MINUTES

CIVIL RULES ADVISORY COMMITTEE

March 16 and 17, 1998

The Civil Rules Advisory Committee met on March 16 and 17, 1998, at the Duke University School of Law. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Judge David S. Doty; Justice Christine M. Durham; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge David F. Levi; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; and Chief Judge C. Roger Vinson. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Sol Schreiber, Esq., attended as liaison member from the Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Eduardo C. Robreno attended as liaison member from the Bankruptcy Rules 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 Robert Campbell (American College of Trial Lawyers), Alfred Cortese, Marsha J. Rabiteau, Fred S. Souk, H. Thomas Wells (American Bar Association Section of Litigation), and Jackson Williams (Defense Research Institute). Professor Paul D. Carrington, former Reporter for the Advisory Committee, participated in several portions of the meeting.

Chairman's Introduction

Judge Niemeyer opened the meeting by describing the informal Working Group on Mass Torts authorized by Chief Justice Rehnquist. The working group was established because the Advisory Committee's work on Rule 23 has demonstrated that judicial approaches to dispersed mass torts continue to present difficult questions. The questions suggest that answers may require legislation as well as rulemaking. Many different Judicial Conference committees have interests in the topics that may be addressed in wrestling with possible answers. The experience of the Advisory Committee makes it natural for the Advisory Committee to play a leadership role. Judge Scirica has been named chair of the working group, and Sheila Birnbaum and Judge Rosenthal are members. Liaison members have been appointed by the committees for Bankruptcy Administration, Court Administration and Case Management, Federal-State Jurisdiction, and Magistrate Judges. The chair of the Judicial Panel on Multidistrict Litigation also is a liaison member. The working group had its first meeting in March, and has set the dates for its next two meetings. It is to report to the Chief Justice at the end of one year. The Advisory Committee will need to consider the proposed recommendations of the working group at the Advisory Committee's fall meeting, if it is to have any opportunity to act. Turning to relations with Congress, Judge Niemeyer noted that continuing efforts are being made to maintain open communications. Judge Niemeyer and Judge Scirica have recently testified before congressional committees. They sense that Congress continues to support the Enabling Act process, particularly if effective communication continues. But it must be recognized that congressional processes can operate faster than the Enabling Act process, and the desire to accomplish change quickly is likely to continue to press against deference to the Enabling Act process.

Bills to amend procedural rules directly seem to be introduced with greater frequency. Often the bills are introduced because the sponsors do not know that the Enabling Act process can be invoked to pursue the same questions, and indeed often is pursuing the questions even as the bills are introduced. An illustration is provided by proposed Civil Rule 23(f), which is pending before the Supreme Court on the Judicial Conference recommendation for adoption. If the Court sends the rule to Congress, it could become effective on December 1, 1998. But some members of Congress do not want to wait that long for a new permissive interlocutory appeal

provision for orders granting or denying class certification. Pressure to adopt proposed Rule 23(f) by legislation continues. One possible outcome might be legislation specifically accelerating the effective date after the Supreme Court transmits the proposal to Congress.

The continued concern about the time required to complete the Enabling Act process has raised the question whether some means might be found to compress the time without reducing the breadth of information and intensity of deliberation that now characterize the process. The Standing Committee has recently urged the advisory committees to consider this issue. There was not time to prepare for thoughtful consideration at this March meeting, but the issue will be on the agenda for the fall meeting.

Judge Niemeyer noted that the Standing Committee continues to be interested in local rules. The specific question of adopting a nationally uniform effective date for local rules will be addressed later in this meeting. Other issues also may deserve action.

The Judicial Conference is continuing to follow the recently adopted practice of inviting the chairs of some Judicial Conference committees to attend Judicial Conference meetings. This practice provides an invaluable opportunity to explain committee proposals, to learn of the work of other committees, and to understand Conference concerns. Judge Niemeyer, for example, was able to provide information about Advisory Committee work on discovery, the mass torts project, and local rules questions. Local rules have a seductive fascination for district courts, and the strength of their charms was reflected in some of the reactions to his presentation. Any proposals to effect significant curtailment of local rule freedoms are likely to meet substantial resistance. He emphasized, however, that local rules not only threaten national uniformity, but also emerge from processes that of necessity are not as thorough as the advisory committee process. The 6-person jury, for example, took hold through local rules. The Advisory Committee, after thorough study, concluded that a 6-person jury is a significantly different institution from a 12-person jury. But opposition to the proposal to restore the 12-person jury, growing from entrenched habits spawned by the local rules, proved irresistible.

Finally, it was noted that the docket of unfinished Committee business has grown during the period of attention to Rule 23 and, more recently, discovery. A subcommittee should be designated to review the docket and make recommendations for the best methods of attending to the items that remain on it. This task may be assigned to the subcommittee that originally was formed to review the RAND report on the Civil Justice Reform Act.

Legislative Report

John Rabiej provided a report on pending legislation. A number of new bills bearing on procedural matters have been introduced since the descriptive list in the agenda book. The "sunshine in litigation" bills continue to be introduced. There is some concern in Congress that the Advisory Committee has devoted too much time to the questions raised by the bills without reaching any final conclusion. (This topic returned later, when the Committee determined to conclude its study of Civil Rule 26(c) protective orders without recommending any present changes in the rule.) The proposed Judicial Reform Act includes controversial provisions, including one that in effect allows a party one peremptory challenge of the trial judge.

Other topics addressed in pending bills involve class actions. There is concern that the Private Securities Litigation Reform Act has encouraged some plaintiffs to file class actions in state courts, leading to bills that would preempt state class actions in this area. Civil Rule 11 bills continue to be introduced, including a specific attempt to use Rule 11 to control frivolous class actions.

The perennial bill to require stenographic recording of depositions is again before Congress.

Copyright legislation and proposed international conventions hold an important place in Congress. Specific concern with international efforts to augment effective copyright remedies may bear in the approach this Committee should take to the obsolete Copyright Rules of Practice, a matter addressed later in the meeting.

One of the bills dealing with court-annexed arbitration includes language for establishing local programs by local rule. The Court Administration and Case Management Committee is addressing this legislation, and has urged that an alternative to local rules be found. The local rules issue is the same here as elsewhere -- even when it may be desirable to allow local autonomy, particularly to continue to work through such developing matters as alternate dispute resolution techniques, means should be found that do not encourage a further proliferation of local rules with the attending encouragement to depart from uniform national procedure.

The local rules issue also is reflected in the recently accomplished amendment of the "sunset" provisions in the Civil Justice Reform Act. Although the amended statute is not clear, it seems to authorize continued adherence to local practices that could not be adopted by local rules because inconsistent with the national rules. At the same time, the machinery for changing the local plans is dismantled. This is a perplexing situation that requires further attention.

Mass Torts Working Group

Judge Scirica described the formation and organization of the Mass Torts Working Group. The group was formed because Judge Niemeyer was able to draw on this Committee's experience with Rule 23 revision to convince other Judicial Conference committees that there are problems that cut across the jurisdictions and interests of the committee structure. These problems deserve study, and should be studied in a coordinated way. The Federal Judicial Center will be lending help as well; Judge Zobel is interested, and Thomas Willging will be directing a variety of studies. Professor Geoffrey C. Hazard, Director of the American Law Institute and a member of the Standing Committee, also will participate in working group efforts. The first meeting, held on March 4 in Washington, was successful. Preparations are under way for the next two meetings, which will be held with relatively small numbers of richly experienced judges, lawyers, and academicians. The first of these meetings will be held April 23 and 24 at the Hastings College of the Law, and the second on May 27 and 28 at the University of Pennsylvania Law School. Later meetings will be planned when needed.

The goals of the working group are limited by the available time. It would be good to generate two documents. The first would describe the mass-torts phenomenon. It seems important to emphasize that each mass tort that emerges is different from its predecessors. There is a risk that experience with one mass tort may be generalized to prescribe approaches to another that, because it is different, is better approached in a different way. A description of the known problems, in short, can be quite useful. The second document would illustrate possible approaches to resolving the problems that are identified in the first. There are many possible approaches. At one end of the line would be means to assert control by a single court over all parties and all issues involved in a mass tort; nothing of the sort exists now. At the other end of the line would be structures and procedures to regularize and foster coordination among courts that entertain related actions, without effecting any consolidation or other common control. The range between these approaches is thickly populated with alternative approaches. Almost all approaches raise obvious questions of jurisdiction, and many involve substantive and choice-of-law issues. Concerns of federalism and comity will occupy a central position.

One question, growing out of the testimony and comments on proposed Rule 23 revisions, is whether federal courts should encourage nationwide classes in mass torts cases. Class actions seem to accelerate filings, and perhaps increase the total number of claims advanced. They present the familiar "private-attorney-general"

phenomenon, albeit in a setting quite different from the small-claims class action that acts on claims that otherwise would be abandoned without litigation. There are interdependencies between the Enabling Act rules process and legislation that cannot be ignored.

Various models will be drafted "just to see what they look like." It is hoped that the specific focus provided by even a crude first attempt to anticipate some of the procedural and jurisdictional questions raised by various approaches will enrich the advice provided to the working group.

After the April and May meetings, the working group and staff will reflect on the advice gathered at the meetings and attempt to refine the initial models or develop new models. This experience may suggest the need for a third and similar meeting early in the fall. The target will be to prepare a draft report for consideration by the Advisory Committee at its fall meeting. Although it is not entirely clear what date should be viewed as the beginning and end of the one-year term of the working group, the report should be made no later than the March 4 anniversary of the first group meeting. Consideration by the Advisory Committee thus must be at a fall meeting.

Minutes approved

The Minutes for the October, 1997 meeting were approved.

Discovery

Judge Niemeyer opened discussion of the report presented by the Discovery Subcommittee. He noted that the question is whether changes can be made in discovery that will reduce cost while preserving the full information values we now enjoy. Related questions are whether we can restore a uniform national practice, particularly with respect to disclosure, and whether it is possible to elicit greater judicial involvement with discovery problems.

The Boston College conference in September, 1997, provided fine support for the developing efforts of the Discovery Subcommittee. The symposium articles and working papers will be a good resource for the future, as the conference itself has provided strong support for the subcommittee.

The subcommittee report itself is consistent with the three-level model of discovery that has been before the committee. There is initial disclosure, followed by attorney-managed discovery, within a framework that will provide for judicially managed discovery for cases that extend beyond a reasonably permissive core level of attorney-managed discovery.

The discovery discussion was then turned over to the subcommittee, led by Judge Levi and Professor Marcus.

Disclosure

Four disclosure alternatives were presented by the subcommittee.

The first alternative would retain the disclosure system adopted in 1993, but eliminate the provision that allows individual districts to opt out by local rule. This would establish national uniformity. As reflected in the subcommittee working papers, this alternative would be supported by the initial studies that find the present system effective. The Federal Judicial Center study is the most recent and detailed. On the other hand, this approach would likely encounter vigorous resistance in districts that have chosen to opt out of the national rule. An attempt to force disclosure on reluctant courts, with no more support than the tentative conclusions of early studies, could fail, leaving no disclosure system at all.

The second alternative would repeal most of the present disclosure rule, leaving only the damages and insurance disclosure provisions of Rule 26(a)(1)(C) and (D). These limited disclosures would again be made uniform by defeating the opportunity to opt out by local rule. This approach has the virtue of simplicity, and would accommodate the resistance to disclosure found in many courts.

The third alternative is the main "middle-ground" proposal. This approach would be to retain the present disclosure system and make it national, but limit the witness and document disclosure requirement to items that are in some way favorable to the disclosing party. This proposal would eliminate the "heartburn" that arises from requiring disclosure of the identity of unfavorable witnesses and documents. The model built to illustrate this alternative includes several features that probably should be added to the present rule if it is retained and made nationally uniform. One new feature is an express provision for parties who join the action after disclosure by the original parties. A second is a method of designating the exclusion of categories of cases that should not routinely be made the subjects of disclosure and the Rule 26(f) party conference. Exclusion could be accomplished either by designating categories of excluded cases in the national rule or by incorporating by reference the local district categories of cases excluded from Rule 16(b). The third reaches cases at the opposite end, allowing exemption from initial disclosure because the case is so complex or contentious that it seems more useful to proceed straight to discovery. The draft provides for exclusion by allowing any party to stall disclosure until the district court has an opportunity to review the objection as part of the Rule 26(f) process.

