MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 14 and 15, 1999

The Civil Rules Advisory Committee met on October 14 and 15, 1999, at Kennebunkport, Maine. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Mark O. Kasanin, Esq.; Judge David F. Levi; Myles V. Lynk, Esq.; Judge John R. Padova; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Chief Judge C. Roger Vinson and Professor Thomas D. Rowe, Jr., attended this meeting as the first meeting following conclusion of their two terms as Committee members. Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee; Professor Edward H. Cooper attended by telephone as Reporter. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Adrian G. Duplantier attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas Willging, Judith McKenna, and Carol Krafka represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred W. Cortese, Jr.; and Fred Souk.

Judge Niemeyer introduced Judge Padova as one of the two new members of the committee. Professor John C. Jeffries, Jr., the other new member, was unable to attend because of commitments made before appointment to the committee.

Judge Niemeyer expressed the thanks of the committee to Chief Judge Vinson and Professor Rowe for six years of valuable contributions to committee deliberations. Each responded that the privilege of working with the committee had provided great professional and personal rewards.

Introduction

Judge Niemeyer began the meeting by summarizing the discovery proposals that emerged from the committee's April meeting and describing the progress of those proposals through the next steps of the Enabling Act process. The April debates in this committee were at the highest level. Committee members were arguing ideas. If the ideas are inevitably influenced by personal experience, the discussion was enriched by the experiential foundation. It is difficult to imagine a better culmination of the painstaking process that led up to the April meeting. During those debates the disclosure amendments were shaped to win acceptance despite the strong resistance from many district judges who did not want to

have local practices disrupted by national rules. The decision to reallocate the present scope of discovery between lawyer-managed discovery and court-directed discovery met the question whether the result would be to increase abuses by hiding information and would lead to increased motion practice. The committee concluded that any initial increase of motion practice would be likely to subside quickly, and that the result would be the same level of useful information exchange. The committee also decided to recommend an explicit cost-bearing provision, notwithstanding the belief that this power exists already. The opposing motion made by committee member Lynk proved prophetic, as his arguments proved persuasive to the Judicial Conference. The seven-hour deposition limit also provoked much discussion, and significant additions to the Committee Note, before it was approved.

The responsibility of presenting the multi-tiered advisory committee debates and recommendations to the Standing Committee was heavy. The Standing Committee, however, provided a full opportunity to explore all the issues. The carefulness of the advisory committee inquiry, the deep study, and the broad knowledge brought to bear persuaded the Standing Committee to approve the recommendations by wide margins.

The Standing Committee recommendations then were carried to the Judicial Conference, where the central discovery proposals were moved to the discussion calendar. Because all members of the Judicial Conference are judges, there were no practicing lawyer members to reflect the concerns of the bar with issues like national uniformity of procedural requirements and the desire to win greater involvement of judges in policing discovery practices. Some of the district judge members were presented resolutions of district judges in their circuits, and felt bound to adopt the positions urged by the resolutions. Practicing lawyers sent letters. The Attorney General wrote a letter expressing the opposition of the Department of Justice to the discovery scope provisions of Rule 26(b)(1).

With this level of interest and opposition, the margin of resolution seemed likely to be close. Judge Scirica and Judge Niemeyer were allowed considerably more time for their initial presentations than called for by the schedule, and then sufficient time for each individual proposal.

Discussion of the disclosure proposals began with a motion to vote on two separate issues — elimination of the right to opt out of the national rule by local rule, and elimination of the requirement to find and disclose unfavorable information that the disclosing party would not itself seek out or present at trial. The proposal to restore national uniformity was approved by a divided vote. Approval likewise was given to the proposal to scale back initial disclosure to witnesses and documents a party may use to support its claims or defenses.

The proposal to divide the present scope of discovery between attorney-managed discovery and court-directed discovery was discussed before the lunch break, while the vote came after the break. This vote too was divided, but the proposal was approved. The discussion mirrored, in compressed form, the debates in the advisory committee. Professor Rowe's motion to defeat the proposal was familiar to the Conference members, who explored the concern that the proposal might lead to suppression of important information.

The presentation of the cost-bearing proposal was not long. It was noted that the advisory committee believes courts already have the power to allow marginal discovery only on condition that the demanding party bear the cost of responding. Although the purpose is only to make explicit a power that now exists, several Conference members feared that public perceptions would be different. Again, the views expressed in advisory committee debates on Myles Lynks's motion to reject cost-bearing were reviewed by the Conference. The Conference rejected the proposal.

The presumptive seven-hour limit on depositions met a much easier reception; it was quickly approved.

The next step for the discovery amendments lies with the Supreme Court. There may well be some presentations by members of the public to the Court. If the Court approves, the proposals should be sent to Congress by the end of April, to take effect — barring negative action by Congress — on December 1, 2000.

In the end, the discovery proposals were accepted not only because the content seems balanced and modest, but also because of the extraordinarily careful and thorough process that generated the amendments. The Discovery Subcommittee's work was a model. It is to be hoped that a detailed account of this work will be prepared for a broader audience, as an inspiration for important future Enabling Act efforts.

Judge Scirica underscored the observations that the debate on the discovery proposals was very close. The debate, with the help of Judge Niemeyer's excellent presentation, mirrored the discussions in the advisory committee. Conference members know a lot about these issues. They came prepared; some had called either Judge Scirica or Judge Niemeyer before the meeting to ask for additional background information. All of the arguments were put forth; nothing was overlooked.

Assistant Attorney General Ogden noted that the Department of Justice appreciated the efforts that were made to explain the advisory committee proposals to Department leaders. Although official Department support was not won on all issues, the Department supports ninety percent of the proposals. The Department, moreover, recognizes that its views were given full consideration. For that matter, there are differences of view within the Department itself. Opposition to the proposed changes

in the scope-of-discovery provision, however, was strongly held by some in the enforcement divisions. From this point on, it is important that the Enabling Act process work through to its own conclusion.

Judge Niemeyer responded that it is important that the advisory committee maintain a full dialogue with the Department of Justice. The Department works with the interests of the whole system in mind.

Judge Duplantier reported that he had observed the Standing Committee debate. The written materials submitted by the advisory committee were read by district judges, and they recognized that the advisory committee had worked hard on close issues. This recognition played an important role in winning approval of the proposals.

Judge Niemeyer observed that the questions that arise from local affection for local rules will continue to face the advisory committee.

Scott Atlas expressed appreciation for the efforts of the advisory committee to keep the ABA Litigation Section informed of committee work. The Section will continue to support the discovery proposals.

It also was noted that the Judicial Conference considered on its consent calendar the packages of proposals to amend Civil Rules 4 and 12, and to amend Admiralty Rules B, C, and E with a conforming change to Civil Rule 14. These proposals were approved and sent on to the Supreme Court.

In June, the Standing Committee approved for publication a proposal to amend Rule 5(b) to provide for electronic service of papers other than the initial summons and like process, along with alternatives that would — or would not — amend Rule 6(e) to allow an additional 3 days to respond following service of a paper by any means that requires consent of the person served. A modest change in Rule 77(d) would be made to parallel the Rule 5(b) change. Publication occurred in August, in tandem with the proposal to repeal the Copyright Rules of Practice, and make parallel changes in Rule 65 and 81; these proposals were approved by the Standing Committee last January.

Judge Niemeyer noted that the admiralty rules proposals grew from an enormous behind-the-scenes effort by Mark Kasanin, the Maritime Law Association, the Department of Justice, and the Admiralty Rules Subcommittee. The package was so well done and presented that it has not drawn any adverse reaction.

Appointment of Subcommittees

Judge Niemeyer announced that changes in advisory committee membership and new projects require revisions in the subcommittee assignments and creation of a new subcommittee.

The Admiralty Rules Subcommittee will continue to be chaired by Mark Kasanin. The two new members are Judge Padova and Myles Lynk, replacing Chief Judge Vinson and Professor Rowe.

The Agenda Subcommittee will continue to be chaired by Justice Durham. The new members are Judges Carroll and Kyle, and Professor Jeffries.

The Discovery Subcommittee will continue without change.

The delegates to the Mass Torts Working Group were Judge Rosenthal and Sheila Birnbaum. The Working Group delivered its Report to the Chief Justice exactly on time, last February 15. The Chief Justice directed that the Report be printed and distributed to the public, but has not acted either way on the Working Group recommendation to create a new Judicial Conference Mass Torts Committee. A new committee, drawing from several established Judicial Conference committees, could build on the work begun by the advisory committee's extensive study of class actions, and at the same time draw from the knowledge of the other committees in a project considering legislative as well as rulemaking solutions. A project of this kind, on the other hand, would interject the judiciary into a very controversial area. The risk of becoming entangled with highly politicized matters may, in the end, seem to outweigh the opportunities for constructive contributions. Rather than postpone further advisory committee action indefinitely, it is desirable to begin to revisit the questions whether Rule 23 can be revised. Rule 23 revisions might aim at mass torts, but also might aim at other questions — the entire Rule 23 project was put on hold pending completion of the Mass Torts Working Group project. The delegates to the Working Group will be reconstituted as part of a new Rule 23 Subcommittee, chaired by Judge Rosenthal and including also Sheila Birnbaum and Assistant Attorney General Ogden.

The work of the class-action subcommittee will be considerable. The four volumes of working papers provide a solid, if rather formidable, foundation. The work of the advisory committee that built on that foundation will help to provide some focus. But there are many key class-action issues that remain to be explored further and brought to a conclusion. Settlement classes have never been brought to rest, and the Supreme Court has emphasized that its two recent decisions in settlement-class cases have rested on present Rule 23 rather than any final view whether Rule 23 should be revised to provide new answers. Settlement classes inject the courts deep into social ordering. And the advisory committee has never fully resolved the question whether to establish a new "opt-in" class procedure. The advantage of an opt-in class is that it provides a strong reassurance of genuine consent by class members in a way that an opt-out class cannot match.

The most imminent class-action event is the November mass-torts symposium at the University of Pennsylvania Law School. This

symposium has been designated as an official advisory committee activity. Although the symposium has been designed in part as a ground for exploring issues peculiar to mass torts, aiming either at any new committee that may be created or at Congress, it also will provide much food for thought about Rule 23. The fact that legislative proposals will be addressed does not detract from the value of the rules proposals that also will be advanced. The mass tort landscape changes so rapidly, moreover, that it is important to renew our acquaintance. The lessons learned even one or two years ago are now partly out-of-date.

The Rule 23 Subcommittee should work toward presenting materials for deliberation and debate at the next advisory committee meeting.

The Rule 53 Special Masters Subcommittee will have a new chair, Judge Scheindlin, to replace Chief Judge Vinson. A first draft of a thoroughly revised Rule 53 was prepared for the committee a few years ago. The Federal Judicial Center has launched a study to explore the premises that underlie the draft; an interim progress report will be provided at this meeting, and it is expected that the project will be completed in time for a subcommittee report at the next advisory committee meeting.

The Technology Subcommittee will have one new member, Professor Jeffries, to replace Professor Rowe. The subcommittee has worked on electronic filing, and particularly the Rule 5 amendments and Rule 6(e) alternatives that were published for comment last August. Other issues are certain to arise. Many courts are now making docket sheets available electronically, generating privacy issues that were not, in any realistic way, the same when access to docket documents required a personal visit to the courthouse. The Court Administration and Case Management Committee has appointed a special committee to study these issues, chaired by Chief Judge Hornby. They have invited a number of experts to help them explore the policy issues that arise from posting court documents on the internet. By fortunate coincidence, Professor Jeffries will be one of their experts. Judge Carroll observed that the Subcommittee is not yet seeking to take the lead on these issues.

