ADVISORY COMMITTEE
ON
CIVIL RULES
DISCOVERY SUBCOMMITTEE

Santa Barbara, California
January 6-7, 199[illegible]

MEMORANDUM

To: Members, Discovery Subcommittee, Advisory Committee on the Civil Rules
CC: Hon. Paul Niemeyer; Prof. Edward Cooper; Thomas Willging
From: Rick Marcus, Special Reporter
Date: Dec. 18, 1997
Re: Santa Barbara meeting

The purpose of this memorandum is to set out the topics that appear to be on the Subcommittee's plate for the meeting in Santa Barbara on January 6-7, 1998. In essence, this carries forward the outline of items on my Oct. 9, 1997, memo memorializing where we were on return from the meeting in Utah. It is also based on Ed Cooper's draft minutes of the Utah meeting. A copy of pp. 4-21 of those draft minutes is attached at Tab 11 because that may be helpful to members of the Subcommittee in orienting themselves. I will try on occasion to refer to the pertinent portions of those minutes as I discuss specific topics.

The goal of this memorandum is to be relatively self-sufficient with regard to the issues presently before the Subcommittee. On occasion I will cover topics that are not action items for the Santa Barbara meeting, but principally as matters of background. Not all topics that are on the March agenda for the full Committee require attention in Santa Barbara. This memorandum generally follows the sequence of discussion in Utah, and hopefully is a useful way to organize discussion.

For purposes of introduction, the coverage of this memorandum is as follows. Beyond item 9, the topics are meant to be informational rather than action items, as I don't believe we are expected to take action on them. The tabs should correspond to the item numbers below. Since the pagination runs throughout, the following listing also indicates the page on which topics can be found within items. Finally, for purposes of convenience, the subjects that are clearly action items for the Subcommittee at this meeting are marked with an asterisk on the following listing

in case you want to focus most carefully on those.

(1) Reestablishing uniformity

The Santa Barbara meeting is not to spend considerable time on the methods of reestablishing uniformity, but for purposes of background it seems useful to include specifics on what those changes would involve. This material was included in the memo I prepared for the Utah meeting:

Rule 26(a)(1): "Except to the extent otherwise stipulated or directed by order ~~or local rule~~, . . ."

Rule 26(a)(4): "Unless otherwise directed by order ~~or local rule~~, . . ."

Rule 26(b)(2): "By order ~~or by local rule~~, the court may alter the limits in these rules on the number or duration of depositions and the number of interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36."

Rule 26(d): "Except when authorized under these rules or by ~~local rule,~~ order, or agreement of the parties, a party may not seek discovery . . ."

Rule 26(f): "Except ~~in actions exempted by local rule or~~ when otherwise ordered, the parties shall, as soon as practicable . . ." [Note that one might here insert authority for the court to exempt categories of actions as now provided in Rule 16(b).]

Rule 26(f)(1): "what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) ~~or local rule~~, including a statement . . ."

Rule 26(f)(3): "what changes should be made in the

limitations on discovery imposed under these rules ~~or by local rule~~, and what other limitations should be imposed . . ."

In my Oct. 9 memo I suggested that the entire first sentence of Rule 26(b)(2) might properly be deleted. On reflection, I'm not so sure. For one thing, that seems to be the only place where the court is granted the power to limit the duration of depositions. Even if an amendment is adopted to impose such a limitation nationally (item (3) below), that authority to act in a given case should probably remain, albeit perhaps more appropriately in Rule 30(a). Accordingly, I have proposed adding a reference to duration to the current rule. The power to vary the numerical limitations on depositions and interrogatories seems to be contained also in Rules 30(a) and 33(a), although it is there expressed as "leave of court" regarding the maximum number. Perhaps saying in Rule 26(a)(2) that the court may lower the number is worth doing. Once other changes are clearer, this should be revisited.

The Advisory Committee Notes should presumably say that the orders referred to above mean orders entered in this case rather than a standing order of the individual judge, and perhaps refer to Rule 83's limitation on adoption by individual judges of orders that deviate from the Civil Rules. The basic idea is that the order should be an order entered on the basis of the specific characteristics of this case.

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(2) Middle Ground on Initial Disclosure

The full Committee wants to have three choices before it in March. With those presented, it can address the questions raised by item (1) above--whether uniformity warrants imposition of a single regime nationwide. See Oct. 6 minutes at 9:383-88.

By way of background, making the changes indicated in item (1) above would essentially make current Rule 26(a)(1) applicable nationwide and authorize only such deviation as permitted under that rule. Alternatively, abrogating Rule 26(a)(1) altogether would seemingly forbid disclosure requirements nationwide. There has been a suggestion it might be desirable to replace current Rule 26(a)(1) with some sort of prohibition on local requirements for disclosure. That seems heavy medicine, and Rule 83 should in general do the job.

Please note that the ultimate handling of disclosure has implications for a number of other topics, such as whether to retain the discovery moratorium in Rule 26(d).

There are a number of decision points in connection with disclosure that may warrant discussion as topics rather than being subsumed into a draft. In preparation for this meeting, I have reviewed a packet of variations on disclosure prepared for me by Donna Stienstra of the FJC. I have also reviewed the minutes from the Committee's meetings when the initial proposal circulated in 1991 took shape, and during the period when that proposal was reworked into the current arrangement. During that time, many of these points were examined. As a starting point, it would probably be useful to have in mind the actual provisions

circulated in 1991, so they are set forth in a footnote.[1]

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[1] The 1991 proposal was as follows:

(1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting a discovery request provide to every other party:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that bears significantly on any claim or defense, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part of all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by a plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosures. A party is not excused from disclosure because it has not fully competed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or, except with respect to the obligations under clause (iii), because another party has not made its disclosure.

Proposed Amendments to the Federal Rules of Civil Procedure, 137

(a) Issues involved

According to my review, changing the disclosure regime involves consideration of a number of issues. It may be that there is implicit agreement among Subcommittee members about how to handle a number of these decision points, and that the only problem is putting that agreement into language. I am uneasy with that conclusion, however, and suspect that there is reason to lay out what seem to be the salient issues before proceeding to specific language. I fear that assuming agreement on these points may obscure issues that need to be addressed. Please note that the resolution of several of the points is different in the current rule from the provisions of the 1991 proposal. Please note also that the Committee could modify the current rule with regard to some of these issues without developing an entirely new regime like the District of South Carolina's interrogatory system. For purposes of discussion, therefore, a possible redraft of Rule 26(a)(1) follows an initial draft of a new approach.

One difficulty is that ultimately any disclosure system needs to be just that--a system with a number of parts that fit together. The parts might be modified in accordance with the resolution of a number of issues. Once that modification is done, however, the overall machinery should be examined to make sure that the parts fit together in a sensible way. It may be that this task is a bit more difficult than we appreciated in Utah when we undertook to produce our single preferred middle ground. I therefore have also suggested below a more modest redraft of Rule 26(a)(1).

1. Scope of obligation. This topic has, at least, been discussed during this year, and it is a prime bone of contention.

F.R.D. at 87-88 (1991).

The basic question is whether to include unfavorable information or limit the proposal to favorable information. Neither the 1991 proposal nor the current rule makes a distinction on this basis. The 1991 proposal did seemingly try to limit the scope set by Rule 26(b)(1) in a different way--asking only for witnesses or documents with information that "bears significantly on any claim or defense." The current rule does not narrow Rule 26(b)(1)'s scope, but does limit disclosure to "disputed facts alleged with particularity in the pleadings." (That provision seems designed to address problems of notice, dealt with below in connection with timing, the next issue, more than the scope of the obligation.)

Probably the most basic question is whether to require disclosure of unfavorable information. Insisting that such information be disclosed is the most aggressive form of disclosure, and most directly provokes the opposition of considerable segments of the bar. Including harmful information also exacerbates problems of notice and particularity, since it asks a party making disclosure to try to figure out what the other side would find useful to it (and harmful to the producing party). Given the exclusion sanctions of Rule 37(c)(1), limiting disclosure to supporting or favorable information somewhat corresponds to one consequence of failure to satisfy the rule (although there are other sanctions available under Rule 37(c)(1) as well). Failing to include that requirement may invite game-playing, however, and would tend to undercut any argument that disclosure could be a substitute for discovery, or that it provides core discovery (see item 10(b) below).

The problem may be more complicated, however, for there seems to me to be a large category of information that might more suitably be called neutral than harmful or helpful. Consider, for example, organizational or other such information on corporate hierarchy in an employment discrimination case. The

Subcommittee was told in San Francisco that this is important to the development of plaintiff's case, but it is not readily categorized as intrinsically either helpful or harmful. Thus, limiting the rule to supporting information may exclude considerable material that is quite important to the other side but not of a sort that raises the hackles of those opposed to the current version. Perhaps this sort of neutral information is not suited to disclosure at all because it is essentially background, but this middle ground issue seems to deserve mention.