The final alternative is a much-reduced system that virtually eliminates disclosure by reducing it to an item to be considered by the parties at the Rule 26(f) conference. There would be initial disclosure only if the parties agree on it, a possibility that in any event is available without encouragement in the rules. Form 35 would be amended to emphasize the need to consider disclosure.

All subcommittee members agreed that the Rule 26(f) conference was a successful innovation, and should be retained whatever may be done with initial disclosure. It was suggested that Rule 26(f) provides a natural occasion for opening settlement discussions, and that the parties will exchange the information needed to support settlement whether or not there is any disclosure system.

The approach of abandoning disclosure was supported by the observation that in the real world, people know how to use discovery effectively as soon as the action is filed. A great deal of effort should be devoted to preparation and investigation before the case is filed, providing the framework within which discovery can be managed without any need for delay while the limited and relatively formal information required by Rule 26(a)(1) is exchanged. Many districts have decided to manage without disclosure, and are managing quite well. Many problems would disappear if we got rid of this initial disclosure.

In response, it was observed that there are studies indicating that initial disclosure often is a neutral force, but -- as in the FJC study results -- rather often succeeds in reducing cost or delay, or promoting settlement, or leading to better outcomes. The subcommittee as a whole thought that some form of disclosure should be retained.

The reformulated response was that the names-and-addresses-of-witnesses form of disclosure can help, but that it is not enough to justify the moratorium on discovery that was adopted to support initial disclosure. The names of witnesses and identity of documents can be obtained on first-wave discovery, and the overall discovery process will work more efficiently if there is no need to wait for several months while process is served and the Rule 26(f) conference is arranged.

The subcommittee report then made it explicit that the subcommittee's first choice is the mid-ground that requires

disclosure of information favorable to the disclosing party. This approach is, to be sure, a compromise. But it seems to work well in two districts that now have it, the Central District of California and the Northern District of Alabama. If this form of disclosure is adopted on a uniform national basis and continues to work well, it may provide the foundation for an eventual return to the 1993 disclosure system as a uniform national system.

The Rule 26(f) meeting was again hailed as the key, with the suggestion that it should be made to run with as little interference as possible. The middle ground, synthesized with Rule 26(f), is the best system. Paul Carrington's approach seems best. We should set out the things the parties must exchange, and time limits. The court should become involved only if the parties cannot do it. This alternative would include more detailed instructions on what must be accomplished at the Rule 26(f) conference.

Another approach, not recommended by the subcommittee, is to separate disclosure into separate phases, with the plaintiff making disclosure first. The defendant would follow after a suitable period, responding directly to the plaintiff's disclosures as well as to the issues framed by the pleadings. This approach could support much more detailed disclosures than can be made with simultaneous exchanges based on notice pleadings. The District of South Carolina standing interrogatory approach provides an illustration. It was asked why the subcommittee has not recommended this approach. The subcommittee response was that most cases now have minimal discovery. And in most cases what discovery there is works well. The prospect of forcing detailed discovery of the sort reflected in the South Carolina interrogatories on all cases seems unattractive. They cover more ground than seems likely to be covered in most cases now, and more than is likely to be needed in most cases.

The South Carolina standing interrogatories approach suggests a different possibility, that of drafting pattern discovery requests for complex cases in specific subject areas. Allen Black and Robert Heim are working on an illustrative set for antitrust cases to help measure whether this task is feasible. If promising results emerge, the subcommittee will want to consider the means for generating pattern discovery systems and for advancing them to the world.

Disclosure could be sequenced in waves without adopting the South Carolina interrogatories. Sequencing, however, increases the number of conflict points. It also encourages those who go next to protest that those who went first did not fulfill the disclosure obligation and that this excuses their own failure to respond or sketchy responses.

The need for disclosure was then championed as a prop for the Rule 26(f) conference. Knowing that disclosure will be required soon after the conference encourages preparation for the conference. The mid-ground that requires disclosure of favorable information was supported on the related ground that if the conference does not lead to settlement, the parties know that the disclosures will be followed immediately by discovery demands for unfavorable information.

Brief mention was made of the subcommittee's review of (a)(2) expert-witness disclosure and (a)(3) pretrial disclosure. The subcommittee believes they should be retained. They now are national rules without the opportunity to opt out by local rule that is available for (a)(1) initial disclosure. Some districts, to be sure, have adopted local rules that purport to opt out of these disclosure requirements. The local rules are not consistent with the national rule and appear invalid.

A question was asked as to the strength of the positive responses to disclosure experience. Is it simply a matter that lawyers think they can live with the present (a)(1) system, or that it actually accomplishes real benefits? The FJC study seems encouraging, but is it enough?

The mid-ground proposal discussion then turned to the means of excluding "low-end" cases from the obligation to disclose even favorable information. One possibility studied by the subcommittee but not advanced for further discussion would be delegation to the Judicial Conference. Disclosure would be required in all cases except those excluded by resolution of the Judicial Conference. The possible advantage of this approach is that it would allow more flexible adaptation of the exemption list to changing experience, free from the lengthy Enabling Act process. It was concluded, however, that this advantage also is the vice of this technique. This matter is too much part of the procedure rules to be delegated out of the deliberately thorough Enabling Act process.

A variation on the subcommittee proposal would be to list some excluded categories of cases, in the manner of the list of affirmative defenses in Rule 8(c), with a concluding catch-all equivalent to the Rule 8(c) "and any other matter constituting an avoidance or affirmative defense." It was quickly concluded that this approach would provide more confusion than guidance. It was pointed out that the FJC discovery study sought to exclude cases that typically have little or no discovery, and by adopting half a dozen excluded categories eliminated more than half the cases on a typical docket. It should be possible to adopt a specific list of eight or ten or twelve categories that will exclude a great share of the cases that ought not be subject to the burdens of even limited, favorable-information disclosure.

One additional safety valve is provided by the opportunity of the parties to agree that disclosure is not appropriate. Rule 26(a)(1) now allows the parties to stipulate out of disclosure, and this provision will be retained. The Rule 26(f) conference, in addition, provides the natural focus for agreeing to exclude disclosure when it seems redundant or unnecessary.

The alternative middle ground, which would essentially eliminate witness and document disclosure but leave agreement on such disclosure as an explicit topic for the Rule 26(f) conference was noted briefly. It was provided as an alternative to the "favorable information" disclosure, but without strong support.

Turning to the "high-end" exclusion, it was asked whether there was a risk that obstructionist parties would overuse the opportunity to stall disclosure by objecting. The draft Committee Note attempts to deal with this by discussing the nature of the cases that might make disclosure inappropriate. As an illustration, the draft suggests that disclosure may properly be deferred pending disposition of motions challenging the court's jurisdiction. The draft raises the question whether deferral also may be appropriate pending decision of dispositive motions, particularly those addressed to the pleadings. This sort of question is something that can be worked out in generating the next draft.

The subcommittee's support for the mid-ground approach was reiterated. There are some challenging drafting problems, but they are not so great as to defeat the enterprise. Disclosure in some form should be retained, and made uniform on a national basis.

It was asked whether trial judges would encounter substantial burdens in administering the distinction between favorable and not favorable information. Thomas Willging responded that in studying the two districts that take this approach to disclosure, the FJC found that attorneys spend less time with the court, and more time meeting and conferring with each other. It seems to work. But this information does not address the prospect that claimed failures to disclose will become issues at trial. At the same time, limiting the disclosure requirement to favorable information provides a much more natural and effective base for the exclusion sanction at trial. The threat of exclusion does not work well as to information a party does not want to use at trial, but should work well as to information a party does want to use.

Professor Carrington observed that the 1991 committee would say that the mid-ground proposal goes in the right

direction. During the deliberations then, disclosure was not limited to favorable information because of the expectation that favorable-information disclosure would inevitably be followed by discovery demands for unfavorable information. But in the setting of adopting a truly national rule, the recommendation is a politic step. There is no virtue in the local option, which was added to the 1993 amendments from a sense of compulsion arising from the variety of practices that had proliferated under the Civil Justice Reform Act. There are enough virtues in disclosure to support adoption of a uniform national rule.

The committee voted unanimously to adopt the favorable-information approach to disclosure, and to work further on the details.

Work on the details must be done expeditiously after the committee has gone as far as can be done in full meeting to establish the general directions. The Style Subcommittee must be allowed time to review the drafts, and then the full Advisory Committee must review them. A report to the Standing Committee must be prepared by mid-May.

The first detailed drafting question is how to describe "favorable information." Those words will not do the job; too much information is potentially favorable or unfavorable to any given position. Three alternatives were considered: (1) "information that tends to support the positions that the disclosing party has taken or is reasonably likely to take in the action"; (2) "information that the disclosing party may use to support its positions in the action"; and (3) "information upon which the party bases its claims, prayer for damages or other relief, denials, or defenses in the action." Difficulties can be imagined in each formulation, and offsetting advantages.

The "may use" formulation was supported on the ground that it ties directly to the incentive to disclose, and best describes to all parties the disclosure obligation. The subcommittee recommended -- with the support of the committee -- that the duty to supplement disclosures imposed by Rule 26(e)(1) be retained. A party can easily understand and implement the duty to disclose the names of witnesses and identity of documents it may want to use at trial. It can as easily understand and implement its freedom to fail to identify the material -- which may amount to warehouses full of documents -- that it does not want to use at trial. As trial preparation proceeds, the disclosure obligation can be supplemented easily and naturally. There is no real risk that a party can avoid the duty to supplement by arguing that it did not know at the time of the initial disclosure that it might want to use information it later decided to use.

The formulation that addresses information on which a party bases its claims, denials, or defenses was supported on the ground that "bases" implies that the information is significant. The information need not be everything that the party may want to use at trial; this formulation narrows the obligation of initial disclosure. In particular, it avoids the need to identify witnesses or documents that will be used only for impeachment purposes.

Discussion of the draft drawn from information on which claims are based quickly concluded that whatever approach is taken, there is no need to refer to the "prayer for damages or other relief." Damages and relief are part of the claim, and the disclosure requirement of Rule 26(a)(1)(C), which will be continued under all proposals, will catch up most of the damages element as a double precaution.

An initial expression of preferences canvassed four possible descriptions of disclosure information: "tends to support" got one vote. "Supports" got three votes. "May use to support" got three votes. "Upon which bases" got four votes. Further discussion led to further endorsements for "supports." It was urged that this term fits the time of initial disclosure, a time when the parties do not know what they may want to use at trial. "We want to know what you know will support your positions." "Supports" clearly signals the intention to exclude an obligation to disclose unfavorable information. "May," in the "may use" formulation, is equivocal. And "positions," in any of the

formulations, is too broad. "May use" again was endorsed because it provides the focus for enforcement by exclusion at trial. It is an essential qualifier, because a party may not know with certainty what it will use. And "use" avoids the ambiguity of "supports," since the same information may both support and undermine a position -- many a witness has both supporting and undercutting information, as does many a document. And parties will disclose more than they will with "supports."

The next vote provided 7 votes for "supports claims, denials, or defenses," no votes for the "bases" formulation, and 4 votes for "may use to support the disclosing party's claims, denials, or defenses." It was decided to adopt the "supports" formulation, most likely to be rendered as "discoverable information supporting the claims, denials, or defenses of the disclosing party."