In an accurate forecast of the advisory committee's later decision to pursue the question whether it is possible to adopt simplified rules of procedure for some cases, a Simplified Procedures Subcommittee was appointed. Sheila Birnbaum will chair the Subcommittee. Its members tentatively will include Judge Levi, Assistant Attorney General Ogden, Judge Padova, and Professor Jeffries. Professor Marcus was asked to work with the Subcommittee in his capacity as Special Reporter.

The advisory committee delegates to the ad hoc subcommittee on Federal Rules of Attorney Conduct will continue to be Judge Rosenthal and Myles Lynk. They also will be charged with helping

to formulate the advisory committee's advice to the Standing Committee on development of a uniform rule for financial disclosure.

Legislation Report

John Rabiej made the Administrative Office report on legislative activity on matters of interest to the advisory committee.

Legislation was introduced earlier this year that would federalize all class actions asserting a "Y2K" claim. The Administrative Office's Director wrote on behalf of the Judicial Conference to the chairs of the Congressional Committees opposing the bill. The letter had been coordinated with Judges Niemeyer and Scirica and reflected their concern that the judiciary's opposition should not be interpreted to reject all future efforts to extend federal jurisdiction over peculiarly national class actions or mass torts under suitable conditions. Despite the judiciary's opposition, the legislation was enacted into law. The House later passed a separate bill that would federalize state class actions with the exception of a small number of essentially intra-state actions. Judge Niemeyer expressed his hope to the Judicial Conference's Executive Committee that the judiciary might defer opposing the bill at this time and maintain a flexible negotiating position. He noted that the bill was unlikely to proceed much further in Congress this year.

In responding to the bills that would essentially federalize most state-court class actions, the Judicial Conference Executive Committee was importuned by the Federal-State Jurisdiction Committee to take a position flatly opposed to any transfer of class-action jurisdiction from state courts to federal courts. Based on experience growing out of the advisory committee's class-action conferences, studies, and hearings, and particularly on the conferences held by the Mass Torts Working Group, representatives of this committee sought to persuade the Executive Committee to adopt a more nuanced view. Since 1995, and perhaps earlier, the Judicial Conference has been on record in support of some role for federal courts in class actions that sweep across many states or the entire country. The advisory committee and Working Group heard much concern with the opportunity to frame national class actions in any state that seems most hospitable to the party choosing the forum, and particular concern with the prospect that a collusive class-action settlement may be shopped from one state to another until an agreeable court is found. With the able assistance of Administrative Office staff, the Judicial Conference response to the pending bills was framed in terms that leave the way open to support mass-tort legislation if it proves desirable to develop federal subject-matter jurisdiction in this area. It will be most important to continue to work with the Federal-State Jurisdiction Committee in this area, whether through a new Mass Torts Committee or through other means of cooperation. The future of the class-

action bill that passed the House is uncertain in the Senate, and President Clinton has threatened a veto. The prospect that there will be more activity in this area remains open. There are strong and competing federal and state interests in these areas, and all involved must be sensitive to the competition and cautious in developing solutions.

S.353, the Class-Action Fairness Act of 1999, includes a provision that would eliminate judicial discretion from Civil Rule 11(c), restoring the 1983 provision that made sanctions mandatory. Similar provisions have appeared in other bills since the 1993 Rule 11 amendments. The opposition of the judiciary to this incursion on the rulemaking process has been communicated to Congress.

Minutes Approved

The draft minutes for the April 1999 meeting were approved as circulated.

Federal Rules of Attorney Conduct

Judge Niemeyer introduced the background of the Federal Rules of Attorney Conduct. States comprehensively regulate matters of professional responsibility. But problems arise when, for example, a Pennsylvania attorney with a Virginia client appears in proceedings in the United States District Court for the District of Columbia. Choosing the applicable law is not easy — and different enforcing bodies may make different choices. Professor Coquillette, as Reporter for the Standing Committee, created a 10-Rule model for consideration of an approach that would adopt state law for most issues but establish specific Federal Rules of Attorney Conduct for the issues that most frequently arise in federal courts. At about the same time that the Standing Committee launched its project, the Department of Justice began to encounter difficulties with expansive interpretations of professional responsibility rules in some states, most notably Model Rule 4.2 or its analogues dealing with contacts with represented persons. A three-way dialogue has emerged between the Department of Justice, the American Bar Association, and the Conference of Chief Justices. The role of the advisory committee is to act as one of the several advisory committees offering advice to the Standing Committee. The report presented by Professor Coquillette today is one that calls only for discussion.

Professor Coquillette began by expressing appreciation for the many warm gestures of support extended by advisory committee members after the automobile accident that prevented him from attending the May 4 meeting of the Attorney Conduct Rules Subcommittee.

The history of the Federal Rules of Attorney Conduct project has been surrounded with controversy. Much of the controversy arises from misinformation about the origins and purposes of the project. A great many bodies outside the Judicial Conference

structure are involved with these topics, and it is essential that everyone involved have a clear understanding of the project.

The major concern of the Standing Committee, cutting across all of the advisory committees, is to promote consistency in the rules process and to advance justice. Ordinarily the Standing Committee discharges its responsibilities by relying on the advisory committees as the initiating agencies for rule activities within their respective competencies. But it is not feasible to rely on the advisory committee structure to originate proposals that cut across the several different areas of practice allocated to those committees. The Standing Committee at times is forced to take the lead. Issues of technology are a continuing example. Questions of attorney conduct are another example.

In 1988 Congress asked that the proliferation of local district court rules be slowed down. The Local Rules Project was established. The Project in fact made a lot of progress in trimming the number of local rules. And in the process, the Project identified local rules that seemed worthy of emulation. Many of the Federal Rules of Appellate Procedure and other national rules derive from local rules that the Project submitted to the advisory committees for consideration.

Attorney conduct matters are governed by many different local rules. The local rules often are inconsistent with the district's home state rules. Some of the local rules are unique — they are not consistent with the rules of any state or with any national model set of rules. The Federal Judicial Center has helped the Standing Committee catalogue the many district rules. It is important to remember that this project did not originate with the concerns the Department of Justice is now expressing. To the contrary, it began with the Local Rules Project. The Project initially identified the attorney conduct rules problem, but concluded that the problem was too big to be fit in with its other work. Attorney conduct local rules were put aside for separate consideration after the initial work of the Project could be concluded in other areas. Now the topic has come back.

The most important point to emphasize is that the Standing Committee is not trying to increase federal regulation of attorneys. Its purpose is quite the opposite. Today we have extensive federal regulation of attorney conduct through local rules. Many of the local rules purport to address topics that lie at the core of state interests and that involve little or no independent federal interest. The purpose of the present effort is to rein in this extensive federal control, limiting any federal control to matters that implicate important federal interests.

The Standing Committee has concluded that despite the questions that might be raised at the margins of Enabling Act authority, there surely must be centralized authority to deal with the situation created by the proliferation of local rules. If

local rulemaking cannot properly deal with any of these issues, then the challenge is to find a way to set aside all the invalid local rules. But if indeed there are important federal interests, derived from the need to ensure federal control of federal procedure, then the challenge is to find a way to cede back to the states the areas of primary state interest while retaining a core of federal control over the issues that matter most to the federal courts.

In preparing to address these issues, the Standing Committee arranged two conferences constituted of representatives from all the different groups interested in these questions. Four options emerged from the work of these conferences.

One option is to do nothing. The present situation would continue. As described in more detail below, the present situation is even more confused than would appear from a mere survey of the local rules.

A second option would be to adopt a complete and independent set of attorney conduct rules for the federal courts. Implementation of this approach most likely would involve adoption of the most current version of the ABA Model Rules.

A third option would be to adopt one national rule that mandates dynamic conformity to state law, together with a choice-of-law rule for the appellate courts. This model would leave no room for federal law. There is substantial controversy about this approach. Some have urged that although the federal rules should incorporate the text of the local state rules, federal courts should remain free to interpret the text in ways at variance with local state interpretations. The result would be a semblance of conformity, but substantial federal independence in fact. Others urge that there is no point in a mere pretense of conformity, and substantial damage when lawyers innocently but mistakenly believe that conformity to state law provides clear answers that can be relied upon in resolving dilemmas of professional responsibility.

The fourth option would begin with dynamic conformity to state law, but add a core of express federal rules addressing matters of particular interest to federal courts. This approach was illustrated by the "ten-rules" model drafted for the Standing Committee. Although there were nine independent rules for federal courts, this model achieved substantial conformity to much state practice because it was based on the ABA Model Rules, relying on the variations of the Model Rules that are adopted more frequently than any others.

The invitational conferences offered no support for the "do nothing" approach. The conferees believed that the local rules present a substantial problem; the problem is reduced in the districts that seem to routinely ignore their own local rules, but there are costs even in the appearance of federal rules that in fact have no meaning. Neither was there any support for adopting

a complete and independent body of federal rules.

These consensus views left two choices open — dynamic conformity to state law as to all matters, or dynamic conformity coupled with a limited number of independent federal rules addressing matters of special federal interest. Because these issues cut across the interests of all the advisory committees, an ad hoc subcommittee was appointed. The subcommittee includes representatives from each of the advisory committees, and has advisers from other Judicial Conference committees. The subcommittee met in May and in September. Its work has shifted attention to a fifth option, embodied in the draft Federal Rule of Attorney Conduct 1 submitted with the agenda materials for the fall advisory committee meetings.

This fifth approach is styled as a Federal Rule of Attorney Conduct for two reasons. First, it cuts across all federal courts and the interests of each advisory committee and each separate body of present Federal Rules. Second, it is anticipated that there well may be additional FRAC — a likely FRAC 2, for example, would be designed to deal separately with the unique issues that confront bankruptcy practice. The Bankruptcy Code has its own definition of conflicts of interest, and adjustments also may prove appropriate for other issues.

The FRAC 1 draft combines the dynamic state conformity approach with continued federal independence in matters of federal procedure. The dynamic state conformity is clearly designed to incorporate the interpretation of local state rules by state bodies that have authority to establish definitive state law. Although federal courts retain power to control the right to appear in federal court by admitting, suspending, and revoking federal practice privileges, disciplinary enforcement as such would remain with state authorities. No one is eager to establish a federal disciplinary bureaucracy, nor to establish general federal disciplinary authority. Continued federal independence in matters of procedure, on the other hand, is based on recognition that many issues of attorney conduct involve both compelling procedural interests of the courts and important matters of professional responsibility. The FRAC 1 draft seeks to ensure federal control over federal procedure by protecting attorneys against state discipline or civil liability for acts done in compliance with federal procedure or a federal court order.

State enforcers recognize that this draft confirms state authority in many areas in which state authority has seemed to be challenged by local federal court rules. They remain apprehensive, however, about the continuing role of federal procedure as a protection against state authority. It will be important to ensure that the provision for federal regulation of federal procedure be drafted as clearly as may be to reduce the unavoidable ambiguities that arise from the broad overlap between procedure and professional responsibility. The broad overlap, however, will make

it impossible to avoid all ambiguity. Residual ambiguity need not defeat the enterprise. Similar ambiguities occur regularly in making adjustments between procedure and substance. Common sense and sensitivity in application generally work well. The present structure is one that supports many imaginary situations of horrible conflict, but for the most part these situations remain imaginary. Federal courts do not in fact undertake to usurp state licensing and discipline functions, and state disciplinary bodies do not in fact seek to interfere with the procedural interests of federal courts. The difficulties arise because careful lawyers sensibly seek authoritative assurance about proper courses of conduct and are unable to find assurance in the crazy maze of local federal rules.