Assuming that the Subcommittee wishes to move away from the requirement to disclose unfavorable material, there comes the problem of describing what is to be produced. There are various approaches reflected in local rules. For purposes of reference, it seems worthwhile to list a few. On occasion, this listing includes separate treatment for witnesses and documents. It could be that differentiation between the two is in order on this score. In case these would be of assistance in considering how such provisions might be phrased, here are a number of variations:

> requiring production of documents that "tend to support the positions that the disclosing party has taken or is reasonably likely to take in the case." (N.D. Cal. L.R. 16-5(b))
>
> "all lay witnesses whose testimony you may use at the trial of this case." (D.S.C. L.R. 7.04(A); 7.07(E))
>
> provide the identity of each witness "believed by [the disclosing party] to have discoverable non-privileged personal knowledge concerning any significant factual issues specifically raised in the pleadings or identified by the parties in their report to the court under Fed.R.Civ.P. 26(f)" and produce all documents "that may be used by [the

party] (other than solely for impeachment purposes) to support its contentions with respect to any significant factual issues in the case." (N.D.Ala. L.R. 26.1(a)(1)((A) and (B))

all witnesses "who have knowledge of facts supporting the material allegations of the pleading filed by that party, or rebutting the material allegations of the pleadings filed by any opposing party" and all documents "then contemplated to be filed by that party, or to rebut the material allegations of the pleadings filed by any opposing party." (C.D. Cal. L.R. 6.2.1 and 6.2.1)

each witness "whom [the party] will or may have present at trial" and each document "which you contend supports your claim or claims" (for plaintiffs) or "which you contend supports your defense or defenses or your claims against other parties." (for defendants) (M.D. Ga. L.R. 15.2(4); 15.2(6); 15.3(4))

list all witnesses "having relevant knowledge of the facts or issues involved in this action" and all documents "relied upon to support your contentions." (S.D. Ga. L.R. 26.3(A)(3) and (5); 26.3(B)(5) and (7))

list of "each person who is likely to have knowledge of material facts upon which the party bases the claims, prayer(s) for damages or other relief, denials and/or defenses asserted in that party's pleadings" and "[t]he documents upon which the party bases the claims, prayer(s) for damages or other relief, denials, and/or defenses asserted in that party's pleadings." (D. Nv. L.R. 26-1(a)(2)(A) and (B))

identity of "all persons with pertinent information

> respecting claims, defenses and damages" and "the documents relied on by the parties in preparing the pleadings or documents that are expected to be used to support allegations." (E.D.N.Y. CJRA Plan II(A)(1)(a) and (d))

As the foregoing should make clear, there are multiple possibilities. Limiting the obligation to materials that a party intends to use at trial may be quite problematical at this early stage of the proceeding (but see timing, below).

The review of the district variations also suggested at least one other thing that may warrant mention. The E.D.N.Y. also directs parties to produce an "authorization to obtain medical, hospital, no-fault and worker's compensation records." E.D.N.Y. CJRA Plan II A(1)(c). That probably can't be done by discovery now, and is included in the draft proposal below.

2. Timing. There is a plethora of timing issues that are related but somewhat distinct.

(a) Simultaneous v. sequential disclosure. The current rule essentially calls for simultaneous disclosure. So did the 1991 version, with the exception discussed in (f) below of acceleration by early demand accompanied by disclosure. There was considerable discussion of this topic during the deliberations of the Committee in 1989-92. For example, the following is reported in the minutes of May 22-24, 1991 (p. 2):

> Judge Keeton joined Judge Pfaelzer in questioning the time periods, suggesting 60 days rather than 30, and favoring sequential disclosure. Justice Zimmerman, Judge Brazil, and Judge Winter resisted extension and sequentiality, Judge Winter noting that the argument for sequentiality is an argument against notice pleading, and Judge Brazil arguing that defendants receiving a disclosure would simply use it

to fortify more pre-answer motions.

This issue connects to others discussed below (e.g., relation to motions). It is raised first because it was one on which several lawyers seemed to support changing the current rule. From the perspective of defendant, having information from plaintiff before disclosure is due may make having to disclose much less onerous. In addition, the idea is that plaintiff should, under Rule 11, have put together much of this information before filing suit. Accordingly, plaintiff should be ready to disclose sooner since defendant usually learns of the suit only after filing.

Another question is whether, in these circumstances, the party which is to disclose second can refuse to do so on the ground that the other side's disclosures are inadequate. With simultaneous disclosures (as under the 1991 draft and the current rule), one can equitably say that the alleged incompleteness of the other side's disclosures is irrelevant. But if one side's disclosures in a sense "build on" the other's, that stance becomes more difficult to maintain. Thus, the 1991 draft did allow refusal to disclose on the ground of the inadequacy of the opposing party's disclosure in the "jump start" situation (see (f) below).

(b) Relation to motions. As the discussion just above points out, disclosure does not occur in a vacuum, and it should be calibrated with regard to other things likely to happen in the suit. That raises at least two types of issues regarding motions that basically explore the extent to which disclosure could turn into a tool advantageous to defendants:

(i) Deferral pending ruling on Rule 12 motions. One issue is whether disclosure should be deferred until motions are ruled upon. This, of course, seems implicit in the Private Securities

Litigation Reform Act, and the Ninth Circuit has so held. Arguably disclosure is a waste of time if Rule 12 motions are pending. But putting off disclosure until after all motions are ruled upon may delay it a great deal (see also the discussion in 2(c) below of timing in relation to the answer). In addition, enabling defendants to put off disclosure by filing motions directed at the complaint may give them an undesirable additional incentive to do so. (On the other hand, making defendants disclose without something more in hand from the plaintiff than the complaint may prompt motions for more definite statements.)

(ii) Use of disclosure in support of motions. A slightly different issue is whether disclosures can be used in support of motions. At least one plaintiffs' lawyer in Boston, who was generally receptive to sequential disclosure, said that his position was premised on preventing the defendant from using the content of the disclosure in a motion.

There are at least three ways in which such use might occur. First, defendant might use such materials in support of Rule 12 motions. Second, it might use such disclosures as a basis for a motion under Rule 11. Third, it might offer the plaintiff's disclosures to satisfy the initial showing required under Celotex for a motion for summary judgment. At least one court has addressed such matters. The discovery order of at least one division of the N.D. of Indiana says:

> Recognizing that further investigation or discovery may be undertaken, the court will not consider the written pre-discovery disclosures (as distinct from the information disclosed or discovered thereby) for any purpose when considering a motion for summary judgment under Fed. R. Civ. P. 56.

As with the use of standing interrogatories (see below), the

question of supplanting the pleadings with disclosures presents difficulties. At present, it seems that disclosure can be used for any purpose, and failure to disclose can as well (see Rule 37(c)(1)).

(c) Before or after answer. Note that the 1991 proposal put off disclosure until after filing of an answer. (In a multi-defendant case, plaintiff's disclosure would be due 30 days after the filing of the first answer, and each defendant's disclosure would be due 30 days after it filed its answer.) There is much to be said for this sequence. Until it has readied its answer, the defendant may be unable to say what it will deny or what affirmative defenses it will raise, so making disclosures on those subjects may present difficulties. Until it has seen the answer, plaintiff may be unable fully to provide its own disclosures. Indeed, some courts that have sequential disclosures follow the defendant's disclosure with a further disclosure by plaintiff in light of what the defendant had to say.

This was also the subject of discussion in the 1989-92 period. Many members then urged awaiting the answer. Others cautioned that this would provide incentives to delay an answer. See, e.g., minutes of Nov. 29-Dec. 1, 1990 at 2-3 (comments compressed from actual minutes to focus on this issue):

> The Chair suggested waiting until the answer is in to disclose information bearing on the answer. Prof. Miller suggested that this is not realistic given the unlikelihood of an answer being timely filed. * * * Magistrate Judge Brazil cautioned against building an incentive to delay an answer. Ms. Holbrook noted that if a 12(b)(6) motion is pending, maybe disclosure is a waste of time. Prof. Miller questioned whether you want this process to proceed if any Rule 12 issue is pending. * * * The Reporter suggested that

Rule 12 could be modified to make the presumption run the other way, requiring an answer unless the court orders otherwise. * * * Magistrate Judge Brazil thought this would produce motion practice by defendants seeking delay. Judge Pointer thought Rule 11 might deter excess delay motion practice. Magistrate Judge Brazil thought this not a sufficient response, that too many Rule 12 issues are too close. Judge Winter renewed the thought that requiring an answer while a 12b6 motion is pending, to say that opposition to that had been insurmountable. The Chair called for a vote on whether the disclosure should be linked to the answer; an affirmative vote was taken. It was decided to hold the issue of whether an amendment to Rule 12(a) should accompany this decision.

It is worth noting also that, if the discovery moratorium is to continue, precluding disclosure until after an answer is filed and putting discovery off until after that could lead to very considerable delays in some cases. The disclosure provision eventually adopted in 1993 tied disclosure in with case management more generally by directing that disclosure occur within 10 days of the Rule 26(f) meeting, and putting everything on hold pending completion of motions and filing of an answer would seem inconsistent with the case management orientation because it could lead to delays of undetermined duration. In the Northern District of California, for example, there is now a 35 day notice period for ordinary motions. If a defendant is promptly served (say in one week) and makes a motion to dismiss that is served 40 days before the hearing and is denied on the date of the hearing, its answer would not be due until 57 days after filing of the action. Putting disclosure 30 days after that puts it, at a minimum, about 90 days into such a case.

(d) Before or after meet-and-confer session. The Rule 26(f) meet-and-confer provision was added after the commentary

period on the 1991 proposal, and as presently in force Rule 26(a)(1) permits disclosure to occur up to ten days after that meeting. (Of course, tying disclosure to the meeting may not be consistent with tying it to other things, such as the filing of the answer or disposition of Rule 12 motions.)