With disclosure limited to supporting information, attention turned to the limitation in present (a)(1)(A) and (B) that witnesses and documents need be identified only as relevant "to disputed facts alleged with particularity in the pleadings." This limit was introduced to the disclosure provision because notice pleading often makes it very difficult for an opposing party to know the contours of the case as it will emerge from discovery. The whole design of the 1938 system, indeed, was to transfer much of the information exchange between the parties from pleading to discovery. Contention interrogatories, requests for admission, and Rule 16 practice have developed over the years to augment the subordination of pleading even as to identification of the legal issues. But this concern is greatly reduced when the nature of disclosure is reduced to disclosure of information supporting the claims, denials, or defenses of the disclosing party. The disclosing party presumably knows at the time of disclosure what its positions will be, and is obliged to supplement its disclosure as it perfects its understanding of its own positions. Nor is it simply that there is no apparent reason for continuing this limitation. A major reason for adopting it was the hope that it would encourage each party to plead with greater particularity so as to enhance the disclosure obligation imposed on its adversaries. With disclosure changed to supporting witnesses and documents only, the limitation would encourage each party -- and perhaps most especially the plaintiff -- to plead in broad terms so that it has no disclosure obligation. The committee voted 9 to 2 to delete the words that limit disclosure to disputed facts pleaded with particularity.

Discussion next turned to the draft designed to relieve the parties of the disclosure obligation in "high-end" cases that are better handled through court-managed discovery. The draft Rule 26(a)(1)(E) provides for disclosure with 10 days [later changed to 14 days] after the Rule 26(f) meeting "unless a party contends that initial disclosure is inappropriate in the circumstances of the action, in which event disclosure need not be made until 10 [later changed to 14] days after the initial scheduling order is entered by the court pursuant to Rule 16(b)." The effect would be that disclosure occurs if all parties want it, and -- under the "unless otherwise stipulated" language carried over from the current rule -- does not happen if all parties agree to dispense with it.

It was asked whether language should be included to identify "complex or class actions" as inappropriate for disclosure. The subcommittee responded that this possibility had been considered because it is indeed the complex cases that today are routinely exempted from disclosure in favor of judicial discovery management. Anecdotal experience suggests strongly that disclosure is inappropriate in such cases. But all of the studies suggest that it is not possible to define "complex" cases by subject-matter or other criteria.

Further discussion of drafting alternatives led to adoption of this formulation:

These initial disclosures must be made at or within 14 days after the subdivision (f) meeting of the parties unless otherwise stipulated or directed by the court. If a party objects before this time that initial disclosures are not appropriate in the circumstances of the action, the court must determine what disclosures -- if any -- are to be made, and direct that any disclosures be made no earlier than 14 days after entry of the initial scheduling order

under Rule 16(b).

The next set of problems arises from the failure of the present rule to address the disclosure obligation of parties who join the action after the time for initial disclosures. The Rule 26(e)(1) duty to supplement does not reach later-added parties because it applies only to a party who has made a disclosure. The proposed draft, also part of proposed 26(a)(1)(E), would provide that: "Any party not served at the time of the meeting of the parties under subdivision (f) shall make these disclosures within 30 days after the date on which the party first appears in the action unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order." Difficulties in this formulation were recognized. The reference to a party "served" seems to overlook those who join by intervention, plaintiffs added by amendment of the complaint, and perhaps others. The reference to a person not a party "at the time of the meeting of the parties" seems to fit awkwardly with those who become parties immediately before the meeting. It was agreed that the problem of later-added parties should be addressed, and that these apparent drafting glitches should be worked out. The resolution may look something like this: "A person who becomes a party after the eleventh day before the subdivision (f) meeting of the parties must make these disclosures within 30 days after becoming a party unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order."

A question not raised by the subcommittee was presented by the question whether disclosure should occur before the Rule 26(f) meeting. Paul Carrington noted that this had been the initial thought of the committee when Rule 26(f) was rewritten for 1993, but that it had been concluded that the meeting is necessary to make disclosure effective. The need may be reduced to some extent by the proposed retrenchment of disclosure to supporting information. But even under this reduced disclosure system, the meeting may well serve to focus the positions -- the claims, denials, and defenses -- of the parties. It was suggested that perhaps the note to the amended Rule 26(f) should suggest that disclosure before the meeting is desirable. But it was responded that even if that would be desirable in an ideal world, the meeting is where arrangements particular to the case are made. Disclosure may not be important to what actually is done. And the committee was reminded that Rule 26(f) seems widely regarded as the most useful of the 1993 discovery changes -- and there have not been any complaints that it would be improved by requiring disclosure before the meeting. The meeting "breaks the ice." Disclosure often occurs at the meeting. The committee agreed that no change should be made.

Another question not raised by the subcommittee was identified in the timing provisions of Rule 26(f). It sets the meeting at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). It requires a report to the court "within 10 days after the meeting." Because of Rule 6(a), "intermediate Saturdays, Sundays, and legal holidays" are excluded from the 10-day period. With a three-day legal holiday weekend, it is possible that the report will be due one day after the scheduling conference or order (the intermediate weekend and holidays are not excluded from a 14-day period). The need to have the report due in time to allow consideration before the conference has led one member to routinely order that the Rule 26(f) conference be held within 30 days after an answer is filed; the report is to be filed 14 days after the meeting. The Rule 16(b) conference follows the report unless the parties do not want the conference -- and most often the parties work things out at the meeting. It might be desirable to adopt an idea suggested by Paul Carrington, setting the meeting within 90 days after a defendant is served.

Renewed discussion of the 26(f) time limits agreed that it is not desirable to have the report of the meeting presented to the court for the first time at the scheduling conference. It was agreed that the time for the meeting should be set at 21 days, rather than the present 14 days, before the scheduling conference or order. The time for the report of the meeting also should be changed, to 14 days after the meeting. This change will coincide with the change to Rule 26(a)(1)(E) that sets the time for disclosure at 14 days after the Rule 26(f) meeting, and -- in part

by moving outside the Rule 6(a) rules for calculating periods of less than 11 days -- set a clear date one week before the scheduling conference. This sequence will allow the parties to focus on a common deadline for disclosures and report, and will ensure adequate time for the court's consideration of the report.

Other Rule 26(f) matters also were raised. The subcommittee report had not suggested any exclusions, but its recommendation to delete the power to adopt exclusions by local rule is accepted by the committee. That leaves a need to provide for exclusion in low-end cases. It was noted at the Boston College conference that the meet-and-confer requirement is an unnecessary burden in many simple cases, simply one more useless hoop to jump through. The committee agreed that Rule 26(f) should be modified to incorporate the same low-end exclusions as are adopted for initial disclosures under Rule 26(a)(1). The court will continue to have discretion to exclude other cases.

The final Rule 26(f) question is posed by the language requiring that the parties "meet to discuss," and making them responsible for "being present or represented at the meeting." The 1993 Committee Note states that the rule requires a face-to-face meeting. This obligation ordinarily is reasonable in dense urban areas, but may impose untoward burdens in large and sparsely populated districts. The present power to exempt cases by local rules enables each district to take account of its own circumstances and adopt mollifying exemptions -- one example was offered of a rule that allows a telephone meeting when any attorney is located more than 100 miles from the court. Removal of the option to have local rules requires that this issue be reconsidered for the national rules. There are great advantages in a face-to-face meeting that cannot be duplicated by telephone, and are not likely soon to be duplicated by videoconferencing. It might be possible to adopt a compromise rule that seeks to preserve these advantages by requiring the parties to "confer in person if geographically practicable." Potential administrative difficulties, however, persuaded the committee to agree without dissent to change the "meet" requirement to a "confer" requirement.

The topic of low-end exclusions from disclosure and the Rule 26(f) meeting returned. With the help of the Federal Judicial Center, a survey of exclusions adopted by local rules shows an astonishing array of categories of cases that have been excluded in at least one district. Some of the exclusions are unique, and a few are inscrutable. Some are fairly common, and some are almost universal. The effort must be directed toward identifying common categories of actions that typically will not benefit from disclosure or a Rule 26(f) meeting because typically there is little or no occasion for discovery. A first rough estimate includes at least these cases: bankruptcy appeals; bankruptcy matters withdrawn from the bankruptcy court (see § 157(d)); actions for review on an administrative record; social security review cases; prisoner pro se cases; habeas corpus; actions challenging conditions of institutional confinement (perhaps unnecessary if prisoner pro se cases are excluded, particularly since complex actions needing discovery are brought under the Civil Rights of Institutionalized Persons Act); actions to enforce or quash administrative summonses or subpoenas; other Internal Revenue Service actions; government collection actions; civil forfeiture proceedings; student loan collections (perhaps only those below $75,000); proceedings ancillary to proceedings in other courts -- as for discovery or to register or enforce a judgment; and actions to enforce arbitral awards. Further thought will be given to which of these categories may make most sense, and the Administrative Office will be asked for help in developing formulas that accurately describe the intended categories. It was agreed that it would be unwise to exclude all pro se cases; the disclosure requirement can prove especially useful in focusing some pro se actions.

Scope of Discovery

The subcommittee reminded the committee that a major impetus for the present discovery project was the recommendation of the American College of Lawyers that the committee adopt the discovery scope limitation first advanced by the American Bar Association Litigation Section in 1977. The subcommittee brought three

models to the committee for consideration. One would limit the initial scope of discovery to matter relevant to "the claim or defense" of a party," but allow the court to expand discovery to "any information relevant to the subject matter" of the action. The second would modify the final sentence of present Rule 26(b)(1), emphasizing that only relevant information may be sought under the permission for discovery of information that is not admissible but is reasonably calculated to lead to the discovery of admissible evidence. The third would add to (b)(1) an explicit cross-reference invocation of the "reasonable discovery" principles articulated in present (b)(2).

The question whether to displace the "subject matter" scope of discovery limit was introduced by the reminder that the Advisory Committee published essentially this same proposal in 1978, and then withdrew it in light of the comments received. The proposal has been considered periodically since then, and was considered during the deliberations that led to the 1993 discovery amendments. There is reason for caution because it is not clear whether the proposed change would lead to mild restraint or considerable curtailment. Whatever the outcome, moreover, the very fact of change will lead to a transitional period in which contending parties seek to attribute unintended meanings to the change. No language is available to calibrate precisely the degree of desired change, even if agreement could be reached on the precise degree. These concerns suggest that the Committee should demand a clear reason for moving toward the change.

The context for defining the scope of discovery begins with the 1938 decision to turn to notice pleading, to be fleshed out by discovery managed by the attorneys. Discovery kept expanding through the 1970 amendments. More recent efforts have been directed toward reducing the excesses of lawyer-managed discovery. The ABA suggestion has been with us for a long time. At the Boston College conference, many lawyers suggested that adopting this suggestion would not lead to any great change. The modified version created by the subcommittee is new, and addresses the concerns that have surrounded the proposal. Discovery remains available of matter relevant to the subject matter of the litigation, but this full sweep of discovery is made subject to court control. Doubts as to the scope of the change in rule language will be resolved by agreement of the parties -- always a good thing in discovery -- or will be taken to the court. The change thus will provide an effective way to encourage involvement by courts that have been reluctant to devote time to discovery management. The single most important discovery change championed by lawyers is greater judicial involvement in problem cases. This proposal will help move toward that goal.

The subcommittee has not formed a recommendation on this model. But it acknowledges the effort and help provided by the American College in advancing and refining the initial proposal.

Robert Campbell, representing the American College, then addressed the initial recommendation, which did not restore discovery relevant to the subject matter if ordered by the court. He noted that in 1995 Judge Higginbotham, then chair of this Committee, asked the American College to study discovery issues. The question is whether a change from subject matter to claims and defenses makes a difference in the real operation of discovery. The American College believes that it does make a difference. It has offered examples of cases in which judges thought the "subject matter" language of the present rule does make a difference. The Board of Regents of the College has adopted the recommendation as the recommendation of the College itself, a highly unusual step. Neither the College nor its federal rules committee has considered the possibility of restoring subject-matter discovery under court control; probably they would oppose this new feature.

