MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 27-28, 2005

The Civil Rules Advisory Committee met on October 27 and 28, 2005, at the Vintners Inn in Santa Rosa, California. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. David Bernick, a former member of the Standing Committee, also attended. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeff Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Alfred W. Cortese, Jr., Esq., attended as an observer.

Judge Rosenthal opened the meeting by introducing new members Campbell and Gensler. She noted that the members they replaced, Dean John Jeffries and Judge Shira Scheindlin, were each unable to attend this meeting, but that Judge Scheindlin expects to attend the November 18 Style Project hearing. Both Dean Jeffries and Judge Scheindlin sent messages to express their appreciation of the years they spent working with the Committee.

November 18 Style Rules Hearing

It seems likely that the November 18 hearing will be the only one of the three scheduled Style Project hearings to be held. The November 18 hearing will focus on a presentation of the work done by a group organized by Professor Stephen Burbank and Gregory Joseph. Several teams, each composed of one academic and one practicing lawyer, divided the rules among them. They have prepared a thorough, rule-by-rule, study of the published Style Rules. The study looked for possible changes of meaning and also sought still better ways of restyling. They also have deliberated on the wisdom of undertaking the Style Project. The Committee is grateful to them for undertaking this work. The format of the November 18 "hearing" will not be the usual "witness-testimony" format. Instead, it will be more in the form of roundtable discussion.

One of the questions to be addressed in November will be the question whether the Style Project might have unintended supersession effects. The concern is that because all of the Civil Rules will, according to the intended schedule, take effect as a package on December 1, 2007, some rules may supersede statutes enacted after the day an inconsistent rule provision was originally adopted. This would reverse the situation on November 30, 2007, when the inconsistent statute would have superseded the earlier inconsistent rule provision. An example is provided by Rule 11. Rule 11 was last amended in 1993. The Private Securities Litigation Reform Act was enacted in 1995, including provisions that supersede inconsistent provisions in Rule 11. The argument might be made that Style Rule 11 will come to supersede the 1995 statute.

Brief discussion pointed out three matters of common agreement within the Committee. First, the Style Project is not intended to effect any change in the supersession effects of any rule. Each rule should have the same supersession effect on December 1, 2007, as it had on November 30. This conclusion inheres in the purpose to restate the rules' language without any change of meaning. Second, the Style Project can be accomplished without changing the supersession effect of any rule. Third, the question remains open as to how best to ensure the intended non-effect. It would be possible to expand the first paragraph of the Committee Note to each rule that explains the purpose of the Style changes; the alternative of providing the additional explanation only in the Committee Note to Rule 1 would save many repetitions, but might not draw attention when

arguments are made about the supersession effects of a particular rule and statute. A second approach would be to include a statement of the null effect in the Supreme Court Order that transmits the Style Rules to Congress. This would be clear, but could easily become even more obscure to most lawyers and judges than a statement in the Rule 1 Committee Note. A third approach would be to include the statement in Style Rule 86, which addresses the effective date of rules amendments. Perhaps some other approach may be found. The question is how to establish an accessible rule of interpretation.

Discussion noted that the only similar question to arise with either the Appellate Rules or the Criminal Rules focused on Criminal Rule 48(b) and the Speedy Trial Act. The Criminal Rules Committee decided to restyle the rule, but not to attempt to revise it to conform to the statute. They attempted to make clear the intent to have no effect on the relationship between statute and rule. There has not been any hint that this approach has led to any difficulty.

The first signs of the overall reactions of the Burbank-Joseph group indicate that individual views on the wisdom of the Style Project vary. Some are enthusiastic. Others are mildly uneasy. Still others are opposed, some strongly. There has not been time yet to evaluate the direct responses on a rule-by-rule basis — they have only just arrived — but a quick initial scan shows largely familiar issues. There do not seem to be great difficulties on the individual rule level.

April Meeting Minutes

The draft minutes for the April 14-15, 2005 Committee meeting were approved, subject to technical corrections.

September Judicial Conference

Judge Rosenthal reported that all of the Civil Rules amendments proposed for adoption by the Standing Committee were approved on the Judicial Conference consent calendar. The amendments included the several rules changes dealing with discovery of electronically stored information, new Supplemental Rule G on civil asset forfeiture, and amended Rule 50(b) to enhance the procedure for renewing a motion for judgment as a matter of law after submission to the jury.

Judge Levi observed that the June Standing Committee agenda was the fullest in memory. The Evidence Rules Committee brought up four rules to resolve longstanding circuit conflicts. One that caught particular attention deals with the admissibility in later proceedings of statements made in settlement discussions. This proposal also was approved on the Judicial Conference consent calendar.

The Bankruptcy Rules Committee has been incredibly busy. The new bankruptcy legislation requires rules changes and new forms within six months. Approximately ten years worth of rulemaking was accomplished in four months, leaving time to disseminate the results. The rules and forms alike deal not only with complex technical issues, but also with important policy questions.

Appellate Rule 32.1 was very controversial in the Judicial Conference. Four circuits do not permit citation of "unpublished" opinions; nine do. The leading opponent of Rule 32.1, which allows parties to cite "nonprecedential" opinions, concluded his remarks by observing that the rule would be retroactive. A motion to make the rule prospective was not much opposed. Having agreed that the rule would require the circuits to allow citation only of opinions adopted after the rule takes effect, the Conference overwhelmingly approved the rule.

Judge Rosenthal added that the Standing Committee spent a lot of time on the electronic-discovery rules. As challenging as these were, they were all approved and no Judicial Conference

member sought to take them off the consent calendar. Informal expressions by several members well-informed on electronic-discovery issues indicated that they had planned to move the rules to the discussion calendar, but that careful study of the proposals showed that they were much improved from earlier versions and did not require discussion. That is a great compliment to the way the process worked, not only with the hard work in the Advisory Committee and Standing Committee, but also in the thoughtful work done by so many participants in the public comment period and in the several meetings that prepared the way before the rules were published.

It was noted that several rules changes will take effect on December 1, 2005. They clean up small details. The package headed toward an effective date of December 1, 2006, includes many broader changes.

Legislative Report

John Rabiej reported that this Congress again is considering a bill to restore mandatory sanctions to Rule 11. Among other provisions it would require suspension from practice after "three strikes." Similar bills have been introduced in earlier Congresses, always in the House; a bill passed the House in the last Congress, but was not taken up in the Senate. The Administrative Office has again sent a letter expressing Judicial Conference opposition to the legislation, including an account of the Federal Judicial Center survey that showed overwhelming support among federal judges for the 1993 Rule 11 amendments. The House is likely to vote on the bill soon, and to send it to the Senate.

E-Government Rules

Judge Fitzwater noted that the E-Government Rules, including Civil Rule 5.2, have been published. He attended a Courtroom 21 conference last week where the rules were discussed. The "two-tier" provision of Civil Rule 5.2, presumptively limiting remote public electronic access to records in social security and immigration cases, drew the most comment. The conference group included people who have strong interests in public access to court records and who fear that this provision is at the top of a slippery slope that will lead to additional restrictions on remote public access.

Administrative Office

Peter McCabe observed that there is a budget crisis throughout the judiciary. The Administrative Office has many open positions. But Jeff Barr will be working with the Rules Office on a regular basis.

Advisory Committee and Standing Committee agenda materials soon will be available on line.

Old records, back to 1934, are gradually being put into electronic form. Some records continue to be missing, but real progress has been made.

The Rules website is being used a lot more now. It will prove to be an invaluable research tool as more and more information is made available. The research will be particularly helpful in enabling retrieval of the work of earlier committees on topics that relate to current projects. If Rule 56 is restored to the active agenda, for example, the extensive work that went into the proposal that failed of adoption in 1992 will be a great help.

Federal Judicial Center Report

Judge Rosenthal prefaced the Federal Judicial Center Report by noting that the Judicial Conference is committed to study the Class Action Fairness Act's impact on federal courts. This Committee will be involved. The study will help to illuminate additional resource needs that may emerge from an increase in federal-court class actions. In addition, the Act requires a report on good settlement practices within 12 months. Beyond that, the Act may generate practices that have a general impact on Rule 23, showing a need for further work on class-action litigation.

Thomas Willging described the FJC proposal distributed to the Committee as an overview of the study design. Other Judicial Conference committees will focus primarily on the impact of CAFA on federal-court resources. It is important that the study also do what it can to shed light on rule-based issues.

The study will focus on three aspects of impact. One is the impact on filings — how many new class actions are brought to federal courts as a result of CAFA? How can the incremental CAFA filings be distinguished from natural growth in class actions? The increment cannot be measured directly, but it may be approximated through a process of triangulation. One factor will be whether the action involves state claims — but if federal claims are included, it will remain uncertain whether the federal claims were added only because the plaintiff anticipated that the action would in any event wind up in federal court. Distinctions will be drawn between cases originally filed in federal courts and cases brought to federal courts by removal. The types of action will be considered, in such categories as personal injury, product liability, property damage, and so on. Trend lines in filings for these various types of actions will be considered; we know that class-action filings increased in the 10 years before CAFA, and can account for that in projecting what would have happened without CAFA.

A second aspect of impact will be at the motions level and beyond. Are there more motions to dismiss or to remand? For class certification? To approve settlements? What types of classes are defined — nationwide, statewide, or something else? Comparisons at the motions level will be difficult. The study will compare the two years from February 18, 2003 through February 17, 2005 with the two years from February 18, 2005 through February 17, 2007. This will not be a direct measure of CAFA's impact, but it will shed some light. This is a fast-moving field.

A third impact is at the appellate level. CAFA provides a new form of appeal jurisdiction from orders granting remand — how many appeals are sought? How many are granted?

The study will be able to generate preliminary information about filing and removal rates within a few months. But more complete information will take 2 years, 3 years, or even longer. The study cannot be rushed without skewing the information provided.

Discussion began by noting that apart from the jurisdiction provisions, CAFA includes other provisions that bear more directly on Rule 23 practice. Coupon settlements and attorney fees are regulated. Notice of settlements must be given to public authorities. Section 1715(b)(5) goes beyond Rule 23(e)(2) in requiring notice of "side agreements." This and other provisions could affect opt-out choices. It is possible that the impact on federal courts will be shaped by the desire of all parties to be in state court, where it may be easier to achieve a binding settlement.

Discussion continued by noting that some of the inconsistencies between CAFA procedures and Rule 23 may not affect many cases. The "Bank of Boston" provision, for example, § 1713, allows approval of a settlement that obliges any class member to pay sums to class counsel that would result in a net loss to the class member only on a written finding that nonmonetary benefits

to the class member substantially outweigh the monetary loss. This sort of settlement will occur infrequently, if ever. Some of the information that must be provided to federal and state officials on settlement will be difficult to get; it is beyond what Rule 23(e) requires. The cost of not providing it is that people are not bound by the settlement; this may create an incentive to avoid federal court. It has been rare to dismiss an action after certification in order to refile in state court; if that starts to happen, it may be a good sign that these CAFA provisions are having an impact on practice.

There is a lot of CAFA case law so far, but it focuses on the effective date, including the impact of Rule 15 relation-back concepts on amendments made after the effective date in actions filed before the effective date. It focuses also on assigning the burden on a motion to remand — does it lie on the removing party, or on the party who seeks remand?

It was noted that the study will be able to show appearances by the officials who get CAFA notices.

The study also will be able to show whether actions seem to concentrate in particular federal courts.

It was further noted that Rule 23 settlement-class proposals have been kept on hold to see how the *Amchem* decision plays out. Experience under CAFA may help to show whether these questions should be taken up again.

One troubling question is what happens when the parties stipulate to certification of a class for purposes of seeking approval of a proposed settlement but the settlement is not approved. Should they be estopped from questioning certification of the same class for litigation purposes? A much-criticized Seventh Circuit decision says that agreement on a class definition and certification for settlement should remain binding even if the settlement is not approved. It was noted that this can be a real problem for a defendant — once you start down the settlement road, you need to define a class you can live with. But it should remain possible to argue that a class that is manageable for settlement purposes is not manageable for trial.

Another observation was that it will be interesting to see what unintended effects CAFA will have. One possibility is that the parties will "park" cases in state courts to provide an escape from federal court. Having settled, they may prefer to seek approval in a state court to avoid the possible disruption of notice to government officials; when the settlement is mutually desired, no party has an incentive to remove the action to federal court even though CAFA removal would be available.

