MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 16 and 17, 2000

The Civil Rules Advisory Committee met on October 16 and 17, 2000, at La Paloma in Tucson, Arizona. The meeting was attended by Judge David F. Levi, Chair; Sheila L. Birnbaum, Esq.; Judge John L. Carroll; Justice Nathan L. Hecht; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Professor Myles V. Lynk; Assistant Attorney General David W. Ogden (by telephone); Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Judge Paul V. Niemeyer attended as outgoing chair. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Michael Boudin attended as liaison from the Standing Committee, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge James D. Walker, Jr., attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Judge T.S. Ellis, III, Judge Jean C. Hamilton, and Judge William W Schwarzer attended to present a panel discussion on differentiated case management, expeditious case processing, and the possibility of developing a small-claims procedure. Observers included Loren Kieve (ABA Litigation Section); Alfred W. Cortese, Jr.; Sharon Maier (ABA Litigation Section — Rule 23 Subcommittee); Jonathan W. Cuneo (NASCAT); and Fred Souk.

Judge Levi opened the meeting by introducing the new members, Justice Hecht and Judge Russell. He noted that Mark Kasanin's term of appointment has been extended, furthering the benefits of continuity provided by veteran Committee members. And he expressed appreciation for the service rendered by Justice Durham during her years as a Committee member.

Appreciation: Judge Niemeyer

Judge Levi further expressed the thanks of the Committee to Judge Niemeyer for his work as member and then chair. He noted that Judge Niemeyer had guided the Committee through many topics, including some that were contentious. Judge Niemeyer continually insisted that in all projects, both noncontentious and contentious, the Committee look beyond the technical details to consider the larger issues of policy and social interest that shape good procedure. In areas of potential danger, he saw to it that the Committee took the time necessary to become fully informed. Efforts were made to hear from as many different voices as possible. Public comments and testimony at hearings were studied carefully. Conferences were arranged. Empirical work by the Federal Judicial Center was regularly sought. The Committee emerged from the work with a solid foundation for each project. A resolution of thanks and appreciation from Chief Justice Rehnquist was read to hearty applause.

Judge Niemeyer responded by noting that the Committee's process has been satisfying and fulfilling. Among the rules launched during his time with the Committee is the class-action appeal rule, Rule 23(f). Although Congress has not yet adjourned, it seems likely that the discovery amendments scheduled to take effect on December 1 will indeed remain on schedule. Other recent work has included such long-pending projects as a package of amendments to the Admiralty Rules and abrogation of the Copyright Rules of Practice. The Committee's work has been in the finest traditions of American lawmaking. "Town meetings" were held, experts were consulted, studies were encouraged. Large numbers of alternative proposals were studied. The level of debate, discussion, and compromise has been of the highest. "Sometimes, during discussions, we came in close." When there was a close division of views, the Committee refused to act; instead it continued to work until consensus was achieved. The public hearings were very helpful — those who participated took the Committee and its work seriously, and the Committee took them seriously. When the Committee eventually came to agreement on a desirable rules change, Committee members became advocates for the change, first in the Standing Committee and by going also to the bar associations and other associations. Testimony was given in Congress, and work was done with Congressional staff. Congress showed real respect for the Committee's knowledge, approach, and work. The Judicial Conference, the final step of and Advisory Committee's direct advocacy, also took the Committee's work seriously. The Department of Justice and its members on the Committee, Frank Hunger and David Ogden, also were very thoughtful and helpful participants in the process.

Judge Niemeyer continued his remarks by noting that institutions such as this Committee thrive on tradition more than on written rules. Committee traditions account for much of the impressive quality of its deliberations and work. All of the members who have served on the Committee over the past seven years have worked hard and made valuable contributions. The Federal Judicial Center has provided strong research support, not only through the regular relationship through Tom Willging but also throughout the entire research staff. Relations with other Judicial Conference committees have worked rather well, in part because of support from the Administrative Office and particularly from John Rabiej. Professor Marcus has been very helpful, in the grandest tradition, as special reporter for the discovery subcommittee.

Service with the Committee, in short, has been a privilege and a pleasure.

Judge Levi expressed the Committee's appreciation to Susan Niemeyer for her regular participation and support in Committee activities. Professor Coquillette brought Judge Scirica's regrets for not being able to attend the meeting, and respects to Judge Niemeyer.

Rules Update

Judge Levi summarized the "pipeline" of rules proposals. Three packages of amendments are slated to take effect December 1, 2000, unless Congress acts to defer. Rules 4 and 12 deal with service and time to answer when an officer of the United States is sued in an individual capacity for acts in connection with official duties. Admiralty Rules B, C, E, and Civil Rule 14, seek to distinguish forfeiture practice from admiralty practice in response to the great expansion of forfeiture proceedings in recent years. Discovery reforms are embodied in amendments of Rules 5, 26(a), 26(b)(1), 26(b)(2), 26(d), 26(f), 30, and 37(c).

The Judicial Conference in September approved and will transmit to the Supreme Court amendments in Rules 5, 6, and 77 to deal with electronic service of papers after initial process, as well as a package that would abrogate the antique Copyright Rules of Practice and adopt a new Rule 65(f) to confirm the application of Rule 65 interlocutory procedures to copyright seizures.

New rules proposals were published for comment in August. One proposal would adopt a new Rule 7.1 on corporate disclosure, to parallel a revised form of Appellate Rule 26.1 and a new criminal rule. Amendments to Rules 54 and 58 would integrate with proposed amendments of Appellate Rule 4 to end the "time bomb" problems that have arisen when failure to enter judgment on a separate document means that appeal time never starts to run. Comments on these proposals are due by February 15, 2001. A hearing has been scheduled for January 29, 2001, in San Francisco in conjunction with hearings on proposed Appellate and Criminal Rules changes. It is too early to guess whether there will be any persons who wish to testify on the Civil Rules proposals at that hearing.

Legislative Report

John Rabiej delivered a report on Administrative Office efforts to track legislation that might affect civil procedure. Thirty or forty bills have come into this category. Congress is working toward adjournment, somewhat later than expected, and this phase of the process is difficult to monitor because omnibus appropriations bills frequently are used to enact unexpected provisions that had not been successful in more direct legislative attempts.

Concern continues to attach to discovery protective orders. A longstanding "sunshine-in-litigation" proposal was attached for a while to legislation designed to establish criminal penalties for failures to disclose product defects and recall information. The discovery provisions, however, have been removed from the bill that appears to be on the way to enactment.

There is good hope that the Judicial Improvements bill will pass. This bill includes a provision that will "sunset" the one remaining provision of the Civil Justice Reform Act.

Several class-action and attorney conduct bills bear directly

on the work of the rules committees. The House passed a minimum-diversity class-action bill, and the Senate Judiciary Committee reported out a different bill. The Senate class-action bill includes a provision that would require the Judicial Conference to make recommendations. Class-action legislation is likely to emerge again in the next Congress. There also has been active attention to attorney-conduct rules for government attorneys. Senator Leahy is sponsoring a bill that would require the Judicial Conference to report recommendations within a year with respect to contacts with represented persons, and to report within two years on other government attorney-conduct issues. Different proposals are being considered in the House, including adoption of the Rule 4.2 proposal of the Ethics 2000 Commission that would permit contact with a represented person when approved by court order. Again, if no legislation is adopted in this Congress these issues are likely to reappear in the next Congress. Professor Coquillette noted that it is this level of Congressional interest, and particularly the provisions that would direct prompt consideration by the Judicial Conference, that has stimulated the continuing work of the Attorney Conduct Subcommittee.

April Minutes

The draft minutes for the April 2000 meeting were approved, subject to correction of typographical and style errors.

Rule 23

Judge Rosenthal reported for the Rule 23 Subcommittee. The subcommittee is approaching the continuing Rule 23 project by attempting to determine whether there are amendments that are sensible and feasible, remembering the need to ensure that a seemingly desirable change will actually work in relation to the changing nature of class actions.

Much time and effort have been devoted to Rule 23 over a period of many years. Proposals were published for comment in 1996; the only one of those proposals to be adopted up to now is new Rule 23(f). Rule 23(f) already is working as hoped. Several courts of appeals have articulated the standards used to act on petitions for leave to appeal, and the courts of appeals already are beginning to use these appeals to provide greater guidance on class-certification issues. Rule 23(f) also will provide a relief valve for the pressures that can flow from grant or refusal of class certification. Rule 23(f), however, does not of itself address the many concerns reflected in the 1996 hearings and the work that led to the 1996 proposals and flowed from considering those proposals.

Mass-tort problems came to occupy a very basic role in committee work. The great pressures that flow from attempts to work through mass-tort litigation have affected Rule 23 as well as many other areas of procedure. The debates over Committee proposals were revealing — there is disagreement and real uncertainty about the means appropriate to address the dislocations

caused by mass torts.

"Consumer" class actions also have been studied. There is a great divide on the question whether these classes are appropriate. Opponents argue that the "private attorney general" concept masks efforts to win through litigation goals that cannot be won in the political process, or more simply to enrich attorneys. But supporters argue that the benefits can be enormous, both for the public good and for providing often small but still meaningful remedies to individual class members. The published proposal to allow a court considering class certification to weigh the benefits of a class victory against the burdens of class litigation withered under vigorous cross-fire from these opposing camps.

The concern to define the appropriate roles for class litigation continues. But this is an increasingly dynamic area. From 1990, there have been increasing filings first in federal courts, and more recently in state courts. This growth inspired the Committee's work, just as it inspired lawyers. But now we are hearing that many state courts are changing the practices that brought fame to some courts for "drive-by" class certifications. Statutes, court rules, and court decisions have restricted the liberal certification practices that flourished for a few years.

Another trend may have peaked and receded. Settlement classes became familiar in several substantive areas, and then an attempt was made to extend this practice to mass-tort cases. The Amchem and Ortiz decisions have cut back on mass-tort settlement classes; it is thought that these decisions have made it impossible to settle some mass-tort classes, and more difficult to settle those that do eventually settle. As settlement comes to seem less likely, greater judicial management has resulted. As part of the certification process, the parties may be asked to provide plans of the tasks and time that would be required to prepare for trial. And, if certifications to not dwindle down because settlement-only certifications are restricted, the result may be more class-action trials.

All of these questions have been illuminated by the empirical work undertaken by the Federal Judicial Center and the Rand Institute for Civil Justice.