The first reaction voiced was that this proposal "will create a firestorm." If it is coupled with discovery cost-shifting, the Committee will be seen as defendant-oriented. Even the more modest change in the language about discovery of inadmissible matter will draw fire, but it makes sense. It is, by contrast, difficult to say just what difference there is between "subject-matter" discovery and "claim or defense" discovery. Rule 26(b)(2) now establishes ample power to limit discovery in suitable proportion to the needs of the case. The proposal "projects

an image, however much it is not intended, that all that is wrong with discovery is the practice that favors plaintiffs." The proposal abandons 60 years of precedent establishing the scope of discovery in return for a well of new uncertainties. The more sensible approach is to offer minor adjustments in the sentence that deals with discovery of inadmissible evidence, and to enhance the force of (b)(2) principles by explicit cross-reference. We should be particularly wary of discovery proposals advanced by senior members of the bar who have advanced to careers that allow delegation of most hands-on discovery to younger lawyers.

The proposal was defended as "not earth-shaking, but a good idea. Document discovery is the problem. This will send a signal. That's all it will do."

The subcommittee noted that the authority to expand the scope of discovery back to the subject-matter scope of the present rule is an important part of this model. It puts the judge in the position of demanding and considering explanations of the needs for the full sweep of discovery. There is no need for metaphysical precision in describing the different scopes of discovery; this is simply a practical means of encouraging judicial control by expanding the occasions for seeking it. The proposal "changes the message of open-ended, unrestricted discovery." It may force the parties to identify their needs more clearly.

This model, in short, is not the American College proposal. It is instead a means of stimulating judicial involvement. It changes the balance between lawyer-managed discovery and court-managed discovery. It is important to find some means to encourage court management. Rule 26(b)(2) was intended to have this effect, but inexplicably has failed to have much noticeable impact. Establishing different scopes for lawyer-managed and court-managed discovery, and expressly incorporating (b)(2) by reference, will help accomplish what (b)(2) was designed to do many years ago.

Strong support was expressed for the American College proposal. Out-of-control discovery is common. No one who participated in designing the discovery system foresaw what it would become. Technological advances in storing and retrieving information have only exacerbated a problem that already was made acute by document discovery excesses. Adoption of the proposal will send an important signal that discovery must be better controlled. Reasonable proportionality is required by (b)(2) now, and it has not been made to work.

A judge observed that experience in refereeing many discovery disputes shows that the real culprit is in the "reasonably calculated" sentence. We do need to establish some new limit on the scope of discovery. But we should clarify the connection between the "reasonably calculated" sentence and the two separate scopes of discovery -- does it bear on information relevant to the parties' claims or defenses, or does it bear on information relevant to the subject matter of the action?

It was asked whether it is possible to provide more concrete illustrations of the differences that the proposal would make. Doubt was expressed at the Boston College conference whether this change in the language defining the scope of discovery would make much difference. If that is uncertain, it is certain at the same time that any change will lead to many discovery disputes. Can we be sure that the change is worth the uncertainty and the resulting costs?

It was responded that the change is designed to create a new management tool to be used when the parties fail to effect reasonable discovery. The adoption of a distinction between the scope of lawyer-controlled discovery and the scope of court-controlled discovery is a great compromise. It is an advance over present (b)(2) because courts are not effectively using the management possibilities established by the proportionality principle. It will make a difference, among other litigation, in product-liability cases that now seem particularly prone to excessive discovery demands.

On a vote among three options, no votes were cast for adhering to present Rule 26(b)(1). Two votes were cast for bypassing any change in the scope of discovery, but in favor of cross-referring to (b)(2) and modifying the language about discovering inadmissible evidence. Nine votes were cast for narrowing the scope of lawyer-controlled discovery to matter relevant to claims or defenses, while allowing the court to expand discovery back to matter relevant to the subject matter of the action.

A drafting change was suggested to limit discovery of inadmissible evidence only if relevant to the parties' claims or defenses. This limit could be expressed by beginning the second sentence: "This relevant information need not be admissible at trial * * *." It was responded that if the court orders discovery of information relevant to the subject matter, the same opportunity to discover inadmissible evidence should be available. A motion to add "this" failed.

It was asked whether the reference to (b)(2) principles should be limited to the (b)(2)(iii) cost-benefit provision. The subcommittee responded that this question had been considered and resolved in favor of incorporating all of the (b)(2) principles. All are important, and all deserve this emphasis.

Further discussion of drafting led to agreement on this language for a revised (b)(1)

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The court may, for good cause shown, order discovery of any information relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by subdivision (b)(2).

Deposition Length

In 1991 the Committee published a proposal that would limit the length of a deposition to 6 hours, unless additional time were allowed by the court. The proposal was withdrawn from the final amendments. During the San Francisco meeting that first began gathering discovery information, many attorneys suggested that no deposition should need more than 6 hours absent obstructionist activity. If a limit is to be adopted, there is a question as to the best means of defining the limit -- as six hours, as one business day, or as one day of six hours.

It was asked whether a longer time should be allowed for expert depositions -- some fear was expressed that many expert witnesses are expert at drawing out a deposition without saying anything.

It was observed that in the Agent Orange litigation 168 depositions -- including expert depositions -- were taken in one day each. This was made possible, however, by requiring that before the deposition all documents to be used be submitted to the deponent, and read by the deponent. It was noted that the subcommittee had considered the document-submission requirement, but had put it aside because a number of lawyers had expressed the fear that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use.

Concern was expressed that it will be difficult to allot six hours, or a day, among all the parties, particularly in cases that involve more than two parties. But confidence was expressed that lawyers would generally work out these problems, recognizing that the court will have power to extend the time limit and that most courts will be

displeased by requests to make the parties behave sensibly in ways they should be able to work out for themselves.

It was asked whether there is any pressing need to set a presumptive limit for depositions. The response was that many lawyers at the Boston College conference noted that the expense of depositions is a significant problem. An illustration was offered of practice in New York, where depositions lasting 6 to 8 days are routine in employment-discrimination cases. A presumptive limit is needed; appropriate requests for additional time will be granted routinely. Plaintiff lawyers are particularly apt to favor a limit as a means of reducing unnecessary time and also reducing transcript expenses.

It was decided by a 9 to 1 vote that a durational limit should be adopted.

Turning to the task of defining the limit, it was suggested that a "one business day" term would avoid the foreseeable problems of squabbling over the hourglass or stopwatch, and would particularly avoid the definitional questions presented by the 1991 proposal for 6 hours "of actual examination of the deponent on the record." Any time limit is an invitation to filibuster; the "one business day" expression may reduce the temptation. The notion of a business day is admittedly loose; this should work in its favor.

Confidence was expressed that there is not as much game playing now as formerly, and that the vast majority of attorneys who know there is a time limit will prepare in advance and complete depositions within the limit.

It was noted that the FJC data indicate that courts that impose time limits seem to have longer depositions. These data do not, however, provide any information as to the direction of any causal connection that may exist. It seems more likely that time limits have been adopted in districts that have had problems with undue deposition length, and that it is long depositions that have caused the rules to be adopted, than that the rules have caused long depositions.

In response to another question, it was stated that the subcommittee recommendations would include amendment of Rule 26(b)(2) to allow a court to set different limits on deposition length by local rule. In the end, however, it was agreed that local rules would not be allowed to change the presumptive limit. Alterations would require consent of the parties and deponent or court order. Neither Rule 26(b)(2) nor Rule 30(d)(2) will allow variation by local rule.

It was urged that it would be better to place the deposition time limit in Rule 30(d)(2) than in Rule 30(a).

It was suggested that although there may be significant differences between the time needed for depositions for discovery and the time needed for depositions for trial testimony, these differences can be taken into account in administering the limit. Many lawyers will prefer to keep trial depositions short; the fear that these depositions may need extra time may be misplaced.

After concern was expressed about the indefiniteness of "one business day," a vote found 6 members in favor of "one day of n hours," and 5 members in favor of "one business day." Discussion of how many hours should be specified found 6 members in favor of 7 hours, and 5 members in favor of 8 hours.

It was agreed that the limit should be "one day of 7 hours." The Committee Note should discuss the desirability of flexible administration -- many doctors, for example, seek to schedule depositions beginning late in the afternoon, perhaps at 4:30, so as to be able to treat patients all day.

The question whether the limit should be expressed as "actual examination of the deponent on the record" returned. Although the actual meaning of this limit is unclear, it seems to exclude colloquy between counsel, rest breaks, and the like. It was noted that this limit will exacerbate timekeeping problems, and even invite them. It will be argued that objection time is not actual examination time, and so on. It was agreed that this limit would be deleted. The Committee Note should say that reasonable breaks are permitted.

The committee agreed unanimously that Rule 30(d)(2) should be amended to provide that "a deposition is limited to one day of seven hours." It was further agreed that extension of this time by stipulation should be permitted only if the deponent joins the stipulation. The purpose of the time limit properly includes witness protection.

It was further agreed that there is no need to adopt a parallel time limit for Rule 31 depositions on written questions. If unreasonably long questions are submitted, relief can be won from the court in advance.

Cost-Bearing

The subcommittee noted that both the Reporter and Special Reporter believe that Rule 26(c) allows a court to enter a protective order that conditions discovery on payment of all or part of the expenses by the party demanding discovery. Similar authority should be read into Rule 26(b)(2) as a less limiting alternative to an order that simply prohibits discovery as disproportionate to the needs of the case or otherwise beyond reason. Nonetheless, it may be helpful to adopt an express cost-bearing provision if it is believed that courts should consider this alternative more frequently.

The subcommittee proposal is that Rule 26(b)(2) be amended to allow the court to order that a party demanding discovery pay all or part of the reasonable expenses incurred by the responding party if the court makes any of the determinations that authorize an order that discovery not be had, as specified in present items (i), (ii), or (iii). In many situations, this proposal will expand, not contract the opportunity for discovery -- the determination that discovery is inappropriate under item (i), (ii), or (iii) would lead to an order barring the discovery, but the softer alternative is allowed of permitting discovery on payment of part or all of the resulting expenses. The item (iii) cost-benefit calculation is the one most likely to be involved in this process: the cost of the discovery is reallocated to a party willing to bear it in return for the anticipated benefits. But nothing in this process would authorize discovery beyond the scope permitted by Rule 26(b)(1); cost-bearing is simply an alternative to a (b)(2) prohibition.

It was suggested that this proposal would not accomplish any meaningful change. Judges now condition discovery on payment by the demanding party. Nonetheless there is likely to be protest by those poorly informed, or by those who oppose present practice, that this proposal is simply one more attempt to protect institutional defendants that have a wealth of discoverable information. We are accustomed to a procedure that generally makes no attempt to allocate the costs of demanding and responding to discovery. To emphasize the authority to impose on the demanding party not only the costs of demanding discovery but also the costs of responding will go against the grain of many. If it is feared that (b)(2) is not being used as often or as vigorously as should be, the Committee should find ways to draw attention to (b)(2) principles. Parties and courts can be trained to use (b)(2) more. "It is there and available."

In response, the subcommittee noted that even though courts probably do have authority under present rules to condition discovery on payment of costs, the authority is not clearly stated. It is not clear that all courts understand the power, and it is not clear that it is used as often as it would be if made explicit. The lack of any explicit provision may make the power seem more exotic than it is.

An alternative might be to add this provision to Rule 26(c)(2), so that a protective order specifying the "terms and conditions" of discovery could include cost-bearing terms. The Rule 26(b)(2) context, however, provides ready-made criteria that seem appropriate to the purpose. The (b)(2) conditions -- the item (i), (ii), and (iii) determinations that justify a limitation -- must be coupled to the limitation.

Another alternative was suggested. Judge Schwarzer has suggested that since the most frequently cited source of unduly expensive discovery is document production, the cost-bearing principle should first be adopted as part of Rule 34. Although it may prove awkward to draft a Rule 34 provision that seeks to define the "exceptional" or "complex case," the purpose would be to reach the cases that involve large burdens of document search and retrieval with little prospect of benefits reasonably proportioned to the burdens. It remains true that it is very easy to impose enormous document production costs at little cost to the demanding party. One of the complaints voiced about document discovery, indeed, is that some litigants do not even bother to read all of the documents whose production they have demanded.

