COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 16-17, 2003
Phoenix, Arizona
Minutes

TABLE OF CONTENTS

ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 16-17, 2003. The following members were present:

Judge Anthony J. Scirica, Chair
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Dean Mary Kay Kane
Mark R. Kravitz, Esquire
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Deputy Attorney General Larry D. Thompson
Judge Thomas W. Thrash, Jr.
Chief Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the U.S. Courts; James N. Ishida, senior attorney in the secretary's office; Ned Diver, law clerk to Judge Scirica; Marie Leary of the Research Division of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, Jr., Professor R. Joseph Kimble, and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge David F. Levi, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: former committee member Judge Frank W. Bullock, Jr.; Judge Wm. Terrell Hodges, chair of the Judicial Panel on Multi-District Litigation and former chair of the Advisory Committee on Criminal Rules; Judge Lee H. Rosenthal, member of the Advisory Committee on Civil Rules; Judge Jack B. Schmetterer, member of the Federal-State Jurisdiction Committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Alfred M. Wolin; and Professors S. Elizabeth Gibson, Deborah R. Hensler, and Francis E. McGovern.

INTRODUCTORY REMARKS

Judge Scirica presented a plaque to Judge Bullock, whose term on the committee had just expired, and he thanked him for six years of distinguished and productive service to the committee. He also remembered with great fondness Justice Alan C. Sundberg, former member of the committee, who had passed away recently.

Judge Scirica reported that the Judicial Conference in September 2002 had approved all the committee's proposed rule amendments, including changes to FED. R. CIV. P. 23 (class actions), FED. R. CIV. P. 51 (jury instructions), FED. R. CIV. P. 53 (special masters), FED. R. EVID. 608 (character evidence), FED. R. BANKR. P. 7007.1 (corporate ownership statement), and several other bankruptcy rules and forms addressing privacy, social security numbers, multilateral clearing banks, and disclosure of compensation paid to a petition preparer. He pointed out that the only issue placed on the Conference's discussion calendar was the provision in proposed FED. R. CIV. P. 23(e)(3) authorizing a court to give class members a second opportunity to "opt out" of a (b)(3) class if settlement is proposed after expiration of the original opportunity to request exclusion. He noted that the Conference had approved the proposal unanimously.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 10-11, 2002. It also agreed to expand the discussion in the minutes regarding a court's authority under proposed FED. R. CIV. P. 23(b)(3).

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring several pieces of legislation impacting the federal rules. He noted that Congress had restored, at the committee's request, two provisions in FED. R. CRIM. P. 16 inadvertently omitted from the package of restyled criminal rules that took effect on December 1, 2002.

Mr. Rabiej stated that Congress had enacted the Multiparty, Multiforum Trial Jurisdiction Act of 2002 creating minimal-diversity federal jurisdiction over actions involving a single mass accident. But, he pointed out, the Act did not include a provision endorsed by the Judicial Conference addressing the transfer problem raised in *Lexicon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998).

Mr. Rabiej reported that the Homeland Security Act of 2002 included a provision directly amending FED. R. CRIM. P. 6 to authorize the government to share certain grand jury information with appropriate federal, state, local, or foreign officials. He pointed out that the statutory language had incorrectly amended an outdated version of Rule 6 and that Congressional staff had been notified of the problem.

Mr. Rabiej reported that omnibus bankruptcy reform legislation had not yet been enacted, but it would be promoted again in the new Congress. Judge Small added that the

Advisory Committee on Bankruptcy Rules had completed a good deal of preliminary work on appropriate rules and forms to implement the omnibus legislation.

Mr. Rabiej said that Judge Carnes had testified before a House Judiciary subcommittee in opposition to the proposed Bail Bond Fairness Act. The legislation would amend FED. R. CRIM. P. 46(e) to prohibit a judge from forfeiting a bond for any condition other than the defendant's failure to appear. He added that the Administrative Office was in the process of compiling statistics for Congress on bail forfeitures.

Mr. Rabiej reported that Senator Kohl had asked the Judicial Conference to consider appropriate changes in FED. R. CIV. P. 26 regarding protective orders and sealing orders.

Mr. Rabiej noted that Judge Alito had testified on behalf of the judiciary at a House Judiciary subcommittee oversight hearing addressing the precedential value of "unpublished" appeals court decisions.