The subcommittee has made a preliminary decision to focus its efforts on the process of class actions, not the standards for class certification. Certification standards already are perceived to be exacting. The processes of appointing counsel, making fee awards, and reviewing proposed settlements have become the central subjects. The general question is whether Rule 23 can do more to provide structural assurances of fairness.

Another development has been overlapping, duplicative class actions, and class actions that are parallel to nonclass proceedings that involve large numbers of aggregated plaintiffs. It is difficult to find means within the scope of the Rules Enabling Act to deal with the inefficiencies and unfairness that

can result from overlapping and competing class actions.

The materials in the agenda book have not matured to a stage that would support detailed discussion and revision. They are more preliminary, but designed to support discussion of the advisability of working further on these topics. The four Rule drafts address review of class settlements (but not settlement-class certification), attorney appointment, attorney fees, and appeal standing. The model notice and related forms being developed by the Federal Judicial Center raise also the question whether the notice provisions of Rule 23 should be revised. These models are intended to focus discussion, but not to exclude consideration of other possible Rule 23 revisions. Suggestions for other topics that might be developed will be welcomed.

The draft Rule 23 codifies current "best practices" for reviewing settlements. It does not attempt to restate or revise the criteria to be considered, nor does it attempt to set out a complete and exclusive list. It does not attempt to restate or revise the settlement-class teachings of the Amchem and Ortiz opinions. It seems likely that as Rule 23(f) appeals are heard and resolved, there will be a better foundation to consider whether to address settlement-class certification explicitly in Rule 23.

The settlement-review rule includes a provision that would allow class members to opt out after the terms of a proposed settlement are made known, whether or not there was an earlier opportunity to opt out and without regard to the general rule that class members cannot opt out of mandatory Rule 23(b)(1) or (b)(2) classes. This provision was developed in part in recognition of the "hybrid" classes certified under Rule 23(b)(2) that include both injunctive or declaratory relief with damages relief, but it reaches all forms of classes. There is substantial controversy and uncertainty surrounding both the proposed opportunity to opt out of the settlement of a mandatory class and the proposed requirement that a second opportunity be allowed when a settlement is announced after expiration of the initial period for opting out of a (b)(3) class. It has been protested that increased opportunities to opt out will make it more difficult to achieve settlement. But at the same time it is recognized that often successful settlements have been achieved in (b)(3) classes that have been certified at the same time as a proposed settlement is preliminarily approved, giving an opportunity to opt out after the initial settlement agreement.

Another set of problems arises from the role of objectors. What provisions should be made for discovery? Should successful objectors be awarded expenses, including attorney fees? Objections can be made for good reasons, but objections also can be made for obstruction, delay, or the hope of being bought off. It is very difficult to draft rule terms that distinguish between "good" and "bad" objectors. The draft invokes Rule 11, but this device may be both redundant and ineffective.

Disclosure or discovery of "side agreements" is another topic that has proved difficult to grasp. How can such agreements be defined? There are many kinds of understandings that may be reached, whether or not articulated, in the process of hammering out a class settlement. Some are trivial. Some are important, but only to a few class members. Further development seems desirable before this topic can be addressed by the rule.

There is a continuing demand for greater judicial scrutiny of proposed settlements. Draft Rule 23(e)(5) seeks to distill the most obvious things that have been articulated by the courts. But the list itself obviously raises the question whether it is wise to encumber the rule with so many factors. One risk of this approach is that practice may be frozen around the list. The list cannot be complete, but factors not in the list may be taken less seriously. Some or even many of the factors in the list may not be relevant to a particular settlement, but a court may feel obliged to consider and make findings with respect to each. These risks are diminished if the list is set out in a Committee Note, not in the rule, or is relegated to some other place such as the Manual for Complex Litigation. Yet the earlier hearings on Rule 23 provided advice that there is a need for greater scrutiny and guidance. And some of the factors in the list seem to move beyond things that have been clearly identified in current practice; examples are provided by the focus on plans for distributing an award to class members, and by the consideration of the reasonableness of attorney-fee provisions.

Present decisions provide little guidance on "appointment" of class counsel. The draft rule would give courts a greater opportunity to seize control at the outset. It is not clear whether this much judicial involvement is desirable. The draft also imposes severe limits on what an attorney may do on behalf of a class before being appointed as class counsel. These provisions need much more study, in face of challenges that they ignore much common, desirable, and often necessary practice. The danger of impairing class interests also may be questioned in light of the fact that the class is not technically bound by acts taken before class certification.

The class attorney appointment rule lists several factors to be considered in selecting counsel. Many have been recognized for years in addressing the effective representation requirement, and are not controversial. But there is a new one, asking whether selection of counsel can be done in a way that facilitates coordination with other actions. There are few opportunities to effect coordination by rule provisions, and this one may both prove effective and avoid the federalism concerns that surround many alternative proposals.

The attorney-fee draft presents first the question whether the rules should address this topic at all. There is a lot of sentiment to do something that will help the process of making careful awards, but there is much disagreement whether a court rule

is the proper means of proceeding. There is equally disagreement as to the factors that might be adopted. The factors included in the draft rule draw from the RAND report, and many of them focus on tying fees to the benefits actually won for class members. The draft deliberately avoids any choice between lode-star and percentage-of-recovery approaches to fee calculations. It requires disclosure of side agreements, again raising the question of defining the agreements that must be disclosed and raising also the question whether courts should be concerned at all with the arrangements for dividing the awarded fee among different lawyers.

The draft on appeal standing responds to the rule in many circuits that a class member must win intervention to have standing to appeal the judgment in a class action. The first question is whether the intervention procedure is in fact the better procedure, asserting a measure of control that will discourage ill-informed or mischievous appeals.

Clear-language proposals have regularly been made for class-action notice rules. A simple rule demand for clear language, however, may not accomplish much. Better results may flow from providing good examples. With this thought in mind, the Federal Judicial Center agreed to undertake to collect good notice examples and then to synthesize a model notice from the best examples. This work is well under way, and will continue; the current drafts are included in the agenda materials. Much good may come from making the final product available through the Center by on-line availability to lawyers, use in judicial training, and other means.

The subcommittee has a tentative but ambitious goal to develop concrete proposals for detailed consideration at the Committee meeting next April. Refined versions of the present drafts would be presented.

Following this introduction, there was a review of several features of the drafts, including items not described in the introduction.

The provision for revealing "the terms of all agreements or understandings made in connection with the proposed settlement, dismissal, or compromise" is set forth alternatively as a requirement of disclosure in the notice of proposed settlement or as a proper subject for discovery by an objector. Objections have been made as to each approach, but it also has been urged that these matters are so important that both should be adopted — a summary should be required with the notice of proposed settlement, and further discovery should be available to an objector.

The question of a right to opt out of a proposed settlement includes a wrinkle that has not been much discussed. The draft speaks of an opportunity to request exclusion from the class. Disapproval of the settlement, however, may mean that those who sought to opt out of the settlement would prefer to remain in the class. Thought should be given to providing that exclusion from the settlement means exclusion from the class only if the

settlement is approved.

The provision for discovery to aid in appraisal of the apparent merits of the class position might be revised in ways that reduce the concern that discovery will go so far as to undermine one of the principal objects of settlement. Discovery might be aimed at information "reasonably necessary to support the objections," or discovery might be conditioned on a preliminary showing of reasons to doubt the adequacy of the settlement.

The provisions on objectors include a new subparagraph, draft Rule 23(e)(4)(B), that limits the ability of an objector to settle the objections on terms that yield the objector treatment more favorable than the terms available under the class settlement. The concern is that a class member who advances objections on behalf of the class is both assuming a fiduciary duty to the class, similar to the duty of a court-recognized class representative, and is assuming powers of delay and obstruction that draw from the need or desire to conclude the settlement. If the settlement indeed is inadequate as to the class, any added benefit wrung from the class adversary should be spread over the class unless the objector occupies a distinctive position that is not fairly reflected in the class definition. These concerns are reflected in the requirement that court approval must be won. The draft is intended to require approval by the trial court, even if an appeal is pending. It may prove desirable to discuss the relationships between trial court and appellate court when the settlement is reached pending appeal: under present procedure, the objector can simply settle and withdraw the appeal. It does not seem a markedly different or untoward interference with the appeals court's jurisdiction to condition this result on approval by the trial court. The trial court is likely to be in a much better position than the appeals court to appraise the terms of the settlement.

One of the factors listed for review of a proposed settlement is the extent of participation in settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master. This factor reflects recurring suggestions that courts should play a role in structuring settlement negotiations to protect against self-serving or inadequate representation by designated class representatives and class counsel. Familiar suggestions include appointment of a class guardian, creation of a steering committee of nonrepresentative class members, use of a special master in a role somehow different from that of a class guardian, or direct judicial involvement. The Committee has regularly concluded that an attempt to graft such devices onto Rule 23 is likely to produce more confusion than benefit. But formal or informal efforts along these lines may prove valuable in particular cases. Actual use of one or another of these devices may provide useful reassurance that the settlement reflects generally held class interests.

Another of the factors would consider the probable resources and abilities of the parties to pay, collect, or enforce the

proposed settlement judgment. A settlement that seems to promise generous but illusory benefits may not be as wise as a differently structured settlement that, in the end, may prove more useful. It may prove difficult to translate this abstract concern into practice. And there is a risk that this factor will encourage sloppy consideration of the increasingly questioned "limited fund" concept, encouraging courts to accept uncritically the terms of a settlement that the parties seek to justify primarily on the ground that nothing more is possible.

The list of factors also would permit consideration of the existence and probable outcome of claims by other classes and subclasses. This factor relates to the factor that would authorize comparison to results actually achieved for others, but goes beyond it. The comparison would not be entirely one-way: it would authorize consideration of the risk that this settlement would seize for this class an unfair portion of the assets likely to be available for other claimants. The most notorious concern in this dimension relates to "futures" claimants who have not yet filed actions, and who may not yet have mature claims or even be aware that they may have claims. There are manifest grounds for concern in this direction, but at the same time it is difficult to ask a court to disapprove a proposed settlement because it is too generous to the only parties before the court.

The last factor singled out for preliminary attention was the one that authorizes consideration of rejection of a similar settlement by another court. It is difficult to preclude approval of a settlement that has been earlier rejected; further information may show that a proposal that once seemed inadequate is indeed reasonable and adequate. But perhaps some means should be attempted to strengthen this effort to defeat attempts to "shop" a settlement by successive presentation to different courts. An attempt even might be made to restrict the opportunity of a state court to approve a settlement that has been rejected by a federal court, treating disapproval as a judgment binding on the same class or a substantially identical class.