The Department of Justice has specific concerns about specific issues that confront its national practice. It is engaged as a national law firm; it has investigatory and enforcement roles that are quite different from anything done by other national law firms; and it frequently is involved in work that may come to affect any of a great many different states. One of the most pressing sets of problems arises from the "Model Rule 4.2" question of contacts with represented persons. The Department initially took the position, through the "Thornburgh" Memorandum, that its attorneys were exempt from state regulation. The Eighth Circuit found that the Department lacked authority to establish its own independence. The "McDade Amendment," 28 U.S.C. § 530B, has now confirmed that Department attorneys are subject both to state regulation and also to local federal court rules. Bills have been introduced in Congress to undo the McDade Amendment. Senator Leahy has introduced S. 855, which would essentially remit the Department's issues to the Judicial Conference for proposals within one year on the Rule 4.2 issue, and within two years on other matters of special concern to government lawyers. If the bill were enacted and Judicial Conference recommendations were made, it is not clear whether the next step would be promulgation of the recommendations through the regular Enabling Act process or instead would be direct consideration and adoption by Congress. One outcome might be a FRAC 3, dealing with federal government attorneys.

The subcommittee voted to send the draft FRAC 1 forward to the advisory committees for discussion at the fall meetings. Only the Department of Justice representative voted against sending the draft forward, acting on the view that the draft does not sufficiently protect the needs of government attorneys. The draft is presented for discussion only. A workable federal answer will emerge only if it takes a form that proves acceptable to the American Bar Association (which is involved both through its "Ethics 2000" Committee and its standing committee), the Conference of Chief Justices, and the Department of Justice. The issues and pressures are intricate and important.

Discussion began with the observation that this is a complicated area with two points to be remembered. First, the

clarity of the FRAC 1 draft points to the Standing Committee as the appropriate place to focus the issues — the issues are defined as arising from reconciliation of the federal interest in federal procedure with state interests. Federal procedure is peculiarly a matter within the province of the Standing Committee. Second, the arguments for and against the draft focus on the need to draw lines between procedure and responsibility, and on the need to cabin local federal rules. Professor Coquillette observed that the Local Rules Project will continue in any event, as it has been newly reinstituted, no matter what comes of the FRAC initiative. And the advisory committee was reminded that the Standing Committee has been asked to consider alternative draft revisions of Civil Rule 83 that seek to regularize the local rulemaking process.

The District of Colorado was offered as a good illustration of the problems that can arise from local federal rules on professional responsibility. D.Colo. Local Rule 83.6 adopts the Colorado Rules of Professional Responsibility. But after the Colorado Supreme Court revised three of the professional responsibility rules — including Rule 4.2 — and its own Rule 11, the federal court adopted an "administrative order" that excepted these four matters from its adoption of state practice. The administrative order is not as easily available to lawyers as the local rule. The result is an opportunity for serious confusion. Draft FRAC 1 would supersede such local rule contretemps. Enforcement likely would be straightforward — the Local Rules Project experience has been that when a local rule is plainly inconsistent with a national rule, the districts are willing to rescind the local rule. The Project undertakes to compile all local rules. Simple persuasion is effective in most cases of inconsistency. The circuit councils provide enforcement authority when needed. But the process will not always be easy. It was noted that in the Northern District of California, there was no particular concern to repeal local rules inconsistent with the national rules until the Ninth Circuit Judicial Council got interested in the subject for all courts in the Circuit.

Another committee member stated that the FRAC effort is very useful. The draft FRAC 1 approach would give attorneys clear notice of governing law and would get the district courts out of the process of enforcing local rules. The federal courts have found ways to stay out of disciplinary enforcement as it is; their efforts focus on regulating their own procedure and the right to practice in federal court. There is no apparent federal court interest in conduct that occurs outside federal court, unless it be connected to the right to practice in federal court. When federal courts do undertake to address matters of professional responsibility, moreover, they tend to be more strict than state authorities because there is so little federal experience with the realities of evolving practice. There is a tendency to adhere to more traditional views that states are less likely to hold. The draft should go forward for further development.

The Department of Justice interest was expressed in strong terms. Department lawyers engage almost exclusively in federal proceedings. The governing rules are very important to them. Concern does not much focus on the issues that arise in typical civil litigation. The rules that apply to Department lawyers in civil litigation are the rules that apply to other lawyers with other clients, and do not present many problems. But criminal litigation involves a different process. The Department's role is different from the roles played by private lawyers, and also different from the roles played by state attorneys. State regulation of some aspects of the federal enforcement system can defeat the system. Rule 4.2 is not the only problem, but it is an easily understood illustration. There are many different interpretations of Rule 4.2 among the several states. Most of the interpretations do not cause problems. But the stricter interpretations do cause problems. One response is that Department investigators who are not lawyers make contacts without consulting Department lawyers; this is a perverse consequence, because the rights of the persons contacted will be better protected if any contact is authorized and regulated by a Department lawyer.

In the Department's view, the draft FRAC 1 makes a start by recognizing the importance of federal procedure. But it is not clear that reservation of matters of "procedure" for federal regulation goes far enough to protect behavior before filing a proceeding in federal court. It will be important to the Department to develop a "FRAC 3" to give clear guidance on the issues that are central to the Department's operations.

Another committee member expressed an initial reaction that these problems are not as complicated as the discussion made them appear. Motions to disqualify attorneys, for example, arise regularly; regularly the federal court applies state rules of conduct. When a question of contact with a represented person arises, the United States Attorney can ask the court to order a hearing, a process that will protect all important rights. If federal rules are to be adopted, moreover, it may be better to adopt separate rules for district courts (both criminal and civil), for bankruptcy courts, and for appellate courts. These rules could be adopted as parts of the Civil Rules, Criminal Rules, and so on. Attorneys would not pay as much attention to a separate set of rules.

Discussion turned to the part of draft FRAC 1(b) that would authorize a federal court to refer a question of attorney conduct to state authorities without investigation, or instead to undertake an investigation before making a referral. It was asked whether there is any need that justifies even thinking about a federal investigation — why not just refer the question directly? Is it because of a recognition that referral itself carries significant consequences for an attorney, and a hope that a discreet federal investigation that leads to no referral will reduce the risk of untoward consequences? Could this need be served as well by

providing that referral to state authorities may be made only for good cause, leaving open the procedure by which a federal court determines whether there is good cause to refer? It was noted that state-court judges experience similar problems. Commonly a state judge is obliged to refer an attorney to disciplinary authorities if there is an appearance of a professional responsibility problem. Federal judges will be in a similar position under draft FRAC 1 if they believe it appropriate to explore discipline that goes beyond determination of the right to practice in federal court.

The procedure of the District Court for the District of Columbia was described as one that enables a judge who observes possible violations to refer the question to a committee. The committee investigates and reports back to the judge. In response to a question whether this procedure was advisable, it was responded that it works well, in part because there is a strong relationship between the federal court committee and the bar counsel.

The Committee on Grievances of the Southern District of New York launches an investigation only if it believes there is a federal interest. When an investigation is pursued, the Committee decides whether to impose discipline at the federal level, and also decides whether to refer the matter to state disciplinary authorities. It is important that the federal court retain control of the decision whether to investigate.

This discussion led to a defense of draft FRAC 1(b) by a committee member who observed that now there is no specific way to get from federal court to state procedures. As a federal judge, this member observed flagrant misconduct and took the matter to state disciplinary authorities. He was told that the only way the state disciplinary authorities could act would be on a complaint filed by the judge. Filing the complaint brought the judge into an adversary state grievance process, including deposition, defensive efforts to impugn the judge, and a personal involvement that was not at all desirable. An explicit procedure that averts these consequences is all to the good.

It was noted that federal courts also have undertaken their own disciplinary proceedings after state authorities have refused to act on a referral from the federal court.

The federal courts in California have found the state disciplinary procedures unsatisfactory in the best of times. The state has a great many disciplinary complaints, and the process takes a long time. Recently the state simply closed down its grievance process for lack of state bar funding. So federal courts have had to create their own systems.

The draft FRAC 1 approach will lead to difficult questions. What is intended by federal regulation of "procedure"? Does this mean case management? Specific court orders? Anything embraced in the Federal Rules — Appellate, Bankruptcy, Civil, Criminal, and

Evidence? And it is not clear that there are practical problems that justify encountering these questions. States rarely attempt to impose discipline for obeying a federal court order. If there is a practical problem, it is the situation confronting the Department of Justice. The criminal defense bar in California is using disciplinary charges as a defense strategy, complaining about things done in criminal prosecutions. This is a serious problem. There also are serious problems in the investigation stage. United States Attorneys spend most of their time directing investigations. Often enough it is not clear at the investigation stage what federal court will be most appropriate for prosecution, and thus it is not clear what state rules may come to apply. But § 530B creates a difficult issue of Enabling Act authority — since this statute expressly invokes state law as well as local federal court rules, it is uncertain whether an Enabling Act rule can supersede either state law or local federal rules with respect to government attorneys.

Professor Coquillette stated that there is a practical problem. The problem, however, is not entirely as it may seem on the surface. Federal courts often create flexibility by ignoring their own local rules, enabling an individual judge to act wisely in an individual case. A federal court may interpret its local rule in unforeseeable ways by looking to what is done by other federal courts, without regard to the local rules that may have inspired the rulings of other federal courts. The result is that a body of federal law, independent of local rules, is gradually emerging on the most frequently encountered questions that invoke federal procedural interests. If federal courts could always be counted on to decide without regard to local rules, it might seem that the local rules are no more than a quaint set of anachronisms that present no more than an aesthetic or theoretical problem. But there are practical problems. The Department of Justice has been driven by the McDade Amendment to set up a special unit on professional responsibility; one consequence has been that the Department cannot make the most appropriate assignment of attorneys to particular tasks, but must reshuffle assignments to avoid the professional responsibility rules that attach to some attorneys. Big law firms, with increasingly multidistrict practices, are having problems. And, as witnessed by a forthcoming report from the ABA Litigation Section, the proliferation of local rules is a general problem. Attorneys cannot afford to ignore the local federal rules, no matter how often they might be reassured that the rules do not really do what they seem to do, nor mean what they seem to mean.

It was asked why Rule 4.2 problems are not experienced at the level of state prosecutions, leading to correction of the eccentric views espoused in some states. The Department of Justice response is that much depends on the particular state. In many states, the criminal investigation process is essentially exempted from Rule 4.2; in these states, neither state prosecutors nor local United

States Attorneys encounter problems. But in other states, in a development that has emerged only in the last 10 years or so, new interpretations are emerging. Still, state prosecutors even in these states do not have the same problems that the Department encounters because state investigations are less likely to be directed by attorneys. The Department prefers to involve attorneys in investigations for the greater protection of the citizenry. In addition, the Department frequently becomes involved in investigations that are more complex than most state investigations and that reach across a number of states.

Judge Scirica stated that the Standing Committee hopes that work on federal attorney-conduct rules will continue in the advisory committees along the lines followed in this discussion. All the advisory committees are being consulted this fall. The problems are important, and deserve continuing debate. There is an overlap between federal procedural interests and state interests in regulating professional responsibility; just what allocation of authority will work best remains to be determined. Attorneys in general are very concerned — they do not want state authorities to impose sanctions for acts that are proper in federal court. And corporate counsel are especially concerned. This concern extends to the counterpart of the Department of Justice concerns. Corporate counsel believe that government investigators are approaching mid-level managers to gather information that the corporation does not want to reveal and that can properly be kept confidential by the corporation.

Judge Niemeyer summarized the discussion by noting that the Rule 4.2 question involves several issues: are investigative activities so much a matter of "procedure" connected to eventual federal court proceedings as to be within the Enabling Act process? The question of investigation by a federal court of possible responsibility violations before referring matters to state authorities is another problem. The advisory committee delegates to the Attorney Conduct Subcommittee have been informed by the current discussion, and can carry these questions into continuing Subcommittee deliberations. It is clear that this advisory committee believes that the Subcommittee process should continue. We will do our best to continue to help.