Finally, Mr. Rabiej reported that the new E-Government Act will require courts to post on the Internet all local rules, court opinions, docket information, and documents filed with the court electronically. He added that a provision had been inserted in the legislation at the last moment requiring the judiciary to promulgate national rules under the Rules Enabling Act to protect privacy, security, and public availability of documents filed with the courts electronically.

Mr. McCabe reported that the Administrative Office had successfully tested and installed a new, state-of-the-art electronic document management system to handle the vital records of the rules process.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4) She added that the Center anticipated publication of an updated version of the complex litigation manual by mid-summer 2003.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum and attachments of December 6, 2002. (Agenda Item 5)

Judge Alito reported that the advisory committee did not have any action items to present, but it had approved some amendments for presentation to the Standing Committee at a later date as part of a package of amendments. He also said that the advisory committee had approved in principle: (1) a new Rule 32.1 requiring courts to permit the citation of "unpublished" or "non-precedential" opinions; and (2) an amendment to Rule 35(a) specifying how to calculate "a majority of the circuit judges who are in regular active service" needed for an en banc hearing when one or more judges are disqualified. He noted that these changes will likely be presented to the Standing Committee at its June 2003 meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of December 11, 2002. (Agenda Item 6)

Amendments for Publication

Judge Small reported that the advisory committee was seeking authority to publish three amendments for public comment.

FED. R. BANKR. P. 3004

Judge Small pointed out that Rule 3004 (filing of claims by debtor or trustee) was being amended to conform the rule to § 501(c) of the Bankruptcy Code. The statute provides that a debtor or trustee may file a proof of claim for a creditor if the creditor fails to "timely file" a proof of claim. The existing rule, however, permits the debtor or trustee to file a claim on behalf of the creditor *before* expiration of the creditor's filing period. It also provides that if the debtor or creditor files a claim, the creditor may then file a superseding claim.

The proposed amendment would prohibit a debtor or trustee from filing a proof of claim until after the creditor's opportunity to file expires. It would also delete the provision in the current rule authorizing a creditor to file a superseding claim.

Professor Morris said that there are occasions when it may be reasonable for a debtor or trustee to file a proof of claim for the creditor before the filing deadline. Nevertheless, he said, the rule is simply inconsistent with the statute. There is, moreover, no need to specify in the rule that the creditor may file an amendment to the proof of claim, as that matter is better addressed by development of the case law.

A committee member expressed reservations about the proposed amendments. He noted that the effect of the revised rule is to prevent a debtor in a chapter 11 case from filing a proof of claim on behalf of a creditor until 30 days after the bar date set by the court for filing claims. He described a chapter 11 case in which the debtor had filed a proof of claim on behalf of mass tort claimants in order to bring those claims before the court for adjudication. He said that this early filing of proof of the creditors' claims was consistent with § 501 of the Code because the word "timely" in the statute can be interpreted to mean within the time the court needs to effectively resolve matters essential to the case.

He suggested that the proposed amendment to Rule 3004 would limit a court's ability to manage chapter 11 cases and could result in unnecessary delay and notice costs. He recommended that the proposal be amended to begin with language such as: "Except as otherwise ordered by the court." This would allow the court to maintain greater control over the case and permit the debtor or trustee to file a claim on behalf of creditors without having to establish either a general or specific bar date for filing claims in the case.

Judge Small recommended that the suggestion be considered by the advisory committee at its April 2003 meeting. Therefore, he asked that the advisory committee's request to publish the rule be deferred until the next Standing Committee meeting.

FED. R. BANKR. P. 3005

Judge Small reported that the proposed changes to FED. R. BANKR. P. 3005 (filing of claim by co-debtor) are similar to those proposed in Rule 3004 and would likewise be deferred until the next committee meeting.

FED. R. BANKR. P. 4008

Judge Small said that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would establish a deadline for filing reaffirmation agreements. Section 524 of the Code requires that reaffirmation agreements be filed with the court. It also sets a number of other requirements that must be met before a reaffirmation agreement may be approved, including a hearing before the court when the debtor is not represented by counsel. The current Rule 4008 fixes the time and notice for discharge and reaffirmation hearings, but it does not impose a deadline for filing reaffirmation agreements.