Arguments can be made either way on whether to have the disclosure first or the meeting first. The general approach of the courts using standing interrogatories (see issue 3 below) is to have that sequential exchange occur before the meeting takes place. Paul Carrington has urged that having disclosure before the Rule 26(f) meeting is designed to ensure that the lawyers are in a position to talk sensibly at the meeting. On the other hand, in San Francisco it is generally thought (I believe) that the meet-and-confer session is an important opportunity to refine and focus the disclosures, so that disclosure should occur thereafter.

The present rule does not, of course, require that the meeting happen first, but only allows that. The Advisory Committee Notes to the 1993 amendment do state, however, that "[o]ne of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made." 146 F.R.D. at 632. Using a sequential standing interrogatory approach may justify mandating that disclosure occur before the meeting, however, since it should focus the process. In addition, limiting disclosure to favorable information somewhat lessens the need to have a conference before disclosure occurs.

(e) How soon to require plaintiff's disclosure if it comes before defendant's disclosure. Generally, Rule 11 contemplates that by the time a complaint is filed the plaintiff should have considerable information even though Rule 8(a)(2) does not require plaintiff to put that information into the complaint. The reality, however, is that sometimes plaintiffs must file in a

hurry. Accordingly, the question when plaintiff must provide the information in question presents a choice. The D.S.C. provisions require that plaintiff file the interrogatory answers and documents with the complaint unless the plaintiff's attorney certifies exigent circumstances, in which event plaintiff gets another five days to disclose. These disclosure documents are then to be served with the complaint. Alternatively, the rule could provide for a later filing by plaintiff and thereby defer the due date for defendant's responses (the DRI proposal was for plaintiff to file in 30 days from the filing of the complaint, and for defendant to file 45 days thereafter).

Insisting on service with the complaint may produce the most concern about supplanting the pleadings with this other, more detailed document. Insisting on filing at the time the complaint is filed may be unnecessary in that ordinarily all plaintiff has to do to satisfy the statute of limitations is file, and not to serve. Thus, one could direct that, even if they are filed after the complaint, the disclosures be served promptly, and with the complaint if it has not yet been served.

(f) Jump start by early disclosure. The 1991 proposal allowed a party unwilling to await the rule's trigger point (30 days after filing of the answer) to get a jump on it by making disclosures and thereby requiring the other side to disclose within 30 days. This early disclosure was thought by some members of the Committee to afford the other side sufficient information to make it appropriate to require disclosure before preparation and filing of the answer. It was also thought to be a safety valve for the initial draft's deferral of disclosure until after disposition of Rule 12 motions, so that plaintiff could get disclosure moving while such a motion was pending in this manner. The "jump start" provision was not included in the rule actually adopted in 1993, which does not tie disclosure to the filing of the answer.

The later the trigger for disclosure, the more a "jump start" provision may have appeal. Such a provision automatically provides a version of sequential disclosure, and operates entirely at the discretion of the parties. It would, however, mean that the other side should have the option to refuse to disclose on the ground that the initial disclosure by the party using the jump start provision was inadequate. More significantly, if the objective is to tie disclosure in with Rule 16 and the judicial management process, including a jump start provision does not offset the drawbacks of putting disclosure off until after the answer since there is no assurance plaintiff will take advantage of this provision.

3. Use of standing interrogatory approach. There has been considerable interest in the standing interrogatory approach. The D.S.C. version (itself reportedly adopted in 1983) was circulated to the Committee for the October meeting and urged on the Committee by the DRI during the Boston conference. This approach does diverge, however, from anything that the Committee has considered previously so far as I know.

A significant problem for the Committee in evaluating this approach is the lack of empirical data on its operation. So far as I am aware, we have nothing but a small amount of anecdotal information about how it has operated in the places where it has been adopted. To improve on that information base in a systematic way would be a challenge. To improve on it in a more anecdotal manner would hopefully be less difficult. Before circulating a draft proposal based on that practice, it would seem desirable, at a minimum, for the Committee to be able to know whether the practitioners in the districts that use this approach support it.

As an abstract (as opposed to empirical) matter, the question can be sensibly evaluated to some extent. Until now,

disclosure has not involved providing a narrative or descriptive item like the interrogatory answers called for by the exemplars adopted in D.S.C. and other districts. Requiring counsel to draft such a document is at least different in kind from the tasks imposed by the current regime. Its effect could also be different. Whether intentionally or not, the interrogatory answers could tend to supplant the pleadings. One argument in favor of this approach is that the minimal pleading requirements of Rule 8 can remain in force while parties are actually required to provide more detailed information promptly. But it may be that the resulting statement will effectively supersede the pleadings. Note also that there is at least a possible issue about the uses to which these disclosures can be put (item 1(b) above).

There are certainly arguments in favor of this approach. If the current regime is unpalatable in part because it seems to turn lawyers into agents for the opposition, having such interrogatories emanating from the court may sooth clients otherwise opposed to "volunteering" information. Moreover, the interrogatories can do things that the earlier efforts could not do. Not only can they call for a factual narration of the supposed events in issue, they can also direct that a party provide more specifics about the legal basis for the claims or defenses being asserted and address some other matters like whether a defendant has been properly named in the complaint and the legal basis for claims and defenses.

4. *Should parties be allowed to stipulate not to disclose?* The 1991 proposal did not allow the parties to stipulate out (although it did allow districts to exempt certain types of actions, see issue 5 below). If this effort is seen as an important part of case development overseen by the court under Rule 16, leaving the parties unilateral ability to decide not to do it seems dubious. Indeed, the standing interrogatory method

appears predicated on a court-imposed obligation to disclose in all cases.

5. Should certain types of cases be exempted, and if so which ones? It would seem that disclosure of this sort won't work very well in a number of types of cases. Those that turn on an administrative record (e.g., § 405(g) actions to review denial of Social Security benefits), and cases in which one or both parties are pro se come to mind. Many districts exempt "complex" cases (variously defined) from disclosure. Saying that all civil cases have to be included therefore seems unwise.

That leaves the question which cases to exempt. In some ways, it would seem that this list should not vary from place to place, since the characteristics of a case that should justify exclusion do not seem to differ depending on where the case is pending. But the task of making this determination may prove quite difficult for the Committee, and the description (e.g., by referring to the numerical codes used in the civil cover sheet prescribed by the A.O.) may seem quite picayune for inclusion in national rules. Moreover, it could be undesirable to require that the national rules be amended every time it is concluded that another type of case should be exempted or when the A.O. changes its form. On balance, it probably is best to do as the 1991 proposal did regarding exemptions.

6. Producing copies or merely a list of documents. The current rule does not require production of documents, but only a list. If the volume of materials is considerably reduced by a change in scope (see issue 1 above) and amplified by the standing interrogatory approach (see issue 3 above), it might be best to require production. Quite a few districts do so, at least as to documents reasonably obtainable. Where there are a lot of these documents, it might be preferable to provide some flexibility. Consider the San Francisco approach:

Local Rule 16-(5)(e). Production of Voluminous Documents

(1) A party producing 100 or fewer pages of documents pursuant to Civil L.R. 16-5(b) [quoted in part in connection with issue 1 on p. 11 above] shall produce the original documents and present them for inspection and copying by the other parties or may make copies and provide them to the other parties.

(2) A party whose production pursuant to Civil L.R. 16-5(b) would include more than 100 pages of documents shall, no fewer than 7 days before such production, so notify the other parties. Each party to whom the production would be made may elect to:

(A) Inspect the documents to identify those it will arrange to have copies; or

(B) Request the disclosing party to copy and forward only specified categories of documents; or

(C) Request the disclosing party to copy and forward all of the documents.

(3) A party copying documents at the request of another party under Civil L.R. 16-5(e)(1) or (2) shall be entitled to immediate reimbursement from the receiving parties at a reasonable rate. A party's request for copies of fewer than all of the documents subject to production under Civil L.R. 16-5 does not waive that party's right subsequently to inspect and obtain copies of the remaining documents without need for a formal request pursuant to FRCivP 34.

7. *Retaining detailed disclosure regarding damages information*. This issue is included only because it was raised in Boston. Presently Rule 26(a)(1)(C) requires details about damages from litigants claiming them. Some in Boston did not seem to know that and expressed opposition. Rule 26(a)(1)(C) was an important provision that provides an advantage for defendants and may also be important to the operation of Rule 68 (offers of judgment). I am not aware of widespread opposition to it.

8. *Filing with court*. Rule 5 permits courts to direct that discovery not be filed with the court. Particularly if the interrogatory approach is used, one might invite the same treatment for disclosures. Present Rule 26(a)(4) calls for filing, and that seems warranted given the relationship to case management.

(b) Initial draft of possible middle ground proposal

Against the background of that lengthy prologue, in the hopes that it will provide something concrete to discuss, I offer the following tentative draft of a revised approach to disclosure employing sequential disclosure and the standing interrogatory method. This would be substituted for current Rule 26(a)(1), with the rest of Rule 26 unaffected (except to the extent that it needs to be revised to take account of whatever we eventually decide should be proposed to the whole Committee). I have elected on occasion to include alternative approaches in brackets.

In case it would be of assistance in relating the foregoing discussion to the draft below, here is a checklist indicating the disposition of the issues indicated in the draft:

1. Scope of obligation: For witness identities, there is a choice between bracketed provisions limiting the scope to

favorable information and expanding it to cover all discoverable information. For documents, the draft is limited to favorable information.