Discovery

Judge Levi introduced the report of the Discovery Subcommittee, noting that it would divide into two basic parts. The first part focuses on a report by Professor Marcus on three issues that have been carried forward, including one set of issues raised by the Standing Committee in response to the pending proposal to amend Civil Rule 5(d). The second part, with help from the Federal Judicial Center, focuses on the emerging issues of discovery in the era of digital information processing. The "computer discovery" issues will be a long-range project that may, like the discovery proposals just advanced to the Supreme Court, be

focused by a preliminary meeting to gather information and perhaps lead to another conference.

Professor Marcus led discussion through his Report to the Discovery Subcommittee, as set out in the Agenda materials.

Part I of the report deals with issues referred to the advisory committee after the June Standing Committee discussion of the proposal to amend Rule 5(d) to bar filing of discovery materials until used in the proceeding. The first of these issues asked whether nonfiling affects the privilege under defamation law to report on discovery information. The privilege questions in fact involve two distinct privileges. The first privilege deals with litigation conduct as such — the privilege to make assertions in pleadings, to respond to discovery demands, to advance arguments, and so on. This immunity does not depend on filing.

The second privilege deals with public reports of matters occurring in litigation. It is difficult to track down this privilege, either with respect to filed materials or with respect to materials not filed. In federal courts, most discovery materials have not been filed in recent years because of local rules or practices that forgo filing. There has not been any sign of any problem with respect to defamation privilege arising from this widespread nonfiling practice. The issues have been treated as those of state-law defamation privilege; there has not been any indication of a move to generate a federal common-law privilege for reporting on federal litigation. The only clear way to affect state-law privilege would be to abandon the proposal to amend Rule 5(d), and to substitute a uniform national rule that requires that all discovery materials be filed.

After brief discussion, the advisory committee concluded that the report to the Standing Committee should be that these privilege questions do not warrant any further action at present.

A second range of issues presented by the nonfiling amendment of Rule 5(d) arises from public access to unfiled discovery materials. A few local rules providing for nonfiling have added provisions regulating means of inquiry and access by nonparties to unfiled discovery materials. Many of the local nonfiling rules do not address the question. There is no indication that there have been any real problems under any variation of these rules. These questions are related to a number of contentious issues that the advisory committee has explored in recent years. The protective order question was considered at length, and eventually abandoned on the ground that there is no showing of need to improve on general present practices. The central question is whether discovery, and derivatively the filing of discovery materials, is designed to be part of the process of resolving particular disputes, or also is intended to make possible public access to private information that could not be forced into the public domain without the happenstance of private litigation.

Discussion of these observations began with reflection on the recent exploration of protective orders. The advisory committee concluded then that there is no present need to enter this area. The fact that the Committee Note to the Rule 5(d) amendments does not address these issues does not reflect a lack of attention. To the contrary, the advisory committee's initial proposal was a rule that provided only that discovery materials "need not" be filed. This approach was influenced by the great concern with public access that surrounded debates about the earlier amendment of Rule 5(d) to authorize specific nonfiling orders in particular cases. The change to "must not" be filed originated in the Standing Committee; the advisory committee considered the change in relation to the question of public access and concluded that the Standing Committee was right. Any attempt to address these issues further would lead straight back to the extensive debates on protective orders — the greater the routine opportunities for public access, the greater the importance of protective-order practice.

The committee concluded that there is no need to act further on the nonfiling amendment to Rule 5(d) now pending in the Supreme Court.

Part II of the Discovery Subcommittee Report addresses the problem of privilege waiver by inadvertent disclosures in the discovery process. The committee has considered these questions as part of its ongoing discovery inquiry. The question now is whether to continue to pursue these questions. The Subcommittee wants to keep the issues alive, particularly as it approaches the problems that arise from discovery of computer information. The practical needs of "computer discovery" may introduce new dimensions to the risks of inadvertent disclosure and waiver. These issues will prove difficult. Although there are continuing questions whether any rule on this subject might need specific congressional approval under § 2074(b), those questions do not seem to present insuperable obstacles. At the most, a proposed rule would require approval by Congress.

The underlying problem is the perception that great energy is now devoted to avoiding inadvertent waiver of privilege by accidental production of privileged documents in discovery. The problem is acute because of the "subject-matter waiver" principle. Accidental production of a single document that is not obviously privileged on its face may lead to waiver of privilege with respect to all communications on the same subject, even though there are many clearly privileged and vitally important communications that have carefully and properly been withheld from production.

The technical question arises from the fact that many of the privileges involved with the waiver problem are state-law privileges. Federal discovery rules, on the other hand, clearly involve matters of federal procedure. The waiver question before the committee is how far to regulate the consequences of disclosures that are required by federal procedure. It is

important to consider these consequences both for the "big document" discovery cases in which inadvertent disclosure is a particular practical problem and also for the emerging era of discovering computer-accessed information.

A related question is whether federal rules — either of Evidence or of Civil Procedure — should undertake to address other inadvertent waiver issues. Page 25 of the memorandum describes three basic approaches that have been taken by federal courts, including a complicated approach that seeks to balance several factors. It is clear that these issues need not be addressed. It is possible to craft a rule that addresses only the specific consequences of production in response to federal discovery requests. Two first-draft models for document discovery under Rule 34 are included on page 23 of the memorandum.

It was suggested that part of the link to electronic data base discovery arises from the question whether it is possible to authorize a preliminary look to see what is in the data base without forcing a privilege waiver if anything privileged is scanned during the preliminary look.

A practical question was raised: suppose, under one of the drafts, a preliminary look is allowed without waiving privilege. The look uncovers privileged information. Will there be a "fruit-of-the-poisonous-tree" doctrine to prevent use of information derived from the preliminary look? How could such a doctrine be enforced? It was responded that there are intimations of such an approach in the California state courts. Return of the materials is a clear response — remembering that the "preliminary look" drafts do not involve actual production of documents for copying, return would be of any memorial made of the information seen but not directly copied. Both of the alternative drafts in the materials are designed for discovery that involves very large numbers of documents. The hope is that a preliminary view can narrow down the focus to materials that the inquiring party actually wants to explore in depth. But even in the "big documents" cases, the probability that hard-core privileged communications will be revealed is low. The problem is the documents that connect to privileged communications but that are not obviously privileged on facial inspection.

Another response to the practical question was that the draft rules are based on common present practice. Parties to big-documents cases often agree to produce documents on terms that preserve privilege against inadvertent waiver. These agreements do not forestall careful privilege review before the preliminary inspection is permitted. The purpose is to protect against subject-matter waiver by production of materials that connect to privileged communications in ways that are not always apparent. The shortcoming of present practice is that, even assuming that courts will enforce these agreed orders between the parties, it is not at all clear that an agreed order can prevent waiver as against

nonparties. An explicit national rule could reduce or, ideally, eliminate the uncertainty that surrounds present practice. It is worth studying the problem to see whether still greater protection can be provided than these drafts seem to promise.

The committee was reminded that during the Boston College discovery conference several participants agreed that the burden of fully protective screening before production is enormous. And even the most careful screening may allow something to slip through.

The problem that many of the governing privileges are created by state law makes it particularly difficult to rely on any agreed order practice that may be followed now. Yet parties in big-discovery cases feel compelled to rely on these agreements by the practical needs of responding, recognizing the danger that a state court may not honor the protection intended by the federal court. There are indeed situations in which screening costs can be reduced by these orders; much depends on what the discovery is about, and what the documents are.

The problem of state reluctance to recognize a federal nonwaiver order or rule may diminish over time. If a nonwaiver procedure is adopted in the federal rules, many state rules will be amended to conform to the federal rule. The number of "rough edges" will be reduced.

A judge asked whether these problems occur with any frequency, noting that he has asked the magistrate judges in his district to look for cases where the nonwaiver preliminary look approach might be used. A response offered an example of a case in which nine million documents were reviewed for privilege.

It was asked whether the rule drafts are too modest by limiting the procedure to cases in which the parties agree. Should the court be empowered to direct preliminary inspection on motion of one party alone? Professor Marcus noted that the parties are likely to be uneasy about relying on an order entered without agreement. The court might order the preliminary inspection procedure as part of a program to expedite discovery, directing immediate access for preliminary inspection on terms that do not afford an opportunity to screen even for obviously privileged materials. Mere agreement of the parties without court order, on the other hand, is not binding on any court. The consequences of the agreement remain to be determined — and to be determined by the views of the court in which the question arises.

It was urged that if a federal rule is limited to the effects of compelled revelation in federal discovery, without addressing more general questions of inadvertent privilege waiver, state courts are likely to respect the effects of the federal rule. Still, it will be possible for litigants to question the effect of the federal order in subsequent state proceedings.

It was asked whether the concern was that a state court might

attempt to enjoin a federal privilege order. The problem is not that, but rather that a state court might conclude that federal activities had waived the privilege no matter what the federal court intended. There is no direct impact on the federal proceeding, but the attempt to ease the burdens imposed by federal discovery is thwarted by the inconsistent state ruling.

The Subcommittee has found the inadvertent waiver issues to be difficult. The hope is that a protective procedure to avoid waiver could save time and money for the parties. The real question is whether effective protection can be provided by federal rule. There are strong grounds to believe that a rule can be adopted through the Enabling Act process without need for direct approval by Congress under § 2074(b); that question of course would be identified as part of any process working toward adoption of a federal rule. All that is intended is to create a federal procedure that protects against the consequences of disclosures forced by federal procedure, in an attempt to expedite federal proceedings and reduce the financial burdens on the parties while providing better assured protection of both federal and state-created privileges.

The advisory committee concluded that these questions are important, and that the Discovery Subcommittee should continue to study them.

Part III of the memorandum addresses a proposal advanced by Alfred Cortese to establish a presumptive retrospective time limit on the backward reach of document discovery. There would be a bright line requiring a court order, based on good cause, to discover documents created or dated more than seven years before the date of the transaction or occurrence giving rise to the claims in the action. The Subcommittee seeks direction whether to pursue this suggestion. If the suggestion is to be pursued, it could be formulated in a variety of ways. The question at this stage is whether to develop the concept, not whether to adopt specific rule language. Several perspectives were suggested.

First, the underlying problem seems to be one of proportionality. The basic argument is that the effort required to identify, produce, and study ancient documents is not justified by the probability of finding useful information. The present discovery rules, however, provide many means to obtain relief from disproportionate discovery demands.

Second, the discovery amendments now being transmitted to the Supreme Court should reduce the possible problems still further. If these amendments are adopted without change, courts will become more involved in regulating the scope of discovery under Rule 26(b)(1). Discovery conferences will be required in all federal courts by elimination of the opportunity to opt out by local rule.

Third, new problems may arise from any attempt to introduce a formally rigid cut-off. The illustration in the materials involves

an automobile designed in 1982, built in 1986, and involved in an accident in 1999. The 1982 design efforts built on modification of designs first developed in 1970. Which year is the base line for the transaction or occurrence giving rise to the claims? 1970? 1982? 1986? 1999? If the draft allows presumptive discovery of documents going back to 1963, it offers little practical protection and indeed may invite more extensive inquiry than otherwise would seem appropriate.

It also was noted that the institutional litigants who are likely to favor this sort of time cut-off for document discovery are not likely to support a similar cut-off for other forms of discovery. The victim of the 1999 automobile accident, for accident, might fairly be asked about the consequences of injuries incurred in 1990, more than seven years before the transaction giving rise to the claim.

Discussion began with the suggestion that there are many ways to deal with this problem. Adoption of a 7-year cut-off would simply encourage some lawyers to go back further in time than they would without this prompting in the rule. The proposal should be abandoned.

Alfred Cortese spoke in defense of the proposal, urging that it would provide a helpful guideline. The point is that in practice, this would give some guidance to control production in response to overbroad requests, in an area of great expense. There are plenty of illustrations of court orders directing discovery that goes beyond any sensible time limit.