Judge Small noted that most courts close their cases quickly. But this creates administrative problems when parties ask the court to reopen a case for the purpose of filing a reaffirmation agreement. The proposed rule resolves the problem by requiring that the agreements be filed by a date certain — 30 days after entry of the order granting a

discharge (or the order confirming a plan in a chapter 11 individual debtor case). He explained that filing reaffirmation agreements by a certain deadline has the additional benefit of informing the court of the need to hold a hearing under § 524, *i.e.*, when the agreement is not accompanied by a statement of counsel.

Judge Small added that the proposed rule would give the court broad discretion to permit a late filing. It would also delete the provisions in the current rule regarding timing of the discharge and reaffirmation hearing, thereby giving the court discretion to set the hearing at a time appropriate for the particular circumstances presented in a case.

The committee by voice vote and without objection approved the proposed amendment for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of December 3, 2002. (Agenda Item 7)

Amendments for Publication

Professor Cooper reported that the advisory committee was seeking authority to publish amendments to two admiralty rules for public comment.

ADMIRALTY RULE B(1)(a)

Professor Cooper noted that Rule B(1) (in personam actions — attachment and garnishment) authorizes attachment of a defendant's property in a maritime *in personam* action when the defendant is not "found" within a district. A defendant who is not physically present in the district, and who has no agent in the district to receive service of process, is not "found" there, even though the defendant may be subject to personal jurisdiction on some other basis. Professor Cooper explained that Rule B(1) serves two purposes: (1) it establishes a form of quasi-in-rem jurisdiction that substitutes for personal jurisdiction; and (2) it provides a pre-judgment security device in some cases where the district court has personal jurisdiction over the defendant

Professor Cooper explained that the proposed amendment incorporates the decision of the Fifth Circuit in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A. of Ravenna*, 132 F.3d 264 (5th Cir. 1998), by fixing the time for determining whether a defendant is "found" in the district as the time when the verified complaint praying for attachment and the accompanying affidavit are filed with the court. It will prevent a

defendant from defeating attachment and evading a security device by waiting until a complaint is filed before appointing an agent to receive service of process. The amendment, he said, will make it easier for bench and bar to apply Rule B(1), and it enjoys the support of the Maritime Law Association.

ADMIRALTY RULE C(6)(b)(i)(A)

Professor Cooper explained that Rule C(6) (in rem proceedings) had been amended in 2000 to create separate, parallel provisions for civil forfeiture actions and maritime proceedings. Under the revised rule, a person asserting a property interest has a longer period to file a verified statement of right or interest under the forfeiture provision than under the maritime provision.

Professor Cooper said that the attempt in 2000 to achieve parallelism in the two subdivisions had created a drafting problem in the subparagraph governing maritime proceedings. The reference to publication of notice under Rule C(4) works in forfeiture actions, but not in maritime proceedings because execution of process always occurs before publication in maritime proceedings. Professor Cooper stated that the proposed amendment would delete meaningless language in subparagraph (b) referring to publication of notice, thereby restoring the rule for maritime purposes to its pre-2000 status.

Professor Cooper stated that the proposed amendment was essentially technical in nature, and it might be adopted without publication and comment. But, he said, it would be helpful to the admiralty bar to include it for public comment with the proposed amendment to Rule B(1)(a).

The committee by voice vote without objection approved the proposed amendments to the admiralty rules for publication.

Information Items

Judge Levi reported that the comprehensive restyling of the Federal Rules of Civil Procedure is the major project before the advisory committee. He noted that the committee had spent one full day of its October 2002 meeting discussing plans for managing the project. The committee, he said, had divided itself into two subcommittees, each of which will assume responsibility for half the rules. The subcommittees, chaired by Judges Kelly and Russell, will review drafts of the rules prepared by the Standing Committee's Style Subcommittee. Additional expert assistance will be provided to the project by Professors Richard Marcus and Thomas Rowe, and by Jeffrey Hennemuth, Deputy Assistant Director at the Administrative Office.

Judge Scirica said that the restyling project is off to a great start, thanks to the impressive drafts prepared by the Style Subcommittee, chaired by Judge Murtha. He specified that deference in matters of style should be given to the Style Subcommittee, and deference in matters of substance should be given to the advisory committee. He also cautioned that changes in the rules should be stylistic only, since the precise wording of the civil rules have generated enormous amounts of case law over the years. If any substantive changes are to be made, he said, they must be clearly identified as such and placed in a different package.