2. Timing:

(a) Simultaneous v. sequential disclosure: Sequential.

(b) Relation to motions: No deferral pending Rule 12 motions, but limits use of narrative statements in connection with Rule 12 motions and provides bracketed limitations regarding Rule 56 motions.

(c) Before or after answer: Disclosure not deferred until after answer.

(d) Disclosure before or after meet-and-confer session: Not specified. This is an area of potential concern, but the following draft is calibrated with regard to time from the filing of the complaint rather than the time of the Rule 26(f) meeting.

(e) How soon should plaintiff be required to disclose? The draft offers two alternatives, one calling for disclosure with the complaint and the other 30 days after filing the complaint. If the former is adopted some provision should probably be made to accommodate the last-minute filing like the D.S.C. five day grace period.

(f) Jump start for early disclosure: Not included because disclosure is not deferred until after the answer is filed.

3. Use of standing interrogatory approach: This approach is used.

4. Should parties be allowed to stipulate not to disclose?

Not allowed without the court's permission. This is in the form used in the 1991 draft.

5. Should certain types of cases be exempted? Yes, in accordance with local rules. This also is in the form used in the 1991 draft.

6. Producing copies of documents rather than a list: The draft calls for copies.

7. Retaining detailed disclosure regarding damages information: This is retained, and is based on the current rule.

8. Filing with court: This is required.

Herewith, then, the initial draft of a new Rule 26(a)(1):

> **(1) Initial disclosures.** Except in actions exempted by local rule, or when the court otherwise directs or the parties otherwise stipulate with the court's approval, a party shall, without waiting for a discovery request, provide all other parties disclosure as follows:
>
> > **(A) By plaintiffs.** At the time of [Within 30 days of the] filing [of] the complaint, each plaintiff shall file and serve on each defendant the following:
> >
> > > **(i) Factual basis for claim.** Provide a detailed narrative description of plaintiff's version of the events underlying the action, including the factual basis for each claim asserted against each defendant in the action and the identity of each person who had significant involvement in the events or transaction giving rise to each claim;

(ii) Identity of witnesses. Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information [relevant to any fact provided in response to paragraph (A)(i) above] [that tends to support the existence of any fact provided in response to paragraph (A)(i) above];

(iii) Documents supporting claim. Make available for inspection and copying as under Rule 34 any documents or evidentiary material, in plaintiff's possession, custody or control and not privileged or protected from disclosure, that tend to support the existence of any fact provided in response to paragraph (A)(i) above;

(iv) Legal basis for claim. Provide a succinct statement of the legal basis for each claim made in the action, including citation to any decisions, statutes, ordinances or regulations on which such claim is based;

(v) Basis for damage claims. Provide a computation of any category of damages claimed, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of the injuries suffered.

(vi) Authorization to obtain medical and related records. Any plaintiff who asserts a claim for personal injuries should provide an executed authorization permitting each defendant

from whom recovery is sought for such injuries to obtain medical, hospital, no-fault and workers' compensation records relevant to those injuries.

(B) By defendants. Within 30 [45] days of service on a defendant by plaintiff or plaintiffs of the disclosures described in paragraph (A) above, that defendant shall file and serve on all other parties that have appeared in the action disclosure as follows:

(i) Identity of defendant. State whether defendant is correctly identified in the complaint and, if not, give the proper identification of defendant and state whether counsel will accept service of an amended summons and complaint reflecting the correct identification;

(ii) Factual basis for denials or defenses. Provide a detailed narrative description of defendant's version of the events underlying the action, including the factual basis for defendant's denial of any factual assertion made in the disclosure by plaintiff pursuant to paragraph (A)(i) above, and the factual basis for any defense defendant has raised or contemplates raising in the action, including the identity of each person who had significant involvement in the events or transaction giving rise to the action;

(iii) Identity of witnesses. Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information [relevant to any fact provided in response to paragraph (B)(ii) above] [that tends to support the existence of any fact

provided in response to paragraph (B)(ii) above];

(iv) Documents supporting denials or defenses. Make available for inspection and copying as under Rule 34 any documents or evidentiary material, in defendant's possession, custody or control and not privileged or protected from disclosure, that tend to support the existence of any fact provided in response to paragraph (B)(ii) above;

(v) Legal basis for denials or defenses. Provide a succinct statement of the legal basis for each denial or defense made in the action, including citation to any decisions, statutes, ordinances or regulations on which such denial or defense is based;

(vi) Insurance. Produce for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of any judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(C) Disclosure regarding counterclaims. If defendant asserts a counterclaim pursuant to Rule 13, it shall also file and serve at the time it files and serves its counterclaim, with respect to each claim made therein, the disclosures described in paragraphs (A)(i) through (A)(v) above. [Within 30 [45] days of service on it of such disclosures,] [At the time it files and serves its answer to such counterclaim,] each counterclaim-defendant shall also file and serve the

disclosures described in paragraphs (B)(i) through (B)(vi) above.

(D) Disclosure regarding third-party claims. If defendant asserts a third-party claim pursuant to Rule 14, it shall also file and serve at the time it files and serves its third-party claim, with respect to each claim made therein, the disclosures described in paragraphs (A)(i) through (A)(v) above. [Within 30 [45] days of service on it of such disclosures,] [At the time it files and serves its answer to such third-party claim,] each third-party defendant shall also file and serve the disclosures described in paragraphs (B)(i) through (B)(vi) above.

(E) Basis for disclosures; sufficiency of disclosures by other parties. A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case [or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures]. [A party directed to make disclosures pursuant to paragraphs B(i) through B(vi) above is not required to make such disclosures if it challenges the sufficiency of the disclosures that triggered such disclosure obligation, providing that it files a motion to compel disclosure pursuant to Rule 37(a)(2)(A) by the date on which its disclosures are due.]

(F) Use of disclosures. The factual disclosures provided pursuant to paragraphs (A)(i), (A)(ii), (B)(ii), (B)(vii) or (B)(viii) above shall not be considered by the Court in connection with any motion

pursuant to Rule 12 [or Rule 56] unless put before the Court by the party that made the disclosure. Nothing herein shall preclude the Court from considering the content of any such disclosure in connection with a request for sanctions under Rule 37(c)(1), [including exclusion of materials proffered in connection with a motion pursuant to Rule 56].

The above is a first effort, and obviously needs refinement even if it guesses right about resolution of all the issues discussed in the prologue.

(c) Revised version of current Rule 26(a)(1)

To provide an alternative approach to the question of changing Rule 26(a)(1), it seemed worthwhile to try to devise a less aggressive modification of the rule than the draft above. For purposes of discussion, there follows revision of the current rule that narrows the scope of disclosure and alters the timing, but does not adopt the interrogatory approach:

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except ~~to the extent otherwise stipulated or directed by order or local rule~~ in actions exempted by local rule, or when the court otherwise directs or the parties otherwise stipulate with the court's approval, a party shall, without awaiting a discovery request, provide to other parties:

(A) Contents of Disclosures.

(i) the name and, if known, the address and telephone number of each individual likely to have

discoverable information ~~relevant to disputed facts alleged with particularity in the pleadings~~ that tends to support the positions that the disclosing party has taken or is reasonably likely to take in the action, identifying the subjects of the information;

~~(B)~~(ii) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the disclosing party that ~~are relevant to disputed facts alleged with particularity in the pleadings~~ tend to support the positions the disclosing party has taken or is reasonably likely to take in the action;

~~(C)~~(iii) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

~~(D)~~(iv) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Timing of Disclosures.

(i) By plaintiffs. Each plaintiff shall file and serve its disclosures pursuant to paragraph (A) above at the time of [within 30 days of] filing [of] the complaint.

(ii) By defendants. Each defendant shall file and serve its disclosures pursuant to paragraph (A) above within 30 [45] days of service on it by plaintiff or plaintiffs of plaintiff's disclosures pursuant to paragraph (A) above.

(iii) Disclosure regarding counterclaims. If defendant asserts a counterclaim pursuant to Rule 13, it shall file and serve its disclosures pursuant to paragraph (A) above at the time it files and serves its counterclaim. Within 30 days of service on it of such disclosures, each counterclaim-defendant shall file and serve its disclosures pursuant to paragraph (A) above.

(iv) Disclosure regarding third-party claims. If defendant asserts a third-party claim pursuant to Rule 14, it shall file and serve its disclosures pursuant to paragraph (A) above at the time it files and serves its third-party claim. Within 30 days of service on it of such disclosures, each third-party defendant shall file and serve its disclosures pursuant to paragraph (A) above.

~~Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the~~

~~meeting of the parties under subdivision (f).~~ A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case [or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures]. [A party directed to make disclosures only after receipt of another party's disclosures is not required to make such disclosures if it challenges the sufficiency of the disclosures that triggered such disclosure obligation, providing that it files a motion to compel disclosure pursuant to Rule 37(a)(2)(A) by the date on which its disclosures are due.]

3

(3) Limiting the length of depositions

The Subcommittee is to develop proposals for limiting the length of depositions. See Oct. 6 minutes at 12-13.

(a) Per-deposition time limit

As a starting point, the proposal circulated in 1991 called for addition of the following provision to Rule 30(d):

> (1) Unless otherwise authorized by the court or agreed to by the parties, actual examination of the deponent on the record shall be limited to six hours. Additional time shall be allowed by the court if needed for a fair examination of the deponent and consistent with the principles stated in Rule 26(b)(2), or if the deponent or another party has impeded or delayed the examination. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorneys' fees incurred by any parties as a result thereof.