A final and distinct feature of the Rule 23(e) draft is paragraph (6), a continuation of a concept that has carried forward from early draft revisions. This paragraph would authorize the court to appoint a magistrate judge or another person to conduct "an independent investigation and report to the court on the fairness" of a proposed settlement. The purpose of this provision is to overcome the failure of adversariness that arises when the parties have joined in presenting and championing a proposed settlement. The court's agent is charged to undertake an investigation in the way that an objecting class member might do, if the objector had sufficient funds, incentive, and ability to pursue the inquiry. The potential advantage is apparent, particularly in actions that do not spontaneously yield well-financed and properly motivated class-member objectors. The potential disadvantages are equally apparent in the form of delay, cost, and the potential for recommendations that rest on an unduly

optimistic view of the costs and prospects of further litigation on the class claim. The virtue of the device in enabling an investigation that a judge could not properly undertake in the office of judge, moreover, may also be a vice — the court's role as neutral arbiter of the dispute may seem compromised when the court appoints an agent to investigate rather than to receive presentations by the adversaries.

The first question in the discussion was whether draft Rule 23(e)(6) contemplates that the investigator appointed by the court could consider all of the factors listed in draft Rule 23(e)(5) for court review. The answer was that the terms of the investigation would be defined by the court: it could be completely open-ended, but also might be confined to one or a few specific inquiries. It was further suggested that although this role is not a familiar one for courts, the device could become usefully productive in some cases.

Turning to the provisions for objectors, it was noted that there are professional objectors who "go from settlement to settlement"; "they want to be, and unfortunately are, bought off." "Their weapon is time." There is one who has filed objections in at least 20 cases in the last two years. Objecting to class-action settlements has become a cottage industry. If we guarantee discovery, there will be still more objectors. Under present practice, discovery can extend even to the settlement negotiation process if there is a showing of probable collusion. The need for discovery by objectors is much reduced by the common practice under which the settling parties make the results of their pre-settlement discovery available to the objectors. The proposals aimed at objectors may make it more — too much more — difficult to achieve settlements. The Association of the Bar of the City of New York and the Department of Justice have expressed concerns that the proposals would discourage settlements. And we do not need to do anything to encourage objectors; we have them now. As it is, objectors thrive because it is always possible to negotiate a small increment in the settlement and then point to the change as the basis for an award of fees. A settlement that provides coupons to be redeemed within six months can be modified to allow redemption within eight or nine months, and so on.

A broader perspective was taken by asking generally what the Committee is — and should be — trying to do. Over the years, it has been said that there are weaknesses in the class-action process. The question is to identify and remedy the weaknesses that are susceptible of cure. Rule 23 establishes a form of public representation; courts have a special interest and responsibility, unlike the situation when an attorney is directly responsible only to an individual client, and the client is responsible for the attorney. Who is looking after the public — either the specific "public" of class members, or the broader public that may be served when a class action is used for public enforcement purposes? Is it to be only the class attorney, who often is self-selected? Most class members do not know the class attorney. The defendant wants

peace. The result is an undemocratic process that may dispatch the claims of class members without due regard for their interests.

On this view, one thing that can be done is to improve transparency. Next, we can recognize that the court is in charge of the class attorney, and the attorney is accountable to the court. Many of the class-action bills pending in Congress reflect this view.

There is not much that can be done to elicit greater involvement by class members. Notice will not get them directly involved, but they are involved in a more attenuated sense even when they may not want to be involved. It would be better to move toward opt-in classes, but that approach is not likely to survive the Enabling Act process.

We should constantly remember that there are historic reasons for the mandatory (b)(1) and (b)(2) classes. If we take that away, we lose much of our legitimacy.

A separate rule on appointment of class counsel and fee awards, together, would be a good idea.

These remarks were met by the observation that judges have all these powers now.

The role of class attorneys was reintroduced with the observation that veterans of the class-action debates have regularly heard that class actions have moved beyond attorney representation of clients. The goal has become "fairness" in some more general sense. Continued efforts should be made to draft rules on attorney appointment and fees, and on other matters, that may improve the fairness of the process. The prospect that such proposals will encounter stiff opposition should not dissuade the subcommittee.

It was said again that courts have the necessary powers of regulation and control, but with the elaboration that it is difficult to find the support that does exist in the case law. Codification in Rule 23 will make the powers more effective. Courts are willing to take hold and assert themselves. The subcommittee should continue work on its proposals to stimulate debate and reach acceptable resolutions.

The "laundry list" of factors in draft Rule 23(e)(5) was questioned by asking whether it implies that the court should consider all of these factors in each case. A settlement effected through negotiations that do not involve anyone other than the class representatives, class adversary, and counsel may be entirely proper; does draft Rule 23(e)(5)(E) suggest that the settlement should be doubted on this score? The Rules do not often resort to laundry lists; perhaps this approach should be dropped.

It was suggested that the draft rules deal with attorney conduct, and that great sensitivity must be observed. Federal intrusion on regulation of attorneys is a "third rail" in federal-

state relations. That is why the Standing Committee has a hard-working subcommittee on Rules of Attorney Conduct. The attorney-conduct inquiry has not focused on the role of attorneys in class actions. But attorney appointment and fees are topics that are addressed by state rules. So is fiduciary responsibility to the class. There is a new body of law developing under the "fiduciary duty" label, outside the formal Rules of Professional Responsibility. The Federal Rules already address attorney conduct through such provisions as Appellate Rule 46, Civil Rule 11, and so on. But many people believe that the Federal Rules should not address attorney conduct, and care should be taken in approaching these topics.

Texas experience was noted. The courts considered these topics, and decided that they were better fit for legislation. The legislature, however, wanted nothing to do with such problems, and if anything is to be done it is now up to the courts to do it. Doing it remains a challenge. The idea that class members should be able to opt out of a (b)(1) or (b)(2) class settlement deserves skeptical attention. The long list of settlement-review factors may have unintended effects; it is difficult to control the impact of such lists. But Rule 23 is social engineering in the courtroom; courts have created the rule, and have a duty to fix it when that proves possible. The problem of professional objectors is one that deserves attention; some frame the question as pirates who prey on the other pirates involved in class litigation, but it remains true that class members should know what went into the settlement and have an opportunity to object.

The question of "side agreements" was framed by asking what sorts of agreements may be made incident to settlement. One form has been that seen in the Amchem and Ortiz cases, where counsel separately negotiated settlements of the present cases in parallel with class settlement of future claims. That process was very public, and consciously addressed. Other agreements involve such things as splitting attorney fees in ways that courts do not learn about — there is a real question whether courts should care how a total fee is divided once it has been set. Increasingly, fees are set separately under agreements that in form provide that the fees do not come out of the class recovery. But possible concerns remain that the agreement for a fee award up to a stated ceiling was negotiated in tandem with the class settlement, and that the total fee may seem excessive if part of it is shunted off to counsel who did little work and incurred little risk in relation to the allocated share. Another form of agreement may be settlement for individual class members represented by an objecting attorney on terms more favorable than general class terms, capitalizing on the costs of objection-induced delay. Other agreements may involve understandings that discovery results will not be shared with lawyers in other cases, that other class actions will not be brought or that individual plaintiffs will not be represented in related litigation [some states apparently permit such agreements]. In some litigation these agreements have been reached after an

inquiry into separate agreements was made on the record. In others, objectors have been bought off, apparently with a share of class counsel fees, but discovery has been denied as to the terms.

The general observation was made that there is no assurance that tomorrow's practice will be the same as today's practice.

A number of "picky" points were raised. The draft rules do not address the question of settlement on appeal by a class representative, a question involved in the recent Ninth Circuit decision in the United Airlines litigation. The possibility that a settlement should be evaluated for its effect on future claimants, draft Rule 23(e)(5)(H), is troubling — why should the court be concerned with more than fairness to the class before it? The expressed concern that an independent court-directed investigation under draft Rule 23(e)(6) takes the court outside ordinary judicial functions, on the other hand, is overstated; the court has to take on a nonadversary, class-protecting role in class litigation. The draft rule on attorney fees seems to authorize awards in circumstances that may involve so much substantive lawmaking as to fall outside the Enabling Act. And, more broadly, it should be asked whether it is wise to attempt to make rules when the background of practice is continually changing.

Turning back to objectors, it was observed that draft Rule 23(e)(4)(A) provides for fee awards to objectors, but does not speak to fee awards against objectors apart from the invocation of Rule 11. This should be addressed; bad objectors do exist, and mere reference to Rule 11 is not sufficient deterrence.

The Rule 23(e)(4)(B) attempt to regulate settlements with objectors, focusing on terms "reasonably proportioned to facts or law that distinguish the objector's position from the position of other class members" was questioned on the ground that the "reasonably proportioned" concept is "not crystal clear."

It also was urged that the provision for court direction of an independent investigation of a proposed settlement should be beefed up. "Sunshine, transparency" are important. A third party can be critically useful as an adversary to the joined forces of class counsel and class opponent. A "guardian ad litem" for the class is a good idea.

It was asked what information is now made public in fee applications. The answer was that usually there is a paragraph or two in the notice of proposed settlement that describes what fees may be sought. The actual applications run to hundreds of pages, providing detailed information. But interest in the information is seldom shown.

The draft rule on appointing class counsel was the next topic of discussion. The introduction of the draft began by emphasizing that the draft is a rough first pass that has not been considered at any length by the subcommittee. The very first part, subsection (a)(1), does two very different things. The first sentence states

simply that an attorney may not act on behalf of a class until appointed by the court.

The second sentence of draft (a)(1), set out in brackets, covers a substantial portion of a proposition that has proved highly controversial. In broadest form, the proposition is that no one can act on behalf of a class until the class is certified. This proposition is scaled back in the draft, but the draft still would provide that no one may conduct court proceedings on any matter related to class certification or the merits of the class claims, and no one may engage in out-of-court settlement discussions, until appointed to represent the putative class. Supporters of this approach urge that official approval is required to ensure that an attorney who seeks to represent a class is competent, does not have disabling conflicts of interest, and has at least a moderately effective class representative to supervise the representation. The dangers of pre-appointment activity are thought to be particularly great with respect to settlement negotiations, where an attorney may sell out class interests in return for an understanding as to attorney fees.