Concern was expressed that if a Rule 34 approach were taken, it might seem to exclude by implication the cost-bearing authority now found in Rule 26(c). The Committee Note will have to make clear the intention to emphasize the power as particularly useful in document-production cases, while retaining it as a general matter under Rule 26(c) as well.

In addressing the Rule 34 proposal, it was noted that it is not proper to characterize either recommendation as cost-sharing. All that is involved is the power to insist that a party making a demand for discovery that lies at the margin of reasonableness pay part or all of the costs of responding. Discovery should not afford a carte blanche to impose staggering costs on other parties. Civil Rule 45(c)(2)(B) has made clear that nonparties are to be protected against the costs of producing documents in general terms. Parties deserve similar protection against demands that, although within the Rule 26(b)(1) scope of discovery, seem excessive.

The subcommittee moved adoption of Judge Schwarzer's Rule 34 version, including references to both Rule 26(b)(2) and Rule 26(c). The motion was resisted on the ground that the original subcommittee version was better. Cost-bearing protection may be useful against such events as distant depositions -- a party who wishes to take a marginally useful deposition in a distant place might be ordered to pay another party's travel costs, for example. The general approach, moreover, avoids the difficulty of ensuring against undesired negative implications that cost-bearing is inappropriate outside Rule 34 discovery. The subcommittee proposal, further, explicitly requires that the court make one of the Rule 26(b)(2) determinations as a foundation for ordering one party to bear another party's costs. The Schwarzer proposal, in addition, requires the court to make an advance estimate of compliance costs, a tricky concept to manage.

The Rule 34 approach was again championed on the ground that it addresses the most common source of complaint about excessive discovery. This is the problem everyone continues to talk about. Further drafting can establish a clearer link to Rule 26(b)(2) and require its determinations. There is a similarity between this proposal and reforms contemplated in England. The rule is likely to be invoked only in cases that involve parties able to bear the discovery costs that may be imposed, or who at least are represented by firms able to bear the costs. It was suggested that the Committee Note should say that the cost-bearing power should be exercised only in cases involving large document volumes.

The original subcommittee proposal to adopt a general cost-bearing provision in Rule 26(b)(2) failed by 4 votes for and 7 votes against.

A proposal to add cost-bearing to rule 34 was adopted by 10 votes for, 1 vote against.

Drafting the Rule 34 approach remains to be done.

Judge Schwarzer's proposal was to add a new paragraph to Rule 34(b), following the present second paragraph:

On motion of the responding party, made in accordance with Rule 26(c), the court shall, when appropriate to implement the provisions of Rule 26(b)(2), determine the estimated cost of responding to a request and impose all or part of the cost on the requesting party.

Three alternatives were considered. Two of them would add a new sentence at the end of the second paragraph in Rule 34(b): "On such a motion, the court shall limit the discovery, or require the moving party to pay part or all of the reasonable expenses incurred by the responding party, as appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." The second alternative omitted the reference to limiting discovery: "On such a motion, the court may require the moving party to pay all or part or all of the reasonable expenses incurred by the responding party, as appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." The third would add a new paragraph following the second paragraph of Rule 34(b): "On motion by the responding party under Rule 26(c), the court shall limit the discovery in accordance with Rule 26(b)(2)(i), (ii), or (iii), or require the party submitting the request to pay part or all of the reasonable expenses incurred by the responding party."

Each alternative repeats Rule 26(b)(2), a problem not encountered when cost-bearing is incorporated in Rule 26(b)(2), and in the same way each might seem to negate by implication the exercise of the same power as to other forms of discovery.

A preference was expressed for the third alternative because it expressly ties cost-bearing to Rule 26(c) as well as Rule 26(b)(2). It requires a Rule 26(c) motion, freeing the issue from confusion with the motion-to-compel practice. The Committee Note can say that there is no negative implication as to cost-bearing incident to other forms of discovery. And it also can note that the explicit provision has been adopted in Rule 34 because document production has been the most frequent source of problems.

It was suggested that the drafting would better show that the court can both deny some part of the document demand and order cost-bearing as to other parts if it read: "the court shall, in accordance with Rule 26(b)(2)(i), (ii), or (iii), limit the discovery or require the demanding party to pay * * *."

Another suggestion was that the first two alternatives could tie the cost-bearing remedy to the objection process in Rule 34(b). The second paragraph requires a responding party to state that inspection will be permitted or to object, and requires that the reasons for objections be stated. It should be possible to draft the rule to implement the general discovery-enforcement structure that requires the demanding party to assume the moving burden. This can be accomplished by providing that one ground for objection is that discovery should be limited, or cost-bearing ordered, under Rule 26(b)(2). This approach has the advantage of incorporating the explicit Rule 37(a) motion procedure. The demanding party must first attempt to confer with the objecting party, and then must move to compel. An approximate version might be:

* * * The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. An objection may include an assertion that discovery should be denied under Rule 26(b)(2) or that the principles of Rule 26(b)(2)(i), (ii), or (iii) [and Rule 26(c)] should be implemented by an order that the party submitting the request pay part or all of the reasonable expenses incurred by the objecting party. The party

submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

The Committee Note would make it clear that the court can order production of some items, bar production of others, and condition production of still others on payment of part or all of the reasonable production costs.

It was moved that the cost-bearing principle be implemented by adding a new third paragraph to Rule 34(b), beginning: "On such a motion, or on motion by the responding party under Rule 26(c), the court shall, in accordance with Rule 26(b)(2)(i), (ii), or (iii), limit the discovery or require the requesting party to pay part or all of the reasonable expenses incurred by the responding party." The Note could say that the authority exists now; it is not intended to imply any limit on the same power as to other discovery methods. It might be illustrated by referring to distant depositions, or depositions beyond the number that seem reasonable for the case. This emphasis will protect against the fear that because defendants often have to bear the burden of document discovery, this proposal is intended primarily to protect defendants. But it should be emphasized that special problems seem to arise in "big documents cases."

The Committee voted unanimously to adopt a Rule 34 cost-bearing principle, on terms to be drafted by the Reporters and submitted to the Committee for review by mid-April.

Discovery Moratorium

Rule 26(d) was amended in 1993 to provide that a party may not seek discovery from any source until the parties have met and conferred as required by Rule 26(f). The proposal to reduce the scope of initial disclosure to supporting information raises the question whether the moratorium should be abandoned. There is less reason to defer the beginning of discovery as initial disclosure provides less of the information that inevitably will be sought. Deletion of the moratorium would require amendment of Rule 26(d), and changes in Rules 30, 33, 34, and 36 that would restore the timing provisions deleted by the 1993 amendments. The subcommittee seemed to favor this approach at the Santa Barbara meeting. But the Rule 26(f) conference remains, and the purpose of the conference in part is to discuss and agree on a discovery plan. It does not seem to make much sense to allow what may be substantial discovery before the parties ever begin to confer and plan.

Support for abandoning the moratorium was found in the lengthy delays that may arise from postponed service and then awaiting the Rule 26(f) conference and scheduling conference. Courts should not deceive themselves as to the extent of influence they exert through the scheduling conference. Discovery continues to be managed by the lawyers, for the most part without court supervision. The moratorium made sense as a quid pro quo for initial disclosure of adverse information. But if initial disclosure is reduced to self-serving information, it becomes more important to get discovery launched as soon as possible. The moratorium has value as a means of delaying discovery while motions to dismiss are considered, but more direct means are better for this purpose. The moratorium may discourage plaintiffs from starting out fast; deleting it may balance the package of discovery changes.

Support for retaining the moratorium was found in the integral role it plays in the scheme of disclosure and Rule 26(f) conference. "If we are to have disclosure at all, there should not be willy-nilly discovery first." Lawyers can stipulate out of the moratorium if prompt discovery is needed, or simply accelerate the Rule 26(f) conference.

The view was expressed that it really makes no sense to retain any form of initial disclosure and Rule 26(f) conference if they are to be preceded by substantial discovery. The disclosure of supporting information will seldom have any function in this setting. And early discovery would defeat the very purposes of a conference

designed to discuss settlement, focus the issues for discovery beyond the often vague contours of notice pleading, and develop a plan for coordinated and effective discovery.

A motion to retain the Rule 26(d) discovery moratorium was adopted by unanimous vote.

Time Limit on Document Production

The subcommittee noted that proposals have been made to establish a presumptive backward time limit for the scope of document production. The nature of the proposals is illustrated by a formulation that would require that good cause be shown to secure production of documents created more than seven years before the conduct, transaction, or occurrence giving rise to the litigation. Because these proposals came to the subcommittee after its January meeting, it offered no recommendation.

The concept of establishing a presumptive temporal limit on the scope of document production was found interesting. It was agreed that any specific time period chosen for a rule must be, in one sense, arbitrary. There are no data to support a seven-year period rather than a period of six years or eight years. Nor are there data to support distinctions among different types of litigation, to suggest, for example, that employment discrimination cases deserve a longer or shorter presumptive limit than product liability cases.

The Committee agreed that more work must be done to develop and support this concept before a decision can be made whether to recommend it for adoption. The question was remanded to the subcommittee for further work.

Discovery Time Cut-Off

Following the recommendations of the Judicial Conference in reporting on experience under the Civil Justice Reform Act, the Committee has studied the desirability of revising the rules that relate to the time allowed to complete discovery and to the process of setting a trial date. Rule 16(b) now requires that the scheduling order set a time for completing discovery, and provides that the scheduling order may set the date for trial. The district court has ample power to begin case management by setting firm dates for concluding discovery and for trial. The question is whether the rules should be made more specific, setting out a presumptive period for completing discovery and a presumptive trial date.

The RAND report on CJRA experience emphasized that time to disposition can be reduced, without increasing costs, by a combination of early judicial management that sets an early discovery cut-off and an early and firm trial date. Case-management practices differ among courts, however, raising the question whether the national rules should specify periods for completing discovery and trial dates. Any specifications must necessarily be presumptive only, not mandatory -- some cases present special needs that cannot be met within the periods that are satisfactory for most cases, and some courts have docket problems that preclude adherence to a rigid trial schedule set by national mandate.

The subcommittee report began with the suggestion that the enduring problem is whether to "decouple" discovery completion from trial date. The Committee has recognized throughout its study of these questions that it is not feasible to set even a presumptive trial date by national rule. Some federal districts are burdened with heavy criminal dockets that, in part because of speedy trial requirements, would make unrealistic any attempt to set a firm trial date during the early stages of a civil action. But it is agreed on all sides that it would be a mistake to mandate a discovery cut-off without any reference to a realistic trial date. A lengthy period between the conclusion of discovery and trial is regarded as at best costly, and at worst as an impediment to effective trial.

With this caveat, the subcommittee presented three options. One does not address trial dates, but directs that discovery be completed within a specified number of days. This proposal does not advance any recommendation for the actual number of days to be specified; the FJC study finds that 6 months -- 180 days -- is the mode. The second proposal requires that the Rule 16(b) scheduling order set a date for trial -- the first alternative in this proposal would specify a still undetermined number of days after the date set to complete discovery, while the second alternative would only require that the trial date be set a reasonable time after the date set to complete discovery. The third proposal simply requires that the scheduling order set a date for trial.

Discussion began with the observation that additional rules may not be the best approach to these problems. The issue is one of case management. The Committee on Court Administration and Case Management and the Federal Judicial Center can work to foster sound case-management practices, including early discovery cut-offs and early and firm trial dates.

Thomas Willging reported that the FJC study could not duplicate the RAND findings on the effect of a discovery cut-off. No correlation with cost or delay was shown by this study.

It was observed that for many years, lawyers and judges have believed that cost and delay can be reduced when the court sets an early trial date "carved in stone." The difficulty is that some courts simply are not in a position to do this.

Doubt was expressed as to the universality of the benefits gained by early and firm trial dates. In some complex cases, lawyers find that they need to gather information through discovery before they are able to make realistic assessments about the best means of case management and possible settlement. The Rule 16(b) conference is too early for realistic consideration of a trial date for these cases. Other types of cases may present different problems. In personal-injury actions, for example, trial should not be scheduled until the plaintiff's condition has stabilized. And for the same reasons, it would be wrong to cut off discovery before the condition is stabilized.