CAFA also may lead to more frequent and more sophisticated attacks on settlements, not only by public officials but by other objectors. A lawyer connected to a state attorney general will be able to get authority to appear for the attorney general, mounting a well-financed attack. "The stakes will increase." "Bad" objectors may gain increased influence.

Agenda — General

Judge Rosenthal introduced the agenda by noting that this meeting provides a contrast to the intense work at recent meetings to advance proposals dealing with major, complex, and often controversial topics. There will be a lot of final-stage work on the Style Project over the next several months, but the time has come to draw back a bit to consider what topics might be addressed next.

The agenda book presents three types of materials. First are a number of lingering agenda suggestions that might be dropped from the docket for lack of foreseeable interest over the next few

years.

A second type involve a number of discrete topics that have been considered at intervals, without ever benefiting from sufficient time for an informed decision whether to develop a concrete proposal or to move on without proposing changes. Included in this group are such topics as "indicative rulings"; pleading amendments, both in general and with respect to relation back; jury polling; and Rule 30(b)(6) depositions of an organization.

The third set of topics includes longer projects. The time counting project has been launched by appointing a subcommittee that crosses the several advisory committees. Judge Mark Kravitz chairs the subcommittee; Chilton Varner is the Civil Rules member. The subcommittee has developed a template for common issues that span the several sets of rules. The template will be submitted to the advisory committees for consideration at the spring meetings. Once methods of computing time are set, each advisory committee will consider the need to adjust specific time periods in its own set of rules. For the Civil Rules, consideration of specific time periods will extend beyond simple accounting for changes in the computation rules. Some of the specific periods present obvious problems — indeed the problems are so apparent that no one expects these periods to be observed.

Two other possible long projects include reconsideration of notice pleading and revising the procedures that surround summary judgment. These projects would consider basic issues of how courts decide cases, and the ways in which parties and lawyers litigate. For many years various groups have asked that these topics be seriously considered. The present purpose is not to decide what the outcome might be, nor even to decide immediately whether to commit to a full-blown project. Instead the purpose is to begin deliberating the question whether one or both of these subjects is ripe for further work in the near future.

Finally, the Class Action Fairness Act may provide an occasion for deciding whether we should soon return to the class-action provisions of Civil Rule 23. It is too early even to guess what impacts it will have, but the consequences may generate new issues that will require consideration.

Time Project

Chilton Varner reported on the work of the Standing Committee Subcommittee that is directing the time project. The Subcommittee is primarily responsible for achieving a uniform approach by the several advisory committees to the rules that govern time computations. In addition to uniformity, simplification is an important goal. The specific periods allowed for specific procedures are left to the primary responsibility of each advisory committee.

The Subcommittee has met once and has reached consensus on a number of issues. Many issues have presented no problem. All the sets of rules, for example, agree that the day from which a time period runs should be excluded in computing the period.

The "11-day" rule, on the other hand, is confusing. This is the rule that excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less than 11 days. [In the Bankruptcy Rules the period is less than 8 days.] It is counter-intuitive that a 14-day period often can be shorter than a 10-day period. The Subcommittee believes that "days should be days." If that approach is adopted, the Appellate Rules Committee can revise the few Appellate Rules that deliberately refer to "calendar days" in order to escape the 11-day rule.

The Subcommittee has agreed that the changes in time-computing rules should be made simultaneously in all of the individual sets of rules. As a practical matter that will require that all

of the work in reconsidering specific time periods will have to be done by a single effective date. Eliminating the 11-day rule, for example, would have a dramatic effect on the meaning of the many 10-day periods in the Civil Rules. Many of those periods should be reconsidered before the new computing rule takes effect.

There is continuing uncertainty as to what should be done with the rules, such as Civil Rule 6(a), that excuse filing on a day when the clerk's office is inaccessible because of "weather or other conditions." Electronic filing tests this rule in at least two directions. In one direction, difficulties with computer systems may mean either that the court's system is unable to accept filings or that the filer's system is unable to transmit a filing. In another direction, the court's computer system may be accessible for filing when weather or other conditions prevent access to the clerk's office. It is not clear whether the time has come to adapt these rules to the circumstances of electronic filing.

The Subcommittee began with a disposition to eliminate the provisions such as Civil Rule 6(e) that allow an additional 3 days for filing after service by any means other than personal service. But study has suggested that there may be difficult issues here; no resolution has been reached. It may be that this question is bound up with disposition of the individual time periods allowed by specific rules — they may be made sufficient to allow for delays in transmission by mail, computer malfunctions, and the like. At the same time, elimination of Rule 6(e) and parallel rules might tempt lawyers to pick a mode of service that as a practical matter reduces the time available to respond.

Another issue that needs consideration is the handling of periods expressed in hours. Some statutes are beginning to adopt such periods. If the final hour falls on a Saturday, Sunday, or legal holiday, when should the constructive concluding hour run?

Another set of problems arise from "backward-looking" deadlines, such as the Civil Rule 56(c) requirement that a summary-judgment motion be filed at least 10 days before the time fixed for a hearing. The difficulties arise because often there is not a fixed date to count back from.

Discussion began with the observation that time rules are very important. Lawyers devote great effort to calculating time periods, yet mistakes are made. And periods expressed in terms of service can raise difficult fact disputes; when a period can be measured with respect to filing there is a clear event that the court knows without difficulty.

Another set of questions may arise from the scope of the time rules. Civil Rule 6(a), as parallel provisions in other rules sets, applies to computing time periods set by statutes. This aspect of the rule may generate some unanticipated consequences.

Yet another set of questions arises from the Civil Rule 6(b) combination of generous provisions for extending time periods with a flat prohibition on extending the times for motions under Rules 50, 52, 59, and 60. The prohibition generates two kinds of problems. One is that lawyers frequently overlook this rule, seeking extensions that cannot be given. When on occasion a judge cooperates in overlooking the rule, the consequence can be loss not only of the right for post-judgment relief but also loss of the right to appeal. The other problem is that the 10-day periods provided in Rules 50, 52, and 59 may be too brief to support effective motions in complex cases. District courts can circumvent this problem by the expedient of delaying entry of judgment, but that approach requires that the need for more time be anticipated and even then exists in tension with the prohibition against a direct extension.

It also was noted that the Criminal Rules Committee likes the oft-repeated suggestion of one participant that time periods often should be expressed in multiples of 7 days. The advantage would be to reduce the number of occasions on which a period ends on a Saturday, Sunday, or legal

holiday.

A choice must be made as to the best method for considering the great many time periods established in the Civil Rules. It may be desirable to provide for consideration by dividing the Committee into two subcommittees, with review in the full Committee. But it may be desirable instead to address the questions initially in the full Committee to facilitate uniform approaches.

Agenda Cleansing

The agenda materials included brief summaries of 33 proposals that have been held on the docket, some of them for several years, without eliciting any sign of interest. Some of them seem worthy ideas that nonetheless are too much points of detail to warrant constant fiddling with the rules. They were presented for discussion on a rule that any member could retain any proposal on the docket for further development at a future meeting. There was brief discussion of two of the proposals.

Uncertainty was expressed as to the nature of the problems that might arise from the 2000 Rule 5(d) amendment that reduces the filing of discovery materials; in 1999 the Standing Committee was concerned that the change might affect evidentiary privileges. There has not been any sign of difficulty since the amendment took effect, and the Reporter of the Evidence Rules Committee sees no reason for concern.

Another of these items suggested amendment of Rule 7.1 to address failure to provide the required disclosure statement. The Rules Office staff conducted a survey of district court clerks in 10 districts, large and small. Nine of the ten said there was no problem. The clerk for the Southern District of Indiana said there is a problem, but not one that merits rule revision. Failure to file a required statement is handled by contacting the parties.

A motion to delete all of these items from the discussion docket passed unanimously.

Rule 8(c)

Apart from the notice pleading question discussed separately, the agenda presents two small questions about Rule 8(c). Each emerged from the Style Project.

One question is whether the designation of "contributory negligence" as an affirmative defense should be revised to reflect the general adoption of comparative negligence in place of contributory negligence. Only a few states continue to cling to contributory negligence. A change, however, would force choice of a new term. Should it be comparative negligence? Comparative fault, because comparison is used with respect to non-negligence claims, as when a manufacturing defect claim of strict liability is met by a defense that the plaintiff was negligent in using the defective product? Or, more accurately still, comparative responsibility because the single numerical allocation of responsibility encompasses both degree of departure from the required standard of care and also relative causal contribution? It was observed that there is no apparent sign of difficulty arising from continued reference to contributory negligence, either because everyone understands it to embrace comparative responsibility or because the extension is automatically made by example through the residuary language of Rule 8(c) encompassing "any other matter constituting an avoidance or affirmative defense." Given the disposition of the larger questions addressed to Rule 8(c), no final determination was made on this question.

The second question was raised by the longstanding suggestion that "discharge in

bankruptcy" is no longer an affirmative defense. Judge Walker expanded on this suggestion. Present 11 U.S.C. § 524 carries forward former section 14f, added to the Bankruptcy Act in 1970. Under § 524 a discharge operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any debt discharged in bankruptcy as a personal liability of the debtor, whether or not the discharge is waived. Violation of § 524 is punishable as contempt. It is no longer viewed as an affirmative defense. A default judgment obtained in violation of § 524 is void.

It was agreed that "discharge in bankruptcy" should be deleted from the list of illustrative affirmative defenses in Rule 8(c). There is no pressing problem, as witnessed by the long survival of this example after it became irrelevant. The change will be made as part of the next convenient package of amendments published for comment.

Discussion beyond those two issues raised the question whether all of the list should be deleted in favor of a simple statement that a defendant should plead any matter that is an affirmative defense under applicable law. That would avoid potential confusions with state law, which may supply different characterizations than the federal rules do. Many of the matters enumerated are likely to arise far more often in state-law cases than in federal-question cases.

It was asked whether it really would be wise to remove the list of examples from Rule 8(c). To be sure, the list is incomplete. And it would be a mistake to attempt to generate a more complete list, in part because of the substantive overtones and in part because the list never will be fully complete. But there is some value in offering common illustrations — although such items as injury by fellow servant may be hopelessly antiquated.

It was concluded that these questions should be carried forward, to be considered as part of any broader exploration of notice pleading that may be undertaken. If there is no broader project, the questions might be considered again independently.

Rule 15

The agenda book presents two pleading topics. One is the question whether the broad general approach of "notice" pleading should be reconsidered. The other is a narrower set of questions addressed to the amendment practice established by Rule 15. Movement away from notice pleading might have a profound impact on amendment practice, but it remains useful to consider possible revisions of Rule 15 within the present notice pleading system. A subcommittee considered Rule 15 questions not long ago, and recommended that any study be deferred pending completion of other large projects. Those projects have been completed, and the time is ripe to begin defining the next set of projects. For that matter, one special aspect of Rule 15(c) has come on for substantial attention this year as courts struggle with the need to apply the February 18, 2005 effective date of the Class Action Fairness Act jurisdiction and removal provisions to litigation commenced earlier but subject to later amendments.

Four options are suggested for dealing with these issues: a thorough revision of Rule 15; a very narrow revision of Rule 15(c)(3) to allow relation back not only when there is a mistake but also when there is a lack of information as to the identity of a new defendant; do nothing now, but keep these questions on the docket for future consideration; and purge Rule 15 from the docket.

A somewhat more detailed summary of the Rule 15 materials was provided.

One discrete set of questions arises from the seemingly odd provision in Rule 15(a) that cuts off the right to amend once as a matter of course on the filing of a responsive pleading but not on

the filing of a responsive motion. Judges have suggested that this should be changed — among the suggestions submitted to the Committee are that the right to amend as a matter of course should be eliminated, or that it should terminate when a motion to dismiss is filed. Particular irritation is expressed over the experience of encountering an amended complaint filed after submission of a motion to dismiss. Many other revisions are possible, including a revision that would allow amendment as a matter of right within a defined period after a responsive pleading or motion is filed. This generous approach might be defended on the grounds that it remains possible to misplead a valid claim and that leave to amend would almost certainly be granted to any plaintiff who wishes to persist in face of the initial objections.

Other general Rule 15 suggestions have been that Rule 15(b) may be too generous in its approach to amendment at trial; that amendment should be accomplished by filing a complete amended pleading rather than a separate document that must be considered together with earlier pleadings; and that Rule 13(f) might be better integrated with Rule 15.