The balance of the draft, subdivision (b), would establish an appointment procedure that requires an application for appointment even if only one attorney seeks to represent the class. The information required in an application is, for the most part, similar to information routinely considered in determining whether a named class representative will, with the help of intended counsel, adequately represent the class. One part of the information identifies "the terms proposed for attorney fees and expenses"; this inquiry would legitimate, but not directly encourage, the "bidding" practices that have attracted renewed interest in recent decisions. As noted earlier, another new factor asks whether appointment of counsel who represents parties or a class in parallel litigation could facilitate coordination or consolidation to reduce the problems of parallel litigation. A separate paragraph, (b)(4), sets out alternatives that would direct either that no consideration be given to the fact that one applicant has filed the action, or that no significant weight be given to this fact.

The first comment went to attorney responsibility issues. An attorney deciding whether to file a class action may not know until the actual filing whether the action will be in a state court or a federal court. The attempt to regulate what is done on behalf of a class before filing trenches heavily on state regulation of attorney conduct in circumstances that may not yield even the eventual justification that the action has come to federal court and to generate corresponding federal interest. State chief justices dislike present local federal court rules on attorney conduct. Anything that addresses such questions as who can represent a class, fiduciary duties, and the like, invades state territory. Most states take the position that state rules bind an attorney admitted to practice in the state no matter what court the attorney may act in. This proposal should be coordinated with the

Attorney Conduct Subcommittee.

A second comment was that the rule is misdirected. It aims at all class actions, but routine class actions do not need it. There are many class actions in which no one is competing to represent the class, and no one can be induced to become a competitor.

The draft rule was defended by asking how an attorney comes by authority to represent a class. It is not enough to say that Rule 23 establishes the authority. The representative class-member client may or may not be a "real client" at all; some class representatives are recruited by, and subservient to, class counsel. But even when the class representative has genuinely and independently selected class counsel, the class representative has no authority to act for the class until the court authorizes it. The court is responsible for binding the class to representation by this attorney, and should be active in discharging its responsibility. The draft rule requires a hearing, and that is good.

It was asked whether it would help to attempt to tailor the rule more closely to the different needs of different kinds of cases. The Private Securities Litigation Reform Act, for example, establishes a procedure for selecting lead plaintiffs, who then are responsible for picking class counsel. Any rule should recognize this statutory procedure, and perhaps should simply cede to it.

From a somewhat different perspective, it was widely agreed that the factors listed in the draft subdivision (b) all are considered by courts now in determining whether to certify a class. The anticipated quality of representation by counsel is an important part of the certification decision. What, then, is added by establishing a formal procedure for appointing class counsel?

Turning back to the feature that prohibits any action on behalf of a class before appointment as class counsel, it was noted that many things are done before a certification decision. Discovery on the certification question is common. The draft seems to prohibit any of this activity before appointment. That is too rigid. Some softening, at least, is necessary.

It also was noted that particularly difficult problems will arise with respect to counsel for a defendant class. One common problem is that no one defendant wishes to be responsible for paying the incremental costs that come with representation of the class: how is it fair for a court to appoint counsel in such circumstances? How, for that matter, will the court get any application for appointment? But a quite different problem arises when a defendant is willing or even eager to provide representation for the class: how can we trust that there will be no conflicts of interest among class members, and how can we protect against them? These problems may be so difficult as to require that an attorney-appointment rule be limited to plaintiff classes. But any such limit might stir speculation that the rule rests on hostility to plaintiff classes.

Class Attorney Fees

Another draft rule would address determination of fees for class counsel. As noted earlier, it does not attempt to choose between lode-star and percentage-of-recovery methods of setting fees. For the most part, at least, this rough initial draft simply sets out factors that are familiar from present practice. But it does raise some difficult questions.

A first range of questions goes to authority to make a rule governing attorney fees. There is firm ground as to fees based on statutory provisions, when a settlement includes fee-payment terms, and when an award is made out of a class recovery. But the draft would authorize an order for payment by members of the class, or by a party opposing the class, on more open-ended terms. Payment by class members may seem particularly important with respect to a defendant class, and might alleviate the concerns with appointing a defendant-class attorney. Payment by a class adversary who has lost to the class may seem attractive as well, but what distinguishes class litigation from other litigation that is covered by the uniquely "American Rule" that generally bars fee shifting? Finding Enabling Act authority for these general provisions may prove difficult or even impossible.

Brief discussion suggested a general anticipation that any rule on attorney fees will be met with vigorous opposition from plaintiff-class counsel.

It was asked why the general Rule 54(d)(2) provisions, which include specific reference to submissions by class members, are not adequate to the task. These provisions establish a procedure for seeking a fee award, but do not address the grounds for making an award or the criteria for measuring it. The question posed by the draft is whether a rule addressing these questions is desirable, and whether — if desirable — it can be adopted in the rulemaking process.

It was noted that the American Bar Association Model Rules of Attorney Conduct include a provision that attorney fees must be reasonable. In theory, a district court can proceed directly against an attorney who charges an unreasonable fee. The local rulemaking process has asserted authority over attorney fees. Direct disciplinary procedures are possible.

Judge Rosenthal concluded this discussion by noting that the question for the moment is not authority but guidance for a court embarked on determining a fee award. A rule could give support to measure the award in an orderly and disciplined way. But work is needed to harmonize with other rules and to consider cross-references, particularly to Rule 54(d)(2).

Appeal Standing

Draft Rule 23(g) in the agenda materials is new; it has not been considered at all by the subcommittee. It would authorize appeal from a class-action judgment by a class member. The

proposal was spurred by a submission from attorneys in the California Attorney General's office. The rule in several circuits is that a class member can achieve "standing" to appeal a class-action judgment only by winning intervention in the district court. If intervention is denied, the order denying intervention can be appealed, but the class-action judgment can be appealed only upon reversal of the order denying intervention. This procedure has been adopted in the belief that allowing class members to appeal would undermine control of the class action by the court-approved representatives and their lawyers, and frustrate the court's own responsibility.

The argument for permitting appeal by class members is simple. They will be bound by the judgment. Individual rights or defenses will be taken away by the judgment. Our entire system of procedure and trial-court responsibility is built on the premise that appeal is available as a matter of right to test the correctness of the judgment. A person who is to be bound should have a right to appeal. This argument takes on special force when the class judgment rests, as so often happens, on a settlement that has been approved by the court. There is a risk not only that the class representatives have entered into an improvident settlement, but also that the trial court may not have sufficient adversarial input to test the adequacy of the settlement and may be affected by a temptation to conclude troublesome litigation.

The structure of the draft builds from these arguments to permit appeal by a class member from any judgment based on a settlement or dismissal approved under Rule 23(e), and from any other judgment that is not appealed by a class representative. This structure reflects a belief that a settlement is so distinctively precarious that a non-representative class member should be able to appeal even in the no-doubt unusual situation in which a class representative also is appealing. Perhaps the distinction is overly refined. The draft Committee Note serves as the vehicle for addressing obvious surrounding problems: a class member can present on appeal only issues that were properly preserved in the trial court; if a class member appeals before a class representative takes an appeal, the class member's appeal "is suspended, and should expire upon submission of the appeal on the merits"; if many class members appeal, the court of appeals can designate one or more to serve as class representatives for the appeal. The Note also identifies the question whether appeal standing should be restricted to the final judgment. A class member, for example, may wish to appeal under Rule 23(f) from an order granting certification of a class, arguing that certification is improper, that the named representatives are inadequate, that the class has been defined too broadly, and so on. The court of appeals can protect itself, the district court, and the appointed class representatives by denying permission to appeal. The danger of delay and strategic misuse may seem to overwhelm these advantages, however; further thought is needed.

Discussion began by asking whether there is a real problem

that needs to be addressed. It was further asked whether a Civil Rule can supersede standing rulings by the courts — is this a rule of procedure at all? And even if a rule can properly address the question, is it wise to permit appeals that can tie a case up for years after those initially responsible have become satisfied with its conclusion?

It was recognized that the question is a tricky one. Perhaps there is no real problem with current practice; there are no empirical data to demonstrate that bad dispositions of class actions are surviving only because nonrepresentative class members are unable to win intervention to appeal under present practice. Just as with anything else that increases the role of objectors, we must be careful.

Notice

Thomas Willging presented the notice and related drafts being developed by the Federal Judicial Center. He noted that the draft "is still in mid-point." They hope to find a linguist to review it, and then will test it on groups of non-lawyers. There are a number of issues yet to be resolved. Perhaps the most important remaining challenge will be an attempt to draft a one-page summary that has a chance of being read and understood by class members.

Another issue goes to the language used to describe the preclusive effects of remaining in a class. The scope of claim preclusion that attaches to a class-action judgment may appropriately be somewhat different from the scope of claim preclusion that follows individual litigation. Finding language to capture these concepts in a way that means anything to nonlawyers will be difficult.

It would be helpful to have Committee members submit their own top five candidates for words or phrases that should be eliminated as jargon.

Further attention is needed with respect to the part of the notice that describes what a class member can expect to receive from the litigation. The present draft has two alternatives: one in a loss-per-unit form (so many cents per share of stock), the other in a loss-per-person form (a fund divided per capita by an uncertain number of claimants). There are serious questions whether either example is useful outside the securities litigation field that inspired each.

The sections on selecting an individual attorney and on making individual appearances "seemed to get out of control." Rule 23 does require notice of the right to appear. These matters will be considered further.

Mr. Willging was asked whether forms would be prepared for other types of litigation. He responded that the aim is to develop a "skeleton" that can be adapted to several forms of action. No attempt will be made to develop a generic form in the elaborate detail of the notice created for the current fen-phen litigation.

It was noted that the subcommittee may continue to consider possible amendments to Rule 23 addressing the notice obligation. It might help to specifically include a reminder of the need to seek "plain English" in notices. The time may have come to recognize the need to attempt some form of notice in Rule 23(b)(1) and (b)(2) class actions. It may be possible to soften the requirement of notifying all identifiable class members in actions that involve very large classes and no more than very low dollar recoveries for any individual class member. These issues remain open on the agenda.

The concluding remark was that a one-page summary form, if it can be created, will be the most useful possible product of this work.