The impact of heavy criminal dockets was again noted. And it was stated that it is difficult to make accurate early estimates of the time needed to decide the dispositive motions that commonly follow completion of discovery. Some courts, in addition, find it helpful to order alternate dispute resolution efforts when a case is not fully resolved on post-discovery motions. Again, the time required cannot be predicted at the outset of the action.

A more direct view was that a national rule directing that a firm trial date be set in all cases would be a fiction in many courts. It would be a mistake to mandate something that cannot be done.

These concerns led back to the view that it is irrational to establish a specified time for completing discovery that is severed from a firm trial date. The best that might be done is to require an "on-or-about" trial date; the Committee should consider whether this alternative would have sufficient benefit to justify its vagueness. Or Rule 16(b) might be amended to require that a trial date be set at the beginning when it is feasible to do so, but this would be a minor variation on the present Rule 16(b)(5) provision that makes the trial date a permissive scheduling-conference subject.

Discussion turned to the proposition that there may be more than one pretrial conference, particularly in complex cases. Some judges find it helpful to schedule a routine second conference just to make sure that the lawyers do not forget about a case in the press of other work. Cases that have multiple Rule 16 conferences are particularly suited for working toward a firm trial date after the first conference.

The Committee concluded that present Rule 16 should not be amended. The most effective response to the findings in the RAND report -- remembering that the FJC study could not replicate them -- is to encourage the Committee on Court Administration and Case Management and the Federal Judicial Center to emphasize in training programs and other efforts the values of early case management, early discovery cut-offs, and early and firm trial dates.

Privilege Waiver

The subcommittee has received repeated suggestions that great costs are incurred to avoid inadvertent waiver of privileges in cases that involve production of vast numbers of documents. Some lawyers have noted that they achieve an uncertain measure of protection by stipulating to protective orders that allow preliminary examination of responsive documents on terms that provide the preliminary examination is not production of the documents and that the producing party does not waive any privilege. The examining party then specifies the documents it wants to have produced, and the ordinary privilege-assertion process is resumed. This process can substantially reduce the costs of reviewing documents that are not obviously privileged. The need for such review is that inadvertent disclosure of a document that proves privileged on detailed factual inquiry and fine legal analysis may waive the privilege as to many documents that obviously are privileged. This process seems to work when the parties trust each other. But it is not at all clear that a stipulation of the parties can protect against waiver arguments by nonparties.

The subcommittee prepared a model for consideration. The model, with a variation advanced in a footnote, would establish a new mode of responding to a Rule 34 request to produce. Rather than produce or object, the response would be to allow initial examination. The responding party could withhold from the initial examination any documents within the scope of the request, complying with the "privilege log" requirements of Rule 26(b)(5). Allowing initial examination would not waive any privilege. After the initial examination, the requesting party could specify the documents still requested. The ordinary Rule 34 process would resume at that point.

It is not clear how many lawyers believe that a process like this would be useful. Some support was offered at the Boston College conference, and substantial interest was expressed at the earlier San Francisco meeting. Strong interest was shown at the Litigation Section summer 1997 meeting. Even if stipulated protective orders work to reduce the costs of document review, they do not provide clear protection.

Skepticism was expressed on various grounds. One view was that no able lawyer would allow a preliminary examination without undertaking a review as careful as the review required to respond directly to a demand to produce. Another view is that there are doubts whether even a preliminary examination rule designed to limit the effects of a federal procedure is within the scope of the Enabling Act. 28 U.S.C. § 2074(b) provides that rules that modify a privilege can take effect only if approved by Act of Congress. Many privilege issues in federal court are governed by state law; there may be "Erie" questions about a federal rule that mollifies a state waiver rule.

The committee agreed that the subcommittee should study these issues further.

Number of Depositions

Rule 30(a)(2)(A) was added in 1993 to establish a presumptive limit on the number of depositions. Court permission must be obtained if a proposed deposition would result in more than 10 depositions being taken under Rule 30 or Rule 31 by plaintiffs, by defendants, or by third-party defendants. The FJC study shows that most cases involve far fewer depositions than this. If most cases need less discovery, it may be desirable to reduce the presumptive number. The purpose would be to increase the number of cases that are forced into judicial

discovery management. This would enhance the model that looks toward a three-stage discovery procedure: initial disclosure is followed by party-managed discovery within a reasonably narrow core that meets the needs of most cases. More burdensome discovery is to be controlled by the court as well as the parties, to protect against the occasional excesses that continue to give rise to dissatisfaction with the discovery system.

Despite the attraction of this possibility, it was noted that there has not been any protest that 10 depositions "per side" is too many. There are significant numbers of cases that deserve this number. The fact that most cases are completed with far fewer depositions tends to support the conclusion that the stated limit has not encouraged parties to take more depositions than they otherwise would.

It was agreed that no action should be taken now to limit the number of depositions set in Rule 30(a)(2)(A) and the parallel provision in Rule 31(a)(2)(A).

Rule 26(c)

The possibility of amending Rule 26(c) has been on the Committee agenda for several years. The topic first arose in response to bills that reflected concern that discovery protective orders may prevent public access to information that is important to protect public health and safety. Throughout the period of Committee study and public reactions to published proposals, the Committee was unable to find any persuasive evidence that present practice in fact defeats public access to such information. The proposal published in September, 1995, was designed to capture the good practices that are generally followed so as to ensure that all courts do the same wise things. The power to modify or dissolve a protective order was made explicit. It was provided that modification or dissolution could be sought by a nonparty, and that the test for intervention for this purpose does not require the showings required to intervene as a party. Modification or dissolution would be available to protect public interests, including public health or safety, and also would be available to relieve the burden of duplicating discovery efforts in separate litigation. After considering the testimony and comments on this proposal, the Committee concluded that there was no urgent need for action and carried the proposal forward for further consideration as part of the broad discovery project.

As the discovery project has unfolded, the Committee again has found that richly experienced lawyers, from all fields of practice, find no need to change present protective-order practice. At the Boston College conference, plaintiff and defense lawyers alike seemed to agree on this.

Further discussion expressed concern that when the Judicial Conference returned this proposal for further study, some members may have misunderstood its reach and effect. Even that possibility was not found a ground for renewing the proposal, however, given the lack of apparent need for present amendments. The Committee voted unanimously to terminate consideration of the 1995 Rule 26(c) proposal.

Although the Committee does not believe that there is any need to change protective-order practice, the Committee recognizes that some members of Congress believe there is a need. Legislative proposals will continue. As with other matters, there is reason to regret the difficulty of integrating the benefits of the Enabling Act process with the strengths and direct-action capacities of the legislative process. The Committee remains willing to study these questions further if new information becomes available -- remembering that the Federal Judicial Center did a sophisticated and helpful study at the Committee's request -- and to provide support by other means if Congress finds that desirable.

Technical Amendments

Subcommittee recommendations for technical amendments in the discovery rules were adopted without extensive discussion.

Rule 30(d)(1) would be amended to delete the potentially confusing reference to "evidence," and to make it clear that nonparties as well as parties are bound by the rules limiting instructions not to answer: "(1) Any objection ~~to evidence~~ during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person ~~party~~ may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~on evidence~~ directed by the court, or to present a motion under paragraph (3).

Rule 30(d)(2) would be amended to conform to the proposal to limit the time allowed for taking a deposition. The second sentence would also be divided out, creating a new paragraph (3), and revised to make it clear that sanctions may be imposed for any impediment, delay, or conduct that frustrates fair examination of the deponent.

Rule 37(c)(1) would be revised to apply sanctions not only to a failure to supplement initial disclosures as required by Rule 26(e)(1), but also to a failure to supplement a discovery response as required by Rule 26(e)(2).

A number of discovery rules will be amended to conform to the provisions that reestablish national uniformity, deleting the option to depart by local rule.

It was decided not to do anything about the potential uncertainty created by the 1993 amendments as to discovery of liability insurance. Until 1993, the rules expressly included liability insurance within the scope of discovery. This provision was added because it was not obvious that insurance coverage is relevant to the subject matter of an action or may lead to the discovery of admissible evidence. The 1993 amendments made insurance coverage one of the items covered by initial disclosure and deleted the scope-of-discovery provision. The uncertainty arises in cases that are exempted from initial disclosure. Under the 1993 framework, the uncertainty arises most obviously in districts that have opted out of initial disclosure by local rule. Under the proposed amendments, the uncertainty will arise most obviously in cases that are exempted from initial disclosure by the "low-end" exemption. There is no indication, however, that this potential uncertainty has created any difficulty. The earlier rule made it clear that liability insurance coverage is within the scope of discovery. The continuing provision for initial disclosure establishes the same terms and limits, and inevitably must be followed in defining the scope of discovery for cases exempted from initial disclosure. It does not seem worth the complication to craft a rule that removes insurance coverage from the disclosure exemptions that otherwise might apply.

Rule 5(d)

In 1978, the Advisory Committee published a proposal to amend Rule 5(d) to bar routine filing of discovery materials. The published proposal read:

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings.

This proposal was put aside in favor of present Rule 5(d), which provides that the court may order that discovery materials not be filed. The Ninth Circuit Judicial Council study of local rules found that many districts in the Ninth Circuit have local rules that bar filing. Many other districts around the country have similar rules. The Ninth Circuit Judicial Council has recommended that Rule 5(d) be amended to allow adoption of such local rules, which now seem invalid because inconsistent with Rule 5(d).

The 1978 proposal was supported by cost concerns. One set of costs is incurred by courts that must find means of storing everything that is filed. Another set of costs is incurred by the parties who must pay for copies to be filed. It was withdrawn, however, in face of expressed concerns that nonfiling defeats public access to information that may be of public interest. Now a legion of local rules have done what the Advisory Committee was not willing to do twenty years ago. This widespread experience with the costs of filing may of itself provide strong support for reconsidering the 1978 proposal.

In addition, there are particular difficulties caused by developing discovery technology. Rule 30(f)(1) has been amended to provide that the officer presiding at a deposition shall either file the transcription or recording with the court, or shall "send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it * * *." This provision seems inconsistent with Rule 5(d). The reference to "recording" obviously reflects burgeoning audiotape and videotape means of recording depositions. The burdens that would be imposed on district courts obliged to make such recordings available for public "inspection" could be considerable.

The obvious direct response to the Ninth Circuit Judicial Council recommendation would be to propose that Rule 5(d) authorize local rules that bar filing. But there is no apparent reason why local variations are appropriate. There should be a uniform national rule, one way or the other. A motion was made to propose adoption of the 1978 proposal.

Discussion of the 1978 proposal noted that it would provide for filing when discovery materials "are used in the proceedings," so that they must be filed if used to support summary judgment or other motions. It says only that materials "need not" be filed, so that a party who prefers to file may do so. Perhaps most important, the proposal reflects what actually is being done. Even apart from local rules or specific court orders, there are indications that the apparent filing requirement for deposition transcripts is routinely ignored by many lawyers in many districts -- perhaps with the support of amended Rule 30(f)(1).

A motion to propose the 1978 proposal was adopted by unanimous vote.

Discussion of the Discovery Subcommittee report concluded with thanks and applause for the Subcommittee, and particularly for Judge Levi as chair and Professor Marcus as special reporter.

Federal Rules of Attorney Conduct

Professor Coquillette introduced the Standing Committee's study of the rules that govern attorney conduct in federal courts. The origins lie in the 1987-1988 concern of Congress with local rules, which led to legislation tightening the rules that limit local rules. Congress saw local rules not only as confusing to lawyers, but also as circumventing the role of Congress and the Enabling Act process.

The Local Rules Project helped to reduce the number of local rules. Then the Civil Justice Reform Act fostered a proliferation of local practices. Now the pendulum is again swinging the other way -- as shown by Judge Wilson's proposal at the last Standing Committee meeting that an absolute number limit should be imposed on local rules. The American Bar Association Litigation Section has launched a local-rules project to study the problems.