A committee member suggested that it is not fair to compare medical discovery to document discovery. Medical discovery is carefully focused on issues obviously relevant to the dispute, and likely to produce useful information. Document discovery requires examination of mountains of obviously useless information; careful thought about the possibility of developing some practical means of protection is warranted.

Another committee member suggested that the current proposal to divide the scope of discovery in Rule 26(b)(1), requiring court approval for some part of the discovery that now is available as a matter of course, is a major change. We should allow time for experience to develop with this proposal before undertaking further limitations. Still another member agreed. The current discovery proposals should be given time to develop before pursuing this idea.

A motion to table this proposal was adopted with one abstention.

Discussion turned to discovery of electronic data. By way of introduction, it was observed that email has transformed our methods of communicating. Many conversations that formerly were conducted in person or by telephone are now conducted by electronic

exchange. Communications that never were preserved in tangible form now can be resurrected. There are replacements for the old methods of relying on individual memory as disclosed on depositions and as supplemented by telephone logs. In addition, all sorts of information is stored, including privileged information, in media that with easily stored back-up means threaten to endure forever. A great deal of information, moreover, is "downloaded" to many dispersed systems — what once was maintained in a single central location and then purged is now replicated in many local networks or individual computers and retained, one place or another, for indefinite periods. The volume is staggering, and the search costs incredible. The question is how do we provide real discovery? And who does the search? Although the physical act of electronic retrieval may not be great, the cost of designing the search often reaches startling levels. And if the computer produces a million documents in response to the search, who bears the cost of sorting through the documents? And the magic of electronic storage creates new questions. Many computer users delete documents, intending to destroy them. Back-up systems and the operation of delete programs, however, often make it possible to retrieve deleted information. Must often expensive reconstruction efforts be undertaken, even though in earlier days there would be no possibility of retrieving physically destroyed documents? Many efforts are being undertaken to explore these problems. And the Federal Judicial Center is undertaking its own study.

It is very difficult to know how to develop discovery practice to sort through mountains of information to produce manageable discovery. Perhaps present rules are adequate to the task. If these problems are to be approached, the Discovery Subcommittee will need to design means to become better informed about the problems that have been encountered already and about the ways in which the problems have been met. The approach may follow the model used in developing the discovery proposals that have been transmitted to the Supreme Court this fall.

Judith McKenna described the Federal Judicial Center project to examine discovery of electronic information. The Center has been considering these problems for some time. Its attention was first drawn to these questions by requests addressed by judges to the Center’s judicial education arm. Judges were asking for help, noting that attorneys also needed help with these issues. Educational programs were developed, including several that featured Kenneth Withers. The educational effort is continuing, but a research effort is being developed as well. A study is now being put together. The Center needs to know what the Advisory Committee needs as information. Computerization extends to everyone, not just large corporations. Small businesses and individuals are increasingly relying on computer information systems. The situation is very fluid, and a number of issues are under consideration.

Depositions generate the largest discovery costs in most

cases, but there are some cases in which document discovery entails still greater costs. Rumors are increasing about the occasionally great costs of discovering electronically stored materials. Continuing legal education courses are coming to deal with these issues, and in turn are spurring increased efforts to undertake electronic discovery. One initial research effort might be to attempt to find out how frequently electronic discovery is undertaken now. But if it were found that there is not much electronic discovery today, that information would not provide much reassurance about the potential for expansion, and perhaps very rapid expansion, in the future.

There is no basis yet for knowing whether there are issues that are unique to discovery of computerized information. It has been relatively easy to find cases that have generated problems with this sort of discovery. It is not as easy to find cases in which there are no problems, but that may be because people do not bother to comment about the non-problems.

At this point, the project seems likely to involve several components: (1) A short piece to identify the problems, perhaps looking at the cost-benefit analysis that might be used. This piece is likely to be produced soon. (2) A larger descriptive study of where the problems and successes have been, perhaps based on some sort of empirical survey or other research. (3) Additional judicial education materials. We would like to develop a typology of how these issues come before judges. It will be necessary to separate out issues that usually are lumped together in the literature.

Kenneth Withers then offered illustrations of the issues that might be studied, based on several hypothetical problems.

One set of issues arises from information that is stored in large, undifferentiated files. This often happens with email searches. The requesting party demands all email relating to a specific topic. The responding party says there is no ready way to search the information, which exists only in a back-up medium that is not arranged in any way. Judges have to be educated about the technical issues in order to be able to make informed rulings.

Other issues arise from poor electronic records management. Electronic record management documentation — file lists — may not be producible. Deposition of the electronic records manager may show that there is no system in place to retrieve the information that has been stored. This is a very difficult situation. Information services departments often save and store <u>all</u> corporate records, but in a form without roadmap and without any individual person who knows how to search.

Data proliferation is another problem. Documents and data are regularly copied. This multiplies the documents, media, and locations subject to discovery. A request for all nonidentical copies of each document can require very extensive searching.

So a request is made for documents created years ago. The response is that they may exist — but they are stored on hardware and media, regulated by software, that all are obsolete. Technology changes rapidly. Much of the historic material may be very difficult to retrieve. A number of cases have had to deal with these issues, beginning with disputes among the experts whether it is possible to overcome the difficulties of obsolete technology.

Email requests often seek information stored in hundreds of thousands of "pages." The responding party objects that searching the information is costly and any printout will not include system data that identify the sender, recipient, or like information. And problems arise from third-party proprietary interests in the software.

There also are problems with nonproduction. The responding party says the remaining documents were automatically destroyed. Often the process involves first a deliberate instruction to delete material, and then gradual (and unpredictable) replacement of the information, still preserved, by overwriting. The requesting party argues that the responding party negligently or even purposefully destroyed them. It is in fact likely that documents will be destroyed before discovery by operation of standard programs. Forensic experts will assert that they can be retrieved nonetheless. And the response again is in part one of burden, and in part that reconstruction will also reveal privileged or confidential information not subject to discovery. It is objected that on-site inspection is not proper. Framing an effective protective order is very difficult.

Often a party requesting information will seek the right to send its own experts to work with the computer systems that have access to the information, arguing that the design of the search is vitally important to the outcome. The questions of access to privileged and other protected information are formidable, and are not easily resolved by protective orders.

There are still other problems. One big help will be found in judicial education. But much imagination is required in anticipating future evolution of these problems. There may be room for improvement through court rules. And larger societal ideas about privacy, production, and related issues may change the perspective from which the discovery issues are approached.

A committee member observed that the most difficult issues do not arise in the "big" case that is heavily litigated with experts on all sides. Instead, the problems arise in normal litigation. Suppose in a sex harassment case a demand is made for all email. The employer says the email is all gone. In large part this is not a problem of developing new rules. Instead, it is a problem of proportionality of the sort addressed by Rule 26(b)(2): how much expense and effort are required and appropriate in relation to the

stakes in the litigation, the probability of finding useful information, and other values? The first solution may well lie not in rules changes but in judicial education about technology issues.

Kenneth Withers responded that this is what judges are saying all around the country. They want training in what information retrieval is feasible, and what effective protections are possible. We need to collect the forms and protective orders, the standard interrogatories, the law review literature. In response to the suggestion of a committee member that lawyers groups are becoming interested in these questions, he agreed and noted that the FJC is finding the people working in this area. Continuing legal education programs are beginning to investigate the problems. We must anticipate the prospect that "paper may become a rare event."

In response to another question, Kenneth Withers noted that we do not yet know enough to say what search costs are, nor what arrangements are being worked out to pay the costs. There are examples. Cost data are likely to be available, in sanitized form, from the independent contractors who design the searches. And people talk about these things. The question remains: what does the advisory committee need to know?

The problem, of course, is that what the advisory committee needs to know involves a base line of comparison. The costs and problems of electronic discovery must be compared to the benefits achieved and to the costs encountered by other modes of discovery. It might help to have a study of ten or a dozen cases with substantial electronic discovery. The study would at least provide examples of how much discovery was pursued, how much information was discovered, how much of the information was useful, and what the costs were. It could find out the parties' evaluations of the usefulness of the discovery and of the problems. The nature of the problems encountered in practice will be important in deciding whether the problems can profitably be addressed by rulemaking. And it will help simply to listen to plaintiff and defendant attorneys talk about the problems. We do find people who say this is important. Raw data alone may not be enough to help us tell.

Professor Marcus asked whether there is a way to compare electronic discovery to paper discovery.

It was suggested that research design questions are better answered by the Discovery Subcommittee working with the FJC. The full advisory committee can help to raise the issues, but it is not possible for so many people to participate directly in the research design.

Professor Marcus urged that any committee member who finds a problem should send it on to the Subcommittee. It is important to know during the design stage what questions should be asked.

Judge Niemeyer noted that we have had a tradition of full disclosure of every document that relates to the claims and

defenses in an action. It is not clear what is going on with respect to electronic discovery. Anecdotal review — a little meeting with experienced practitioners — may help to focus the issues. There is an emerging group of knowledgeable people whose learning can be tapped with profit.

Assistant Attorney General Ogden noted that there are people at the Department of Justice who are expert in these issues, and who would be glad to help the committee.

Judge Niemeyer suggested that the discussion had been helpful, in part in a discouraging way by illustrating the scope of the problems, the changing nature of the problems, and the vast areas of information that remain to be searched. We should leave it to the Discovery Subcommittee to organize a preliminary inquiry of the sort that launched their last major project.

It was suggested that the first challenge is to articulate the issues that are peculiar to electronic information and that are outside the scope of the present rules. We need to learn whether this is a rules question at all.

Some issues were suggested for illustration. Electronic mail takes the place of communications that often were oral in earlier days. If there is a tangible record, it seems to be a record. But the volume of these records may be immense: do we need a new definition of what is a "document" for discovery practice? Or do we need to define some other limiting principle that applies peculiarly to electronic records? The operative meaning of Rule 34 has expanded greatly, both in potential invasiveness and potential burdens, and we need to decide whether this reality requires new measures of containment.

Agreement was expressed with these observations, subject to the reservation that it is not clear what issues are peculiar to electronic discovery in ways that might justify rules amendments. One distinctive issue may arise with respect to the attempts to have experts for the inquiring party work directly with the computer system of the party whose information is demanded in discovery — there has not been any analogous practice of having agents of the inquiring party search the paper record files of the party whose information is demanded. And the issues of volume may be so magnified as to become different in kind, not merely amount.

This discussion concluded by agreeing that the immediate work must be left to be organized by the Discovery Subcommittee. The project likely will begin by gathering anecdotal information to help develop more pointed further inquiries.

Corporate Disclosure

Judge Niemeyer introduced the question of corporate disclosure by observing that from time to time popular media reports have focused attention on cases in which failures of the disclosure systems have led federal judges to act in cases in which they

should have recused themselves. These questions should be addressed by some part of the Judicial Conference process. Congress seems to prefer that the Third Branch address these issues directly, without interference from Congress. That leaves the questions of what should be done, and whether part of the answer should be found in rules adopted under the Enabling Act.

Professor Coquillette began the discussion by asking what is it that the Standing Committee expects the Civil Rules Advisory Committee to do. There are several immediate pressures to consider these problems. Recent newspaper accounts highlighting failures of disclosure systems have stimulated interest in means of improving the systems. The Committee on Codes of Conduct would like to see a uniform rule on disclosure that applies to bankruptcy courts, district courts, and courts of appeals, with only such variations as may be required by differences in the natures of those courts. And the Appellate Rules Committee has already secured approval in 1998 of an amended Rule 26.1 that reduces still further the information required in corporate disclosures.