Judge Levi reported that the advisory committee continues to be interested in multi-state class actions and mass torts litigation. To that end, he said, it has endorsed legislation in principle permitting minimal-diversity federal jurisdiction. But, he added, the Federal-State Jurisdiction Committee of the Judicial Conference has opposed that approach and favors retaining cases in the state courts. He pointed out that the rules committees had been communicating with the federal-state committee in an effort to present a common legislative position to the Judicial Conference.

Judge Levi noted that the advisory committee had worked cooperatively with the Bankruptcy Committee of the Conference in reviewing proposals by the National Bankruptcy Review Commission for legislation to address problems raised by future mass tort claims in bankruptcy.

Judge Levi reported that the Discovery Subcommittee of the advisory committee is actively monitoring developing practices associated with discovery of information in electronic form. He said that the committee had conducted conferences with the bar and had received invaluable research assistance from the Federal Judicial Center. In addition, he noted, Professor Marcus informally had circulated a memorandum soliciting comments on whether there is a need for rule changes to address distinctive features of discovery of electronic materials. Judge Levi said that the advisory committee had not yet decided whether rules amendments are necessary.

Judge Levi reported that the advisory committee would consider proposed rule amendments dealing with civil forfeitures. He noted that the Department of Justice favored the changes and the criminal defense bar is opposed.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes presented the report of the advisory committee, as set forth in his memorandum and attachment of December 11, 2002. (Agenda Item 8)

Judge Carnes noted that the restyled body of criminal rules had taken effect on December 1, 2002. He added that Congress had enacted legislation amending FED. R. CRIM. P. 16 (discovery and inspection) to replace language inadvertently deleted in the restyling project.

Judge Carnes reported that the advisory committee is continuing to study amendments to FED. R. CRIM. P. 35 (correcting or reducing a sentence). The rule permits a court to correct an error in a sentence within 7 days after "sentencing." He pointed out that there is a difference of opinion as to whether the term "sentencing" should mean the judge's oral pronouncement of sentence or the entry of judgment. The advisory committee, he said, would present an amendment in June 2003 specifying that "sentencing" for purposes of Rule 35 means the oral pronouncement of a sentence.

Judge Carnes noted that the advisory committee had decided to propose a rule, akin to Civil Rule 72, that would govern appeals from magistrate judges' rulings on nondispositive and dispositive matters in criminal cases. But, he said, the committee is not certain whether it should include language in the rule addressing the taking of guilty pleas by magistrate judges in felony cases. He explained that a plurality of the circuits has held that if a magistrate judge takes a guilty plea in a felony case and files a report and recommendation, the plea becomes final if no objection is made within 10 days. He added that the proposed amendment had been presented to the Magistrate Judges Committee of the Judicial Conference for comment.

One participant cautioned against copying Civil Rule 72(a). He said that the rule is not well drafted and has created a number of problems. Judge Carnes responded that the advisory committee's proposed rule is parallel to, but does not copy, the civil rule. He added that the proposal specifies that the defendant must make any objection to the district judge before an appeal may lie to the court of appeals.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in his memorandum and attachment of December 5, 2002. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present. He noted that a revised amendment to FED. R. EVID. 804(b)(3) had been published, modifying the hearsay exception for declarations against penal interest. The committee, he said, would review the public comments at its next meeting and decide whether to proceed with the proposal.

Judge Smith pointed out that the advisory committee is continuing to review case law, scholarship, and other sources to determine whether any rules of evidence need amendment. He added that the committee would continue to exercise considerable restraint in proposing any changes to the evidence rules, and it will bundle any amendments into a single package for joint publication and approval.

Judge Smith noted that the advisory committee has been working on a long-term project to prepare provisions stating, in rule form, the federal common law of privileges. He emphasized that the committee would not propose any privilege rules as amendments to the Federal Rules of Evidence (which must be enacted directly by Congress). But, he said, the committee needs to be prepared to respond to legislative initiatives dealing with privileges. Judge Scirica stated that the approach taken by the advisory committee is very sensible.