There are many local rules on attorney conduct. Many of them are inconsistent. This topic was viewed as too sensitive to approach during the first stages of the Local Rules Project. The early stages focused on numbering systems and eliminating local rules that are inconsistent with the national rules.

In 1995, acting under the Standing Committee mandate to maintain consistency, Judge Stotler asked Professor Coquillette to undertake serious studies of the rules regulating attorney conduct. The resulting studies are brought together in the Working Papers on the rules of attorney conduct. They show a wide variety of approaches among the different districts. One federal district has adopted the 1909 ABA Canons of Professional Ethics. Some follow the Code, including districts in states that have adopted the Model Rules. The opposite phenomenon also occurs. The District of Delaware, for example, has adopted the Model Rules, while Delaware adheres to the Code. Some districts have no rules at all. Some of the no-rules districts look to both the Code and Rules for guidance. One district has its own unique set of rules. The Federal Judicial Center study shows that these differences in approach do in fact create problems.

The Standing Committee sponsored two conferences of experts on professional responsibility. They found four options: (1) Do nothing. Continue to leave these matters to control by local rule. (2) Establish a uniform federal rule that adopts for each district the current professional responsibility rules of the state embracing the district. This "dynamic conformity" model was favored by 60% of chief judges in a FJC survey. (3) Adhere to the dynamic conformity model for most issues, but establish uniform federal rules governing the core topics that occur most frequently and involve the most important federal interests. Such topics might include conflicts of interest, candor to the tribunal, the lawyer as witness, and other matters. (4) Adopt a complete system of independent federal rules.

The experts did not favor the status quo. "Chaos is growing." There are more and more local rules, and they are increasingly inconsistent. Indeed the Court Administration and Case Management Committee has recently invited the districts to create local rules to govern the conduct of lawyers used as "neutrals" in ADR systems, without suggesting model rules that might foster some measure of uniformity. The Department of Justice, however, would prefer the status quo to adoption of bad national rules.

The Conference of Chief Justices prefers the dynamic conformity model.

The Department of Justice, and 30% of the chief judges in the FJC study, prefer the third approach. The Department of Justice believes that its interests require uniform rules that meet its needs on some topics.

The American Bar Association agrees that something should be done; for now, it prefers the core rules approach.

No one favors adoption of a complete body of independent federal rules. In part this position rests on the belief that it would be a mistake to create independent federal enforcement systems.

The Standing Committee wants the advisory committees to help with the broad issues of policy: should any federal rules be adopted as a freestanding set of Federal Rules of Attorney Conduct, or should they be incorporated in each of the several sets of rules? Civil Rule 83, for example, could be amended to incorporate federal rules that could be adopted as an appendix to Rule 83. So far, virtually everyone seems to favor a freestanding set of rules.

A second policy issue requires identification of the mechanism for developing and reviewing proposed federal rules. For the moment, the Appellate Rules Advisory Committee has, with Appellate Rule 46, the only uniform national rule. Rule 46, however, is couched in terms of conduct unbecoming a lawyer; the vagueness of this term in turn has spawned many divergent local appellate rules. The Advisory Committee believes that there are few attorney-conduct problems in the appellate courts, and prefers that other committees take the lead. The Bankruptcy Rules Committee believes that bankruptcy practice should be governed by unique rules. The

Bankruptcy Code has some statutory provisions governing these matters. Bankruptcy practice, moreover, often involves cases with hundreds or even thousands of claimants-parties; the conflict-of-interest rules that work for ordinary litigation seem inappropriate for bankruptcy administration. Professor Coquillette has recommended that the Bankruptcy Rules Committee be provided the opportunity to develop proposed rules for bankruptcy lawyers. The Evidence Rules Committee does not presently believe that it has much of an independent stake in these issues. That leaves the Criminal and Civil Rules Advisory Committees as the groups that may have the most immediate interests. The question is whether they should each act independently, with such contributions as might be made by the other advisory committees, or whether an ad hoc advisory committee should be formed.

The third policy question involves the choices sketched above: should anything be done at all? If so, should the model be dynamic conformity or a core of federal rules that leaves other matters to dynamic conformity?

The ten core rules that have been drafted provide a concrete image of what the core-rule approach might be. The system has an attractive simplicity. The federal rules would be provided to each lawyer on admission to practice in a federal court. Rule 1 establishes dynamic conformity to local state law for everything not covered by Rules 2 to 10. Rules 2 to 10 provide the core. They cover approximately 85% of the issues that actually arise in federal cases. They are, however, a relatively minor portion of a complete body of rules; creation of a complete body of federal rules would add great length and complexity to reach only a small number of additional cases. Rules 2 through 9 are tightly geared to the Model Rules. This drafting choice has several advantages. It avoids the need for enormous effort by adopting a model that has been carefully worked out. The model will establish national uniformity for the federal courts, but at the same time will make federal law uniform with the law in many states. Rule 10, on the other hand, is independent of the present Model Rules. It establishes variations from Model Rule 4.2, which governs contact with represented persons. The present Rule 10 draft embodies the current discussion draft that seeks to resolve disagreement between the Department of Justice and the Conference of Chief Justices on this topic. If agreement can be reached on this issue, it will establish support for the core-federal-rules approach from the American Bar Association, the Conference of Chief Justices, and the Department of Justice.

Following this introduction, it was observed that the Advisory Committee has favored an educational approach in dealing with topics this important and complex. Professional responsibility matters have generated enormous bodies of expert thought. Bringing the Civil Rules Committee to the point of useful deliberation on the substance of specific rules will require real effort. The Committee should be able to think fruitfully about the broad issues of approach sketched by the Standing Committee. It will be much more difficult to provide cogent advice on something like the "Rule 4.2 - Rule 10" issues, which invoke competition between the need to protect genuine attorney-client relationships and the needs of law enforcement in settings that may involve attenuated attorney-client relationships.

It was asked whether independent federal rules would increase the risk that a lawyer would be punished twice for the same conduct, once in federal court and once in state court. It was noted that of course a federal court must determine for itself whether a lawyer can continue to practice in the court, and whether some sanction other than revocation should occur; and of course the licensing state has an independent interest in regulating its lawyers. This is true whether or not there are independent federal rules. It can happen that a federal court will impose a sanction and state officials will not, or that state officials will punish conduct that the federal court does not punish.

One Committee member suggested that it makes no sense to incorporate federal rules of attorney conduct into the civil rules or any other discrete set of rules. The rules will apply across the full range of attorney conduct and should be freestanding. He also suggested that it would be better to create a single ad hoc committee with representatives from interested advisory committees than to burden each advisory committee agenda with these questions.

It was asked what agencies would be responsible for enforcement if core federal rules were adopted. Professor Coquillette answered that federal courts will continue to rely in large part on state agencies. Now federal courts often refer problems to state agencies even when state rules are quite different from the local federal rules. A core-rule approach would reduce the problems because some topics would be governed directly by state law, while federal law would be identical or nearly identical to state law in many states. Simple dynamic conformity of course would eliminate the problem entirely -- state officials would be asked to enforce state rules. At the same time, federal courts almost inevitably would have their own procedures for determining whether to suspend or revoke the privilege to appear in federal court. "Study 7" in the work papers is consistent with this expectation.

The core-rule approach was challenged as involving problems of federalism. Much of the impetus for nationally uniform core rules derives from the "Rule 4.2" position of the Department of Justice. The Department wants to immunize its attorneys from state enforcement, but state enforcement is the norm for matters of attorney conduct. And these matters are further complicated if there is a federal rule that favors criminal investigators -- joint task forces are common, and the federal rule will encourage the state participants to relinquish to the federal participants investigation techniques that are forbidden to the state participants.

The Conference of Chief Justices is concerned that the core rule approach, by superseding local rules, "defederalizes" the traditional role of the states.

This federalism concern was balanced by the observation that many districts now have rules that resemble the proposed core rules. Others have rules that depart further from state practice. The core rules would make for a uniform national law that presents a political problem more in dealing with the attachments of district courts to their local rules than in dealing with state interests. The core federal rules system would bring federal law closer to state practice, not draw it further away.

Returning to the process question, it was suggested that an ad hoc advisory committee, established with perhaps 2 representatives from each of the interested advisory committees, would make sense. It would be possible for the Civil and Criminal Rules Advisory Committees to cooperate in separate efforts, but the task would be a heavy load on their dockets. Probably it would be a mistake for each advisory committee simply to abdicate any interest in these problems.

Concern was expressed about the seeming willingness to allow the bankruptcy courts to operate under separate rules. There are, to be sure, special problems in bankruptcy practice. Ordinary conflict-of-interest rules may make it difficult to provide non-conflicted representation for all creditors. But bankruptcy matters often return to the district court; it would be better to have a single set of rules for the district courts. The American Law Institute considered requests for special bankruptcy rules in developing the Restatement Third of the Law of Lawyering, and put these issues aside. To the extent that special rules are required for bankruptcy, they should be incorporated directly into the core rules. Any other approach will detract from the moral force of the core rules. Special treatment may indeed be deserved for some bankruptcy issues. One illustration is provided by a local rule that allows a person initially appointed as mediator to undertake representation of a party if the court approves -- the rule seems necessary because it may be impossible to foresee the parties that may become involved at the time bankruptcy proceedings begin.

Strong support for the core-rule approach was voiced from the perspective of an attorney who regularly practices in many different federal districts. A single and uniform set of federal rules would be very helpful. The local rules are not good. And it would be a mistake to incorporate these rules separately into the different bodies of rules. They should be a single, stand-alone set of Federal Rules of Attorney Conduct.

Discussion of an emerging preference for the core federal rules approach, adopted as a formally separate set of Federal Rules of Attorney Conduct, led to reconsideration of the "Rule 4.2 - Rule 10" problem. The Rule 4.2 problem was seen as still dynamic, and such an important element of the core rules that approval of this approach might seem premature. Support also was voiced for the simple adoption of local state rules -- the core approach still omits much more of the Model Rules than it embraces. It is too early to make the choice between simple dynamic conformity and adoption of core rules to supplement dynamic conformity on issues outside the core rules.

Professor Coquillette summarized the issues by observing that the Standing Committee does not want this Committee to remain aloof from the attorney-conduct rules problems. Participation through an ad hoc committee would be desirable if that is the most effective means open to this Committee. Time pressure is not intense. The Bankruptcy Rules Committee will need time, and should be given at least a year. No final answers should be reached until the Bankruptcy Rules Committee has reached its own recommendations. The American Bar Association, moreover, has established an Ethics 2000 Committee that will consider state-federal issues.

A motion to recommend adoption of freestanding rules, and to approve participation by naming delegates to an ad hoc committee, led -- without a vote -- to a consensus conclusion on several points. Any federal rule or rules should be adopted in a form that is independent of any of the existing sets of rules. The Committee does not want to choose yet between simple conformity to local state practice and conformity supplemented by specific federal rules on core subjects. There is a sense that any special rules for bankruptcy cases should be incorporated into the body of rules adopted for all other proceedings. Participation through an ad hoc committee seems desirable. There is no wish to take sides on the "Rule 4.2" debate.

Service and Answer Time in Actions Against Federal Employees

The Department of Justice has proposed amendments to Rules 4(i)(2) and 12(a)(3) for actions brought against an officer or employee of the United States sued in an individual capacity. Rule 4(i)(2) would be amended to require service on the United States as well as the individual employee. Rule 12(a)(3) would be amended to allow 60 days to answer.

These questions arise when a United States officer or employee is sued in an individual capacity for acts or omissions connected with the duties of office or employment. The United States frequently provides representation for the defendant, and in appropriate circumstances may be substituted as the defendant. It is important that it be served at the outset, so that it knows of the litigation and can decide what course to follow. It also is important that sufficient time be allowed for these purposes; the 60-day period allowed in actions brought against the United States, or against an officer in an official capacity, is appropriate.