Simplified Procedure

The simplified procedure project was launched as a broad response to the Advisory Committee's responsibility to consider the overall working of the Civil Rules. Section 331 of the Judicial Code instructs the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and to recommend to the Supreme Court "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay * * *." These goals, reflected in Civil Rule 1, remain elusive. The continuing process of attempting to adapt the Civil Rules to new forms of litigation and evolving litigation behavior often seems to make the Rules less simple. It is important to draw back from the details from time to time, and to ask whether larger-scale revisions may be appropriate. The Committee has had discovery on its agenda continually for more than thirty years, and occasionally has asked whether the pleading rules might be asked to carry a more substantial share of the pretrial communication function. The simplified procedure project is designed to ask whether the time has come to pare back some of the complexities, perhaps by designating some categories of cases for a package of rules that would enhance pleading and disclosure, while diminishing the role of discovery.

Judge Kyle introduced the Simplified Rules Subcommittee report by noting that the Subcommittee's purpose at this meeting is to seek a sense of direction. The topic was put on the agenda by Judge Niemeyer, who was asked to summarize the initial directions of inquiry.

Judge Niemeyer gave the background. The Committee's discovery work led to consideration of the burdens of discovery and the relationship between discovery and notice pleading. We have never dared to reopen the 1938 package of notice pleading and discovery. The 1938 reform was a reaction to the spirit of technicality that had come to dominate Code pleading. Discovery was to be managed by

attorneys, with the court as a backstop. The most vigorous complaints over the years have arisen from the conduct of depositions and "scorched earth" tactics. Any attempt to revise the present integrated system of pleading and discovery for all actions, however, would be extraordinarily perilous. Rather than take on the whole system, the Simplified Procedure project is designed to begin with some discrete categories of litigation. If success is achieved with these cases, the experience may provide the foundations for more general revisions several years in the future.

Part of the inspiration for this project has been the American Law Institute Transnational Rules of Civil Procedure project. That project seeks to identify the central tasks of adjudication that are common to all procedural systems and to develop simple rules that can discharge those tasks effectively.

It is hard to know what would happen if simplified rules were adopted. If they were made optional, would people opt into them? Can we properly make any such rules mandatory for some categories of cases?

The project has been discussed, in preliminary form, with several bar groups and with groups of district judges. There has been much positive reaction. But there also has been concern about possible interference with local ADR rules, and more generalized concern. One particular concern must be met head-on: the proposal is not to develop a cheap and inferior set of rules for "small claims." It is an attempt to develop rules that will give better results in cases that may be overwhelmed by full application of all the procedures available under the general Civil Rules. We should remember that discovery is not used at all in something like 40% of federal civil actions, and is little used in another 25% to 30%. Perhaps these cases would benefit from rules that, at little cost, require more detailed initial pleading and disclosure.

It has seemed desirable to pursue this effort. One goal may be to develop a set of optional rules that are so attractive that litigants will choose to be governed by them.

To pursue these questions in a larger perspective, the Subcommittee has invited Judges Ellis, Hamilton, and Schwarzer to present experiences and proposals that look in different directions. Those who have questioned the broad attempt to develop a set of simplified rules have looked in several directions. One direction challenges the assumption that the federal rules are "too much" for many cases that are, or better would be, in the federal courts. The very fact that most federal civil actions involve little or no discovery suggests that the rules are not too complex. The theory that federal procedure is too complex, moreover, must deal with the fact that many states have chosen to follow the federal rules for their own courts of general jurisdiction, and that many of the state systems that have developed their own traditional models can hardly be found simpler than the federal

model. Perhaps most importantly, it is urged that federal courts already have the power to adopt simplified procedures for cases that deserve them. The sweeping management powers established by Civil Rule 16, and the broad judicial discretion built into the discovery rules, ensure that no litigant need be overwhelmed by strategic misuse of procedural opportunities. Individual case management is protection enough. In addition, several courts have developed differentiated case management plans that ease the potential burdens of individualized management. These plans establish presumptive procedural limits for each of several "tracks," and encourage the parties to work together in choosing the appropriate track.

The question, in short, is a familiar one: time and again, a proposed procedural revision is met by the response that the flexibility and discretion built into the Civil Rules establish ample authority to accomplish the goals sought by the revision. The issue may be not so much the adequacy of present rules as the adequacy of implementation. The conclusion that present rules are adequate in the abstract need not defeat revision — it may be easier to guide discretion by general rules than to supervise case-by-case exercise of discretion. But it is important to know how the present rules are working.

It must be emphasized that the draft Simplified Rules are not at all the type of rules that might be developed specifically for pro se litigation. To the contrary, they are simplified only to those who have a professional understanding of procedure. They are not a complete, self-contained system. They only supplement the Civil Rules for certain issues, most notably pleading, disclosure, and discovery. The Civil Rules continue to apply to all matters not directly governed by the draft Simplified Rules. Implementation requires expert knowledge of all of the Civil Rules, both general and simplified.

Judge Schwarzer described a small-claims procedure that he has developed for consideration. The proposal is an "anti-Rules" proposal in the sense that it depends entirely on party consent. It begins with the observation that many actions in federal courts involve dollar stakes that are low in relation to the cost of litigation. The Federal Judicial Center review showed that for the actions in which the amount of the demand is known, more than 11% involved demands for less than $50,000, and more than 16% involved demands for less than $150,000. There also are many cases pursued pro se. The purpose of this model is to facilitate rapid, inexpensive access to justice for small-stakes cases. The result also might be to save some judicial resources.

This small-claims proposal is consensual. The action would be filed in the same way as any action. Possible election of the small-claims rules would be raised at the initial scheduling conference or by similar means. Once the rules are selected, the common obstacles to speedy disposition are removed. There are no motions, no conferences after the initial conference, and little

discovery because the time frame for getting to trial does not allow much time for discovery. All complexities are avoided. Jury trial is eliminated. There is no need to adopt any new procedure rules. A general order could establish the system.

The incentives for electing this system begin with a guaranteed trial date in 30 or 60 days. This speedy trial guarantee is possible only if most judges of the court join in the system; each judge would agree to be available for a period of one or two months to give priority to these cases. The early trial system also is likely to change the judge's role, assigning more responsibility to the judge because the parties have not had as much opportunity to be prepared. Such rapid access to justice is important, and may attract many litigants.

Another incentive could be developed by establishing a cap on damages, perhaps $75,000. Plaintiffs might agree in return for speedy and inexpensive trial, while defendants would be attracted by the limit on recovery.

Although no rules changes are needed to establish this system on a local basis, the proposal might be supported by adding consideration of expedited procedures to the list of topics considered at the Rule 26(f) conference.

This system would provide "rough and ready justice," but there may be room for that in our system.

Judge Hamilton introduced the differentiated case management plan of the Eastern District of Missouri by observing that when the Civil Justice Reform Act was enacted, "we were in quiet desperation. Our case management needed overhaul." They reacted by adopting differentiated case management, developing the ADR program, and putting magistrate judges "on the wheel" to be assigned at random to try civil cases subject to the right of any party to opt for trial before a district judge.

The differentiated case management plan has five tracks, including three that set expected times to trial: an expedited track, with 12 months to trial; a standard track, with 18 months to trial; and a complex track, with 24 months to trial. The other tracks are for "administrative" cases that involve disposition on records that have already been developed (such as social security disability review cases), and pro-se prisoner cases.

The expedited track was designed to have no Rule 16 component. But we have found that most lawyers have trouble thinking of their cases in this mold, so there are not many cases assigned to this track. It has not matured the way we thought — the problem seems to be a psychological one, not a pragmatic one. But lawyers may want more than 12 months to prepare for trial. The court has not yet thought whether there are ways to force more cases into this track. There also are very few cases in the complex track. Most cases seem to be standard cases.

To make the track system work, judges must take care to

enforce the time rules.

One thing that has changed is that the court has gone back to voluntary disclosure. Lawyers, initially suspicious, have come to think that voluntary disclosure is a good thing.

Adoption of the differentiated case management system involved a real culture change. It has been very helpful. Probably it has not increased the number of settlements, but it seems to encourage early settlements. Lawyers get together before the first Rule 16 conference. They propose time schedules that ordinarily can be adopted without change — they are careful in framing the initial schedule because they know that most of the court's judges are reluctant to allow changes once the plan is adopted.

The process of adopting the differentiated case management program was itself good for the district. Judges were brought together not only with lawyers but also with the court staff. Judges are more amenable to suggestions for change; the court has fine-tuned many things as it has gone along.

Judge Ellis began his description of the "rocket docket" practices in the Eastern District of Virginia by noting that the set of draft simplified rules seems well done. But the effort is like the virtuoso design of a good concrete canoe — the world has no need even for the most expertly designed concrete canoe. The Rulemaking process is long and arduous. Before entering the fray, there should be a major demonstration of need, founded on empirical studies that show what the need is. The burden of proof is on the proponents of change. As one obvious question: how many cases involving stakes of less than $50,000 are delayed in resolution because of current rules? It is necessary to figure out the problem before devising a fix. There do not seem to be any studies that show a need, and it is not likely that any studies that may be undertaken will show a need. But any change should be preceded and supported by empirical study.

Lawyers want a truce in rulemaking. We have rules changes almost every year, and important rules changes every few years. The capacity of the bench and bar to absorb change should not be taxed without a strong showing of important advantages to be won.

Some courts have devised procedures for categories of cases, called differentiated case management. This tells us, first, that some courts perceive a need for this in their local circumstances, but does not tell us that any particular local plan will work for other courts. The Eastern District of Virginia practices would not work in the Southern District of New York — the practices would not even be perceived as fair there. Eastern District judges are not proselytizing for export of their practices. The adoption of local plans tells us, next, that courts already have power to do this. Rather than devise new national rules, the most that may be needed is to have the Federal Judicial Center include information about the adoption and use of local plans as part of its educational program.

It does not seem likely that there is a large group of cases that are delayed by current rules. And there is a risk that a plan that adopts a specific target for time-to-disposition will simply entrench the target as the norm, when speedier disposition could be achieved.

The level of differentiation in this docket management plan begins with standard orders. The standard orders, however, can be changed. Lawyers agree to additional time more frequently than had been anticipated.

The Eastern District of Virginia program was initiated by Judge Walter Hoffman in 1962; that was the old rocket docket. Along about 1977 Judge Albert V. Bryan Jr. came to the court, and became the architect of the present system. The system is simple, with three basis components.