LOCAL RULES PROJECT

Professor Coquillette reported that both Congress and the organized bar have complained about the number and nature of local court rules. Congress, he said, has expressed particular concern over local rules that are inconsistent with federal statutes and rules — thereby avoiding the congressional scrutiny provided for in the Rules Enabling Act process. The American Bar Association, he added, is concerned about the proliferation of local rules and the tendency of local rules to undermine unity of procedure in the federal courts.

Professor Coquillette stated that the current Local Rules Project has three goals: (1) to identify problematic local rules that conflict with uniform federal law; (2) to identify sound and successful local rules and bring them to the attention of other courts; and (3) to identify areas of local rulemaking that may be appropriate for uniform national rules. He said that the committee was being asked at this meeting only to "accept" the report of the project and refer it to the rules reporters for review and comment.

Professor Coquillette said that the report, including the reporters' comments, will be considered at the committee's June 2003 meeting. At that time, he said, the committee will be asked to address a number of policy questions, such as: (1) whether a set of model local rules should be prepared; (2) how much of the report should be transmitted to each district court; and (3) what specific response should be requested from each court.

Judge Scirica said that the committee should also address the numbering of local rules. He noted that he had telephoned the chief judges of the remaining courts that had not yet renumbered their local rules in accordance with FED. R. CIV. P. 83. He and other

members expressed a strong preference for taking a "soft" approach and seeking voluntary compliance by the courts.

The participants engaged in an extended discussion of the advantages and disadvantages of local court rules. Among other things, the participants advised that local rules can be very beneficial in: (1) filling gaps in the national rules; (2) accounting for genuine geographic and demographic differences among districts; (3) promoting procedural experimentation and innovation; (4) adjusting to new phenomena, such as technological developments, before the rules committees are ready to promulgate national rules; and (5) promoting uniform practices among the judges of a court.

Judge Scirica and Professor Coquillette complimented Professor Squiers for her enormous efforts and extraordinary report.

ATTORNEY CONDUCT

Professor Coquillette noted that attorney conduct in the federal courts is governed by hundreds of local court rules, and many of them are inconsistent with the rules of the states in which the courts are located. He explained that this situation is complicated by the "McDade Amendment," which specifies that federal government attorneys must comply with the conduct rules of the respective states. In addition, he said, the recent Homeland Security Act and Sarbanes-Oxley Act contain attorney-conduct provisions. The Sarbanes-Oxley Act, he noted, has spawned a set of far-reaching attorney rules proposed by the Securities and Exchange Commission. The proposed rules are different from the model ABA attorney-conduct rules, the rules of many states, and the rules of the federal courts.

Professor Coquillette briefly described the work of the committee's attorney-conduct task force, noting that it had focused on two issues of particular interest to the Department of Justice: (1) contact by government attorneys with represented parties; and (2) confidentiality of client conversations with grand juries. But, he said, the task force and the committee had deferred further action in light of the various legislative events. Judge Scirica added that the rules committee is not the central player in this difficult area, and it cannot propose national rules as a practical matter unless there is a consensus among the Department of Justice, the ABA, and the Conference of Chief Justices. He suggested that the Department consider initiating further dialogue with the other interested parties.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Professor Capra presented the report of the Technology Subcommittee. He reported that the Court Administration and Case Management Committee had taken initial steps to adapt the model local rules for electronic filing of civil cases to address the electronic filing of documents in criminal cases.

Professor Capra pointed out that several district courts have issued local rules making electronic filing of documents mandatory. The national rules, however, require consent. The Technology Subcommittee, he said, was working to resolve this inconsistency. He also pointed out that the electronic signature provisions of the model electronic filing rules may need to be modified.

Finally, Professor Capra reported that the Advisory Committee on Evidence Rules is examining the evidence rules to determine whether any changes are needed to deal with the impact of information technology.

MASS CLAIMS LITIGATION

Judge Scirica asked each of six invited panelists — Professor Hensler, Judge Hodges, Professor Gibson, Judge Higginbotham, Judge Wolin, and Professor McGovern — to offer personal observations on the current state of mass claims litigation.

Professor Hensler emphasized that it is critical to recognize that there are several different categories of mass claims litigation, each of which must be analyzed separately. Asbestos litigation, she said, is the easiest category of mass claims cases for the federal courts to address at this point. Most of the cases consolidated by the Multi-District Litigation Panel have now been closed, and only about 10 percent of asbestos cases are now filed in, or removed to, the federal courts. Moreover, most of the action in the federal courts is now found in the bankruptcy courts following the recent surge in chapter 11 filings by corporate defendants.

