasonably directs." The Ninth Circuit recommended consideration of a Rule 51 amendment that would legitimate such local rules. The Committee concluded at the March, 1998 meeting that there is no apparent reason to subject this issue to the vagaries of local rules. If there are good reasons to enable a judge to demand requests before trial, the authority should be added to Rule 51.

This conclusion did not complete consideration of Rule 51. It also was suggested that Rule 51 is not easily read by those who are not fully familiar with the ways in which courts have interpreted its language. The Criminal Rules Committee, moreover, had already published a proposal to amend Criminal Rule 30 to authorize the court to direct that requests be made at the close of the evidence "or at any earlier time that the court reasonably directs." Recognizing that the Civil Rule could not catch up with the Criminal Rule, the Committees exchanged views and the Criminal Rules Committee came to consider the draft Rule 51 that was before the March Civil Rules Committee meeting. The Criminal Rules Committee has expressed interest in considering broader review of the jury-instructions rules.

The draft Rule 51 in the agenda materials was discussed briefly. In addition to authorizing a requirement that requests be filed before trial, the draft recognizes the need to allow later requests in two ways. It provides discretion to permit an untimely request at any time before the jury retires to consider its verdict. And it requires that supplemental requests be permitted "at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due." It was urged that this language was too narrow. "Anything is reasonably anticipated," and too few issues would qualify as not reasonably to be anticipated. On this view, the court should be required to treat any supplemental request as timely.

It was asked whether it would be wise to follow the lead of some local rules that limit the number of requests that can be submitted. This suggestion found little approval.

Many judges hold instruction conferences during trial: should the rule formalize this? Or is it better to have the conferences after completion of the evidence? Even in a complex case that presents many issues, or in a case that may present one or more very difficult issues of law? It was responded that it seems better to preserve flexibility; a judge should be left free to proceed without any instructions conference when that seems appropriate.

It was observed that judges often start working on instructions before trial.

The question of written instructions was raised. Some judges regularly use written instructions. Others do not, for fear that jurors may start to parse the instructions and end up ignoring the evidence.

Pattern instructions also were noted. Many circuits have pattern instructions that are used routinely on common issues. Trial courts rely on them. But they are not "official" in the way that many state pattern instructions are official. And they are not used for the tricky cases. There was no interest in attempting to amend Rule 51 to require use of pattern instructions.

The Committee noted its understanding that the Criminal Rules Committee does not feel an urgent need to act on the jury instructions rules. Rule 51 will be carried forward on the docket, with the request that Committee members communicate their views on reform to the Reporter to support submission of an improved draft for the next meeting.

Corporate Disclosure Statement

The Judicial Conference Committee on Codes of Conduct has asked the Standing Committee to consider whether other sets of procedural rules should adopt provisions similar to Appellate Rule 26.1, which requires corporate disclosure statements. The underlying concern is that a district judge may lack information necessary to determine that the judge is disqualified from a particular case.

This topic came late to the agenda and was presented only in preliminary form. Discussion began by focusing on the deliberate decision to amend Appellate Rule 26.1 to delete the requirement that a corporate party identify "subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." The Committee Note to the amended rule states that "Disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation." It was suggested that information about subsidiaries may be important. The theory that a subsidiary is not injured when a parent corporation is injured does not seem always realistic.

Reliance on filing forms was suggested as an alternative -- rather than create a new Civil Rule requiring disclosure statements, a model filing form could be created for use by district courts. The form could be the same for civil, criminal, and bankruptcy cases if that should prove appropriate, or different forms could be adopted to meet such different needs as might emerge. One judge observed that her court requires corporate disclosure information by a form filed with the Rule 26(f) report.

The usefulness of forms was challenged by reflecting on the way in which the Appellate Rules reportedly came to include a disclosure requirement. Counsel for institutional litigants found it inconvenient to have to meet different disclosure practices in different circuits. It is much easier to adopt a single disclosure statement that can be duplicated and used in every court. A form would meet this need only if a uniform form were adopted by all courts.

In favor of adopting a uniform national rule, it was observed that there is a uniform national disqualification standard. This would make it easier for corporations that are repeatedly caught up in litigation to comply. But there may be more reluctance to disclose in district court filings than in appellate court filings. And there is some cost and aggravation even in complying with a routine requirement, a burden that will be heavier for the first-time or sporadic litigant.

Turning to the substance of a possible disclosure rule, it was asked whether disclosure requirements should extend to partnerships -- limited or general, limited liability companies, business trusts, or other organizations not in corporate form.

Two delegates must be appointed to the Standing Committee's ad hoc committee on federal rules of attorney conduct. The Committee concluded that the best way to take up disclosure statements is to ask these delegates to study the topic, perhaps in conjunction with the ad hoc committee's work.

This Committee will report to the Standing Committee that the corporate disclosure requirement deserves further study. It is useful to get the information, but it is not clear what disclosure means should be required. These questions deserve attention. Given the need to coordinate at least the Bankruptcy, Criminal, and Civil Rules Committees -- and perhaps to involve the Appellate Rules Committee as well -- it may be that initial consideration could be assigned to the attorney conduct committee as a separate issue.

Other Matters

Two agenda items were deferred to the spring meeting. Item VIII opens the question whether the Civil Rules should be amended to reflect the procedure established by 42 U.S.C. § 1997e(g) that allows a defendant to "waive the right to reply" in an action brought by a prisoner under federal law. This item will be considered by the Agenda Subcommittee. Item X invited further discussion of the time required to act in ordinary course under the Rules Enabling Act. The Standing Committee has urged consideration of these timing issues, and they will continue to be part of the agenda.

Next Meeting

The spring meeting was tentatively set for Monday and Tuesday, April 19 and 20, 1999.

Respectfully submitted,

Edward H. Cooper
Reporter