A different Rule 15 issue has held a place of honor on the agenda for several years. It began with a simple suggestion to amend Rule 15(c)(3). One of the tests for permitting relation back of an amendment changing the party against whom a claim is asserted is that within an appropriate time the new party must have notice so that it knew or should have known that it would have been sued "but for a mistake concerning the identity of the proper party." This language has been tested in many cases in which the plaintiff knew that it could not identify a party that it would make a defendant if identification were possible. Recurring illustrations are provided by actions claiming unlawful police behavior in which the plaintiff cannot name the police officers involved. Several circuits have ruled that in such cases there is no "mistake" and that an amendment naming the proper police officer defendant cannot relate back even though all other (c)(3) requirements are satisfied. It is possible to conjure up reasons to explain this result — the plaintiff who knows of the identity problem should work harder, or file earlier in the limitations period. But these reasons are not compelling. The Third Circuit has rejected them in forceful dictum, and has suggested that the rule should be amended to allow relation back when the new defendant knows it would have been named but for a "mistake or lack of information concerning the identity of the proper party."

Consideration of this seemingly simple proposal initially leads to the question whether other aspects of Rule 15(c) might usefully be considered at the same time. As a matter of abstract theory, it is possible to imagine many untoward results arising from the invocation of Rule 4(m) in (c)(3). There is no indication that these possibilities in fact have emerged in practice, but it is fair to wonder whether it is proper to amend the rule even in a small way when it presents manifest opportunities for mischief.

Beyond the drafting problems with present Rule 15(c)(3) lies the central question whether (c)(2) and (c)(3) present genuine Enabling Act questions. (c)(1) provides for relation back when "permitted by the law that provides the statute of limitations applicable to the action." That means that the only occasion for invoking (2) or (3) arises then the applicable limitations law does not permit relation back. These paragraphs operate to defeat a defense established by controlling limitations law. How is this a matter of practice or procedure that does not abridge or modify the defendant's substantive rights and enlarge the plaintiff's substantive rights? There may indeed be cases in which the problem really is one of pleading misadventure, and in which all reasonable limitations policies have been satisfied. The case that prompted the adoption of Rule 15(c)(3), Schiavone v. Fortune, 1986, 477 U.S. 21, may well be such a case. It involved the mistaken designation of the defendant under the name of the division that committed the allegedly wrongful acts rather than under the proper corporate name. The 1991 Committee Note begins by stating that

Rule 15 is "revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." But in many cases — and particularly in cases where the plaintiff knows that it cannot identify an intended defendant — the problem is not really a problem of pleading procedure. It is one of limitations policy. Rule 15(c) can be defended as good limitations policy, but is that enough? Is it enough because Courts have accepted relation back under Rule 15(c) since 1966 without hesitating over Enabling Act abstractions?

Discussion began by asking whether law professors tend to think there are serious Enabling Act problems with Rule 15(c). One answer was that "it is problematic." Another answer began with the observation that before 1991 it was possible to argue that then-Rule 15(c) governed relation back exclusively, prohibiting relation back outside its terms even if state law would permit it. The First Circuit rejected this argument, and properly so. Present (c)(1) is a desirable recognition that federal courts should honor state law that permits relation back. But what of the situation where state law prohibits relation back? It has been accepted for a long time that 15(c) properly permits what state law does not permit. If it is not currently invalid, a small change might not make any difference. At the same time, it can be predicted that any change will encourage some academic doubters to renew the general question of validity. And it is possible that state attorneys general also will challenge it — they have a strong interest in the many civil rights actions challenging acts by state officials.

It was suggested that it would be possible to address the 15(a) questions and then perhaps think about subdivision (c) as a matter of "fairness."

The discussion concluded at this point to defer to the last remaining agenda item, Rule 30(b)(6). It was agreed that Rule 15 would be carried forward for future discussion. It may prove useful to again seek work in a subcommittee before bringing these questions back to the full committee.

Rule 26(a)(2)(B): Employee Expert Witnesses

This topic was brought to the docket by a law review article submitted as a suggestion. Rule 26(a)(2)(B) clearly limits the obligation to disclose an expert witness report to an expert trial witness who is "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve the giving of expert testimony." That means that a report need not be provided for an employee who will testify as an expert witness but whose duties as an employee do not regularly involve the giving of expert testimony. Or so it seems. A majority of the reported cases dealing with this subject take a different approach. They say that disclosure of an expert report is a good thing because it facilitates deposition of the expert, and might at times make it unnecessary to depose the expert. The Committee Note extols the virtues of expert witness reports. In effect, the Committee did not really appreciate what it was doing when it wrote the rule text, so the rule should be read to require a report because an employee who does not regularly give expert testimony is specially retained or employed to give testimony in this case.

These cases fairly pose the question: if the 1993 rule had it right, something might be done to restore the intended meaning. But if the cases are right in believing that a report should be required, finding no worthy distinction based on the regularity with which a particular employee provides expert testimony, something might be done to adopt this revisionist view in the rule text.

Discussion began with the observation that this is a real problem in practice. The conflict in the cases may not be resolved in a particular case until it is too late to provide expert testimony in some other way. A careful response is to give notice to the other side that a particular witness is

or is not required to give a report, inviting a response in case of disagreement. There is a particularly serious problem with privilege waiver.

It was noted that in 1997 the ABA Litigation Section offered a report, subsequently withdrawn, complaining that some courts were requiring treating physicians to give expert witness reports under 26(a)(2)(B) even though the Committee Note offers them as a clear illustration of expert witnesses who need not give a report and the cases recognize that a treating physician becomes specially retained or employed only if asked by a lawyer to do something in addition to regular treatment and testimony based on the treatment.

A further question may arise from the relationship to Rule 26(b)(4)(B), which severely limits the right to depose an expert who has been retained or specially employed in anticipation of litigation but who will not be used as a witness at trial.

The problem of privilege waiver is addressed in the Rule 26(a)(2)(B) Committee Note, where it is observed that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Some lawyers continue to fight a rearguard argument that work-product information need not be included in the report even though it was consulted in forming the expert's opinion.

It was asked whether, apart from possible problems of work-product and privilege, there is a good reason not to require a report?

One response was that the 1993 changes in the wording of Rules 26(b)(3) and (4) have introduced uncertainty about the extent of work-product protection for employees. There is a risk that some will be designated as nontestifying "retained" experts to shield against discovery.

A second response was that an employee may be designated as an expert witness under Evidence Rules 702, 703, or 705 because the party is not sure whether the testimony can be admitted as lay opinion testimony under Rule 701. Requiring an "expert" report in these circumstances may be too much.

Beyond opinion, moreover, employee witnesses often will be testifying to blends of historic fact and opinion quite different from the opinions typically provided by a professional expert witness. The universe of information considered by an employee may be far broader than the information provided to a professional expert witness. There may be compelling reasons to enable employee witnesses to talk with the employer's attorneys under shield of privilege. There was a lot of law to that effect before adoption of Rule 26(a)(2)(B).

Privilege was recognized as a problem, but with the suggestion that it tends to be raised early on in the litigation as the parties discuss deadlines for exchanging reports. The careful practitioner, moreover, will ask who has the burden: is it on the party offering a witness to give a report? Or on the other party to depose the witness? If there is no obligation to give a report, a trial-witness expert can be deposed without waiting for the report. Questions asked at deposition may be blocked by an assertion of privilege. Then the privilege question will need to be addressed.

This line was pursued further by asking why it should make any difference to privilege whether a report is required. If privilege and work-product protection should be waived by offering information to a witness for consideration in forming an expert opinion, adoption of an expert-report requirement does nothing more than advance the point at which the otherwise protected information

must be revealed. Examination at deposition or trial should be subject to the same waiver principle even though there was no requirement to disclose a report. If the Committee Note to Rule 26(a)(2)(B) got it right, it is not because there is a distinction with respect to privilege waiver between expert trial witnesses who are obliged to give a disclosure report and those who are not. The same holds true for the Evidence Rule 612 provisions on production of documents used by a witness to refresh recollection, provisions that may be invoked at deposition as well as at trial.

This discussion led to the question whether indeed privilege-waiver theories should distinguish between hired experts (and the functional equivalent in employees who regularly give expert testimony) and employees who occasionally are called upon to give expert testimony. There may be an important difference between the need to disclose a 10-page advocacy summary provided to a hired expert witness and the full range of information available to an employee who may of necessity be involved in helping to prepare the fact information required to try the case. Truly privileged information may deserve protection, being careful to distinguish merely "confidential" information that may deserve a protective order but not the absolute protection of privilege. This distinction may be implicit in the 1993 Committee Note to Rule 26(a)(2)(B), and in turn reflect on the reasons for distinguishing between employees whose duties regularly involve giving expert testimony and other employees sporadically called upon to provide expert testimony.

This thought was expressed more succinctly. The "hired gun" expert witness is a better subject for privilege waiver than the employee who is no more than an occasional trial expert witness. The rule is designed to focus on the independent expert.

A subtle variation was suggested: perhaps privilege should be waived only if the employee actually relied on the privileged information in forming an opinion. If it was merely considered but not relied upon, there would be no waiver.

It was noted that Professor Capra, Evidence Rules Committee Reporter, believes that there is a lot of confusion in this area and that it deserves further work.

Further discussion reiterated concern that several cases seem to disregard what the rule clearly says about reports from employees who do not regularly give expert testimony. It may be better to require reports from all expert trial witnesses, subject to protecting privilege and work-product information. On the other hand, protecting privilege and work product may prove particularly difficult with respect to employees. And it is important that a party know what are the consequences of designating an expert trial witness.

At the end of the discussion it was concluded that the 1993 rule may well have got it right, but that there are very difficult problems of privilege in addition to the question whether it is better to identify a category of employee expert trial witnesses subject to deposition directly without an obligation to first disclose an expert report. The question will be carried forward for discussion at the spring meeting. Among the materials to be considered may be a revision of Rule 26(a)(2)(B) that sharpens the distinction now drawn among categories of employee experts and that provides Committee Note discussion that further explains the problems of privilege and work-product waiver.

Rule 30(b)(6): Organization as Deponent

Professor Marcus introduced Rule 30(b)(6) by noting that it was adopted in 1970 to cure the runaround corporate defendants inflicted on people seeking corporate information. Whoever might be named as deponent would prove unable to provide pertinent information, leading to a practice requiring chains of successive depositions that was called "bandying." Deposition of the organization makes the organization responsible for designating people who will testify for it on the

subjects identified in the deposition notice. Even with this procedure, courts still regularly find that corporations have not met the obligation to identify knowledgeable witnesses.

The current questions were initiated by the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. They suggest that Rule 30(b)(6) is used in overreaching ways, and in particular is used to intrude on work-product protection. The tensions seem to focus on how much effort is required by the organization deponent to educate individuals in all of the "matters known or reasonably available to the organization." In addition, there are common efforts to argue that an organization's designated witness "binds" the organization by deposition answers. And there are more general concerns that these depositions are used to dig too deep.

It is not clear how far any real problems that may be identified are susceptible of correction by rules changes. The New York Bar proposal would change Rule 30(b)(6) only by limiting the inquiry to "factual" matters; the rest of their suggestions are framed as best-practice guides. It does not seem likely that the Committee will conclude that this rule should be repealed, although other means are available to address the "runaround" problem. It would be possible to address the "admission" problem in rule text; part of the strategy might be to allow changed statements of position but only by supplementing the deposition. The Rule 26(e)(1) duty to supplement an expert witness deposition might be a useful model. The numerical limit questions also can be answered directly — if an organization designates ten persons to appear at its deposition, does that exhaust the presumptive ten-deposition limit? Does each person count as a separate deposition for the limit to one day of seven hours, even though in form this is a single deposition of the organization? If some changes are made in the rule text, finally, it may be appropriate to describe and address the background problems in the Committee Note.

Judge Rosenthal then introduced David Bernick, recently a member of the Standing Committee. He was asked to describe his experience with Rule 30(b)(6) depositions because of his extraordinary range of experience in discovery and actual trial of highly complex cases and because his years on the Standing Committee have assured his understanding of the opportunities and limits of the Enabling Act process.

Mr. Bernick began discussion with a "war story." The witness designated to testify for a corporation about document management procedures did not know about a particular document showing advice by a British lawyer to an affiliated company. The document was the subject of a default sanction in an Australian court in litigation involving an affiliated company, not the corporation that was deponent in the United States proceeding. But the federal court ordered sanctions for failure to provide a witness with knowledge of the document, in face of the argument that to produce a witness with knowledge of the document would necessarily waive privilege. Very complex issues can be involved.