First, there is a quick, fixed, and immutable trial date. It is, however, a mistake to set the trial date at the time the action is filed. Instead, the court sends out a standard scheduling order setting a four- or five-month discovery cutoff, and a final pretrial conference date. Trial is about a month from the final pretrial conference. Many "big" cases are filed in the court, often involving lawyers from outside the district; by the time of the final pretrial conference, the lawyers from outside have been educated by local counsel to understand that there are *no* continuances.

Second, there has to be judicial discipline to try cases. Judges should not hesitate for fear of being wrong. Judges "should do our best, thoroughly and thoughtfully," but expeditiously. It also helps to have an effective summary judgment practice, supported by the circuit court.

Third, there must be a supportive local legal culture. The culture has developed over the years; it is far more important and effective than local district rules could be.

The result of this system is that there are only a few exceptions to the practice of holding trial from six to nine months after filing. That is not because the district has an unusual mix of cases. To the contrary, it seems to have a typical mix. Some very complicated cases begin and end within this time frame. Even patent actions, with the substantial amounts of time required for "Markman" hearings, can be managed in this way.

Magistrate judges discharge the court’s responsibilities with respect to discovery. They work hard.

The practices in the Eastern District of Virginia probably cannot be exported to other districts. But the district does not need to import an additional layer of simplified rules.

General discussion began with the suggestion that the time has come to reexamine the consensus that individual case assignment is the best vehicle for intensive case management. We should look

hard at the model that makes any judge available to try any case; we may find that this system in fact works better. It was noted that in the Eastern District of Virginia the Alexandria court has a master docket. In other parts of the district individual dockets are used. The master docket supports flexibility, but in all parts of the district judges are available to try cases assigned to a different judge. This is important.

Other devices as well can be used to speed trials. In Alexandria a jury is picked in no more than two hours, apart from a big capital case or equally momentous actions. The local legal culture accepts the proposition that a witness cannot be kept on the stand for a day and a half in the hope of "getting a nibble." Cases do try fairly quickly. It is recognized that a jury trial has a maximum length of two or three weeks if there is any hope of jury comprehension. In a very long case, the lawyers may be asked, after using half of the time they claim to need to examine a witness, what else they want to ask.

It was asked whether the Eastern District of Virginia practices are supported by the local bar because they think the practices serve their interests? The answer was uncertain. The leadership of the judges may have been important in the beginning, when there were few judges and they were "very strong." But the local culture is now ingrained, and such cultures do not change rapidly. Court rules do not trump culture. Change does occur over time — the mix of cases changes. But the rocket docket general practice has not changed much in thirty years, apart from making better use of magistrate judges in discovery and settlement. The practice works. "Lawyers know it." The lawyers manage the system without requiring management by the judges.

It was urged that another layer of rules, adopted in the name of simplification, is not what we need just now. One feature of the draft rules would require that each document that may be used to support a claim be attached to the pleading stating the claim; "we do not need this mess." Another feature would restore the 1993 initial disclosure practice, and perhaps expand it; we should not revive that practice. The entirely consensual proposal advanced by Judge Schwarzer has much to commend it, but it may be asked whether we need even to rely on magistrate judges. How about using lawyers as pro tem judges? A panel of qualified and willing lawyers could be established, one of whom would be assigned to each case in the system. This works in California state courts. This is "ADR with teeth," done with party consent. Not many lawyers can take $50,000 cases; such a system might make justice available to persons who now are unable to proceed.

It was noted that each of the three systems described by the judges panel sets time limits, and does not change anything in the Rules to give direction on how the time limits are to be met. There is a judge there, however, to make the time limit credible. So it was noted that in the Eastern District of Missouri the judge has control of the trial date and ordinarily will not change it

once it has been set, but the parties control most matters on the way to meeting the trial date. Practice in the District of Minnesota is much the same. These systems are quite different from the draft "simplified rules." Has there been anything done in local Civil Justice Reform Act plans that is similar to the simplified rules?

It was observed that "any set of rules exists in delicate tension with local culture." Since the 1983 amendments, Rule 16 has contributed to substantial changes in local legal cultures. The initial disclosure provisions in the 1993 version of Rule 26(a)(1) had a similar effect in some districts. National rules can make a difference, but should be used sparingly for this purpose. The question is whether there is a need for special rules for the many small-stakes cases that do, or might better, come to federal courts. The very fact that there are many small-stakes cases in federal courts now may suggest that there is no need for new rules. One alternative is to reconsider the question whether individual dockets contribute to delay in getting to trial. It has also been suggested that Rule 83 should be changed to authorize innovative local rules, with permission of the Judicial Conference, to provide a framework for controlled experimentation.

It was noted that state systems commonly have small-claims courts. In Texas, a separate track was created in district courts, available initially on election of a plaintiff who must agree to limit any recovery to a maximum of $50,000; defendants cannot easily get out of this track. Discovery is limited, amendment of the pleadings is limited, and other procedural opportunities also are curtailed. After two years, "no one uses it." It was hoped that it would be used by banks in collection actions, in small personal-injury actions, and the like. But there have been perhaps 100 cases on this track.

A similar experience was reported for the "expedited track" adopted in the Southern District of New York. Lawyers did not want it, viewing it as a lesser procedure. The "small" cases are not a problem there. "They tend to go away." Lawyers recognize the small cases, know they cannot afford to try them, limit discovery, and settle. When a small case comes to a Rule 16 conference, it is assumed that it will involve one deposition for each party, and will go to trial in six months. This is done without creating a differentiated case management program.

The suggestion that Rule 83 might be amended to authorize experimental local rule procedures was met with the observation that this basic proposal was advanced several years ago and withdrawn in the Standing Committee. The continuing emphasis on national uniformity, and the continuing valiant efforts to curtail disuniformity stemming from local rules, suggest that any proposal along these lines will meet vigorous resistance.

Non-prisoner pro se cases get the same process as other cases in the Eastern District of Virginia. They may involve relatively

low damages, and perhaps an injunction. They get done. There are pro se clerks for prisoner cases; that work is more specialized. Few of the prisoner pro se cases get to hearing or trial.

Motions in the Eastern District of Virginia are handled on Fridays. Every judge is required to be available on Friday, and commonly encounters many unfamiliar cases. Motions are decided orally from the bench; the order then gets typed up. Many motions are disposed of in a single day, often including complex cases. Only a small number are taken under advisement. Good law clerks are an indispensable help.

It was noted that so-called "firm" trial dates infuriate lawyers if they prove to be fictional. And discovery cut-offs should be set just before a real trial date, not a fictitious one. This can be accomplished only with a major cultural change in the federal courts.

The Committee expressed thanks to the panel members for their very informative and helpful presentations.

Discovery Subcommittee

The Discovery Subcommittee has scheduled a discussion of discovery of computer-based information for October 27 in Brooklyn. Judge Carroll asked Professor Marcus to describe the plans. Professor Marcus observed that at the April meeting he had suggested that the March conference had moved us forward, but that perhaps we were no closer to the starting line. The October 27 meeting "may bring us within sight of the starting line."

More than three years ago, during the meetings and hearings that led to the discovery amendments scheduled to take effect this December 1, lawyers started telling us that the Committee should think about discovery of computer-based information. Those questions were deferred while more familiar questions were addressed. The March conference increased our level of familiarity.

The fact that a second conference has been scheduled does not indicate a determination that something must be done now. "Doing nothing remains a strong option" for the time being. The list of participants for the conference has been filled in. The materials for the conference include first drafts on a number of rules amendments that might be considered, but there is no implicit suggestion that any of these drafts should be pursued further. And the drafts do not pursue such topics as more aggressive teleconference trials; revising rules language that stems from the dawn of the computer revolution; addressing the issues that arise when a party wants to seek discovery by addressing queries directly to another person’s computer system. The models, however, are intended to give concrete perspective and a basis for discussion. The "low impact" proposals tell people to talk about issues of computer-based discovery. The others tell people what to do about it.

It would be possible to expand the initial disclosure model to address explicitly the need to include computer-stored information in response to discovery, but to excuse any obligation to provide back-up or deleted information unless the court orders it. Provisions on preserving computer-based material are possible, but we do not do that for other forms of information that may become the subject of discovery request. The problems of preservation may be distinctive, however, because of the lament that in many computer systems the only way to ensure that full information is preserved is to stop operating the system. Cost-allocation questions will be sensitive and difficult to approach. Questions of inadvertent privilege waiver also persist, both with respect to computer-based information and more generally.

After the conference, the subcommittee may be in a position to decide whether the time has come to attempt to draft rules changes for discovery of computer-based information. It will be necessary to understand why it is appropriate to attempt special provisions for such information, and then to determine what to try to provide.

Admiralty Rules

A substantial set of amendments to the Supplemental Admiralty Rules are set to take effect on December 1. These amendments reflect the fruit of several years of work that relied on the close involvement of the Maritime Law Association and the Department of Justice. The major purpose was to reflect the growing use of the Admiralty Rules in civil forfeiture proceedings, making changes that make desirable distinctions between forfeiture practice and true admiralty practice. In April, Congress adopted the Civil Asset Forfeiture Reform Act of 2000. The Act contains several provisions that are inconsistent with the amended admiralty rules. Because the admiralty rules will take effect after the statute took effect, the inconsistent provisions seem to supersede the new statute.

Working closely with the Department of Justice, and with the help of the Maritime Law Association, four sets of changes are proposed to bring the Admiralty Rules into line with the new statute. The Department of Justice supports all of the proposed changes as a means of eliminating the confusion that otherwise will result as courts attempt to work their way through the process of reducing apparent inconsistencies to a workable system.

The first proposed change is the simplest. Admiralty Rule C(6)(a)(i)(A) provides that a statement of interest must be filed within a period 20 days; new 18 U.S.C. § 983(a)(4)(A) sets the period at 30 days. The 20-day period was initially chosen because of a belief that it coincided with pending legislative proposals. Had it been known at the time that the new statute would adopt a 30-day period, the same 30-day period would have been proposed for Rule C. The Committee approved the recommendation that Rule C be amended to adopt the 30-day period; the Committee Note will state simply that the change is made to conform to the statute. This

change is so far technical that the Committee also recommends that it be sent by the Standing Committee to the Judicial Conference for approval without publication.