Professor Hensler said that many observers had predicted a drop in class action filings would occur after the decisions in *Ortiz* and *Amchem.* Filings, however, have actually increased substantially in the federal and state courts. She mentioned that a RAND study in the late 1990s estimated that about 60% of the class action cases were in the state courts.

Professor Hensler said that competing and overlapping class actions are a serious problem, but it is difficult to obtain reliable data on them. Nevertheless, she said, her recent examination of a small sample of settled cases revealed that most had parallel or

competing class actions. She observed that there is a tendency among law firms to file competing class actions for fear that other firms will file them first. Often the firm filing first gains an advantage in obtaining certification and being named as class counsel.

She observed that the pending minimal-diversity legislation could bring a number of mass tort cases into the federal courts and reduce the phenomenon of duplicative and overlapping class actions. But, she added, consumer class actions will continue in the state courts and be litigated one state at a time.

Professor Hensler noted that much of the current settlement and litigation dynamics are fostered by a system of easy jurisdiction and venue that allows attorneys to move from one court to another. The system facilitates development of cases by competing groups of attorneys and creates opportunities for defendants to negotiate settlements with the lawyers most willing to deal with them. She said that the proposed recent changes to FED. R. CIV. P. 23 will be beneficial and help reduce abuses, but they do not address the central jurisdictional problem. Thus, if a federal judge refuses to approve a settlement, the attorneys will still be able to move their case to another venue.

In addition, she noted, many mass tort cases are never certified as class actions, and certification is not a prerequisite to settlement. A review of the dockets of the multi-district litigation panel, for example, reveals a substantial increase in motions to consolidate during the 1990s, and a substantial number of global settlements occurring in mass tort cases that have been consolidated but not certified. On the other hand, in small consumer cases, class action certification is crucial to the viability of the litigation.

Professor Hensler said that the central challenge for the judiciary is to manage large numbers of cases efficiently while still: (1) assuring due process to the plaintiffs in mass settlements; (2) providing fairness to the defendants; and (3) not encouraging the mass filing of additional, weak cases. She said that federal and state judges have been very effective in disposing of individual cases, but they have experienced difficulties in resolving mega cases.

Judge Hodges provided a history of the Judicial Panel on Multi-District Litigation panel and described its operations. He noted, among other things, that the panel scrupulously avoids the merits of litigation and focuses exclusively on consolidation and the appropriate location for cases. He also pointed out that the problems of overlapping and duplicative class actions are dealt with by the transferee judges, rather than the panel.

Professor Gibson described the typical progress of a mass tort bankruptcy case and identified a number of key issues and problems. She noted that when Congress enacted the Bankruptcy Code in 1978, it did not have in mind that it would be used for

mass tort litigation. Nevertheless, it is understandable that businesses facing elimination or ruin would inevitably turn to bankruptcy.

Bankruptcy, she said, is attractive to the mass tort debtor for three major reasons. First, all litigation is consolidated in one court, and the automatic stay stops all other litigation and prevents the filing of future litigation. The bankruptcy court obtains exclusive jurisdiction over all property of the debtor, and all attempts to collect from the debtor are ended unless the bankruptcy court lifts the stay. Claims against related debtors can also be consolidated, and wrongful death and personal injury claims may be transferred into the district where the bankruptcy case is filed.

Second, a "claim" is defined broadly in the Bankruptcy Code as a right to payment. Thus, a holder of a claim may not be able to file a civil suit against the debtor, but may still press a claim in bankruptcy even though it may be contingent, unliquidated, or not yet mature. This enables the debtor to receive a comprehensive discharge of its liabilities in the bankruptcy case.

Third, she said, bankruptcy is attractive to debtors because of the broad discharge granted at the conclusion of the case. The debtor is relieved of all debts except those specified in the plan.

Professor Gibson explained that bankruptcy jurisdiction is vested by statute in the district court and normally referred on a blanket basis to the bankruptcy court. Some matters, however, have to be decided by a district judge, and on occasion district judges withdraw the reference to the bankruptcy court. Thus, it is possible for both a bankruptcy judge and a district judge to preside over a case.