The problems arise from a conflict between substantive corporate law and trial evidence rules. A corporation is a legal construct. Evidence rules focus on reliable, ascertainable facts. Corporate "knowledge" or "action" is derived by inference from the facts of what corporate people do. A judge or jury has to draw inferences, for example, as to what the entity "knew"; it is difficult to reconcile the nature of the party — a legal construct — with evidence rules that do not focus on entities.

Rule 30(b)(6) operates in this context. It operates by creating a über-person whose knowledge is commensurate with what anyone in the organization knows or could reasonably learn. And this testimony binds the organization — the deponent speaks as the organization. And this

person can speak for the legal positions of the organization.

The organization deposition serves functions that also can be served by other discovery devices. Rule 33 interrogatories and Rule 36 requests to admit can gather facts. The organization deposition functions with respect to "ultimate facts" — is the product "safe"? That function can be served by interrogatories, requests to admit, and depositions of persons who have personal knowledge. It also is used to ask for contentions; depositions ordinarily are not used for that, although there may be cases in which the very decision to file the case is a fair subject of inquiry. Ordinarily interrogatories or requests to admit should be used for contention discovery.

Finally, the unique function of the organization deposition as it has developed is to provide evidence that is dispositive of what the organization can say. Once said by the deponent, the statement becomes the organization's position on the issue. These are treated as "organization facts" within the organization's custody or control. Rule 33 might at times be used for this purpose, but it is not often used this way. Interrogatories are used in the early stages of the litigation and there is flexibility in answering that forestalls limiting effects. The answers to interrogatories made early in a litigation reserve the right to change or supplement. And if one party asks another party to supplement interrogatory answers, the supplementing can be done by way of incorporating depositions and expert reports — for this reason, supplementation is commonly not requested.

In other settings, depositions rarely provide case-dispositive facts. Requests to admit might be used for this purpose late in the litigation, but it is difficult to frame the requests and the response usually will be a denial. But Rule 30(b)(6) is being used to establish case-dispositive evidence early in the litigation.

The rationale for adopting Rule 30(b)(6) was to solve the runaround problem. It is fair to address that problem. But current usage of the rule goes far beyond that initial purpose. And case law probably will not solve the problem. Nothing in the rule text addresses it. The problem can be solved only by reading into the rule a gloss that does not appear from the language.

Work-product doctrine does not of itself defeat contention discovery; Rules 33 and 36 establish that.

Only an amendment will cure the problem. And amendment should not be difficult. What is needed is a statement of the purpose served by an organization deposition. It is designed to discover the "locations of information," so that the vastness of the entity does not hide the information. Use for this purpose early in the litigation is desirable. What does exist, where does it exist, who did the relevant things?

So the rule could authorize a deposition "to ascertain the location of facts discoverable under these rules and within the custody or control of the organization." If for some reason it seems desirable to use these depositions as a uniform vehicle for conducting all discovery of the organization, "location of" could be omitted — "to ascertain the facts discoverable under these rules and within the custody or control of the organization." Discovery would be limited to facts, not contentions, but still could be dispositive as to the facts testified to.

The first question asked after this presentation was why the problem is anything more than a Rule 37 problem focused on an organization's failure to designate someone who has the required corporate knowledge? The answer was that "the consequence is way beyond sanctions." If the witness says "I do not know what testing we did fifty years ago" the deposition statement is used at

trial to show that the organization is irresponsible.

Then it was asked why an organization does not address these problems by seeking a protective order? The answer is that present practice is not seen as a misuse of the rule. The problem is the scope of what can properly be asked as the rule is understood. The inquiry can ask more than any person knows. The designated person or persons are required to know everything known anywhere within the organization, and their answers are binding. The Evidence Rules are driven by personal knowledge; a rule 30(b)(6) deponent is required to testify to things that are not personal knowledge.

Beyond that, it is a real burden to have to litigate arguments whether the designated persons failed to do their homework properly. But that burden is less important than the use that is made at trial. If the organization argues that the deposition statement is not right, the opposing party will use the inconsistency — they said one thing, now they say that's not right, when will they get it right?

One Committee member observed that he had obtained a protective order against an adversary's attempt to use a Rule 30(b)(6) deposition to shift the burden of discovery to the organization. Mr. Bernick agreed that the rule should not be used in that way, but noted that many judges disagree. They demand that the organization produce persons with both personal and attributed knowledge. "Undue burden" might be used as a limit, but it has not yet proved a generally effective argument.

It was asked whether courts do permit trial testimony that contradicts things said at the organization deposition — whether the problem is not binding effect, but the admissibility of the conflicting deposition statement? Mr. Bernick responded that some courts do preclude contradiction at trial, and that even if contradiction is permitted the scope of the trial evidence may be limited.

This deposition problem is quite different from the problem that an organization can speak at trial, as at deposition, only through persons. The people who testify at trial will be the right people, the people with the right personal knowledge. And they do not bind the organization on the ultimate issues. The problem, still, is the scope of what the deposition witness is required to speak to — the inquiry is not limited to personal knowledge. For this reason, the requirement that the deposition notice specify the topics for inquiry does not provide effective protection. And if the organization produces witnesses who disagree, they will be asked "what is the organization's position" on the disagreement.

An organization that designates its own trial witnesses thinks long and hard about who they should be. They can be limited to specific topics. They are not required to testify to the ultimate legal conclusion. The pharmaceutical witness will not be asked to address the clinical studies, and so on.

The source of the problem is in large part the obligation to testify to "matters known or reasonably available to the organization." The entity is the deponent. What makes sense is to require it to designate people who learn about where to go to get the information, to identify the witnesses that should be deposed because they have personal knowledge, to identify the documents that should be searched for.

It was asked what should be done when an action is based on long-ago facts that are outside the personal knowledge of any of the organization's people? Mr. Bernick's response was that a rule limited to the location of evidence could include a duty to find who, even including retirees or other no-longer-related people, may have personal knowledge. There is a distinction among people who know of direct experience, people who know only because they are educated specifically for the

purpose of discovery, and people who know not of their personal experience but because in the ordinary course of their duties for the organization they learn the relevant information. The problem of Rule 30(b)(6) arises only with respect to those who must be educated for the purpose of discovery, not for other reasons.

So, it was observed, if an employee reads documents solely for the purpose of preparing for an organization deposition, this is "30(b)(6) 'knowledge,'" not real knowledge. The point can be emphasized by asking what happens if the 30(b)(6) witness testifies very effectively. The other side does not use the deposition. If the organization puts the witness on the stand, the witness cannot testify to 30(b)(6) knowledge unless she can be qualified as an "expert" on the subject. But if the other side likes the deposition, it can be used as the deposition of the organization.

It was asked whether, before 1970, the deposition testimony of a person who is an officer, director, or managing agent of an organization "bound" the organization. It was thought that the testimony was binding, but that the deposition of other organization employees did not bind the organization at all. So today, it is possible that an organization may not find anyone other than an officer, director, or managing agent that is willing to testify at the organization deposition — then it may still be "bound."

A quite different perspective was offered. "[M]atters known or reasonably available" could be read as a restriction on the scope of the deposition and preparation, not a broadening. If the rule were revised, the Committee Note might explain that the location of documents and the identity of fact witnesses are proper subjects; that fifty-year-old information is not; that contentions are not. And an organization should be able to ask for a protective order — for example, to argue that the only purpose of asking about fifty-year-old information is to set the organization up for inappropriate use of the deposition at trial.

It was agreed that an actively interested judge can prevent abuses. But organization deposition problems do not interest many judges. Protective-order motions rarely succeed. The problems will not be solved by hoping that judges will suddenly become interested.

It was observed that some organization lawyers have said that they like 30(b)(6) depositions because they can pick the best deponent. Mr. Bernick responded that you can do this for your trial witnesses. But it is a hassle in major cases. Abuse happens only in a small minority of cases, but when it happens it is a real problem. And if you produce someone for a 30(b)(6) deposition, you may be ordered to produce the same person for a second deposition.

Mr. Bernick renewed his suggestion that the rule should be amended to direct that the organization's person "must testify about the location of facts discoverable under these rules and within the custody or control of the organization." This is legitimate. It saves a great deal of time. "[L]ocation of facts" for this purpose includes documents and people.

It was suggested in response that it still may be useful to employ 30(b)(6) to dispose of issues easily dealt with. This would not be to seek admissions about matters that are in controversy, but instead to find out what actually is in controversy.

A different suggestion was that the rule would be improved if it still directed the organization to produce a person made knowledgeable about a designated topic, but made it clear that the deposition has no greater effect on the organization than if the same witness had been deposed individually.

Another suggestion was that the rule might be amended to make clear that the scope is a limitation, not an invitation: the deposition "must be limited to matters known or reasonably

available to the organization."

The discussion concluded that there is a lot to think about on this topic. It may prove useful to designate a subcommittee to consider these issues. Consultation with the Evidence Rules Committee may be in order. Further work will be done.

Lawyer Signatures on Rule 33, 36 Responses

An ambiguity — or perhaps a conflict — arises from the relationship between Rule 26(g)(2), adopted in 1983, and earlier provisions of Rules 33 and 36. Rule 26(g)(2) says that every discovery response shall be signed by at least one attorney of record, or by an unrepresented party. The Committee Note says explicitly that "[t]he term 'response' includes answers to interrogatories and to requests to admit as well as responses to production requests." There seems no question — an attorney is to sign the answers to interrogatories and also answers to requests to admit.

Rule 33(b)(2), however, says that answers to interrogatories "are to be signed by the person making them, and the objections signed by the attorney making them." The direction that the person making the answers also sign them has appeared in Rule 33 from the beginning. The direction that the attorney sign objections was added in 1970; it is obviously sensible to direct that objections be signed by the attorney, who is more responsible than the party for understanding the reasons that may make an interrogatory objectionable. There is no indication of any intent that the attorney provide a second signature on the answers; that question is posed only by the 1983 adoption of Rule 26(g)(2).

The second paragraph of Rule 36(a) is similar. Each matter of which admission is requested is admitted unless the party addressed by the request serves "a written answer or objection addressed to the matter, signed by the party or by the party's attorney." Here too the language seems to contemplate that the party or the attorney, one or the other, may sign. This provision also dates from 1970, made as part of the decision to delete the former requirement that a party addressed by a request to admit respond by a sworn statement. The Committee Note says, among other things, that Rule 36 admissions function very much as pleadings do, perhaps indicating that an attorney signature suffices.

On the face it, reconciliation seems easy. The later and more specific requirements of Rule 26(g)(2) were clearly intended to require the lawyer for a represented party to sign answers to interrogatories and to requests to admit as discovery "responses." On this view, the only question is whether more specific drafting should be undertaken, perhaps as part of the final stages of the Style Project.

Discussion began with the question why it makes any sense to have both attorney and party sign a discovery response. The lawyer wants the party or its representative to sign the interrogatory answer to impress the obligation of full and truthful answers. It makes sense to have the lawyer sign objections, but why the answers? The signature makes the lawyer vouch for the answers: is that appropriate? It was noted that the Model Rules of Professional Responsibility hold a lawyer responsible if the lawyer knows an answer is false; "if you're responsible, you should sign." But it also was suggested that "an angry judge" does not distinguish between lawyer and party when "an answer is bad" — it makes no difference who signed it. The lawyer is "on the hook" even without signing.

In similar vein, it was suggested that "response" should be taken out of Rule 26(g), leaving Rules 33 and 36 as they are. One problem might be that an opposing party will argue that the lawyer's signature should be admitted in evidence when an interrogatory answer is admitted, putting the lawyer's credibility in issue at trial.

Several members said they had never seen a lawyer sign answers to interrogatories; the lawyer signs the transmittal, but not the answers.

This much discussion suggested that whatever else might be done, the question is too important to be addressed through the Style Project. But that leaves the question whether something should be done to achieve a smoother fit between these rules.

Some members suggested that the topic would be controversial if an amendment is proposed, and that it is better to avoid the controversy unless there is some sign that there are actual difficulties in practice.

But it was suggested that the question may not be so simple. Rule 26(g) was specifically adopted to import standards similar to Rule 11 into discovery practice, and Rule 11(d) was later adopted to make it clear that Rule 11 governs all other matters while Rule 26(g) governs discovery responses. It is important to maintain in the rules a clear sense of attorney responsibility for diligent and truthful answers to all modes of discovery, recognizing that the problems presented by questionable deposition testimony are different. That is what the 1983 Committee Note to Rule 26(g) says.