The second proposed change is more complicated. The statute departs from Rule C(6)(a)(i)(A) in describing the events that trigger the 30-day period for filing a statement of interest. Rule C(6) sets the period to run from "the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." New § 983(a)(4)(A) sets the period as "not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." The differences in wording the reference to publication of notice do not seem troubling. The difference between "receiving actual notice of execution of process" and "service of the Government's complaint" is more troubling. There may be some occasional differences between "execution of process" and "service of the * * * complaint," but they are likely to be rare. There is, however, a difference between actual notice and service. The difference is most apparent when the person filing a statement of claim is not a person served. These differences are likely to be resolved in most forfeiture proceedings by the alternative reliance on the 30-day period that begins on completion of publication, but it has seemed better to resolve them. The Committee approved a recommendation to amend Rule C(6)(a)(i)(A) to conform to the statute, to read:

> **(A)** within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), * * *.

Again, the Committee Note would state simply that the change is made to conform to the new statute. The Committee concluded that this change is sufficiently significant to require publication for comment.

The third proposed change goes to the procedure for answering in a forfeiture proceeding. New Rule C(6)(a)(iii) provides that a person who files a statement of interest must "serve" an answer within 20 days after filing the statement. New 18 U.S.C. § 983(a)(4)(B) provides that the person must "file" an answer within 20 days. There is no necessary inconsistency between these provisions: It is easily possible both to serve and file within the 20-day period. If there is any inconsistency, it is between the statute and Civil Rule 5(d), which requires filing within a reasonable time after service. The different requirements, however, may prove a trap for the unwary. The better response seems to be to amend Rule C(6)(1)(iii) to require both service and filing within 20 days. The ordinary rule requirement is that a pleading be served; there is no apparent reason to abandon that requirement in forfeiture proceedings. The statutory requirement of filing within 20 days, however, can be added to Rule C(6) to

draw attention.

Exploration of this proposal included consideration of an inadvertent drafting slip in new Rule C(6)(b)(iv). This rule is the admiralty practice analogue of the forfeiture proceeding. It was drafted to require that the answer be filed within 20 days of filing the statement of interest, without referring to service. The reference should have been to service. There is no apparent need to retain a filing requirement in this provision; it is recommended for Rule C(6)(a)(iii) only to conform to the new forfeiture statute.

The Committee recommended that Rule C(6) be amended as follows:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement. * * *

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

The Committee Note will state that the "filing" requirement is added to Rule C(6)(a) to parallel the statute, and that the filing requirement is changed to service in C(6)(b) to correct an inadvertent drafting slip. This change is recommended for publication, in part because other changes are recommended for publication.

The fourth and final proposed change involves Rule C(3)(a)(i). The rule requires the clerk to issue a summons and warrant for the arrest of the property involved in a forfeiture proceeding. New 18 U.S.C. § 985 provides that in most circumstances, real property involved in a forfeiture proceeding is not to be seized before entry of an order of forfeiture. It is no longer appropriate to require issue of a warrant for arrest. To meet this new statute, the Committee voted to recommend to amend Rule C(3)(a)(i) to read:

(3) Juridical Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other

property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures. * * *

The Committee Note would direct attention to the new statute.

It was decided to recommend this change for publication, primarily because other proposed amendments also are being proposed for publication.

The question whether to recommend any of the changes for publication was viewed as relatively close. The proposed changes are intended to bring the rules into line with the new statute, apart from the change from filing to service in Rule C(6)(b)(iv). In some ways it would be convenient to have the changes take effect as soon as possible — the fastest possible timetable would be to urge the Standing Committee to recommend adoption without publication in time for action by the Judicial Conference in March 2001, with transmission by the Supreme Court to Congress by the end of April, to take effect on December 1, 2001. Publication of the proposals, however, should go a long way toward ensuring that litigants and courts are able to act in conformance with the statute. And publication will help to ensure that nothing has been overlooked.

Rule 53: Special Masters

Judge Scheindlin presented the report of the Rule 53 Subcommittee. The time has come to determine whether the Subcommittee should bring a final proposed Rule 53 revision to the Committee at the April 2001 meeting.

Rule 53 now addresses only trial masters. Masters in fact are used extensively for pretrial and post-trial purposes. Before trial, masters are used extensively for such purposes as supervising discovery and mediating settlement. After trial, masters are used to help in formulating equitable decrees and to monitor decree enforcement. The present rule is outdated and provides no guidance for current practices.

The current draft revision has been circulated for comment to lawyers, law professors, and the Rule 53 Subcommittee. The Federal Judicial Center responded to the Committee's request by conducting a study of special master practices that Thomas Willging headed; a report on the study was provided at the April meeting. The study confirmed the prevalence of pre- and post-trial master appointments. It also showed that courts appointing masters are as inclined to cite no authority for the appointment as to cite Rule 53. Judges and attorneys consulted during the second phase of the study showed some interest in Rule 53 amendments, but stressed the need for breadth and flexibility while avoiding inappropriate stimulus to the use of special masters.

After describing the several subdivisions of the draft rule, key issues were identified: should a revised rule eliminate the use

of trial masters whose report is read to a jury? Although the draft continues this practice, the Subcommittee and Reporter believe that the practice is inappropriate. It overlaps use of a court-appointed expert under Evidence Rule 706, but without the safeguards and advantages that surround a court-appointed expert trial witness.

Draft Rule 53(a)(1)(B) carries forward the "exceptional condition" requirement in present Rule 53. It is meant to refer to the trial-master practice embodied in Rule 53. A different standard is used for pretrial and post-trial appointments under draft Rule 53(a)(1)(D).

Draft Rule 53(b) is a "laundry list" of duties that may be assigned to a special master. There are roughly three groups: pretrial duties, in paragraphs 1-7; trial duties, in paragraphs 8-9; post-trial duties, in paragraphs 10-14. Paragraph 15 provides a final "other duties" category. These lengthy provisions could be reduced to more general provisions for pretrial, trial, and post-trial uses, or to other broader and more general terms.

It is fair to ask whether all uses of trial masters should be abolished, for judge-tried cases as well as jury-tried cases. The Supreme Court has dramatically reduced the occasions for this practice, and the time may have come to end it entirely.

Draft Rule 53(c)(1) provides opportunity for hearing before any appointment of a master. This is new, but seems a good idea.

Draft Rule 53(c)(2)(D) provides for detailed specification of the dates for action by a master. It is not clear whether this much detail is appropriate.

Draft Rule 53(c)(2)(E) requires the court to specify whether ex parte communications are appropriate between the master and the parties, or between the master and the court. The Federal Judicial Center study found substantial concern about these questions. This provision should not be controversial.

Draft Rule 53(c)(2)(F) opens the question of standards for reviewing special master orders. The question is addressed also in subdivision (i). Perhaps these provisions should be further clarified or simplified.

Draft Rule 53(c)(2)(G) may well be deleted. It provides that the order appointing a master may require a bond. This provision responds to concern about the potential liability of a master. A Civil Rule probably cannot address the substantive question whether a special master is entitled to absolute judicial immunity. A bond requirement, however, could provide protection and might be taken as the sole basis for liability. There is no known present practice in this dimension, and it may be better to put the question aside.

Draft Rule 53(h) provides that a master may submit a draft report to counsel before reporting to the court. Perhaps this

permission should be changed to a requirement.

Draft Rule 53(i)(5) provides de novo review by the court of a master's recommendations with respect to questions of law, unless the parties stipulate that the master's disposition will be final. Is this appropriate?

Draft Rule 53(j)(3) addresses allocation of the master's compensation among the parties, including potentially controversial provisions for considering "the means of the parties and the extent to which any party is more responsible than other parties for the reference to a master." These provisions deserve further consideration.

Draft Rule 53(k), finally, limits use of magistrate judges as special masters. This provision opens up much more general questions about the proper relationships between appointment of special masters and magistrate judges. These questions too deserve further attention.

The first question asked in the general discussion was whether courts continue to use special masters at all for trial purposes. The Federal Judicial Center study in fact found that this practice continues. A case involving complex documentary evidence would be an example. There is no provision for cross-examination of the master; the practice continues to be separate and distinct from the use of court-appointed expert witnesses. And there continue to be occasional uses of a trial master whose report is read to a jury without any cross-examination of the master.

The next question asked what percentage of masters are appointed by consent. The Federal Judicial Center study found that 70% of appointments were made "without opposition." A large fraction of those cases involved true consent. In some of the cases, however, lawyers who would have preferred not to consent refrained from objecting because they feared antagonizing the judge. It was noted that if there is true consent, the parties will frame the appointing order, defining the master duties that they truly want.

It was observed that judicial power is very broad, extending apparently to the limits of judicial creativity. It would be a mistake to draft a rule "backward from what we see." If we could survey state-court practice we likely would find great use of special masters, and judges will continue to think of still newer uses. Perhaps we should abandon both the draft subdivision (a) statement of standards for appointment and the draft subdivision (b) list of appropriate master duties. The rule could begin with the draft subdivision (c) provisions for the order appointing a master, including the requirement that the order state the master's duties. We could delete the general "powers" provision in subdivision (d). It may be better not to speak to the use of special masters in jury trials; perhaps Article III requires that a court be permitted to appoint a special master to assist in a jury trial. The resulting rule would accept and regularize the

present open-ended approach.

A response was that limits in the rule help to prevent an impatient judge from evading the limits of the magistrate-judge statute by appointing a magistrate judge to do otherwise unauthorized acts as a master. Although the 1968 magistrate-judge statute specifically authorizes appointment of a magistrate judge as master, that provision has been largely overtaken by subsequent expansions of magistrate-judge powers.

It was urged that much of the material in the draft rule would be better covered in a Federal Judicial Center pamphlet. The draft includes a level of detail that most rules do not approach. We should be reluctant to freeze so much detail in the text of a rule. A very short list would be better.

A more sweeping approach was suggested — it would be better to abolish Rule 53 entirely. It is wrong to use lawyers, or nonlawyers, to discharge judicial duties. The draft, by expanding the descriptions in the rule, will further encourage the inappropriate use — that is to say, any use — of masters.

It was argued from the other side that we need to adapt Rule 53 to accommodate what is happening. Masters can be valuable judicial adjuncts, particularly in litigation that involves technical matters. A new rule should state broad standards for appointment; provide a hearing for the appointment decision; define standards of review; and consider the condition, found in draft Rule 53(a)(1)(D), that no district judge or magistrate judge of the district is available to discharge the responsibilities to be assigned to the master. Agreement was expressed, but with a question whether the draft Rule 53(b)(1) reference to masters who mediate or facilitate settlement will lead to appointment of ADR participants as masters. This question was met with the observation that some courts apparently do appoint ADR facilitators as masters, hoping that the appointment will establish a basis of judicial immunity that otherwise might not attach.