There has been a real effort to find a way to get the several advisory committee reporters to work through toward a joint solution for the several committees. But the Appellate Rules Committee believes that they have found the right answer for the appellate courts in their recent work, and is little inclined to reopen the question so soon. At the same time, the Standing Committee believes that uniformity across the Appellate, Bankruptcy, Civil, and Criminal Rules would be good for the bar, and good for the consistent development of interpretations of disclosure practices. More courts working on the same basic rule would develop a better working body of law, and do so faster.

The most likely alternatives are: (1) Adopt Appellate Rule 26.1 for all federal courts. This would please the Committee on Codes of Conduct. But this course would not alone answer the need for prompt rulemaking. With all ordinary speed, new national rules could not take effect before December 1, 2002. The gap could be filled in the interim by promulgating a Model Local Rule based on Rule 26.1 and urging all courts to adopt it. (2) Answers could be found entirely outside the Enabling Act process. The alternatives might be simply to suggest a Model Local Rule, or to encourage adoption and promotion of a uniform disclosure form by the Administrative Office. This course would not engender any conflict among the national rules — Appellate Rule 26.1 would stand alone as the only national rule. (3) The advisory committees concerned with the district courts and bankruptcy courts could adopt their own disclosure rules, different from Appellate Rule 26.1. This approach would require an answer to the question whether the different courts face different needs that justify different disclosure requirements. If there is no apparent reason for different requirements, the question would be raised whether Appellate Rule 26.1 should be changed again — there are indeed many people who believe that Rule 26.1 is too narrow.

Professor Cooper provided a supplemental introduction, aimed specifically at the questions facing the Civil Rules Advisory Committee. The starting point must be recognition that no one has urged adoption of a disclosure rule for any court that would require disclosure of all the information that might bear on a recusal decision. The burden on the parties of providing such information in all cases, and the difficulty of processing the information in the court system, would be too great. So the task is the inevitably unsatisfying task of finding the most workable compromise, knowing that occasionally something will slip through the system.

A second starting point must be recognition that it will not be possible for the other advisory committees to act by next spring to recommend to the June Standing Committee publication of rules that depart substantially from Appellate Rule 26.1. Even cursory examination of the many different disclosure systems adopted by local circuit rules and local district rules shows that a great many choices would have to be made as to who must make disclosure, what information must be disclosed, and when the disclosure must be made. The options for prompt action, apart from doing nothing, come down to two choices. Appellate Rule 26.1 could be adapted for district court application, changing the provisions on timing and number of copies to fit district court circumstances. Or a rule could be drafted that delegates to the Judicial Conference responsibility for creating a uniform disclosure form for use in all courts.

Choice among these alternatives will be affected by the importance of uniformity in two different dimensions. Professor Coquillette has already described the presumption that it is important to achieve uniformity as between bankruptcy courts, district courts, and courts of appeals. Uniformity also seems important as among all district courts, all bankruptcy courts, and all courts of appeals. The situation today is that there is no uniformity.

The lack of uniformity is most graphically illustrated by the situation in the courts of appeals. Appellate Rule 26.1 was adopted in 1989. The 1989 Committee Note observed that the rule required only minimal disclosure, and suggested that the circuits might wish to require greater disclosure by local rules. The result has been that eleven of the thirteen circuits have adopted local rules. Some of the local rules do not much expand the requirements of Rule 26.1. Other local rules go far beyond Rule 26.1. Rule 26.1 invites this response not only because of the express Committee Note suggestion but also because of its designedly minimalist nature. The 1998 revision of Rule 26.1 has reduced disclosure requirements still further, deleting as unnecessary the former requirement that a corporate party disclose its subsidiaries and affiliates. There is little reason to suppose that it would be satisfactory to adapt Appellate Rule 26.1 to district court practice without also adopting the permission to

adopt local district rules that require additional disclosure. The result would be not only to continue the variety of local rule and related practices disclosed by the Federal Judicial Center study prepared for the Standing Committee, but also to encourage a further proliferation of district-court practices.

The question of timing is one that clearly distinguishes the district courts from appellate courts. Appellate Rule 26.1 reflects the pace of appellate review. In many cases, filing with a party's principal brief is all that is required. In the district courts, it is essential that filing be made at the earliest possible moment. Several of the judges reviewed by the Kansas City Star made rulings, without adequate recusal information, that involved ministerial actions. Less than a minute of judge attention often was required. Some of the orders were as simple as appointing a "legal courier." An individual docket system makes it possible to establish early screening, and accordingly makes it imperative that the information be provided at the very outset. If only it were possible, it would be desirable to require the plaintiff to provide complete disclosure as to all parties at the time of filing. That is not possible. But the closer, the better.

The difficulty of drafting a more detailed national disclosure rule is not only a matter of time. The District of Kansas recently adopted a new broad disclosure rule. Within three months the rule was repealed because it had generated great confusion and difficulty in application. The difficulties will only grow with time. It is important to remain in constant contact with actual experience under a disclosure system, to see whether it is generating the information needed to avoid embarrassing oversights. It also is important to remain in constant contact with the technological capabilities of the district courts to match disclosure information with recusal information for individual judges. Disclosures that cannot profitably be used today may become profitable tomorrow.

All of these difficulties suggest that it may be important to explore the alternative of Judicial Conference forms. The Judicial Conference could be informed about the needs for disclosure by the Committee on Codes of Conduct. The Committee on Codes of Conduct responds to hundreds of inquiries each year, and is the judicial system's repository of wisdom about judicial conduct. The Administrative Office works continually with the technological capacities of the district clerks' offices, and can devise forms that facilitate optimal use of the information that is gathered. Perhaps most important, forms can be changed much more easily through this process than national rules can be changed.

Carol Krafka then presented a summary of the FJC study on district court disclosure rules that is included in the Agenda materials. There is a parallel study of circuit disclosure rules. It confirms the observation that the minimal nature of Appellate Rule 26.1 has stimulated broader disclosure requirements in most of

the circuits. There are explicit local rules in at least 19 districts. Other districts have something else in place, often by standing order. These rules adopt quite variable approaches to the central questions of who is required to file a disclosure statement, what information is required, and when the information is required. There also are different sanctions for failure to file. The most drastic sanction, and no doubt an effective one, is that the case is stopped in its tracks until the required filings are made.

Judge Scirica asked what sort of information the FJC should be asked to look for? Should they be asked to survey district judges for suggestions? Carol Krafka responded that this suggestion has not been made. Perhaps people have not asked what district judges would like by way of disclosure because they do not often face these issues.

It was observed that federal judges have financial information on file with the Administrative Office. The Administrative Office has followed the practice of informing a judge whenever a request is made for that judge's information. But much, and perhaps all, of the information has now been put on the Internet. It will no longer be possible to know when the information is sought out.

One practical problem with increasing the scope of disclosure requirements is that federal judges are busy. They, and their staffs, tend to review disclosure forms quickly. It is possible to miss things. If the forms become increasingly complicated, we may face the embarrassment of overlooking more of the available information.

It was suggested that it would be better not to attempt a rule change. The typical problem is that, by one means or another, a judge buys stock and then genuinely forgets about it. No amount of disclosure will cure that problem, particularly when routine orders are made at the outset of an action when no one has focused on who the parties are. The Bankruptcy Rules Committee believes that Appellate Rule 26.1 disclosure is satisfactory — you do not need to know, for example, what other subsidiaries are owned by the parent of a party to the action. It is important that all committees do something soon. Meanwhile, the draft national rule should be promulgated as a Model Local Rule.

It was responded that there is an approach that does not involve local rules. We want the Administrative Office to give us a reliable administrative system that will enable a district judge to recuse immediately, at the very beginning of an action or proceeding. Software has been developed by the Administrative Office, and has been improved. We should be able to rely on getting information from the parties that matches the software. In federal court in Houston, an order goes out from the court clerk in each case as soon as it is filed. It asks for "26.1 type" information. This is not a local rule, but a case-specific order

entered in every case.

Discussion returned to the question of seeking to achieve a consensus draft by work among the reporters for the several advisory committees. The Appellate Rules Committee has recently revised Appellate Rule 26.1 and believes that it has achieved a sound rule that meets the needs of the courts of appeals, as supplemented by local circuit rules. The Bankruptcy, Civil, and Criminal reporters can meet at the January Standing Committee meeting and work toward a joint draft. Agreement among the advisory committees would be the best result, avoiding the need for the Standing Committee to arbitrate among them. The Committee on Codes of Conduct does want the Standing Committee to begin the process of developing national rules, and would be pleased to have the rules for bankruptcy courts and district courts parallel Appellate Rule 26.1.

Professor Coquillette added the advice that if the Civil Rules Advisory Committee could reach agreement on a Civil Rule parallel to Appellate Rule 26.1, it seemed likely that the Criminal and Bankruptcy Rules Advisory Committees would agree. That would resolve the question neatly. If the Civil Rules Committee concludes that there should not be any national Civil Rule, the Standing Committee could begin work on alternatives. But there will be difficult questions of uniformity and coordination if work is undertaken to develop a Civil Rule that departs from Appellate Rule 26.1.

A motion was made to adopt a Civil Rule parallel to Appellate Rule 26.1. This motion was later withdrawn.

It was asked whether adoption of the Rule 26.1 model for the district courts would be intended to displace local district rules requiring greater disclosure. This question will remain open as the process continues. And it was recalled that the district court rule would, in any event, require different provisions for the time of filing a disclosure statement and for the number of copies. It also was suggested that because Rule 26.1 requires filing only by corporate parties, district courts might want to expand disclosure to reach other forms of commercial enterprise with public investors.

Judge Niemeyer observed that if a Rule 26.1 model were adopted, a Civil Rule tailored for the circumstances of district courts could be prepared for consideration with this committee's report to the January Standing Committee meeting. Or more drafts might be prepared, illustrating alternative approaches; that process could not be completed by January, and might not yield a draft that could be recommended for publication in 2000.

It was observed that Appellate Rule 26.1 disclosure is "so minimal that it may not serve the function." The disclosures required by several of the local district rules recounted in the FJC report are much more extensive. Adherence to the Rule 26.1

approach invites local rules. It would be better to adopt a system that relies on Administrative Office and Judicial Conference resources to develop and modify disclosure forms.

The virtues of forms were seen in another light. Three years will be required to get any national rule into effect. A form could be developed for use in the interim. The Codes of Conduct Committee and the Administrative Office could help develop the form. The Codes of Conduct Committee is considering these problems, although it must be remembered that its present position is that it would be good to adopt the Rule 26.1 approach for all federal courts.

It was suggested that perhaps disclosure is an area in which bench and bar are in agreement. The task, however, will be to discover just how much information judges want, how much of that information can be managed efficiently within the court system, and how great would be the burdens of extracting that information from the parties.

It was asked whether disclosure is a procedural problem at all. The Committee on Codes of Conduct may be the body best equipped to think about these problems. Disclosure may be desirable "way beyond" the Rule 26.1 level. The question is how to implement the Codes of Conduct. There is little reason to believe that the rules committees are especially knowledgeable in this area, or that the deliberately protracted process for adopting rules of procedure is well suited to the disclosure problem.

These questions suggest that perhaps the better approach is to adopt a national rule that requires filing a form developed by the Judicial Conference.

Further discussion found interest in two models: one would adapt Appellate Rule 26.1 to the circumstances of the bankruptcy courts and district courts, while the other would delegate to the Judicial Conference the task of developing forms that must be filed.

It was urged that the Rule 26.1 approach would invite local rules, and that the result would be a lack of any national uniformity. There is no apparent reason to believe that there are local differences in the appropriate levels of disclosure. But it also was urged that the Rule 26.1 approach should be kept alive for discussions with the Bankruptcy and Criminal Rules Advisory Committees. A draft should be prepared for that purpose.