In the end it was concluded that this topic should be carried forward on the docket without any immediate need for further work. If there is some sign of real difficulties in practice, it can be taken up again.

Rule 48: Jury Polling

It has been suggested that the Civil Rules should include a provision on jury polling. A model is ready to hand in Criminal Rule 31(d). This model allows the court to poll the jury on its own, and requires a poll if it is requested by any party. Polling both ensures that the verdict is indeed the verdict of all jurors, and may reveal problems while there still is an opportunity to solve them without need for a new trial.

The Federal Judicial Center was asked to gather figures on the frequency of hung juries as an indication of the possible risk that routine polling might result in frequent new trials. A study of more than 100,000 jury trials over a period of 25 years from 1980 through 2004 showed that fewer than 1% of civil jury trials result in a hung jury. This information suggests that there is not likely to be much of a problem in this direction.

Committee members expressed the view that this is a good suggestion, with no significant disadvantage.

One possible problem was noted with the language of Criminal Rule 31(d), which calls on the court to poll the jurors "individually." It has been argued on a recent appeal, not yet decided, that "individual" polling requires that the court poll each juror separately in chambers, apart from the other jurors. Resolution of the appeal will indicate whether there is indeed a problem, or whether there is convenient authority to cite to show there is no problem.

It was asked whether it would be better in Civil Rule 48 to use the same expression as in Civil Rule 49, offering as one option a "new trial" rather than "declare a mistrial and discharge the jury." The reference to mistrial in the Criminal Rule may reflect the sensitivity that surrounds double-jeopardy interests: a new trial may not always be available after a mistrial. But it was suggested that since the Civil Rule will address a problem addressed by a parallel Criminal Rule, it is better to adopt exactly the same expression unless there is some more persuasive reason for departure.

This topic will be the subject of a proposal to publish a rule at the spring meeting.

Rules 54(d)(2), 58(c)(2), Appellate Rule 4

The Appellate Rules Committee, in response to questions explored in *Wikol v. Birmingham Public Schools Bd. of Educ.*, 6th Cir.2004, 360 F.3d 604, has suggested that Civil Rule 58(c)(2) be amended to impose a deadline for exercising the trial court's authority to order that a motion for attorney fees suspend the time to appeal the judgment on the merits. The Sixth Circuit opinion, and the exchanges between the Civil Rules and Appellate Rules Reporters, clearly demonstrate the complexity of the interrelated rules provisions that must be navigated to understand present procedure. They also reveal a potential flaw in the language of Rule 58(c)(2) that could, in unsympathetic or maladroit hands, lead to a foolish result enabling the trial court to extend appeal time long after it has concluded.

If that abstract description seems to call for a rule amendment, however, it may be met by countervailing concerns. The core complexity of Appellate Rule 4 has withstood many rounds of revision. Given the rule that appeal time limits are mandatory and jurisdictional, appeals will continue to be lost for missteps in reading or understanding. The rule has been made complex to respond to competing pressures — there is a strong desire to force prompt decisions whether to appeal after the trial court has concluded its actions in the case, but also a strong desire to support orderly resolution by the trial court of post-trial motions that should be decided by the trial court and ordinarily should be decided before there is any appeal. The complexity of the rules that seek to integrate fee motions with appeal time is no different.

The appeal-time issues are framed by the "bright-line" rule that an otherwise final judgment remains final even when there is a pending motion for attorney fees. That means, if there were no contrary rules provisions, that any appeal must be taken in the time allowed without regard to action on the fee motion. This consequence in turn means either that there must be two appeals, one on the merits and the other on the fee motion, or else that the right to appeal on the merits is lost if not timely exercised before disposition of the fee motion. In many cases it may be desirable to tend to the appeal on the merits before the fee issue comes on for decision in the trial court. But in other cases it may be desirable to arrange for disposition of all issues, merits and fees, in a single appeal.

Rule 58(c)(2) responds to these competing interests by establishing trial court discretion to order that a timely motion for attorney fees under Rule 54(d)(2) suspends the time for appealing on the merits. This is accomplished by cumbersome language that invokes both Civil Rule 59 and Appellate Rule 4: "the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." According to Appellate Rule 4(a)(4)(A)(iv) and (v) timely Rule 59 motions end the running of appeal time; a new appeal period starts to run on entry of the order disposing of the last remaining motion among those enumerated in 4(a)(4)(A).

This explicit invocation of one part of Appellate Rule 4 is made more complicated by the implicit invocation of other parts of Rule 4 arising from the Rule 58(c)(2) reference to a notice of appeal that "has been filed and has become effective." These words incorporate separate parts of Rule 4. One is Rule 4(a)(2), which directs that a notice of appeal filed after a decision is announced but before entry of judgment "is treated as filed on the date of and after the entry." Although filed, the premature notice is not yet "effective." In itself this provision does not create much complication. But the premature notice, and also a notice filed after entry of judgment, take effect only provisionally; the effect is ended by the filing of a timely motion of the sort that suspends appeal time under 4(a)(4). Those notices "take effect" within the meaning of Rule 58(c)(2) only on disposition of the last of the motions designated in 4(a)(4).

The upshot of all of this is that the trial court is given authority to make a nuanced ruling on appeal timing, similar in some ways to the Civil Rule 54(b) discretionary authority to enter final judgment disposing of one or more claims, or all claims among two or more parties, before complete disposition of an entire case. If it seems useful to let an appeal on the merits proceed while the attorney-fee motion remains to be decided, the trial court need do nothing. If it seems useful to postpone the appeal on the merits while the attorney-fee motion is decided, the trial court can act to suspend appeal time until the moment when a notice of appeal has "become effective." If there is a timely post-trial motion within the Appellate Rule 4(a)(4) categories, the trial court can consider this matter up to the time it disposes of the last such motion.

So, given this carefully crafted structure, what is wrong — apart from the need to figure it all out? A brief description of the *Wikol* case illustrates a possible shortcoming in Rule 58(c)(2) as adopted. The time line was this:

(1) March 22: the plaintiffs, having won a jury verdict, move for attorney fees.
(2) March 27: judgment on the merits entered.
(3) May 15: fee motion denied.
(4) May 24: plaintiffs move for a 58(c)(2) order.
(5) June 14: plaintiffs file a notice of appeal.
(6) July 11: Rule 58(c)(2) order extending appeal time. entered.

The court concluded that the June 14 notice was effective to appeal denial of the fee motion because it was filed within the appeal period measured from May 15. Because it was effective in part, it cut off the authority to extend appeal time, even though it was not effective as to the merits because untimely as measured from entry of judgment on March 27. The July 11 order was not effective. The court was concerned, however, that it had been required to work through several interrelated rules to reach this result, and invited the advisory committees to consider possible simplifications or clarifications.

The circumstances of the *Wikol* case illustrate the ways in which parties may run afoul of these rules. They also illustrate a bizarre possibility. Suppose the plaintiffs had not filed a notice of appeal on June 14. The Rule 58(c)(2) order entered on July 11 might then be found effective, because the court would have acted before a notice of appeal had been filed and become effective. Never mind that at that point no notice of appeal could become effective absent a Rule 58(c)(2) order. This reading would establish discretionary authority to revive expired appeal time long after the opposing parties had thought the case concluded. Presumably trial courts would seldom grant such orders, but any such order would run contrary to the general purposes and character of Appellate Rule 4.

What might be done to address this possible problem?

The agenda materials sketched two approaches, neither of them entirely satisfactory. One is a partial response to the Appellate Rules Committee's suggestion that Rule 58(c)(2) include a deadline by which the trial court must exercise the authority to extend appeal time. This version allows an extension only if the court gives notice or a party moves within 14 days after a timely attorney-fee motion is made. That would establish a clear cut-off for raising the question, well short of the present rule that allows the court to act at any time before disposing of the last timely motion made under Rules 50, 52, or 59 (or a Rule 60 motion that would be timely as a Rule 59 motion). At the same time, it would not force the court to act immediately, and without more does not establish a point that cuts off the time to act so long as the question was raised at the required time. It has the virtue of eliminating the bewilderment an uninitiate practitioner might encounter in reaching a confident understanding of what it means to act "before a notice of appeal has been filed and has

become effective." An alternative version would substitute the limit that the court may act before a timely notice of appeal has been filed and become effective. This version would directly defeat the possible argument that the present rule allows a court to extend appeal time on the basis of a notice that, because not timely, could never become effective. But it would not alleviate the complexity of the present rules, and might somehow manage to aggravate the complexity.

Quite different approaches are possible. One would be to rescind Rule 58(c)(2) and the parallel provision in Appellate Rule 4. The result would be that the time to appeal judgment on the merits always runs uninterrupted from the entry of judgment. The appeal from disposition of the fee motion must be taken separately. Consolidation of both appeals may be possible, but that will depend on the progress of the case in the trial court and in the court of appeals. The opposite approach would be to rescind Rule 58(c)(2) and amend Appellate Rule 4 to provide that a timely motion for attorney fees always suspends the time to appeal judgment on the merits. If indeed some cases benefit from having the merits appeal resolved before the fee motion is decided, this approach would defeat that benefit (unless the Appellate Rules were amended to allow the notice of appeal on the merits to become effective before disposition of a timely fee motion, an additional complexity that few are likely to wish).

Discussion began with the suggestion that it would be useful to know how courts now exercise the Rule 58(c)(2) authority to adjust appeal timing. Do courts routinely direct that appeal time be suspended? Routinely refuse to suspend appeal time? Mix the effects of their orders because it has proved desirable to adjust according to the understood different needs of different cases?

The desire for additional data was lauded as a good idea. One practicing lawyer commented that in all the cases he had encountered where the parties disagree about postponing appeal on the merits the judge has allowed the petition and failed to suspend appeal time. It was agreed that there is "a lot of confusion in the bar," and that information about the use made of Rule 58(c)(2) would be a good starting point. There are clear tensions pitting the desire to avoid piecemeal appeals against the fear that appeal on the merits should not be long delayed.

It may be desirable to move forward with this project because it ties directly to the time project. The Federal Judicial Center will be asked whether it is possible to undertake a study that will provide better information about the ways in which Rule 58(c)(2) is now used. In any event, the questions should remain on the agenda for active pursuit.

Rule 60 or 62.1: "Indicative Rulings"

Several years ago the Solicitor General suggested that the Appellate Rules Committee adopt a rule addressing the relationships between district courts and courts of appeals when a party seeks relief from an order that is the subject of a pending appeal. The Appellate Rules Committee considered the proposal and — without making any recommendation whether a rule should be adopted — concluded that the matter is better considered within the framework of the Civil Rules.

Most of the attention has focused on motions to vacate a judgment under Civil Rule 60. The pendency of an appeal does not toll the time for seeking Rule 60 relief. The motion must be made within a reasonable time, subject to a maximum limit of one year for motions made under the most frequently invoked paragraphs, Rule 60(b)(1), (2), and (3). The motion, moreover, must be made in the district court. The district court is in a far better position to evaluate the grounds for relief. The district court, however, lacks power to grant a motion addressed to a judgment that is pending on appeal; this area of practice, as many others, is governed by the longstanding rule that only one court should have control. A clear practice to address the resulting dilemma has been adopted in

most circuits. The district court has authority to consider the motion. It has authority to deny the motion. But the district court lacks authority to grant the motion. If it believes that relief should be granted it can "indicate" that it would grant relief if the case were remanded for further proceedings. (Variations also appear. The Ninth Circuit practice denies district-court authority to deny the motion — the district court can consider the motion and can indicate what it would do if the case were remanded, whether to grant or deny. The Second Circuit apparently dismisses the appeal without prejudice to reinstatement after the district court acts on the motion.)

There may be sound reasons to adopt a rule that governs this "indicative ruling" procedure. Even though practice is well established in most circuits, many lawyers and some judges are not aware of it. An explicit rule provision could avoid many false starts and some mistakes. A rule also would establish a uniform national practice for all courts. Beyond that, a rule might helpfully address some details of practice. The agenda drafts, for example, require the moving party to notify the court of appeals when the motion is made and again when the district court has decided what it would do. Notice would enable the court of appeals to regulate its own proceedings in relation to the district court, and to decide promptly whether to remand if the district court indicates that a remand is desirable.

The agenda drafts raise other questions, some small and some not so small. They would allow a district court to indicate that remand is desirable not to grant relief but to justify a considerable investment of energy needed to determine whether to grant relief. They address the question whether the indicative ruling procedure should be triggered by filing a notice of appeal or instead should follow the model of present Rule 60(a) that allows district-court action until the appeal is docketed in the court of appeals. These are small questions.