Professor Gibson noted that committees of creditors are appointed at the outset of a chapter 11 case. In mass tort cases, one or more committees are appointed to represent mass tort claimants, and futures claimants may be represented by a lawyer appointed by the court, although the Bankruptcy Code is silent on this procedure.

The bankruptcy court, she said, is asked to set a bar date by which all claims must be filed against the estate or be barred. This process defines the universe of present claimants able to vote on the plan, and it also allows the lawyers to gather information about the claimants, their injuries, and their financial conditions. It helps the attorneys assess the value of the claims and determine the amount of the case. Efforts may also be undertaken, such as through publication, to ascertain whether there are other potential claimants. Debtors, she said, may try to disallow or litigate the merits of claims against them, either on an individual or categorical basis, but courts generally refrain from litigating the claims, preferring to have the attorneys negotiate and settle them.

Once the claims are filed, she said, the various lawyers and committees negotiate the terms of a plan specifying how the debts are to be paid off. Normally, the value of the tort claims is settled by negotiation, but the court may have to hold valuation hearings. Disputes may arise as to the amount of money set aside for present tort claimants vis a vis future claimants, for property damage vis a vis personal injuries, and between claimants with malignant conditions and those with non-malignant conditions.

The court may order establishment of a trust funded by security of the debtor, and it may issue channeling injunctions requiring that claimants seek payment exclusively through the trust. The legal representative of the future claimants may be actively involved in negotiating these arrangements.

Professor Gibson stated that the system of handling mass torts in bankruptcy is working because judges and lawyers make it work. Nevertheless, she pointed to three main concerns.

First, she said, the Bankruptcy Code was not written with mass torts in mind (except for the 1994 asbestos amendments). Accordingly, many of the procedures fashioned by the courts are not specified in the Code or rules.

Second, the process of handling mass tort cases in bankruptcy is slow, and it may take several years to establish a trust and begin payments. She said that ways should be explored to expedite the process and begin negotiations and payments earlier.

Third, she said, there looms the intractable issue of the constitutionality of discharging the claims of future claimants. It is questionable whether due process is fully satisfied by the appointment of a futures representative to determine the interests of people who do not receive notice and do not participate personally.

Judge Higginbotham observed that the 1966 amendments to FED. R. CIV. P. 23 were intended to address the narrow and well-defined problems of school desegregation cases. The amended rule, however, took on a life of its own and has now attracted a vast array of litigation and special interests. The Advisory Committee on Civil Rules, he said, has initiated a number of beneficial reforms in the rule, but virtually every proposed change has met with organized opposition.

One of the weaknesses, he said, is that there is no body of federal common law, and the shape of the rule prevents healthy future development of the law. There is, moreover, not much more effective reform that can be accomplished by rule. Additional changes will require legislation. The rules committees, he said, have developed considerable expertise and credibility, and they can play a vital role in defining the appropriate shape of legislative reforms.

Judge Higginbotham said that large class actions are never tried. In effect, the courts essentially facilitate settlements. The trial courts, thus, effect, have become an arm of government to aid in resolving disputes that cannot be tried. The trial is a disappearing phenomenon, as judges essentially process papers and manage settlements. Many cases, moreover, do not have real clients, but are filed as competing groups of lawyers round up clients. Unfortunately, this system does not adequately protect the rights of injured future claimants.

The bottom line, he said, entails making a choice between an "opt-in" system and an "opt-out" system. It would be better, he said, to abandon the current class action structure and advise Congress to establish an "opt-in" model that requires real clients, real interests, and real consent.

Judge Higginbotham said that minimal-diversity federal jurisdiction makes a great deal of sense. The federal courts are the appropriate forum for resolving multi-state disputes. These multi-state cases should be brought into the federal system and assigned through the multi-district litigation panel process.

Judge Wolin described his experiences in handling a huge chapter 11 asbestos case. He pointed out, among other things, that he had formed a management committee, had worked closely with the bankruptcy judges in Delaware, and had met personally with each of the lawyers and interested executives. He emphasized the importance of speaking individually and in small groups with the participants because people are reluctant, or unable, to speak candidly in large gatherings in the presence of attorneys and opponents.