Two questions were addressed: Whether these changes are desirable, and which of several alternative formulas should be used to describe the individual-capacity claims reached by these changes.

It was asked what special interests of the federal government justify according treatment not offered to state governments, or to other large organizations. Many actions are brought against state employees on claims that arise out of their state employment, and states often have interests that parallel the interests asserted by the federal government. Many of these actions against federal employees, moreover, are ordinary lawsuits. The underlying conduct and the legal theories are no more complex than those involved in many other actions.

These questions led to the observation that the Civil Rules began with drafting by the Department of Justice, and

in the beginning contained many provisions favorable to the United States. Some of these provisions have been diluted or removed over the years. Rule 4(i)(3) has been recently amended to defeat the occasional government practice of seeking dismissal for failure to meet technical requirements for serving multiple government bodies. Some plaintiffs still were losing cases simply because they had not served enough different people. If the proposed changes are adopted, Rule 4(i)(3) should be further amended to ensure that failure to serve the United States under proposed Rule 4(i)(2)(B) does not defeat the claim.

These doubts were met by the observation that in fact the Department of Justice has found that it really needs notice at the beginning and 60 days to answer. That is what it takes to get the job done. The Federal Employees Liability Reform and Compensation Act of 1988 often leads to certification that an employee was acting within the scope of office or employment and substitution of the United States as defendant. The United States needs at least as much time to respond to these cases -- the review and certification decision add to the time requirements, and there is no reduction in other time needs.

It also was noted that some federal courts routinely provide that in § 1983 actions against state employees, service must be made on the state attorney general's office, and automatically grant extensions of time to answer.

Turning to drafting questions, it was noted that some means should be found to ensure that the rules reach actions against former employees as well as current employees. It was suggested that thought be given to adding "agents" to the list of defendants, since some government agents are not officers or employees of the United States. It was decided that it is better not to raise the complications that might follow an addition of "agents," at least until some actual problems arise on this score. It was agreed that the Committee Note should point out that the purposes of the rule reach former employees as well as current employees.

The most important drafting question turns on the words used to describe the connection between the claim and federal employment that justifies the requirement of service on the United States and a 60-day answer period. The mere fact that a federal employee is a defendant is not sufficient. Three phrases were proposed: that suit be for acts or omissions "occurring in connection with the performance of duties on behalf of the United States"; "arising out of the course of the United States office or employment"; or "performed in the scope of the office or employment."

Although the "scope of employment" language derives from the Federal Employees Liability Reform and Compensation Act of 1988, it won little support. It was found too narrow, and to risk moving the scope-of-employment determination to the initial stages of the litigation.

Initial support was voiced for the "arising out of the course of the * * * employment" formula. The formula seems borrowed from the common phrases used in workers compensation statutes. But it also is used in a variety of procedural rules -- familiar examples include Civil Rules 13(a) and 15(c). It does not require a technical determination of the scope of employment. It has the advantage that it is novel in this setting, and thus can be construed to adapt these rules to the evident lessons of accumulating experience in application.

Support also was voiced for the "connection with the performance of duties" phrase. It is even more obviously open-ended and functional than the "arising out of" phrase. It has the advantage of lacking any obvious analogy to developed areas of technical law, freeing courts and lawyers from the need to articulate the reasons why precedents under compensation laws or other procedure rules may not provide suitable guidance in this setting.

It was asked whether "color of law" should be adopted as the test. An earlier draft was written in terms of acts "under color of federal office or employment." This phrase was rejected because "color of employment" is a new term, and one that might be difficult to cabin. "Color of office" is classically used to include acts made possible by an officer's official position, even though there is no arguable legal justification. Color of employment might be read in similar and perhaps undesirably broad ways. An example was offered of a law-enforcement employee who, while off duty, uses an official badge to perform a robbery.

Further discussion emphasized the difficulty of achieving any perfectly clear language. A deliberately indefinite phrase must be used to support reasonable adaptation to the needs of marginal cases as they may arise. The Committee voted unanimously to adopt "occurring in connection with the performance of duties on behalf of the United States." It also was decided that Rule 4(i)(3) should be amended to ensure that a reasonable time will be allowed to cure failure to serve the United States.

Local Rules

The Standing Committee has asked for consideration of a proposal to amend Rule 83 to provide a uniform effective date for local rules. The draft of Rule 83(a)(1) provided for consideration would read: "A local rule takes effect on ~~the date specified by the district court~~ January 1 of the year following adoption unless the district court specifies an earlier date to meet a[n emergency] {special} need, and remains in effect * * *."

It was suggested that other local rules questions also deserve consideration. The problems caused by local rules might be reduced if requirements of numbering and filing were made conditions on validity. There may be need to determine whether senior judges are included in the "district judges" who are authorized to adopt local rules. Still other issues may arise. Professor Coquillette advised that this Committee need not reach a position in time to report to the June Standing Committee meeting. Further consideration of local rules questions was postponed to the fall meeting.

Copyright Rules of Practice

Judge Niemeyer summarized the proposal to rescind the obsolete Copyright Rules of Practice and to amend Civil Rule 65 to bring copyright impoundment within the general procedures for temporary restraining orders and preliminary injunctions. The Committee has made vigorous efforts to gain advice from intellectual property law experts, and further delay is not indicated by any reason intrinsic to the Committee process. In many ways, the time is long past for removing this embarrassing reminder of superseded statutes and procedures. At least in reported decisions, district courts seem to be acting as the proposed amendments would have them act: they assume that the Copyright Rules are inconsistent with the 1976 Copyright Act, and that due process requires modification of the impoundment procedures they specify. Rule 65 is used for guidance.

Concern has been expressed that the proposed amendments would be inconsistent with obligations imposed by international treaties to provide effective copyright remedies. In fact the proposed amendments would increase effective copyright remedies by providing a secure legal foundation for the practices now followed by district courts in any event. The fact, however, may not fully meet the concerns expressed by members of Congress. Although they understand that these proposals would add strength to domestic enforcement practices, they fear that other countries cannot be made to understand -- in part, perhaps, because they may prefer not to understand. New copyright treaties and legislation are under active consideration.

Recognizing the concerns expressed in Congress, and mindful of the importance of cooperating with Congress, the Committee decided to defer further consideration of the Copyright Rules of Practice to the fall meeting. Judge

Niemeyer will write to appropriate members of Congress to report this action.

E-Mail Comments on Rules Proposals

The Standing Committee's Subcommittee on Technology has asked the Advisory Comments to comment on a proposal to experiment with e-mail comments on published proposals to amend federal rules of procedure. The Administrative Office has established the technical capability to receive e-mail comments, and would be responsible for forwarding the comments to all advisory committee members. The proposal is that the Administrative Office also would be responsible for acknowledging each comment by e-mail, and would "make available on the Internet a generic explanation of action of the Advisory Committees in response to comments received." Because this is a 2-year experiment to determine how well e-mail comments will work, the advisory committee reporters will be relieved of the ordinary obligation to summarize comments. A reporter who finds new points made in e-mail comments, however, would be expected to point them out in providing summaries of ordinary mail comments.

Discussion of this proposal explored the possibilities of transmitting the comments to advisory committee members by email. These possibilities will be explored.

The Committee approved the recommendation of the Subcommittee on Technology.

Form 2

Form 2 has not been amended to reflect the increase in the amount in controversy required by § 1332 to establish diversity jurisdiction. The question is whether the form should be changed simply by substituting the current $75,000 amount, or whether it is better to anticipate possible future changes in the amount. It always will be difficult to predict the timing of any legislative changes that may be made, and it is awkward to have forms that are likely to remain behind statutory reality for as long as three years or even more.

It was agreed that Form 2 should be amended to include this language in the statement of diversity jurisdiction: "The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332 ~~fifty thousand dollars~~."

The Reporter will explore possible means of effecting such technical changes in the forms that do not require the full and lengthy process of the Enabling Act. The Bankruptcy Rules provide more expeditious procedures, and it may be desirable to propose similar provisions for Rule 84.

Rule 65.1

A suggestion to the Committee reflects concern that Rule 65.1 may impose unauthorized duties on district court clerks. Rule 65.1 provides that the surety on a bond given under the rules "submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served." No question has been raised as to the appropriateness of having a court clerk act as agent for the service of process. Confusion may arise, however, from the provisions of 31 U.S.C. § 9306. Section 9306 allows a surety corporation to provide a surety bond outside the state in which it is incorporated or has its principal office only if it "designates a person by written power of attorney to be the resident agent of the corporation for that district." The duties of a resident agent are incompatible with the office of district-court clerk.

The committee agreed that Rule 65.1 does not contemplate appointment of the court clerk as a § 9306 resident agent. The only rule-imposed obligation is the symbolic role as agent for service in the district, coupled with the functional command that notice be sent to the surety. The automatic appointment effected by Rule 65.1 does not satisfy § 9306 requirements, and does not of itself qualify a "foreign" surety corporation to post a surety bond in the district. The surety corporation is responsible for appointing a resident agent, and cannot appoint the district court clerk.

This conclusion seems sufficiently clear to defeat any proposal to amend Rule 65.1.

Rule 51

The Ninth Circuit Judicial Council survey of local rules has found several local rules that authorize a district judge to require submission of proposed jury instructions before trial. These rules seem inconsistent with Rule 51, which provides that requests may be filed "at the close of the evidence or at such earlier time during trial as the court reasonably directs." The Ninth Circuit Judicial Council proposes that Rule 51 be amended to authorize local rules that require earlier submission.

The Committee agreed that there is no reason why this question should be left to local rules, which will establish nonuniform practices. If earlier submission of requests is a good idea, it should be supported by Rule 51 itself.

It was noted that a proposal to amend Criminal Rule 30 has been published that would provide for instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." The Committee Note says: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57."

Courts outside the Ninth Circuit also have adopted practices requiring early submission. One judge requires that requests be filed before jury selection, apparently reasoning that this time still is "during trial."

Concern was expressed that new issues frequently arise from trial evidence, and that there should be a right to submit supplemental requests.

Although it is tempting to try to catch up with the Criminal Rules proposal -- although a Civil Rules amendment would be starting out a full year behind the Criminal Rules publication -- the Committee concluded that the question should be retained for further study. There are many other questions of Rule 51 practice that might be considered to determine whether the Rule should reflect more accurately the many practices that have grown up around its express language. It may be possible to redraft the rule to provide better guidance to parties and courts.

Civil Rule 44

The Evidence Rules Committee has raised the question whether Civil Rule 44 has become redundant to many different provisions of the Evidence Rules. Correspondence between the Reporters has resulted in a recommendation by the Evidence Rules Committee Reporter that there

is no present need to consider these questions. This Committee concluded that the topic does not merit study

unless the Evidence Rules Committee concludes that further work is appropriate.

42 U.S.C. § 1997e(g)

The Prison Litigation Reform Act of 1995 added a new provision to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(g). This statute allows a defendant sued by a prisoner under § 1983 or any other federal law to "waive the right to reply" to the action. "Notwithstanding any * * * rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint." Without a "reply," no relief can be granted to the plaintiff. The court can order a reply "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."

This statute may well supersede provisions in the Civil Rules, most directly Rules 12(a) and 8(d). Rule 12(a) seems to require an answer to the complaint, and Rule 8(d) provides that failure to deny matters alleged in a pleading to which a responsive pleading is required is an admission. It is possible to strain the language of Rule 12(a) to find that there is no inconsistency. But it might be better to amend these rules to reflect clearly the new statute.

It was pointed out that virtually every district has special procedures for dealing with civil actions filed by prisoners, and that there may be no need to add to the complexity created by the new statute and local practices.

It was concluded that the subcommittee charged with reviewing pending docket items should include these questions in its review.

Next Meeting

No firm date was set for the fall meeting. It will be important to select a date that allows the mass torts working group time to prepare a draft report to be considered by this Committee. The date may be set as late as early November.

Adjournment

The meeting adjourned with expressions of great appreciation for the fine support work provided by the Rules Committee Support Office.

Respectfully submitted,

Edward H. Cooper Reporter