A much larger question is whether a rule defining an indicative ruling procedure should be limited to Rule 60. The Solicitor General's proposal encompassed other situations in which a pending appeal defeats district-court authority to grant relief. It may be that a general approach would be more suitable in the Appellate Rules than in the Civil Rules because of the broad range of circumstances that may be presented by appeals taken before a truly final judgment. Or it may be that the topic is simply too broad to approach in any rule. Quite different questions arise in the many different settings that permit interlocutory appeals. It seems to be accepted that a district court generally may not act on the very order that is pending on appeal without permission from the court of appeals. The authority to modify a preliminary injunction that is the subject of a pending appeal, for example, is sharply limited. But district courts retain authority to manage many other parts of the litigation. Section 1292(b) and Civil Rule 23(f), for example, expressly address the question whether proceedings should be stayed. Section 1292(a), on the other hand, does not. It is recognized that the district court can continue to manage the case while an appeal is taken from its action on an interlocutory injunction request, including authority to decide the action on the merits. And appeals taken under the collateral-order expansion of "final decision" appeal jurisdiction are left completely adrift. Some courts, for example, have adopted a rule for official-immunity appeals analogous to the approach taken to double-jeopardy appeals in criminal cases: the purpose of the appeal is to protect against the burdens of further trial-court proceedings, so ordinarily all proceedings should be suspended, but the district court can press ahead on "certifying" that the appeal is frivolous. Other collateral-order appeals, however, generally should not interfere with continued trial-court proceedings.

If a general rule is to be adopted, it is likely better to craft a new rule rather than attempt to address all of these questions within the limits of Rule 60. The difficulty of framing a new rule is illustrated by the sketch of a Rule "62.1" in the agenda materials. A first question is whether to define the rule in terms of acting on a "judgment" on the theory that any order that can be appealed

is defined as a judgment by Rule 54(a). This focus might help to avoid unintended consequences of referring to an "order," but it invites the uncertainties that grow out of Rule 54(a). A second and more important question is how to define the circumstances that require resort to an indicative ruling procedure. The draft refers to an order "that is pending on appeal and that cannot be altered, amended, or vacated without permission of the appellate court." The drafting seems awkward. It might be better to begin the rule by focusing on the need for appellate permission: "If the appellate court's permission is necessary to authorize the district court to grant a[n otherwise timely] motion [under these rules] to alter, amend, or vacate a judgment, the district court may consider the motion and * * *."

Discussion began with an expression of uncertainty as to the means of addressing motions apart from Rule 60 motions. Should the subject of the motion indeed be characterized as a "judgment," or will that misdirect practice when the appeal is from an order that few would recognize is made a judgment solely by operation of Rule 54(a) — and then is a "judgment" only if in fact it is appealable? The Third Circuit, for example, has a broad approach to permitting collateral-order appeal from an order that denies a claim that privilege defeats discovery. Who would think of the discovery order as a "judgment"?

It was noted that the Tenth Circuit practice is to remand in response to an indicative ruling only if the district judge indicates that relief will be granted on remand. A remand to support further exploration before deciding whether to grant relief is not available.

Enthusiasm was expressed for pursuing this project. It would have practical utility, reducing the remaining variations in practice. It helps to "codify what the market has done." The practice, further, has an additional virtue that has not been noted in the discussion. In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 1994, 513 U.S. 18, the Supreme Court ruled that parties lack power to settle on appeal on terms that require that the district-court judgment be vacated. "[M]ootness by reason of settlement does not justify vacatur of a judgment under review." Although exceptional circumstances may justify vacatur, mere party agreement to vacate is not of itself an exceptional circumstance. But the Court also noted that even absent extraordinary circumstances, a court of appeals "may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)." Parties fearful of the precedential impact of the district-court opinion, and uncertain as to possible nonmutual preclusion effects, may be able to settle only if they are confident that the district-court judgment will be vacated. Settlements may be advanced by adding to the rules an explicit provision for this course.

It was noted that class actions present a special variation on the question of settlement pending appeal. Remand is necessary since district-court approval of the settlement is required under Rule 23(e).

Some reluctance was expressed by observing that an indicative ruling procedure "looks like a glorified motion to reconsider" that should not be encouraged by an express rule. Recognizing that an indicative ruling procedure will make more work for district courts, it was urged that the district court nonetheless is in the best position to consider the issues and in any event is required to do so under present procedure so long as the court is aware of it.

It was concluded that this topic should remain on the agenda, to be pursued at the spring meeting on the basis of drafts that develop both a Rule 60-only provision and also a more general provision.

Summary Judgment — Rule 56

Judge Rosenthal introduced the discussion of summary judgment by noting that there are

well-known problems with the language of Rule 56. The problems proved frustrating in the Style Project. Every struggle with the language revealed ambiguities and flaws. Present Rule 56 does not describe what parties and courts do in pursuing summary judgment.

The timing provisions are clearly inadequate and divorced from the practice. Everyone ignores them. "Partial summary judgment" is a well-known practice, but it is not mentioned in the rule. There may be many other opportunities for improvement, whether to make the rule express what happens in practice or to alleviate problems it causes in practice.

The Time Project will require consideration of the time periods in Rule 56. That may be an added incentive to take on other parts of the rule as well. But the project will be very difficult.

The Reporter provided an introduction summarizing half a dozen of the more important questions raised by the failed 1991 proposals to revise Rule 56. The description was assisted by distribution of the 1991 rule text and Committee Note.

The first question is raised by the first paragraph of the 1991 Committee Note. The purpose of the revision appears to have been to encourage greater use of summary judgment — "to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that * * * can have but one outcome." The Note, however, also continues with a cautionary note: "while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters." This caution suggests a different possible purpose — to rein in unwarranted overuse of summary judgment. A third possible purpose might be to combine the first two, reflecting a determination that the actual implementation of summary-judgment procedures varies among different courts and that it would be good to encourage greater use by reluctant courts while discouraging overuse by over-eager courts.

A second question would address the standard for granting summary judgment. Long before the 1991 amendment of Rule 50, the standard for summary judgment called for a determination whether the moving party was entitled to judgment as a matter of law. The 1991 Rule 50 amendments discarded the traditional references to directed verdicts and judgments notwithstanding the verdict in favor of judgment as a matter of law and renewed motions for judgment as a matter of law. The change of vocabulary was intended to emphasize the continuity of a single standard for measuring the sufficiency of the evidence. The same standard applies whether the eventual trial would be to a jury or to the court. The 1991 version of Rule 56 discarded the familiar "genuine issue of material fact" language in favor of determining whether summary adjudication is warranted "because of facts not genuinely in dispute," so that "a party would be entitled at trial to a favorable judgment or determination * * * as a matter of law under Rule 50." Some such approach might make more clear than the rule now does that the directed verdict standard controls. It would be possible to go further in at least two directions. One would be to emphasize the efficiency advantages of summary judgment to argue that summary judgment might be governed by a standard less demanding than the directed verdict standard at trial. A closely related change would be to adopt a less demanding standard for cases to be tried without a jury. But neither of those changes seems likely to deserve serious consideration. Obvious Seventh Amendment concerns would arise from any attempt to defeat the right to jury trial on a fact record that — if duplicated at trial — would require submission to the jury. And even for bench trials, it seems better to require the judge to hear live witnesses if any party is unwilling to submit to trial on a paper record; it might prove too tempting to allow avoidance of trial on a lesser standard than applies in jury cases.

A third question is whether Rule 56 should be rewritten to express the practices established by the decisions in *Celotex Corp. v. Catrett*, 1986, 477 U.S. 317, and *Anderson v. Liberty Lobby*,

Inc., 1986, 477 U.S. 242. The *Celotex* decision defined the summary-judgment burden for a movant who would not have the burden of production at trial. The movant can carry the burden in either of two ways — it can undertake to disprove an essential element of the nonmoving party's case, or it can "show" by reference to affidavits and discovery materials that the nonmoving party cannot produce evidence sufficient to carry the trial burden. The *Liberty Lobby* decision ruled that when the standard of persuasion requires clear and convincing evidence the directed-verdict standard — and by reflection the summary-judgment standard — requires more proof to defeat judgment as a matter of law than when the standard requires only a preponderance of the evidence. The 1991 draft sought to incorporate both rulings by providing that "A fact is not genuinely in dispute * * * if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50." This draft illustrates the challenge that any draft must face: it is intelligible to someone who understands the *Celotex* and *Liberty Lobby* decisions, but must prove challenging to anyone who does not. It also illustrates the question whether at least the *Celotex* decision should be enshrined in the rule. The lore of 1991 is that the Rule 56 proposal was rejected on two divergent responses to the proposition that it expressed current practice. One response was that there is no need to amend a rule simply to reflect what everyone understands in any event. The other response was that it is undesirable to amend a rule to freeze undesirable current practices. It would be possible to remain faithful to the directed-verdict analogy, and in some ways to perfect it, while rejecting the *Celotex* decision. At trial the party with the burden of production loses unless it produces sufficient evidence to carry the burden. The same approach could be taken on summary judgment — a party who does not have the trial burden of production is entitled to summary judgment on request unless the nonmoving party comes forward with sufficient evidence to carry the trial burden. Or, perhaps more plausibly, it could be argued that the *Celotex* approach makes it too easy to win summary judgment. Before 1986, many courts and lawyers had believed that a party who does not have the trial burden of production could win summary judgment only by offering evidence to negate the nonmoving party's case. That approach could be restored.

A fourth question reflects on the imminent need to reconsider Rule 56's timing provisions in conjunction with the time-computing project. Rather than adopt time limits expressed in days, the 1991 draft allowed a motion to be made "at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control." A functional approach such as this has an obvious charm, but it might generate numerous disputes over what is a "reasonable opportunity" in a way that application of present Rule 56(f) does not so much encourage. It also seems to foreclose consideration of a procedure that would enable a motion for summary judgment — perhaps under a different name — to be filed with the complaint in actions to collect a "sum certain." Federal courts regularly encounter actions to recover overpayments of government benefits or defaulted government loans, and also encounter similar private actions. Modern summary judgment has roots in summary collection procedures that might well be restored by crafting a special timing provision in Rule 56.

A fifth set of questions has held a place on the agenda since a time only a few years after rejection of the 1991 attempt. Many districts have local rules that establish detailed requirements for summary-judgment practice. The common thread is a requirement that the moving party specify the facts that appear beyond genuine issue and point to materials on file that support its position. The nonmoving party must state whether it accepts any of the asserted facts, identify other facts as to which it asserts a genuine issue, and likewise support its positions by pointing to specific record materials. Such widespread elaboration of Rule 56 suggests that it may be useful to synthesize a

uniform procedure from the best developed local procedures.

A sixth major set of issues relates to the fifth. In two different places the 1991 draft seemed to authorize summary judgment for default of response by the nonmoving party. The provision requiring a nonmoving party to respond by citing record support for its position concluded by providing that failure to timely comply "in challenging an asserted fact" "may be treated as having admitted that fact," draft Rule 56(c)(2). And draft 56(e) on "matters to be considered" provided that "the court is required to consider only those evidentiary materials called to its attention" by the moving and nonmoving parties. This provision spares the court any obligation to search the record for relevant information omitted by the parties' submissions. But, as compared to the "may be treated as having admitted" provision, it may imply that the court is required to consider the matters pointed to by the moving party. This possible internal tension reflects a tension in reported cases. At least some circuits have clearly ruled that a court cannot grant a motion for want of response without examining the materials submitted by the movant to determine whether the movant has carried the summary-judgment burden. This question goes to the core of what summary-judgment practice should be. As compared to failure to answer a claim, it may be argued that summary judgment is a shortcut that cannot be taken to defeat a right to trial without examining the moving party's showing. There is an analogy to failure to appear for trial — a defendant who has answered, denying the allegations, may (at least in some courts) be entitled to require that the plaintiff put on a case. Even apart from that analogy, summary judgment may be disfavored as an expedient that should defeat the right to trial only if the court accepts the responsibility of examining the summary-judgment showing.

Discussion began with the observation that there is a large body of learning on summary judgment. Many are skeptical of change. They argue that change will put a thumb on the scale, to make it either easier or more difficult to win summary judgment. But that seems wrong. It should be possible to reform the procedure of summary judgment without changing the standards.