The committee was reminded that there is a short-term question that should be kept separate from the long-term solution. For the short run, the advisory committees could work with the Administrative Office to provide leadership to the district courts on a uniform disclosure form. That approach is not inconsistent with a long-term project to develop a national rule. We should work in that direction. We are not yet able to draft a rule more

comprehensive than Rule 26.1, but we are likely to want more detailed disclosure than Rule 26.1 provides. It may be that the end result will be a rule that both specifies some level of detailed disclosure and also leaves the way open to require still greater detail by a process that does not require repeated amendment of the national rules. This approach would make it easier to preempt local disclosure rules.

Professor Coquillette agreed that attention must be paid to both the short- and long-term processes. Rule 26.1 does set a low threshold that invites local rulemaking. Judges find that these questions are terribly important; they want to be sure to have as much information as possible so as to avoid unknowing failures to recuse. The Codes of Conduct Committee wants a uniform minimum rule. An attempt to take away from individual judges the power to require the information they want will be very controversial. Local discretion is prized. Yet we could achieve a lot of uniformity by any of several approaches. A low-disclosure national rule could be supplemented by a Model Local Rule or model form that go beyond the rule requirements.

It was observed again that the administrative process can move more rapidly than the Enabling Act process. If a Model Local Rule and administrative forms can be used to fill the short-term need, there seems little reason to move with undue haste to shape a rule that could take effect in 2002.

It seemed to be agreed that it would not make sense to act in haste to adopt a national rule that is intended to be only an interim measure. A form could be prepared with relative speed. A national rule might be adopted to require use of the form, looking ahead to the day when experience with the form — as it might be modified in response to actual implementation — might justify a more detailed national rule. Appellate Rule 26.1 could be used as a starting point. And it must always be remembered that whatever rule may be adopted, the rule will be addressed only to the litigants. The administrative responsibility of the courts will continue to be to make effective use of the information provided by the litigants.

The discussion concluded by committee directions that both approaches should be followed for now. Two drafts should be prepared by the Reporter, working with the committee's delegates to the attorney conduct subcommittee. One draft will adapt Rule 26.1 for use in the trial courts. The other draft will require filing of a form approved by the Judicial Conference. These drafts can be discussed with reporters for the other advisory committees, and perhaps considered by the Standing Committee in January. If no clear choice emerges on consideration of these drafts, and perhaps others, it may prove desirable to publish alternative models for comment.

Special appreciation was expressed to Carol Krafka for the

great help provided by her excellent FJC report.

Agenda Subcommittee

Justice Durham gave the report of the Agenda Subcommittee. The Subcommittee circulated a list of docket items as a consent calendar in August. The docket materials supporting each item were circulated with the Subcommittee recommendations for disposition. No advisory committee member asked that any of these items be moved to the discussion calendar. The Subcommittee report comes to the advisory committee as a motion for approval.

Brief discussion focused on the continuing desirability of working with the Maritime Law Association on suggestions for changes in the Admiralty Rules. Several agenda items are involved in this process now, and it is expected that this cooperative approach will be continued. It also was noted that it is important to ensure that advisory committee members have adequate time to consider consent calendar items before the time designated to request treatment on the discussion calendar. With this protection, this early experience with the consent-calendar approach has seemed good.

The consent calendar recommendations were approved.

Rule 53 Subcommittee

Chief Judge Vinson summarized the work of the Rule 53 Special Masters Subcommittee. Interest in Rule 53 and the use of special masters has been simmering in the advisory committee for several years. Rule 53 does not directly authorize many practices in the use of special masters that in fact are being utilized with some frequency. A draft revision of Rule 53 has been prepared to speak to many of the practices that seem to have emerged. The first step of the inquiry whether to develop the draft further has been to find out what is actually being done, and why it is done. To that end, the Federal Judicial Center has agreed to undertake a study. A preliminary report on the first phase of that study is included in the agenda materials.

Thomas Willging summarized the results of the first phase of the FJC study. He began with a brief review of the methods used to gather information. The initial goal was to identify more than 100 cases with some special master activity. To that end, an electronic docket search was made of nearly 450,000 cases that had closed in 1997 and 1998. Searching for specific terms in the entries, the study found more than 1,230 cases that involved special master activity. The terms searched included all of the terms used in Rule 53, plus a few more such as "appraiser," "trustee," and "court-appointed expert." A sample of nearly one-ninth of these cases, a total of 136 cases, was selected for more detailed investigation. All of the documents in these 136 cases were examined and summarized in a data base.

The first finding is that use of special masters is relatively

rare, occurring in something like three-tenths of one percent of all federal cases. Even in the types of cases that show the most frequent use, such as environmental, patent, and air-crash personal injury cases, use ran at just less than three percent; it can be said with statistical confidence that special masters are used in no more than five or six percent of even these types of cases. Court-appointed experts were much more rare, occurring about once in every ten thousand cases. Although special masters thus appear to be used infrequently in relation to the total caseload in federal courts, it also can be said that an event that occurs six hundred times a year is not a rare or inconsequential event. The topic need not be written off the advisory committee agenda because it just never arises. Nor, for that matter, can it be known whether special masters would be used more often, or differently, if Rule 53 provided greater guidance.

The question of appointing a master is raised by the judge in the plurality of cases; plaintiffs raise the question almost as often. Defendants seldom initiate consideration of an appointment. Opposition was not frequently expressed; when there is opposition, it is generally from the defendant. Absent settlement or dismissal, the judge usually accepted a party's suggestion that a master be appointed.

More than half the orders appointing special masters did not refer to any Rule or other authority for the appointment. Authority seems to be assumed.

In selecting the person to be master, judges commonly received nominations from the parties, but appointments also were made by other means. Ordinarily the master is an attorney, but not always. A non-attorney master is likely to be either a court-appointed expert, or to be appointed to address a specific issue.

Costs commonly are shared by the parties.

The responsibilities assigned to special masters cover a wide range of activities from pretrial through trial and on to post-trial work. This range of activity suggests there is at least room to expand Rule 53, which focuses only on trial uses.

Generally the court accepted the report and recommendations of the master. Modification is relatively rare, and rejection is quite rare.

As a subjective assessment, it seems that generally the master has at least some impact on the outcome. It is rare that the master's recommendations are either determinative or have no impact.

Judges were more likely to take the initiative in appointing special masters for pretrial use. Curiously, appointments for pretrial work were more likely than other appointments to rely expressly on Rule 53, even though Rule 53 does not refer to this use. Pretrial appointments were most likely to aim at settlement.

When settlement was the purpose, settlement always happened. Plaintiffs were more likely to suggest trial and post-trial appointments of masters.

The study is limited to some extent by the reliance on electronic records. It likely fails to pick up appointments of magistrate judges for master-like functions. But it does not seem likely that there are many of these appointments. It may be that the study underreports total master activity by some fraction, but it does not seem likely that the margin is greater than ten percent.

Phase 2 of the study will involve interviews with judges, attorneys, and masters in a sample of the cases to ask more detailed questions. It will be asked whether Rule 53 created problems, whether a clearer rule would have facilitated anything.

Chief Judge Vinson then observed that the question for the Subcommittee is whether to continue to explore Rule 53. The Phase 1 data suggest a need to update Rule 53 to cover pretrial and post-trial activity. The Subcommittee recommends that work proceed on the Rule 53 draft while the FJC goes on with its study.

It was asked whether the intersection between the duties of magistrate judges and the functions of special masters makes a difference. Magistrate judges, for example, commonly supervise discovery. Similar functions may be assigned to a master. Should this overlap be dealt with in the rule? It was responded that indeed magistrate judges now perform many functions that once might have been performed by a special master. But there may not be enough magistrate judges to displace special masters. Some massive discovery cases may demand more time than a magistrate judge could devote to supervision. And in some districts, there simply are not enough magistrate judges and district judges to meet the needs for discovery supervision. Section 636(b)(2) expressly provides for appointing magistrate judges as special masters, including a provision that allows appointment when the parties consent "without regard to the provisions of Rule 53(b)." And Rule 53(f), somewhat indirectly, provides that a magistrate judge is subject to Rule 53 "only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this Rule."

It was further observed that using a master to enforce a decree in an institutional reform case can lead to reshaping the role of the courts in sensitive areas. Thomas Willging noted that the FJC sample includes some institutional decree enforcement functions, and that these will be explored in Phase 2.

Another committee member noted that there is extensive experience with special masters in environmental cases, and that this practice has proved highly desirable. A master can bring to the case highly specialized knowledge and experience that cannot be provided by a district judge or magistrate judge.

It was noted that Rule 54(d)(2) specifically provides for use of special masters to resolve attorney fee questions.

The motion to continue the Rule 53 study was approved unanimously.

Simplified Procedure

Judge Niemeyer introduced the simplified procedure question by observing that the continued growth in "ADR" mechanisms seems to reflect dissatisfaction with the court system. It suggests that courts are not able to meet the social need for dispute resolution. Some people are turning away from the courts. The federal courts may be particularly feared — the old "making a federal case out of it" epithet has come to be associated with six-figure attorney fees and burdensome procedures. People with claims that are important to them individually cannot afford to litigate their claims; the barriers reach claims of tens or even hundreds of thousands of dollars, and business claims as well as personal claims. One effort to address these problems in part is represented by the "rocket docket" in the Eastern District of Virginia. This system encounters criticism, but also deserves praise. It provides a date certain for a prompt trial, and that is a real benefit. The complaints that emerge seem to focus more on the short time allowed for the trial itself, rather than the expedited pretrial procedure. People manage to live with accelerated pretrial — the result is not "trial by ambush."

The question now is whether it is possible to develop a simplified procedure for some cases, shifting the tasks performed by the pretrial devices of pleading, disclosure, and discovery and ensuring prompt trials. Whenever this idea is mentioned to lawyers or judges, it evokes great interest. When it was suggested to a meeting of the district judge members of the Judicial Conference in September, they were unanimously in favor of pursuing the project and excited by the prospect. When the idea is suggested to lawyers, their reactions seem hesitant and to be based on uncertainty whether the result would be to help them and their clients. But there is little indication that lawyers have actually registered the nature of the proposal.

In pursuing any project such as this, it is important that it not be described as a "small claims" project. The purpose is not to provide a second-class procedure for claims that are deemed unimportant. Instead, the purpose is to provide a procedure that will better enable these claims to be enforced. Plaintiffs will be attracted to a procedure that enables them to move into court and emerge quickly with a final judgment. The focus is on adjudication, not prolonged pretrial work. The system will need a cap on damages. With a cap on damages, the defendant too can save money — without the risk of a runaway damages award, it is sensible to budget litigation expenses accordingly.

Some inspiration for simplified procedure rules may be found

in The American Law Institute's Transnational Procedure Rules project. This project aims at developing a set of rules that can be universally accepted as providing for fair and efficient adjudication of controversies. It has the benefit not only of outstanding reporters — including Standing Committee member Professor Geoffrey C. Hazard, Jr. — but also of drawing from the experience of procedure systems and experts all over the world.

Civil Rule 1, promising just and speedy determination of civil actions, has roots as far back as Magna Carta. Magna Carta, indeed, prohibited delay in justice in terms more bold than Rule 1.

A project to do something this broad for our system will be difficult. But we have an initial draft of nine rules that provide one picture of what a simplified system might look like. The Rule 103(b)(2) requirement that documents be attached to the pleadings seems attractive. The Rule 109 firm trial date also seems attractive. The idea draws from practice in a small-claims court that issued a firm trial date when the complaint was filed. A six-month trial date is compatible with the reduced pretrial procedures provided by these rules, apart from cases in which there are obstacles to prompt service of process.

The difficulties, moreover, may not be as great as appears. They can be reduced by following the draft approach, which does not attempt to adopt a self-contained complete system. It is essential that the procedure be fair to both sides — it is not enough to make it less expensive than the regular rules. Fairness is particularly important if the rules are made mandatory for any category of cases, as the draft would do for cases seeking less than $50,000.