Proposed Amendments to the Federal Rules of Civil Procedure, 137 F.R.D. 53, 111-12 (1991).

Portions of the foregoing, regarding impeding the examination, seem implicit in Rule 30(d)(2) and (3) as presently in force. The Advisory Committee Notes to the foregoing draft point out that sanctions can be imposed on nonparties as well. As noted in item 21 in my memo for the Utah meeting (on the C list), the failure to carry forward some power to sanction nonparty witnesses seems a lacuna in the rules. This is covered in issue 9(e) below. The 1991 draft language might be questioned on some stylistic grounds. For example, if the purpose is to

protect witnesses, should the agreement of the parties suffice to permit a longer deposition? In addition, what does "on the record" exclude?

The time limit was removed from the package of amendments approved in 1993, and a report on what the record shows regarding the reasons for that decision may be of use. Before the proposal was ultimately scotched, Committee members repeatedly voiced misgivings about it. Among the concerns were the possible need for a time-keeper to measure the number of hours and time spent on attorney colloquy (Minutes of Nov. 29-Dec. 1, 1990, p. 12; Feb. 21-23, 1991; and Nov. 29-Dec.1, 1991); problems of dividing the time between counsel and generating excessive motion practice (Minutes of May 22-24, 1991 at 4-5). Finally, at the meeting on Feb. 21, 1992, the following transpired:

> Judge Winter argued against the limitation on the length of depositions as an inducement to strategic behavior. Judge Keeton argued for the limit as long as it is subject to extension by agreement of the parties. Judge Pointer noted that it works in ND Georgia. The Reporter noted that the purpose of the rule was to give some bargaining power to the party seeking to constrain overlong depositions. Judge Phillips noted the concern that an evasive expert may succeed in stonewalling for six hours. The Reporter noted that one purpose of the proposal was to protect the deponent. Judge Brazil thought that the limit will not be easily negotiated in cases in which there is a serious imbalance of information. Judge Winter reiterated that it will produce a lot of traffic in the judges' chambers. The Committee voted 5-2 to eliminate the limit on length of depositions. It was agreed that local rules should be authorized.

Minutes of Meeting of Civil Rules Committee, Feb. 21, 1992.

The starting point for a per-deposition limitation should presumably be the 1991 proposal, which was rejected "on the merits" and not because the wording needed to be fixed up. The number of hours could be changed; note that the FJC discovery survey (Table 24) showed that at the 75th percentile the longest deposition was 7 hours. Note also that six hours could seem quite different if it were two hours per day for three days, and the foregoing does not necessarily deal with that possibility. For example, couldn't a party simply notice the deposition to start at 2:00 p.m. on Friday to ensure at least a weekend to go over added questions before concluding on Monday morning?

As an alternative to the foregoing (and in keeping with the proposal below regarding overall duration of depositions), it might be better to put this provision in Rule 30(a), which is where the current limitation on number of depositions is contained. The basic question is whether this is designed to protect the witness or involve the court. If it is designed to involve the court, Rule 30(a) seems more appropriate. This could be done as follows in amendments to Rule 30(a)(2)(B):

> (B) the person to be examined already has been deposed in the case<u>, or the person's deposition, although not yet completed, has included actual examination of the deponent on the record for more than _____ hours</u>;

(b) Overall time limit per side

Alternatively, the Committee might adopt an overall time limit. This partly raises the problem of how such a limit should be applied. The current limit on deposition number is in essence per side. Rule 30(a)(2)(A) says that it applies to depositions "by the plaintiffs, or by the defendants, or by third-party defendants." The interrogatory limit is by party. See item 19 from my memo for the Utah meeting (the C list), which is now item

9(c) below. The present discussion adopts a per "side" approach, as in multi-party cases it seems to me that a limitation that is otherwise structured will accomplish little. Accordingly, the following could be added as a new (D) to Rule 30(a)(2):

> (D) a proposed deposition would result in a total of more than ____ hours of deposition being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants.

This seems most in keeping with the format currently used with regard to the numerical limitation on depositions contained in Rule 30(a)(2)(A). But this may present something of a problem in that it is harder to know whether the limitation will be exceeded at the time the deposition is noticed. In addition, it might be possible to address the question of keeping track of the time spent by counsel for other sides, and not counting that toward the total. Probably these things could more easily be addressed in Advisory Committee Notes than in the text of the rule itself. Where other parties have used up most of the time, for example, that would seem a very strong argument for relief from the court and it need not be quantified or otherwise spelled out in the rule.

In case it would be desirable to include more specifics in the rule, the following additional provisions could follow the proposed language above:

> To facilitate the determination whether this time limit has been exceeded, the party noticing the deposition shall arrange for a method of recording that indicates the duration of interrogation in each deposition.

This obviously would facilitate keeping track of how long the depositions are taking, but was not included in 1991 and may not

be needed.

Whether or not language is added about keeping an accurate record of the duration of depositions, the following might be added with regard to the overall durational limitations:

> In calculating the duration of depositions taken by the plaintiffs, or by the defendants, or by third-party defendants, for purposes of this paragraph, interrogation by another party shall not be counted unless the interrogating party is in the same category (e.g., plaintiffs, defendants or third-party defendants) as the party noticing the deposition.

But this may not appropriately "count" the time spent by other parties in limiting their ability to take other depositions. Accordingly, another method might be the following:

> In calculating the duration of depositions taken by the plaintiffs, or by the defendants, or by third-party defendants, for purposes of this paragraph, all deposition time shall be counted as having been taken by a party if used by that party or another party of the same category (e.g., plaintiffs, defendants or third-party defendants), whether or not the party noticed the deposition.

The foregoing suggests some of the complexities of this task. For purposes of reference regarding the total number of hours, note that the FJC survey (Table 24) showed that at the 75th percentile the figure for total deposition time was 24 hours for a case, seemingly for all parties.

(c) Curtailing objections

Either as a way of implementing a time limit on depositions,

or simply to save time in depositions, the rules regarding objections as to form might be changed. To accomplish this, the following amendment might be made to Rule 32(d)(3)(A):

> (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition ~~unless the ground of the objection is one which might have been obviated or removed if presented at that time~~.

In addition, if the Committee were inclined to take a very hard line with objections, it could propose amending Rule 30(d)(1) as well to limit objections even more than was done in 1993:

> (1) ~~Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner.~~ A party may object to evidence during a deposition, or may instruct a deponent not to answer, only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

This may be an unnecessarily aggressive move, but would be a way not only of curtailing witness prompting but also of speeding up depositions. Note that at least one lawyer in Boston said that no rule change would force him to allow his witnesses to answer completely meaningless questions. Note also that issue 9(d) below recommends a separate change in Rule 30(d)(1) designed to make it applicable to nonparty witnesses.

(d) Advance provision of documents

At the Utah meeting it was suggested that time limits work

best when the witness is given the documents to review in advance. See Oct. 6 minutes at 11-12:519-22. This could perhaps be accomplished by adding the following to Rule 30(b):

> (8) No less than seven days before the date scheduled for the taking or resumption of the deposition, the party noticing the deposition shall send to the witness's lawyer, or to the witness if the witness' lawyer is not known, copies of all documents to which the noticing party intends to refer during the deposition. Absent agreement by the witness, the noticing party shall not be permitted to examine the witness about any document not so provided to the witness unless the court so orders for good cause shown.

Such a provision could present a number of problems. There was some discussion of these issues during the conference in San Francisco. Counsel present noted that there would be a tendency to over-designate documents. In addition, curtailing interrogation about newly-arising matters may multiply occasions for asking to retake the deposition. At the least, it would seem that there should be permission to interrogate about documents the witness brings to the deposition room. Moreover, the question whether this limitation should apply to other parties might warrant attention in the rule. Should this also be done by "sides" rather than parties?

4

(4) Discovery cutoff

The discovery cutoff problem currently presents a global issue and a question of drafting. The global issue is presented by the fact that the Subcommittee is not directed to work on a firm trial date at present. See minutes of Oct. 6 at 20: 937-38. It is, however, to explore ways of setting a nationwide cutoff, albeit without adopting specific cutoff times. See id. at 14:644-53. That presents the question whether the cutoff should be adopted without a firm trial date. Note that the Brookings report that led to the enactment of the CJRA saw a clear linkage between trial date and discovery cutoff because "the early completion of discovery can be counterproductive if the trial is then long delayed." Brookings Institution, Justice for All 15 (1989).

It is not absolutely clear whether the Subcommittee is to address the question of whether to adopt a cutoff in the absence of assurance of firm and early trial dates or to pass it, turning only to drafting of provisions for cutoffs that would be used assuming that question in answered in the affirmative.

One way to handle this drafting task would be to amend Rule 16(b)(3) along the lines of the following:

> **(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
>
> **(1)** to join other parties and to amend the pleadings;
>
> **(2)** to file motions; and

(3) to complete discovery. The court shall limit the period to complete discovery to ___ days unless the parties show good cause for a longer period to complete discovery.