The next two voices differed. The first thought the project of revising Rule 56 an excellent idea. The second thought the project should not be attempted. In a practical sense, there are no problems. The problem with the timing provisions is met by routine extensions. The practicing bar has a good grasp of current practice. Even if a motion is unopposed, trial judges review the supporting materials to determine whether the motion should be granted.

As to the timing provisions, it was noted that they must in any event be considered as part of the time-counting project.

A third view, from a practicing lawyer's perspective, was that "the rule is a wreck." It is unusual that the text of a rule that plays so dominant a role in the administration of cases is so far divorced from practice. The rule is very important. Practice in federal courts, moreover, is increasingly national; it would help national practitioners to have a uniform approach expressed in the national rule. The project is worth taking on.

Further support came with the observation that this is a good project, but it should be divided into separate parts. One part is the procedure of Rule 56. Here there is room for some reservations about the level of detail reflected in the draft Rule 56(c) that spells out the detailed obligations of moving and responding parties. A more fundamental question is whether the rule text should attempt to reflect the *Celotex* and *Liberty Lobby* rules.

Similar comments further supported some form of Rule 56 revision. The local rules are an important help for practitioners — those who look only to Rule 56 do the job poorly. If indeed there is a substantial gap between the rule text and actual practice, so that those who are experienced in

local lore have an advantage over the inexperienced, the project is worthwhile even though it will be challenging. Rule 56 is a trap for the unwary; practitioners accustomed to state practice in Texas, for example, may fail to oppose a summary-judgment motion in federal court because they expect there will be a live hearing. The proliferation of local rules shows there is a need to consider the procedures that surround summary judgment; it may be better to avoid the standards that control the decision.

A different thought was expressed by observing that summary-judgment procedure imposes costs that may drive out smaller claims. A claim for less than perhaps $100,000 may not be sufficient to sustain the costs both of opposing summary judgment and also of actually trying the case. Perhaps there should be a simplified practice for some types of cases that omits summary judgment. At the same time, another participant recalled the suggestion that perhaps summary disposition is particularly useful in some categories of low-dollar cases, especially simple collection cases. At the same time, the question of simplified procedure has never disappeared from the agenda; development of any simplified system will include consideration of the proper role of summary procedures.

It was suggested that it would be a useful preliminary project to compile a set of local rules to illuminate the approaches that might be taken and to facilitate development of a uniform procedure that will be familiar to many courts and lawyers. It also would be useful to gather at least a few standing orders from districts that do not have local rules.

Yet another member suggested that developing a national rule that conforms to practice in procedural matters is a worthy goal, while it may be better to avoid attempts to define summary-judgment standards.

Another brief statement about standards was that reasonably uniform pronouncements may mask substantial differences in application. Many lawyers and judges believe that some courts are more receptive to summary judgments than are other courts. The Fifth Circuit, for example, seems receptive.

It was noted that Joe Cecil at the Federal Judicial Center has collected a lot of empirical data on the working of summary judgment and is working on it. This work may be useful in determining whether there is any reason to pursue the standards question.

A particular issue of standards was noted. Many courts have ruled that a trial judge may refuse to allow an interested person to defeat summary judgment by submitting a "self-serving, self-contradicting" affidavit that seeks to retract damaging testimony at an earlier deposition. The underlying purpose is clear. It would be all too easy to defeat the purposes of summary judgment if a party need do no more than this. But the conceptual foundation for the practice is shaky. A party may, at trial, avert judgment as a matter of law by retracting unfavorable trial testimony. If summary judgment is controlled by directed-verdict standards, it is difficult to understand why a similar practice should not apply. To be sure, the district court has discretion to accept the affidavit and deny summary judgment; the most common formulation seeks a plausible explanation for the changed testimony. This approach might be refined into a rule that a self-serving affidavit need not be accepted to defeat summary judgment because an affidavit is too far removed from the nature of testimony in open court, while retraction at a new deposition following proper notice will defeat summary judgment because the moving party has a better opportunity to test the retraction. But there was no apparent interest in attempting to transform any such approach into Rule 56 text.

The theme of discretion was noted from the more general proposition that, unlike judgment as a matter of law at or after trial, a district judge has discretion to deny summary judgment even though a verdict would have to be directed if the trial produced the same record as is presented on

summary judgment. This practice is supported by a variety of concerns. The most obvious is the prospect that even though no sufficient Rule 56(f) showing of a need for further discovery can be made, a better record may emerge at trial. In related fashion, it may prove more efficient simply to try the case than to agonize over the often diffuse summary-judgment record. And it is proper to seek the reassurance of an actual trial record when a case presents issues of general public importance or a need to develop the law in light of the inspiration provided by a sure grasp of particular facts.

These comments renewed the question whether it is appropriate to define a project that seeks to clarify and improve the procedures that govern summary judgment without attempting to express Rule 56 standards in new language. Any form of Rule 56 project will be "interesting" in the senses of importance, difficulty, and potential controversy. But, this comment suggested, it remains worthwhile.

The bar groups that suggest many procedure reforms have not sought Rule 56 amendments. But no one has asked for advice, and committee members believe that the American College of Trial Lawyers would be interested.

Reluctance was expressed with the thought that any Rule 56 project, however defined, will "elicit neurotic responses from the bar." All of the sensitive issues will be raised despite careful efforts to address only more narrowly "procedural" problems. Any project must be long-term. Absent any emergent concern in the bar, it may not be worth it.

Discussion turned to Rule 56(f) with the observation that this part of the practice is very important. What is so important is that Rule 56(f) orders become the focus of regulating and narrowing further discovery. It may be desirable to consider changes here. This suggestion was echoed with agreement that the practice is very important, yet many lawyers do not seem to be aware of it while those who are aware do not know how to use it well. One of the suggestions made with the 1991 draft was that it would be useful to regularize an "offer of proof" procedure that requires a party to justify the need for further discovery by describing the facts it hopes to support by admissible evidence and — if possible — by pointing to inadmissible information that supports the hope that admissible evidence can be found.

Rule 56(d) also was noted with the thought that it is little used, but perhaps should be encouraged because taking issues off the table by "partial summary judgment" can simplify the remaining litigation and make it more affordable. The 1991 draft seemed to encourage this, in part by splitting a general concept of "summary adjudication" into separate categories of "summary judgment" disposing of a claim and "summary determination" that resolves important issues or defenses.

The conclusion was that the next step will be to gather local rules and a few illustrative standing orders. The Federal Judicial Center will be asked to lend such support as it can within the many competing demands on its resources. The spring meeting will afford an opportunity to decide how to go forward "without sinking into a morass of substantive issues."

Rule 8: Notice Pleading

Judge Rosenthal introduced notice pleading as one of the fundamental long-range characteristics of the Civil Rules that merits periodic evaluation to determine how well the present system serves the goals articulated in Rule 1. Do we continue to have the best approach toward accomplishing the just, speedy, and inexpensive determination of litigation? A few years ago the Committee took up the question whether simplified procedures might be adopted to address cost and delay for at least some subset of civil actions. After finding the questions difficult the Committee postponed further action on that project. It is appropriate to ask whether the project might be taken

up again, or whether it might be transformed into a general investigation of systems that might elevate the role of pleading and, by diminishing the role of discovery, reduce cost and delay. The 1938 rules focused on individual litigation in a setting that provided a very different mix of cases than we know now. Changes in the nature of litigation may justify reexamination of the basic system. At the same time, it must be recognized that notice pleading is a sensitive topic. To take on the topic is to invite charges that the purpose is to raise barriers, to limit access to court for disfavored types of litigation. That is not the purpose. But the topic is one to be approached with great care, if at all.

Discussion of notice pleading must always begin with recognition of the great changes made by the Civil Rules in 1938. Notice pleading and discovery were combined into a new package that heavily discounted the possible value of pleading as a device to screen unfounded claims or to help prepare for trial. Pleading instead was designed to set the stage for other pretrial devices that would bear the primary responsibility for exchanging fact information and contentions between the parties. Discovery has expanded enormously since 1938, and has been supplemented by the prediscovery Rule 26(f) conference, disclosure, and proliferating uses of Rule 16 pretrial practice. The result has been to transform the real meaning of established legal principles and also — in reaction to facts disclosed by discovery that often would never have emerged in any other fashion — to accelerate the development of new legal principles. Rule 11(b)(3) reflects the interdependence of pleading with discovery and the continually increasing reliance on discovery: it is proper to advance fact contentions without evidentiary support so long as the allegation is "likely to have evidentiary support after a reasonable opportunity for further investigation and discovery." Civil litigation is a far more powerful instrument of social regulation than it would have been under earlier pleading and discovery systems.

These changes have not come free. The Committee has struggled with calls to control the burdens of discovery almost continually since the 1970 amendments that broadened the scope of discovery. Discovery questions continue to press, not only in the relatively confined topics addressed at this meeting but also in pervasively difficult and ever-changing subjects such as discovery of electronically stored information. It is possible to reconsider the decision that the procedural system should support and even encourage litigation based on the hope that discovery will produce support for contentions hoped to be proved but not capable of support at the time of the complaint. More rigorous pleading standards could be imposed, at least in some cases.

The nature of any inquiry into notice pleading must be tempered by asking what notice pleading means in actual practice. The Supreme Court has twice ruled clearly that "heightened pleading" can be required only when specifically provided by statute or by a Civil Rule, such as the Rule 9(b) provision for pleading fraud or mistake. Those opinions also suggest that any change should be made in the orderly course of the Rules Enabling Act process. But other Supreme Court decisions contemporary with these decisions seem to approve heightened pleading requirements. And the lower federal courts, although directed in part by the statements that heightened pleading can be required only under a specific rule or statute, continue at times to demand pleading details that go beyond mere notice of the events that give rise to the plaintiff’s demand for relief. These practices, persisting over many years in the face of explicit discouraging words, suggest that bare minimum notice pleading may not be the best answer for all cases. It may be appropriate to ask greater detail in some cases.

One obvious approach would be to develop specific pleading rules for specific types of claims, building on the models provided by Civil Rule 9 and by the Private Securities Litigation Reform Act. This approach, however, has manifest substantive overtones and might augment concerns that heightened pleading requirements spring from distaste for some varieties of legal rights. It also might prove too confining, imposing demanding standards across entire categories of cases that include many actions that should not be subjected to heightened pleading.

Another approach would be to move back toward fact pleading as a general requirement. The original idea of "Code" pleading may not have been a bad idea; it may have been the implementation by lawyers and judges caught up in the spirit of petty legalism that led to the practices rejected by the move to notice pleading. Even if that is so, the question would remain whether the same spirit — exacerbated by possible tendencies toward hyper-zealous advocacy — might not lead to equally undesirable results today and tomorrow.

Yet another approach would be to make some modest change in Rule 8(a)(2) to emphasize the often forgotten words: "showing that the pleader is entitled to relief." These words could, if revived, be a strong statement of what notice pleading should be — not a mere identification of an event but a statement that if proved would establish a right to relief. On this view, they knew what they were saying in 1938, but we have wandered from the intended path.

The final suggestion in the agenda materials is that case-specific flexibility might best be achieved by accepting Rule 8(a)(2) as it is and restoring something akin to the bill of particulars practice that was abandoned in 1946. The Rule 12(e) motion for a more definite statement might be expanded from a device to improve pleadings too incomprehensible to support meaningful response into a device that requires statement sufficient to support informed decision of Rule 12 motions for disposition on the pleadings.

Discussion began with the observation that a common-law process of evolution toward more demanding pleading requirements in some situations, to the extent that it happens, is not a bad thing. A requirement that a pleading actually "show" a right to relief is desirable and "policeable." This tendency could be enforced by considering further active integration of Rule 8 pleading standards, Rule 16 scheduling and pretrial orders, and Rule 56 summary-judgment practice, encouraging judges to take an active interest in ferreting out the cases that demand more than barebones "Form 9" pleading. The system seems to work well as it is now. And even a modest change, such as the draft that would require "a short and plain statement of the claim in sufficient detail to show that the pleader is entitled to relief," would excite vigorous and possibly disturbing reactions. Although pleading might seem the last best chance to avoid unnecessary pretrial burdens, it might be better to keep the pleading barriers low and reinvigorate summary judgment.

The next observation was that these possibilities, and the variations that seem to emerge from the cases, are fascinating. But it is important to know whether there is a problem. If lower courts in fact are pretty much doing what a good rule text would have them do, there is little reason to muddy the waters by attempting to ensure that they keep on doing what they are doing anyway. The law of unintended consequences is real.