Professor Cooper provided a more detailed description of the Simplified Rules draft. The draft is very much a first attempt to illustrate the nature of the issues that must be faced; it is not even close to a model of what might eventually be done.

The first question is whether to make the attempt at all. One part of the concern must be whether an attractive new procedure will bring to federal courts cases that might better remain in state courts: can federal courts handle the new business fairly and well, even if the procedure is itself well designed? Another concern is that the new rules not seem a second-class procedure. It must be clear, both in purpose and result, that the new rules are designed to be better than the ordinary rules for the cases in which they apply.

A basic question of approach is whether to attempt to create a complete set of self-contained rules, or whether to follow the draft approach that simply displaces some of the regular rules. The draft approach has been numbered beginning "Rule 101" and following numbers to emphasize the distinctness of these rules, but also to contain them within the broad framework of the Civil Rules. This approach makes it possible to have a much shorter set of rules, and to rely on the vast body of precedent that gives meaning

to the ordinary rules. But it also makes the supplemental rules difficult for pro se litigants. Any attempt to develop a set of rules for pro se litigation must look quite different from this draft, and is likely to involve provisions that will be unattractive for lawyer-managed cases.

The approach taken in this draft is based on the view that the most profitable approach to simplification lies in the package of pleading, disclosure, and discovery rules. It does not address motion practice directly, in part because it is difficult to conceive of a system that does not permit a motion to dismiss for lack of jurisdiction or for failure to state a claim, or does not permit summary judgment. But motion practice may be the source of great delay and expense. If pleading is a proper focus, is it desirable to attempt to restore more detailed fact pleading? Are the early indications of success with the disclosure practice invented by the 1993 version of Rule 26(a)(1)(A) and (B) sufficient to justify building on that version in these rules? Is it possible to enforce a rule that requires greater specificity in demands to produce documents under Rule 34?

The attempt to establish firm trial dates raises obvious questions of courts' abilities to make good on the promise. The draft does not include any provision for shortening trials themselves, a feature that might be important in achieving a firm trial date.

Choice of the actions that come within the rules — the matters covered by draft Rule 102 — also is an important question. The choice will depend in part on what the rules actually do, and on the confidence we have in the rules. The FJC has provided information about the numbers of cases involving various dollar recovery demands brought in federal courts over a ten-year period. The records for about 70% of the cases did not show any stated dollar amount. Often a stated amount was not relevant to the relief requested, but for many of the cases it seems likely that the records were incomplete. Nearly 12% of the cases involved demands for $50,000 or less. Although this is a very large fraction of the cases in which there was a stated demand, that comparison of itself does not provide much guidance to the total portion of the docket that involves demands in this range. Depending on the approach that is taken, it may be important to consider adoption of a requirement that a definite amount be pleaded — either for all actions in federal court, to defeat evasion of a mandatory rule directing that all cases of below a certain dollar level come into the new procedure, or for cases in which the plaintiff seeks to elect the new procedure.

If this project is pursued, it will be important to identify the people who can help. Some help can be found from lawyers who decide not to bring litigation in federal court, although subject-matter jurisdiction is available, because of the complexity of federal procedure. More help may be found from lawyers who do

bring to federal court actions that involve rather small amounts of money, or that involve important principles but cannot support big litigation expenditures. Experience in state small-claims courts may be consulted, but it is questionable whether procedures designed for the problems that typically come to small-claims courts will work for the actions that may be brought to federal courts.

Discussion began with the question of pleading dollar demands. It was urged that actual recovery should be limited when the simplified rules are invoked.

It was observed that Massachusetts has a set of pro se rules that are contained in a short pamphlet, expressed in terms that aim at a sixth-grade reading competence. Such rules would be very different than the simplified rules draft advanced here.

Thomas Willging observed both that dollar demands are not relevant in many federal actions, and also that the electronic data reporting forms do not require information about the amount demanded. The FJC figures do not support the conclusion that specific dollar demands are made only in 30% of federal actions.

It was asked what might be done to make simplified rules attractive to plaintiffs, to encourage them to opt into the system to the extent that it might be made optional. One incentive could be provided by establishing both a right to an early trial and an opportunity for a short trial.

Caution was expressed by asking whether there is a sufficient number of cases to make it worthwhile to adopt a set of simplified rules. If application of the rules is made mandatory, as in the draft Rule 102 application to all cases involving less than $50,000, there will be a lot of litigation over the amount actually involved. Plaintiffs may add claims for punitive damages to escape application of the rules. And defendants must have an incentive to the extent that the rules are made elective — the draft would provide a procedure for consent of all parties when the damages demand ranges between $50,000 and $250,000, and another consent procedure applicable to all cases.

The view was expressed that "if you provide it, they will come." There are types of cases where this may make sense. The dollar limits could easily be raised to $500,000. There is a lot of concern over expense and delay. Corporate defendants would like this procedure as something more attractive than the present choice between spending large sums on attorney fees or on paying off plaintiffs to avoid spending large sums on attorney fees.

It was suggested that "good lawyers are doing this now, when the relative uncertainty of jury verdicts puts all parties in fear." But it may not be wise to raise the dollar limits. Perhaps we should rely on agreement of the parties to invoke the new procedure. And a firm dollar cap on damages would provide an

incentive to defendants to agree.

It was agreed that surely this project should go forward. But attention should be given to motion practice. Motions can become an important source of expense and delay. The firm six-month trial date also could be a problem. It would help to find a way to build magistrate-judge trial into the system. To the extent that application of the rules is made to depend on agreement of the parties, it would be easy to provide that trial will be held by a magistrate judge or district judge depending on overall docket management needs.

The dollar limits were approached from another direction, asking why the mandatory limit is set below the amount required for diversity cases. Under this approach, only federal question cases would ever fall within the mandatory reach of the rules. The dollar limit might be set at double the amount required by § 1332 for diversity jurisdiction. Alternatively, an elective procedure could work without any need to refer to dollar limits or limits on other remedies. And Miller Act cases are a good illustration of the types of federal-question cases that might be brought within this procedure.

It was urged that caution should be observed in approaching trial by magistrate judges. Many lawyers are reluctant to consent to trial by magistrate judge because it is difficult to explain the consent to a client "when something goes wrong."

Professor Coquillette observed that simplified procedure reforms are very attractive. In our common-law tradition, they date back at least as far as 1285, when a set of ten simplified rules was adopted for commercial disputes. But we should be careful to consider the question whether these rules, or some other rules, might be adopted to help pro se litigants. At the same time, the simplified rules approach could easily be used for cases that involve more than $50,000.

Drafting in terms of "monetary relief" may prove unwise. There is a lot of state-court litigation over this and similar terms, addressing questions raised by costs, attorney fees, treble damages, punitive damages, and like supplements to compensatory awards.

The question was asked again: what should be done under the draft if a defendant prefers to invoke these rules, and moves to invoke them on the ground that the plaintiff cannot possibly recover more than $50,000?

It was suggested that many lawyers would find some set of simplified procedures attractive for many cases. This led to expanded discussion of the idea of capping damages. Defendants would find simplified rules very attractive if they could be assured that the stakes would not rise above a stated level. Developing litigation budgets would be much more reliable. If

consent of the parties is required, there is no need for a dollar limit. It is the cap that is important, not the absolute level of the cap. There may be many cases in which all parties would agree to invoke simplified procedures even though hundreds of thousands of dollars are in issue. And in any event, it was urged that any dollar limit should be high enough to capture some diversity cases.

One of the questions raised in the introductory materials is whether the simplified rules might provide for majority jury verdicts. It was urged that this topic should be put aside. Any such proposal would prove divisive — virtually all plaintiffs would favor majority verdicts, while virtually all defendants would oppose them. Such a feature would discourage use of the new system.

Thomas Willging observed that any new set of simplified procedures would be a dramatic change for the federal courts. "We cannot research the future." Perhaps it would be desirable to find a way to establish a pilot project in a few courts to provide a firm basis for study before seeking to implement a new system for all federal courts. The Federal Judicial Center would be available to help.

Another committee member observed that in his state lawyers are often reluctant to go to federal court because of the delay, the "paper jungle," and like concerns. A simplified set of procedures would be very attractive. But the dollar limits should be raised. And the nonunanimous jury should be avoided.

A judge noted that a court’s ability to ensure a firm trial date is affected by the length of trial. It is much easier to give a firm date if trial is limited to one day or two days. It was added that given an expedited pretrial process, short trials are more likely to occur naturally even if the rules do not include any limit on trial length.

The question was raised about the types of cases that might be reached by new rules. Some would be cases now filed in federal courts. Others would be cases filed in federal court only because of this procedure. And we need to consider pro se cases, and whether the attempt to adopt simplified procedures for some cases would generate momentum to consider also a set of procedures for pro se cases. And it was noted that if there is a satisfactory procedure for money-only cases, demand will emerge to extend the procedure to cases seeking other forms of relief.

The RAND study of the Civil Justice Reform Act showed that discovery is limited in many cases. The more recent FJC study done for this committee made similar findings. It may be useful to look at these studies again to see whether they can afford information about the types of cases best considered for a simplified procedure system.

It was urged again that higher dollar limits are desirable.

It was further suggested that there are considerable opportunities to adapt a simplified procedure system to pro se litigants. There is a resemblance to the "tracking" systems that have been adopted in some local rules. The tracks developed for simpler cases could provide good models for this project. We could find out, for example, what kinds of cases went onto the simplified tracks. Thomas Willging supplemented this suggestion by observing that the FJC studies of the "pilot" districts under the Civil Justice Reform Act could also be useful in this regard.

Returning to one of the opening themes, it was noted that the impulse for simplified judicial procedure is kin to the proliferating programs for court-annexed ADR. ADR schemes at times focus on "low-end" cases. There may be useful experience to be gathered here as well.

It was observed that experience in a large law school clinic program has shown that there are many people who have valid federal claims but for amounts so small that no lawyer will take them on. Clinic resources are not adequate to the task, nor are other legal assistance programs. The claimants are left alone, confronting a judicial system that is for all practical purposes inaccessible. But that does not mean that it is practicable to develop a pro se procedure that will meet their needs.

The pro se discussion led to the observation that it is important to remember that pro se prisoner actions claim a large part of the federal docket. These cases require very truncated procedures.

The simplified procedure discussion concluded with unanimous agreement that the project should be pursued. Judge Niemeyer will make final assignments to the Subcommittee. Experience with seeking even relatively modest changes to the class-action rules and the discovery rules has demonstrated the momentum of entrenched procedures. Simplified procedures for some actions, if they can be devised, may provide a new source of momentum that, many years down the road, may help in amending the rules for all cases.

Rule 51

Rule 51 has been on the agenda for some time, in response to a suggestion by the Ninth Circuit Judicial Council that an amendment should be made to legitimate local rules that require requests for jury instructions to be submitted before the start of trial. The committee has concluded that this question should not be left to local rule variation — if it is desirable to authorize a direction that requests be submitted before trial, the national rule should say so. The committee has not determined whether it is desirable to amend Rule 51 in this way, although it is aware that the Criminal Rules Committee has published for comment an amendment of the Criminal Rules that would authorize an order for pretrial requests. Consideration of this issue may also involve other changes designed to clarify the interpretations that have been

grafted onto the text of Rule 51. A revised Rule 51 draft is included in the agenda materials for this meeting. It was concluded, however, that the questions presented by the draft are sufficiently complex that it would be better to defer consideration to the spring meeting. Any advice from committee members to the Reporter would be welcome.

Next Meeting

The dates for the spring meeting were tentatively set at April 10 and 11, 2000.

Respectfully submitted,

Edward H. Cooper
Reporter