This very general treatment assumes an Advisory Committee Note that contains some amplification of what would be good cause. One standard might be complexity, but that might be relatively uninformative. Indeed, the Manual for Complex Litigation has for some time strived without too much success to define litigation complexity. In the second edition the editors studiously avoided defining complex litigation, and the third edition recognizes that a definition is needed but offers a "functional" definition that bears quoting because it suggests the difficulty of the definitional task:

> A functional definition of complex litigation recognizes that the need for management in the sense used here--judicial management with the participation of counsel--does not simply arise from complexity, but is its defining characteristic: The greater the need for management, the more "complex" is the litigation. Clearly, litigation involving many parties in numerous related cases--especially if pending in different jurisdictions--requires management and is complex, as is litigation involving large numbers of witnesses and documents and extensive discovery. On the other hand, litigation raising difficult and novel questions of law, though challenging to the court, may require little or no management, and therefore may not be complex as that term is used here.

Manual, Third, § 10.1. This definition does not seem to help too much with the sort of issue the Subcommittee is addressing, for unless the definition is relatively easy to apply it probably is not very useful.

Picking up on the Manual's definition, one might look to the amount of discovery as the keystone. This, after all, is what might make the case need a longer discovery period. But there may be problems with this approach as well. The numerical limitations for depositions might serve as a benchmark, but if so the decision to extend the discovery period would seem the same as granting leave to exceed the numerical limitations. Perhaps that is sensible, but it does seem to be a different subject. It would be possible instead to prescribe lower limitations in place of the added language proposed above for Rule 16(b)(3):

> The court shall limit the period to complete discovery to ___ days unless it appears necessary for the parties to take a total of more than ____ depositions to prepare for trial.

But this says nothing about other forms of discovery, particularly document discovery, which may also be important in determining the proper duration of the discovery period. Even depositions may be of very different dimensions (although the proposal above regarding item 3 to limit the duration of depositions may change that somewhat). Moreover, any such determination may be difficult to make with precision at this stage in the case, even assuming that the Rule 26(f) conference is retained and the parties must present a discovery plan to the court. Having the length of discovery turn this automatically on number of discovery events might affect the number of events forecast in the plan. So this form of precision seems of dubious value.

Another possibility would be to try to develop a scheme that differentiated cases for purposes of discovery period by some typology. One possibility would be to distinguish by substantive type. Indeed, that is an idea that is being explored in connection with pattern discovery (see item 5 below). Perhaps, as a starting point for presumptive limitations, one could use

the designation of case type of the civil cover sheet and provide in the rule a set of durations keyed to case type. There would probably have to be a catchall for cases in which a duration is not otherwise assigned, and setting the numerical limitations might prove quite challenging.

Finally, the discussion heretofore has not addressed the question of starting point. Assuming that Rule 26(d) continues in effect, the parties would be restricted on when they could start discovery. The idea of a time limitation seems to imply that nobody can do discovery until the appointed time begins to run. Accordingly, it might be worthwhile to amend Rule 26(d) as follows:

> **(d) Timing and Sequence of Discovery.** Except when authorized under these rules or by ~~local rule,~~ order, ~~or agreement of the parties,~~ a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f) and the court has entered an order limiting the period for discovery pursuant to Rule 16(b)(3).

This, of course, would take away the chance to embark upon discovery directly upon completing the Rule 26(f) conference. There was a debate about when to stop the moratorium running when the current rule was adopted, and there are contending arguments. The more importance one attaches to limiting the total time for discovery, the stronger becomes the argument for denying a right to commence discovery before the court sets the time limits for discovery.

Rather than setting the limitation up as part of the court's case management under Rule 16, one could try to build it into Rule 26 as a prescribed limitation subject to extension by the court. At least two possibilities appear. First, Rule 26(a)(5)

could be amended along the following lines:

> **(5) Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations, and requests for admission. Unless otherwise ordered by the court for good cause shown, the period for such discovery shall not exceed ___ days from the date discovery is permitted to commence pursuant to Rule 26(d).

This approach, like the first one proposed above for Rule 16(b)(3), does not try to specify the circumstances that would warrant an extension. The alternative approaches mentioned above for Rule 16(b) could be employed here as well.

Another Rule 26 possibility would be to amend Rule 26(d) as follows:

> **(d) Timing and Sequence of Discovery.** Except when authorized under these rules or by ~~local rule,~~ order, ~~or agreement of the parties,~~ a party may not seek discovery for any source before the parties have met and conferred as required by subdivision (f). Unless the court orders, for good cause shown, that a longer period should be allowed, discovery shall be completed within ___ days of the date on which it is first permitted pursuant to this paragraph.

(5) Pattern Discovery

The Subcommittee is to study the prospects for developing some system of discovery forms. See Oct. 6 minutes at 15:671-72. For the Santa Barbara meeting, reports should be available on two initial efforts.

First, Judge Levi has been in touch with Bob Heim and Allen Black of Philadelphia about whether they could agree on a set of basic "core" discovery for antitrust cases. Heim and Black are experienced lawyers who usually represent opposite sides, and as an accommodation to the Committee have undertaken to explore this possibility. The idea is that it would be quite difficult to tailor such pattern discovery for antitrust cases, so that one might legitimately assume that, if it could be done in those cases, other types of cases would not be so difficult. Some work has been done, and it is hoped that there will be progress worth reporting by the time we meet in Santa Barbara.

Second, Mark Kasanin has looked into the situation with the form interrogatories used in the state courts in California. He sent copies of these forms to members of the Subcommittee and wrote a follow-up letter. Copies of these materials are included as attachments under this tab. He will be able to make a brief report at the Santa Barbara meeting.

MCCUTCHEN
McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

47A

November 18, 1997

Direct: (415) 393-2144
mkasanin@mdbe.com

Hon. David F. Levi
United States District Judge
2504 United States Courthouse
650 Capitol Mall
Sacramento, CA 95814

Discovery Subcommittee - Form Interrogatories

Dear David:

As you will remember I was to look into the question of California's form interrogatories. I previously sent you the three form sets that are in use.

Our investigation with the Judicial Council indicates there have been no real studies or reports done on the use of these interrogatories. However, according to John Toker, with whom we have talked, they are widely used. The basic set is used in personal injury and contract actions and occasionally in other types of actions. The unlawful detainer form, obviously, is used for that. The third set is really taking the first set and adapting it for Municipal Court use.

While the form interrogatories are not as useful in employment or fraud cases, there has been a recent change that will allow the "incident" to be defined by the party propounding the interrogatories. This may make these interrogatories more useful in such cases and perhaps others.

One of the attractions of using these interrogatories according to the Council is that they do not count against the maximum numbers specified in the code. Therefore, they are a "free shot", to be supplemented if necessary by tailored ones.

While objections can be interposed to the interrogatories, there does not seem to be many decided cases when objections have been raised (probably because nobody wants to go through the writ procedure). However, I did note in one case in the past that an objection had gone up on a writ and the Court of Appeals found the interrogatory to be objectionable as involving work product privilege.

47B

At least anecdotally these interrogatories which have been available for some time are widely use. The Council indicates that maybe at some point it should do a study concerning their use.

As Rick and I had expected, the available information on the interrogatories is scant. However, if there is some further inquiry you can think of or that any other members of the subcommittee would like pursued, please let me know and I will do so.

With all best regards.

Very truly yours,

Mark O. Kasanin

cc: Subcommittee Members and Reporter
Prof. Richard Marcus
Hon. David S. Doty
Francis H. Fox, Esq.
Hon. Lee H. Rosenthal

P.S. I might mention that there is a California task force of attorneys and judges looking at state discovery and possible areas for reform. If I can obtain some more information about this before our January meeting, I will do so.

47C

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address).	TELEPHONE NO
ATTORNEY FOR (Name)	
NAME OF COURT AND JUDICIAL DISTRICT AND BRANCH COURT, IF ANY:	
SHORT TITLE OF CASE:	
FORM INTERROGATORIES **Asking Party:** **Answering Party:** **Set No.:**	CASE NUMBER

Sec. 1. Instructions to All Parties

(a) These are general instructions. *For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure section 2030 and the cases construing it.*

(b) These interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or objection.

Sec. 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use in the superior courts only. A separate set of interrogatories, Form Interrogatories—Economic Litigation, which have no subparts, are designed for optional use in municipal and justice courts. However, they also may be used in superior courts. See Code of Civil Procedure section 94.

(b) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that are applicable to the case.

(c) The interrogatories in section 16.0, Defendant's Contentions—Personal Injury, should not be used until the defendant has had a reasonable opportunity to conduct an investigation or discovery of plaintiff's injuries and damages.

(d) Additional interrogatories may be attached.

Sec. 3. Instructions to the Answering Party

(a) In superior court actions, an answer or other appropriate response must be given to each interrogatory checked by the asking party.

(b) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See Code of Civil Procedure section 2030 for details.

(c) Each answer must be as complete and straightforward as the information reasonably available to you permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form *at the end of your answers:*

"I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

(DATE) _____ (SIGNATURE) _____

Sec. 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(a) **INCIDENT** includes the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding.

(b) **YOU OR ANYONE ACTING ON YOUR BEHALF** includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(Continued)

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(c) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(d) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(e) **HEALTH CARE PROVIDER** includes any **PERSON** referred to in Code of Civil Procedure section 667.7(e)(3).

(f) **ADDRESS** means the street address, including the city, state, and zip code.

Sec. 5. Interrogatories

The following interrogatories have been approved by the Judicial Council under section 2033.5 of the Code of Civil Procedure:

CONTENTS

1.0 Identity of Persons Answering These Interrogatories

☐ 1.1 State the name, **ADDRESS**, telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the responses to these interrogatories. (Do not identify anyone who simply typed or reproduced the responses.)