Judge Wolin observed that negotiation and deal-making are an inherent part of the bankruptcy culture — more so than in the non-bankruptcy world of civil litigation. Nevertheless, he said, issues and cases do get tried, and there are skirmishes all along the way that are brought to the court's attention. He added that debtors have an incentive to preserve equity, escape chapter 11 as soon as possible, attract needed capital, emerge with investment-grade security, and carry out their business plans.

Professor McGovern pointed out that there is a possibility that Congress will enact a legislative solution to the asbestos problem. One of the approaches under consideration, he said, involves establishing a private trust fund paid for by the industry and insurance companies. Injured claimants would receive payment from the fund, rather than through the tort system, but an exit to the tort system would be allowed in certain cases without punitive damages. He added that the only way that companies can now be discharged from their asbestos liability is through § 524(g) of the Bankruptcy Code, which requires that 75 percent of the tort claimants approve the plan.

Professor McGovern pointed out that Professor Gibson is working on a manual for handling complex cases in bankruptcy, which should be very helpful. He added that some of the committees appointed in mass tort bankruptcy cases are counterproductive. Therefore, an education program for U.S. trustees on mass torts would also be very beneficial.

Professor McGovern noted that there is considerable concern among lawyers regarding the multi-district litigation panel process. The MDL system, he said, is slow, and there are major variations among the practices of the transferee judges. This causes confusion among state judges and the bar. He suggested that the committee consider working with the MDL panel, either on amendments to the rules or additions to the complex litigation manual — focusing particularly on the need for coordination between the federal and state courts

One member emphasized the importance of preserving the status quo in litigation while the MDL process is being pursued. He noted that while the panel deliberates the issue of consolidation, important legal decisions take place in the state courts that cannot later be undone.

He added that there is great promise for using the bankruptcy system to resolve appropriate cases because of its consolidation of jurisdiction, broad definition of claims, and final discharge of debts. But, he said, there is great ambiguity in the bankruptcy litigation process, particularly with regard to estimation of claims. He suggested that the bankruptcy rules be amended to clarify a number of important matters involving estimation — such as when an estimation should be conducted, what procedure should be followed in making an estimation, what evidence can be used, and what the binding effect of an estimation should be.

He suggested the need for rules amendments to address claims litigation. He explained that an objection to a claim creates a contested matter under the bankruptcy rules, thereby invoking the litigation process and many of the civil rules. But if a proof of claim is not filed, and if no claims bar date is set, there is simply no basis for litigation. The bankruptcy rules, moreover, are silent with regard to handling future litigation. In addition, he said, class actions under FED. R. CIV. P. 23 are available in bankruptcy, but the timing of a certification decision in a chapter 11 case is not specified. He also suggested that it would be beneficial to provide for interlocutory review over certain key decisions materially affecting the outcome of a case.

Professor McGovern suggested that one of the most serious problems that parties face in mass tort cases is the difficulty of obtaining final resolution of cases. In many cases, settlements cannot withstand appeal, and objectors are bought off to achieve finality. Another pitfall of a class action settlement is its undemocratic nature, as it may

be driven by lawyers without real clients. He suggested that consideration be given to importing some of the beneficial features of the bankruptcy process and reopen the debate over "opt-out" classes versus "opt-in" classes.

The focus, he said, should be on fashioning a remedy that allows real cases to proceed under the civil rules. A separate rule might be fashioned to deal with settlements, including certification of classes for settlement purposes only.

Several other participants argued that legislative solutions are needed to address the problems posed by mass claims litigation. They suggested, among other things, that: (1) some of the statutory advantages of the bankruptcy system should be replicated for use in non-bankruptcy litigation; and (2) personal injury claims litigation should be treated separately from other kinds of litigation.

There was very strong agreement among the participants that the rules committees should continue to study the problems associated with mass claims litigation, maintain their dialogue with the various interested parties, and work towards achieving consensus for appropriate legislative solutions. They also encouraged the committees to continue their review without regard to the constraints of the Rules Enabling Act, at least on an initial basis. They said that the committees could be instrumental in identifying the best ways to achieve meaningful reforms, even if those reforms can be accomplished only through legislation.

Finally, there was agreement that the rules committees should hold additional conferences with experts and interested parties and work closely with other committees of the Judicial Conference. Judge Scirica agreed and suggested that a conference might be convened in the fall or winter of 2003.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled on June 9-10, 2003, in Philadelphia.

Respectfully submitted,

Peter G. McCabe,
Secretary