The Private Securities Litigation Reform Act pleading requirements were noted. The statute emerged from experience that seemed to suggest that too many cases survived for too long because pleading requirements were inadequate and because there were too many tempting targets in corporate balance sheets. Some data on the possible impact of the pleading requirements are available. Information on such matters as the numbers and resolutions of pleading motions are available at Stanford. It would be useful to find out what can be learned from this experience.

It was noted that the PSLRA requirements "frontload the process." A tremendous amount of prefiling investigation is required. A 200-page complaint is not uncommon. But once a motion to dismiss is denied "a case is presumed to have merit." Settlement is discussed after denial of a Rule 12(b)(6) motion, not deferred until after denial of a summary-judgment motion. Settlement values have increased dramatically, in part because institutional investors are coming in as plaintiffs. At the same time, there remains a cottage industry of lawyers who bring "stock drop" cases that settle for $5,000,000 to $10,000,000. Enough of these cases survive motions to dismiss to warrant

filing. The result may be that the number of actions filed has not been much reduced by the heightened pleading requirements.

The question whether trial judges think it would help to change Rule 8 was answered by the information that the Standing Committee has begun to consider these questions. Less than a year ago it convened a panel to discuss the possibility of learning from the American Law Institute project on Principles of Transnational Procedure. Professor Hazard and eminent practitioners addressed fact pleading. The panelists agreed that fact pleading is used now, to educate the judge and to respond to the increasing need to front-load the litigation. The bar would not resist formal adoption of heightened pleading requirements for some types of cases. And courts do want heightened pleading in pro se and prisoner cases. A claim of "conspiracy," for example, may meet a demand for more detailed pleading even though "conspiracy" seems as much a sufficient legal label as the "negligently" label accepted by Form 9.

It was noted that beyond telling a persuasive story, practitioners plead more than notice requires to control the definition of issues and to facilitate discovery within the "lawyer-controlled" sphere of Rule 26(b)(1). The need to show that discovery is aimed at a matter "relevant to the claim or defense of any party" should encourage expanded pleading at two levels — once in detail to establish clearly defined claims and again in broad outline to establish expanded claims that support what otherwise might seem "subject matter" discovery.

This suggestion led to the further observation that there are many cases in which the pleadings are not short, but the length results from pleading too much information. The welter of detail interferes with deciding motions to dismiss and with controlling discovery. A big share of most district-court dockets is filled by pro se plaintiffs — prisoners, employment discrimination plaintiffs, people who are generally dissatisfied and have nowhere else to go. In some ways pro se litigants are held to lower, more forgiving initial standards. But in many ways courts have effectively developed separate procedures for handling these cases, often with the help of staff attorneys. The Prison Litigation Reform Act requires the court to take an early look at a large number of cases, and in effect leads to pleading standards not set out in Rule 8. More definite statements are often required — courts use Rule 12(e) essentially to address interrogatories to the plaintiff to flesh out the complaint, even though that is not the intended purpose of Rule 12(e). And the Fifth Circuit has a "Spears" hearing practice under which a magistrate judge simply asks the prisoner to tell the story. If the system is working, perhaps there is no need to struggle with rules that might articulate flexible principles that correspond to what works best.

Later discussion of prisoner and forma pauperis litigation was similar. Many cases are screened and dismissed without even directing service on the defendant. (It was noted that service in forma pauperis actions can be a problem because it is the marshal's responsibility and often the marshals lack sufficient resources for efficient service.) Prisoner cases are not the source of problems with the pleading rules.

It was noted that one hope for the broad scope of initial disclosures adopted in 1993 Rule 26(a)(1) was that parties would be stimulated to allege facts with particularity in order to expand the adversary's disclosure obligations. The practice endured only for a few years, and only in some districts, and it would be difficult to say whether it actually succeeded in prompting more detailed pleading. The retrenchment of initial disclosure obligations in the 2000 rules was not shaped by any judgment on this issue.

Continuing discussion observed that more definite statements are often required in official immunity cases.

And it was suggested that there are few real problems in cases with lawyers, while pro se litigation "is a world unto itself." But there are lawyer-represented cases that do not yield to a desire

for prefiling investigation. Civil rights lawyers, for example, would complain that they cannot realistically uncover needed evidence without discovery. The federal docket does include automobile collisions, slip-and-falls, small business transactions gone bad. Notice pleading may work well in these cases.

Another observation was that much motion practice is not under Rule 12(e) for a more definite statement. Defendants do not want to prompt a more detailed statement of their wrong acts. They use motions to delay the start of discovery, perhaps also with the hope of winning when the plaintiff does not do its job well. But in complex litigation the complaints are not short and plain; they are "long and fancy." These complaints move well beyond the function of simple notice of the claim.

It was suggested that relying on the combination of notice pleading and discovery may raise problems if there is reason to worry about the cost of discovery. And pointed out that one recent action settled for $3,000,000,000 without discovery after denial of a motion to dismiss, and responded that in securities and like litigation there may be less need for discovery because public filings supply much useful information.

Rule 11 was brought back to the discussion, noting that it encourages filing before investigating and wondering why defendants should be made to bear discovery costs when the plaintiff can point to no more than a reasonable hope that its allegations will have evidentiary support after discovery. Toxic tort litigation provides frequent examples of filings that are "way out ahead of the science." The result is five or six years of mostly one-way discovery in which the plaintiffs seek to build from the fact that a contaminant has been released to some evidence of actual harm.

These discussions of complex litigation led to the observation that the Manual for Complex Litigation illustrates methods of management. The spectrum runs from that end to "the most oblique prisoner complaint." Revising Rule 8 is not a likely path of change. A more likely useful idea would be to expand Rule 12(e), establishing greater discretion to demand added detail on a case-by-case basis. This suggestion drew added support. The illustrative draft in the agenda is useful. The cases now say that Rule 12(e) is available only when the responding party cannot reasonably be required to frame a responsive pleading; it is not to be used to elicit greater detail to help determine whether the plaintiff can allege facts sufficient, if eventually proved, to establish a claim. Revision might help. This flexibility would not be used to demand greater detail in every case — there would be little point in attempting to require such detailed pleading of a negligence claim as to support decision on the pleadings. But it could be useful in other areas. Something like this occurs frequently now in official-immunity cases.

Complex litigation came back with the suggestion that the motion to dismiss is attractive to defendants not because complaints fail to state the elements of a claim but because in some areas of the law we have Code pleading in practice. The *Dura Pharmaceuticals* decision in the Supreme Court this year is an illustration of imposing demands of particularized pleading that are difficult to satisfy.

The immediate question was put: are any of the proposals sketched in the agenda materials, or still others, sufficiently attractive that more information should be sought? Or even to move directly toward shaping a specific proposal? Or should the broad notice-pleading topic simply be held open for possible eventual consideration?

One answer was suggested — the place to look for reform is not Rule 8 but Rule 56 summary judgment. This meeting has shown a live possibility that Rule 56 should become the focus of a major project in any event. But another answer might be that pleading motions really do serve good purposes and should be encouraged by ratcheting up pleading requirements. Yet another may be

simply to let things keep "cranking along," reasoning that discovery costs are not disproportionate in most federal-court actions.

Another suggestion was that it would be helpful to learn what district judges around the country think. Do they think they need greater authority to demand more particularity? That they could do more productive things by other means?

One judge suggested that different cases require different things. A direct attack on notice pleading will start a long battle. It is not clear that there is a problem. There are better things to do.

A new thought emerged in the suggestion that a very important practice has developed in the use of "extraneous documents" on motions to dismiss. The practice seems to vary. Much turns on whether a complaint somehow "incorporates" a document, but the test is unclear. Consideration of the document is available on the face of the pleadings if it is incorporated; otherwise it can be considered only by treating the motion as one for summary judgment. It would be useful to find clear and consistent answers.

Another suggestion was that deferral is better. The problem is not notice pleading. It lies instead in a culture of lawyers who are good at discovery, but do not know much about trial. Notice pleading is the heart of the system.

Practice probably varies among different judges. Some judges "go for the jugular," pressing the parties to bring cases on for trial within 12 months. Others are more relaxed, waiting to see what the parties bring to them. The pleading rules should be revised to give the judge greater authority to require details that cut through the fog generated by some cases. Revision of Rule 12(e) may work better than changing Rule 8.

The question was asked directly: "To what end"? If not a change in notice pleading standards, would increased use of Rule 12(e) increase dismissals? We do not now seem to have a fact pleading practice that applies comprehensively to all cases, ordinary and complex alike.

A similar caution was voiced by expressing reluctance to build in a third layer of delay. Motion practice in federal courts often resembles local state practice. Increased use of Rule 12(e) motions would lead to a routine presentation of three motions before trial: a 12(e) motion for a more definite statement, followed by a motion to dismiss, followed by a motion for summary judgment. Each motion builds in delay. And there may be repeated motions for summary judgment, although some courts require that a party seek permission to file more than one.

It was suggested that Rule 12(g) requires consolidation of motions, reducing the risk of multiple motions. But it was responded that often the motions must be considered separately — consideration of a motion to dismiss for failure to state a claim is not likely to be sensible before the court decides whether to require a more definite statement of the claim.

A tentative consensus seemed to be that no one had suggested serious study of the possibility that Rule 8 might be changed to require fact pleading as the basic starting point. That leaves the question whether some less sweeping changes should be studied. The Committee is charged with the task of ensuring that the rules fit evolving needs. These questions might be approached generally, or perhaps as part of a simplified procedure project.

The first recommendation was to do nothing now.

A different recommendation was that it might help to get a better sense of what judges are doing now. Thomas Willging noted that it is relatively easy to undertake a survey that asks the opinions of district judges, but that it is tricky to frame "opinion" questions that will yield actually useful information. A different approach might be to do an electronic survey in a few districts to

see what kinds of motions and orders related to pleading are being made. It also might be possible to look for local rules addressing specific categories of cases; some districts, for example, have local rules for patent cases. Standing orders also may address these issues, such as the orders in some districts that require a detailed case statement in actions under the Racketeer Influenced and Corrupt Organizations Act. These possibilities will be pursued further with the Federal Judicial Center, recognizing that requests for its valuable help are constantly at risk of outstripping available resources.

The proposal to seek FJC help was met by asking whether there are identifiable problems that warrant the expenditure of resources. A response was that there has long been a demand for better tools for early management of lots of cases that survive for longer, and at greater expense, than they should. It is difficult to know whether there really is a problem and an opportunity here. It would be useful to find out. But it was rejoined that this Committee represents a good cross-section of experience and perspectives, and has not identified any clear problems. It has been agreed that pro se cases present separate issues. Apart from that, is there a problem? The toxic tort example may not be a pleading problem, but instead a problem of ambitious law and still inadequate science.

An observer suggested that for at least 25 years the Committee has worked toward focusing litigation on the merits. The remaining links to study are notice pleading and summary judgment. Defense lawyers and litigants think it would be useful to study these practices in addition to the ongoing concerns with discovery.

A responding question asked whether there are data showing how cases against corporate defendants get knocked out of the system — does it happen at pleading? On summary judgment? At trial? The answer was that no helpful studies are known.

A tentative summary of the discussion was offered by suggesting that the desirability of enlisting FJC help depends on how great are the strains on their resources. There may be something valuable to be done with pleading, but the level of interest seems to be "cool, not frozen."

So which might come first, pleading or summary judgment? Or might they be done together? With Rule 56 the greatest interest seems directed to the procedures rather than the standards; a collection of local rules could provide real help in suggesting desirable procedures. This is a well-defined project. It is more difficult to articulate the dimensions of a pleading project, particularly if indeed there is consensus that Rule 8 should not be amended.

Perhaps it will turn out that a Rule 56 project could be coupled with some elements of a Rule 8 project. A search of local rules and standing orders could consider both summary-judgment practices and also any identifiable pleading practice rules or standing orders. An electronic docket search also might give a better sense of what courts are doing with asserted pleading deficiencies. It was agreed that this would be a sensible starting point if the FJC is able to undertake it.

It will be more difficult to find a way to identify cases that cannot be dismissed under present pleading practice but that should be dismissed. Perhaps, after the first phase, it will be useful to go to bar groups to ask for advice.

It was observed that the Standing Committee, having already started down the road on this subject, might be interested in considering the question whether there are pleading problems that warrant the arduous work that would be needed to develop proposals for significant change.

Respectfully submitted,

Edward H. Cooper
Reporter