2.0 General Background Information — Individual

☐ 2.1 State:
(a) your name;
(b) every name you have used in the past;
(c) the dates you used each name.

☐ 2.2 State the date and place of your birth.

☐ 2.3 At the time of the **INCIDENT**, did you have a driver's license? If so, state:
(a) the state or other issuing entity;
(b) the license number and type;
(c) the date of issuance;
(d) all restrictions.

☐ 2.4 At the time of the **INCIDENT**, did you have any other permit or license for the operation of a motor vehicle? If so, state:
(a) the state or other issuing entity;
(b) the license number and type;
(c) the date of issuance;
(d) all restrictions.

☐ 2.5 State:
(a) your present residence **ADDRESS**;
(b) your residence **ADDRESSES** for the last five years;
(c) the dates you lived at each **ADDRESS**.

☐ 2.6 State:
(a) the name, **ADDRESS**, and telephone number of your present employer or place of self-employment;
(b) the name, **ADDRESS**, dates of employment, job title, and nature of work for each employer or self-employment you have had from five years before the **INCIDENT** until today.

☐ 2.7 State:
(a) the name and **ADDRESS** of each school or other academic or vocational institution you have attended beginning with high school;
(b) the dates you attended;
(c) the highest grade level you have completed;
(d) the degrees received.

☐ 2.8 Have you ever been convicted of a felony? If so, for each conviction state:
(a) the city and state where you were convicted;
(b) the date of conviction;
(c) the offense;
(d) the court and case number.

☐ 2.9 Can you speak English with ease? If not, what language and dialect do you normally use?

☐ 2.10 Can you read and write English with ease? If not, what language and dialect do you normally use?

☐ 2.11 At the time of the **INCIDENT** were you acting as an agent or employee for any **PERSON**? If so, state:
(a) the name, **ADDRESS**, and telephone number of that **PERSON**;
(b) a description of your duties.

☐ 2.12 At the time of the **INCIDENT** did you or any other person have any physical, emotional, or mental disability or condition that may have contributed to the occurrence of the **INCIDENT**? If so, for each person state:
(a) the name, **ADDRESS**, and telephone number;

(b) the nature of the disability or condition;
(c) the manner in which the disability or condition contributed to the occurrence of the **INCIDENT**.

☐ 2.13 Within 24 hours before the **INCIDENT** did you or any person involved in the **INCIDENT** use or take any of the following substances: alcoholic beverage, marijuana, or other drug or medication of any kind (prescription or not)? If so, for each person state:
(a) the name, **ADDRESS**, and telephone number;
(b) the nature or description of each substance;
(c) the quantity of each substance used or taken;
(d) the date and time of day when each substance was used or taken;
(e) the **ADDRESS** where each substance was used or taken;
(f) the name, **ADDRESS**, and telephone number of each person who was present when each substance was used or taken;
(g) the name, **ADDRESS**, and telephone number of any **HEALTH CARE PROVIDER** that prescribed or furnished the substance and the condition for which it was prescribed or furnished.

3.0 General Background Information — Business Entity

☐ 3.1 Are you a corporation? If so, state:
(a) the name stated in the current articles of incorporation;
(b) all other names used by the corporation during the past ten years and the dates each was used;
(c) the date and place of incorporation;
(d) the **ADDRESS** of the principal place of business;
(e) whether you are qualified to do business in California.

☐ 3.2 Are you a partnership? If so, state:
(a) the current partnership name;
(b) all other names used by the partnership during the past ten years and the dates each was used;
(c) whether you are a limited partnership and, if so, under the laws of what jurisdiction;
(d) the name and **ADDRESS** of each general partner;
(e) the **ADDRESS** of the principal place of business.

☐ 3.3 Are you a joint venture? If so, state:
(a) the current joint venture name;
(b) all other names used by the joint venture during the past ten years and the dates each was used;
(c) the name and **ADDRESS** of each joint venturer;
(d) the **ADDRESS** of the principal place of business.

☐ 3.4 Are you an unincorporated association? If so, state:
(a) the current unincorporated association name;
(b) all other names used by the unincorporated association during the past ten years and the dates each was used;
(c) the **ADDRESS** of the principal place of business.

☐ 3.5 Have you done business under a fictitious name during the past ten years? If so, for each fictitious name state:
(a) the name;
(b) the dates each was used;
(c) the state and county of each fictitious name filing;
(d) the **ADDRESS** of the principal place of business.

☐ 3.6 Within the past five years has any public entity registered or licensed your businesses? If so, for each license or registration:
(a) identify the license or registration;
(b) state the name of the public entity;
(c) state the dates of issuance and expiration.

4.0 Insurance

☐ 4.1 At the time of the **INCIDENT**, was there in effect any policy of insurance through which you were or might be insured in any manner (for example, primary, pro-rata, or excess liability coverage or medical expense coverage) for the damages, claims, or actions that have arisen out of the **INCIDENT**? If so, for each policy state:
(a) the kind of coverage;
(b) the name and **ADDRESS** of the insurance company;
(c) the name, **ADDRESS**, and telephone number of each named insured;
(d) the policy number;
(e) the limits of coverage for each type of coverage contained in the policy;
(f) whether any reservation of rights or controversy or coverage dispute exists between you and the insurance company;
(g) the name, **ADDRESS**, and telephone number of the custodian of the policy.

☐ 4.2 Are you self-insured under any statute for the damages, claims, or actions that have arisen out of the **INCIDENT**? If so, specify the statute.

5.0 *[Reserved]*

6.0 Physical, Mental, or Emotional Injuries

☐ 6.1 Do you attribute any physical, mental, or emotional injuries to the **INCIDENT**? If your answer is "no," do not answer interrogatories 6.2 through 6.7.

☐ 6.2 Identify each injury you attribute to the **INCIDENT** and the area of your body affected.

☐ 6.3 Do you still have any complaints that you attribute to the **INCIDENT**? If so, for each complaint state:
(a) a description;
(b) whether the complaint is subsiding, remaining the same, or becoming worse;
(c) the frequency and duration.

☐ 6.4 Did you receive any consultation or examination (except from expert witnesses covered by Code of Civil Procedure, § 2034) or treatment from a **HEALTH CARE PROVIDER** for any injury you attribute to the **INCIDENT**? If so, for each **HEALTH CARE PROVIDER** state:
(a) the name, **ADDRESS**, and telephone number;
(b) the type of consultation, examination, or treatment provided;

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(c) the dates you received consultation, examination, or treatment;
(d) the charges to date.

☐ 6.5 Have you taken any medication, prescribed or not, as a result of injuries that you attribute to the **INCIDENT**? If so, for each medication state:
(a) the name;
(b) the **PERSON** who prescribed or furnished it;
(c) the date prescribed or furnished;
(d) the dates you began and stopped taking it;
(e) the cost to date.

☐ 6.6 Are there any other medical services not previously listed (for example, ambulance, nursing, prosthetics)? If so, for each service state:
(a) the nature;
(b) the date;
(c) the cost;
(d) the name, **ADDRESS**, and telephone number of each provider.

☐ 6.7 Has any **HEALTH CARE PROVIDER** advised that you may require future or additional treatment for any injuries that you attribute to the **INCIDENT**? If so, for each injury state:
(a) the name and **ADDRESS** of each **HEALTH CARE PROVIDER**;
(b) the complaints for which the treatment was advised,
(c) the nature, duration, and estimated cost of the treatment.

7.0 Property Damage

☐ 7.1 Do you attribute any loss of or damage to a vehicle or other property to the **INCIDENT**? If so, for each item of property:
(a) describe the property;
(b) describe the nature and location of the damage to the property;
(c) state the amount of damage you are claiming for each item of property and how the amount was calculated;
(d) if the property was sold, state the name, **ADDRESS**, and telephone number of the seller, the date of sale, and the sale price.

☐ 7.2 Has a written estimate or evaluation been made for any item of property referred to in your answer to the preceeding interrogatory? If so, for each estimate or evaluation state:
(a) the name, **ADDRESS**, and telephone number of the **PERSON** who prepared it and the date prepared;
(b) the name, **ADDRESS**, and telephone number of each **PERSON** who has a copy;
(c) the amount of damage stated.

☐ 7.3 Has any item of property referred to in your answer to interrogatory 7.1 been repaired? If so, for each item state:
(a) the date repaired;
(b) a description of the repair;
(c) the repair cost;
(d) the name, **ADDRESS**, and telephone number of the **PERSON** who repaired it;
(e) the name, **ADDRESS**, and telephone number of the **PERSON** who paid for the repair.

8.0 Loss of Income or Earning Capacity

☐ 8.1 Do you attribute any loss of income or earning capacity to the **INCIDENT**? If your answer is "no," do not answer interrogatories 8.2 through 8.8.

☐ 8.2 State:
(a) the nature of your work;
(b) your job title at the time of the **INCIDENT**;
(c) the date your employment began.

☐ 8.3 State the last date before the **INCIDENT** that you worked for compensation.

☐ 8.4 State your monthly income at the time of the **INCIDENT** and how the amount was calculated.

☐ 8.5 State the date you returned to work at each place of employment following the **INCIDENT**.

☐ 8.6 State the dates you did not work and for which you lost income.