Returning to the broader question, it was noted that present Rule 53 "is complicated, and mostly irrelevant to present practice." But there does not seem to be an overwhelming need for change, given the frequent use of consent-acquiescence to arrange master appointments. On the other hand, it may be desirable to bring the rule into conformity with present practice, leaving flexibility that will support further developments. Although no final decision need be made now whether to recommend revisions, the gap between Rule 53 and practice is a strong reason to clean up the rule. Clarification and guidance of the process are important. The level of detail is less important, and indeed too much detail may prove to be a problem. The ways in which further flexibility may be needed can be illustrated by the increasingly familiar questions that surround discovery of computer-based information, and the enhanced level of judicial discovery supervision contemplated by the December 1, 2000 discovery amendments.

A different suggestion was that although there is a mismatch between Rule 53 and practice, it may be better to leave bad enough alone. But if revision is undertaken, the better approach is to be more general and permissive, less directive. The details should be left to some form other than the text of the rule. The new rule could identify appropriate processes, perhaps designate some things that are forbidden, but not designate too much.

It was asked whether there are variations in practice across the country, and whether it is appropriate to interfere if master practice is more developed in some sections than in others. Should we be encouraging all courts, or courts that do not use masters as extensively as other courts, to increase the frequency of references? It was responded that there is no particular sense whether local practices vary, although it might be guessed that particularly busy districts have more incentive to rely on masters. The Federal Judicial Center survey did not identify any local differences.

It was noted that Texas does not favor use of masters, partly because of the expense to the parties. California courts, on the other hand, seem to rely extensively on masters.

It was suggested that federal practice varies more among individual judges than among districts. Masters are used, and will be used more frequently. It would be very helpful to have a set of rules on how to appoint masters, and on how a master's report is reviewed. But it would be a mistake to provide extensive detail on the responsibilities and duties that can be assigned to a master.

Topics that might profitably be addressed in the rule were suggested. One is conflicts of interest, a matter touched by draft Rule 53(a)(2). Another is ex parte communications — the Federal Judicial Center study found that this is one of the topics that most troubles courts, lawyers, and masters; the draft simply provides that the order of appointment must address this topic, and it was agreed that the appropriateness of ex parte communications depends on the purposes of the appointment. A settlement master, for example, may be unable to operate without ex parte communications with the parties. Other issues that should be addressed, at least in the order of appointment, are the standard of review by the court (which helps substitute for the lack of cross-examination), and compensation. On these and perhaps other matters, masters are used for so many different purposes that it may be better to list issues that must be addressed in the order of appointment than to attempt to resolve the issues in a more general way by specific rule provisions.

It was observed, in response to a question, that there seems to be general agreement among magistrate judges that there are appropriate occasions for using special masters.

It also was observed that the Standing Committee is more likely to be receptive to a proposed rule that simplifies present Rule 53, even as it expands the rule to reflect current practices.

As with the current efforts of the Rule 23 Subcommittee, it may be useful to focus more on the process of appointing special masters than on the substantive standards for appointment.

It was agreed that the Rule 53 Subcommittee would work at paring the initial draft down to a "core" draft, to be presented at the April 2001 meeting. It is not clear whether there will be opportunity to take the final steps toward recommending publication or abandoning the project in April, but it would be good to have a well-developed draft.

Rule 51

Civil Rule 51 has been on the agenda for some time, but consideration has been deferred in the press of more urgent matters.

Consideration of Rule 51 began with a suggestion from the Ninth Circuit Judicial Council that something should be done to legitimate the numerous local district rules that provide for submission of requested jury instructions before the start of trial. These rules seem inconsistent with the text of Rule 51, which provides for filing requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs * * *." The Committee has determined in earlier discussions that there is no apparent reason to leave this question to local rules. If, as seems to be agreed, it makes sense to allow a court to direct that requests be filed before trial begins, Rule 51 should be amended to permit the practice on a uniform basis. The Criminal Rules Committee has already published, and in August 2000 republished, a proposal to amend Criminal Rule 30 to provide for instruction requests "at the close of the evidence or at any earlier time that the court reasonably directs."

The question that remains on the agenda is whether Rule 51 should be revised in other ways. The present text of the rule does not give clear guidance to the interpretations that have grown up; an acerbic description is that "Rule 51 does not say what it means, and does not mean what it says." A draft has been provided to bring into the rule a clear statement that a failure to instruct is ordinarily reviewable only if a party has both requested an instruction and separately objected to the failure to give an instruction, but at the same time to make it clear that the request need not be repeated as an objection if the court had made clear that it had considered and rejected the request. The draft also would express the "plain error" rule that has been adopted in most of the circuits, but explicitly rejected in the Seventh Circuit.

Beyond clarification of matters now addressed by Rule 51, a revised draft considered at the meeting would address matters not now covered by Rule 51. It would require the court to inform the parties of all proposed instructions, not only its action on party requests. It would make it clear that instructions may be given at any time after trial begins, and would provide for supplemental instructions. In addition, the draft would allow any party to rely

on the requests or objections of another party, so long as the request or objection directly addresses the same issue and position.

The first comment in the discussion observed that the practice of informing the parties of all proposed instructions before jury arguments makes it possible to take objections before the instructions and arguments, enabling the court to direct the jury to begin deliberations as soon as arguments and instructions have been completed. The alternative of providing a gap for objections between the concluding presentations to the jury and actual submission is undesirable.

But it may be useful to provide one final chance to object to deviations from the proposed instructions as provided to the parties. Appellate judges report that a substantial number of district judges appear to compose important parts of their jury instructions as they are delivering the instructions. And at times a judge who says that one instruction will be given actually gives a different instruction.

As a matter of drafting detail, it was suggested that care must be taken to fit the required time for objecting to the provision for supplemental instructions. An objection to a supplemental instruction, as contemplated by draft Rule 51(b)(4), usually cannot be made "before closing arguments" as draft Rule 51(c) would require. This problem might be cured by deleting the reference to closing arguments, but it is important that closing arguments be made with full knowledge of the instructions — an objection before the instructions will not serve that goal if the court delivers the instructions after closing arguments. Work is needed on the timing of objections: they should be required before instructions are given, but opportunity also must be afforded to object to the way the instructions were actually given.

Another question is whether an objection that was not timely made as to the original instruction can be salvaged by making it when the instruction is repeated. It was concluded that it is proper to object to a decision to reread only part of an instruction when more should be given, but that it is too late to object to the substance of the original instruction.

It was noted that many judges submit written instructions to the jury, but it was not recommended that this practice be required by Rule 51.

It was noted that to the extent that Civil Rule 51 overlaps Criminal Rule 30, vigorous efforts should be made to conform to the style of Rule 30 without doing violence to the traditions that have grown up around the language of present Rule 51.

The question was raised whether it is necessary to address the sensible and ongoing practice of giving supplemental instructions, in light of the difficulty of relating this practice to the proper timing of objections. It was responded that it is useful to

provide for supplemental instructions because they can be tricky; there is a risk that in the desire to facilitate continued jury deliberations with minimum disruption, the court may forget the need to ask the lawyers for their input. One judge observed that when the jury sends in a note or request, it is good practice to draft a proposed response and then request the parties to respond to the proposal. The request and response should be in open court, although the failure to get party input should not lead to reversal if the supplemental instructions were correct or harmless.

Discussion of the plain error standard asked whether stating it in the text of Rule 51 will create mischief. It was responded that the draft provision is useful. It reflects what most, but not all, appellate courts do now. It gives great flexibility. The plain error test applies to allow review of errors not properly preserved in the trial court across a vast range of mistakes in civil proceedings. Jury instructions properly fall within its sweep. And the ongoing standard, incorporated in the simple reference to "plain error," makes it very difficult to win reversal.

Another question was addressed to the provisions that would allow a party to take advantage of requests and objections made by another party who had presented the self-same issue. There are many cases with coparties. It was urged that each party should be required to do something explicit, if only to state adoption of the requests or objections of another party. But it was urged in response that all the purposes of Rule 51 have been served if the court has had a clear opportunity to consider an issue and, with appropriate request and objection, has consciously chosen the instruction actually given. There is no need to punish a party whose lawyer may have been inept or may have decided unwisely that there was no need to reiterate points already clearly made and clearly considered. It was the sense of the Committee members that because objections to instructions are so often related to the particular evidence admitted as to a particular party, the district judge needs to know which of the parties objects to the instruction in evaluating the cogency of the objection. It was tentatively concluded, however, that the draft should be revised by changing "a" party to "that" party.

Rule 43(a)

Magistrate Judge Morton Denlow wrote to the Committee to suggest that the rules reflect the practice of holding a trial on summary-judgment papers. This practice has gained increasing recognition for situations in which summary judgment is not appropriate, but the parties have agreed that the court should decide the case on the summary judgment papers without hearing live witnesses. The procedure depends on the consent of all parties, on the agreement of each party that it does not wish to present any live witness. The result of the procedure is far different from summary judgment. Rather than decide the question of law whether there is sufficient evidence to pass beyond the threshold for

judgment as a matter of law, a question that is reviewed de novo on appeal, the trial court actually decides the case. The Rule 52 requirements for findings of fact and separate conclusions of law must be honored. Appellate review of the fact findings is for clear error, not as a matter of law.

The draft Rule 43(a)(3) prepared to illustrate the proposal was more general than the transformation-of-summary-judgment cases that inspired it. It would allow part or all of the testimony of a witness to be presented in written or recorded form, with the consent of all parties and in the court's discretion. Some courts are experimenting already with such devices as presentation of the direct testimony of expert witnesses by written reports, followed by in-court testimony that begins with cross-examination. More generally, parties who recognize that a case is not suitable for summary judgment still may prefer trial on a written record. The unavailability of witnesses, the difficulty and cost of producing witnesses, the cost of a live trial in relation to the matters at stake, or even a sense that a written record provides a fully satisfactory basis for decision may prompt consent.

General discussion concluded that there is no need to pursue these issues at present. At most, there is a small problem. The Committee's general reluctance to proliferate rules changes during a period that has seen many rules changes should control.

Next Meeting

The next meeting was tentatively scheduled for April 23 and 24, 2001. The site may be in Washington, D.C., or at Stanford Law School.

Respectfully submitted,

Edward H. Cooper
Reporter