☐ 8.7 State the total income you have lost to date as a result of the **INCIDENT** and how the amount was calculated.

☐ 8.8 Will you lose income in the future as a result of the **INCIDENT**? If so, state:
(a) the facts upon which you base this contention;
(b) an estimate of the amount;
(c) an estimate of how long you will be unable to work;
(d) how the claim for future income is calculated.

9.0 Other Damages

☐ 9.1 Are there any other damages that you attribute to the **INCIDENT**? If so, for each item of damage state:
(a) the nature;
(b) the date it occurred;
(c) the amount;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** to whom an obligation was incurred.

☐ 9.2 Do any **DOCUMENTS** support the existence or amount of any item of damages claimed in interrogatory 9.1? If so, state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

10.0 Medical History

☐ 10.1 At any time before the **INCIDENT** did you have complaints or injuries that involved the same part of your body claimed to have been injured in the **INCIDENT**? If so, for each state:
(a) a description;
(b) the dates it began and ended;
(c) the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER** whom you consulted or who examined or treated you.

(Continued)

☐ 10.2 List all physical, mental, and emotional disabilities you had immediately before the **INCIDENT**. (You may omit mental or emotional disabilities unless you attribute any mental or emotional injury to the **INCIDENT**.)

☐ 10.3 At any time after the **INCIDENT**, did you sustain injuries of the kind for which you are now claiming damages. If so, for each incident state:
(a) the date and the place it occurred;
(b) the name, **ADDRESS**, and telephone number of any other **PERSON** involved;
(c) the nature of any injuries you sustained;
(d) the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER** that you consulted or who examined or treated you;
(e) the nature of the treatment and its duration.

11.0 Other Claims and Previous Claims

☐ 11.1 Except for this action, in the last ten years have you filed an action or made a written claim or demand for compensation for your personal injuries? If so, for each action, claim, or demand state:
(a) the date, time, and place and location of the **INCIDENT** (closest street **ADDRESS** or intersection);
(b) the name, **ADDRESS**, and telephone number of each **PERSON** against whom the claim was made or action filed;
(c) the court, names of the parties, and case number of any action filed;
(d) the name, **ADDRESS**, and telephone number of any attorney representing you;
(e) whether the claim or action has been resolved or is pending.

☐ 11.2 In the last ten years have you made a written claim or demand for worker's compensation benefits? If so, for each claim or demand state:
(a) the date, time, and place of the **INCIDENT** giving rise to the claim;
(b) the name, **ADDRESS**, and telephone number of your employer at the time of the injury;
(c) the name, **ADDRESS**, and telephone number of the worker's compensation insurer and the claim number;
(d) the period of time during which you received worker's compenstation benefits;
(e) a description of the injury;
(f) the name, **ADDRESS**, and telephone number of any **HEALTH CARE PROVIDER** that provided services;
(g) the case number at the Worker's Compensation Appeals Board.

12.0 Investigation — General

☐ 12.1 State the name, **ADDRESS**, and telephone number of each individual:
(a) who witnessed the **INCIDENT** or the events occurring immediately before or after the **INCIDENT**;
(b) who made any statement at the scene of the **INCIDENT**;
(c) who heard any statements made about the **INCIDENT** by any individual at the scene;
(d) who **YOU OR ANYONE ACTING ON YOUR BEHALF** claim has knowledge of the **INCIDENT** (except for expert witnesses covered by Code of Civil Procedure, § 2034).

☐ 12.2 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** interviewed any individual concerning the **INCIDENT**? If so, for each individual state:
(a) the name, **ADDRESS**, and telephone number of the individual interviewed;
(b) the date of the interview;
(c) the name, **ADDRESS**, and telephone number of the **PERSON** who conducted the interview.

☐ 12.3 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** obtained a written or recorded statement from any individual concerning the **INCIDENT**? If so, for each statement state:
(a) the name, **ADDRESS**, and telephone number of the individual from whom the statement was obtained;
(b) the name, **ADDRESS**, and telephone number of the individual who obtained the statement;
(c) the date the statement was obtained;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original statement or a copy.

☐ 12.4 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** know of any photographs, films, or videotapes depicting any place, object, or individual concerning the **INCIDENT** or plaintiff's injuries? If so, state:
(a) the number of photographs or feet of film or videotape;
(b) the places, objects, or persons photographed, filmed, or videotaped;
(c) the date the photographs, films, or videotapes were taken;
(d) the name, **ADDRESS**, and telephone number of the individual taking the photographs, films, or videotapes;
(e) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original or a copy.

☐ 12.5 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** know of any diagram, reproduction, or model of any place or thing (except for items developed by expert witnesses covered by Code of Civil Procedure, § 2034) concerning the **INCIDENT**? If so, for each item state:
(a) the type (i.e., diagram, reproduction, or model);
(b) the subject matter;
(c) the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 12.6 Was a report made by any **PERSON** concerning the **INCIDENT**? If so, state:
(a) the name, title, identification number, and employer of the **PERSON** who made the report;
(b) the date and type of report made;
(c) the name, **ADDRESS**, and telephone number of the **PERSON** for whom the report was made.

☐ 12.7 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** inspected the scene of the **INCIDENT**? If so, for each inspection state:

(a) the name, **ADDRESS**, and telephone number of the individual making the inspection (except for expert witnesses covered by Code of Civil Procedure, § 2034);
(b) the date of the inspection.

13.0 Investigation — Surveillance

☐ 13.1 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** conducted surveillance of any individual involved in the **INCIDENT** or any party to this action? If so, for each surveillance state:
(a) the name, **ADDRESS**, and telephone number of the individual or party;
(b) the time, date, and place of the surveillance;
(c) the name, **ADDRESS**, and telephone number of the individual who conducted the surveillance.

☐ 13.2 Has a written report been prepared on the surveillance? If so, for each written report state:
(a) the title;
(b) the date;
(c) the name, **ADDRESS**, and telephone number of the individual who prepared the report;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original or a copy.

14.0 Statutory or Regulatory Violations

☐ 14.1 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** contend that any **PERSON** involved in the **INCIDENT** violated any statute, ordinance, or regulation and that the violation was a legal (proximate) cause of the **INCIDENT**? If so, identify each **PERSON** and the statute, ordinance, or regulation.

☐ 14.2 Was any **PERSON** cited or charged with a violation of any statute, ordinance, or regulation as a result of this **INCIDENT**? If so, for each **PERSON** state:
(a) the name, **ADDRESS**, and telephone number of the **PERSON**;
(b) the statute, ordinance, or regulation allegedly violated;
(c) whether the **PERSON** entered a plea in response to the citation or charge and, if so, the plea entered;
(d) the name and **ADDRESS** of the court or administrative agency, names of the parties, and case number.

15.0 Special or Affirmative Defenses

☐ 15.1 Identify each denial of a material allegation and each special or affirmative defense in your pleadings and for each:
(a) state all facts upon which you base the denial or special or affirmative defense;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of those facts;
(c) identify all **DOCUMENTS** and other tangible things which support your denial or special or affirmative defense, and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

16.0 Defendant's Contentions — Personal Injury

(See Instruction 2(c))

☐ 16.1 Do you contend that any **PERSON**, other than you or plaintiff, contributed to the occurrence of the **INCIDENT** or the injuries or damages claimed by plaintiff? If so, for each **PERSON**:
(a) state the name, **ADDRESS**, and telephone number of the **PERSON**;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.2 Do you contend that plaintiff was not injured in the **INCIDENT**? If so:
(a) state all facts upon which you base your contention;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.3 Do you contend that the injuries or the extent of the injuries claimed by plaintiff as disclosed in discovery proceedings thus far in this case were not caused by the **INCIDENT**? If so, for each injury:
(a) identify it;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.4 Do you contend that any of the services furnished by any **HEALTH CARE PROVIDER** claimed by plaintiff in discovery proceedings thus far in this case were not due to the **INCIDENT**? If so:
(a) identify each service;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.5 Do you contend that any of the costs of services furnished by any **HEALTH CARE PROVIDER** claimed as damages by plaintiff in discovery proceedings thus far in this case were unreasonable? If so:
(a) identify each cost;

(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.6 Do you contend that any part of the loss of earnings or income claimed by plaintiff in discovery proceedings thus far in this case was unreasonable or was not caused by the **INCIDENT**? If so:
(a) identify each part of the loss;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.7 Do you contend that any of the property damage claimed by plaintiff in discovery proceedings thus far in this case was not caused by the **INCIDENT**? If so:
(a) identify each item of property damage;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.8 Do you contend that any of the costs of repairing the property damage claimed by plaintiff in discovery proceedings thus far in this case were unreasonable? If so:
(a) identify each cost item;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.9 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** have any **DOCUMENT** (for example, insurance bureau index reports) concerning claims for personal injuries made before or after the **INCIDENT** by a plaintiff in this case? If so, for each plaintiff state:
(a) the source of each **DOCUMENT**;
(b) the date each claim arose;
(c) the nature of each claim;
(d) the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

☐ 16.10 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** have any **DOCUMENT** concerning the past or present physical, mental, or emotional condition of any plaintiff in this case from a **HEALTH CARE PROVIDER** not previously identified (except for expert witnesses covered by Code of Civil Procedure, § 2034)? If so, for each plaintiff state:
(a) the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER**;
(b) a description of each **DOCUMENT**;
(c) the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

17.0 Responses to Request for Admissions

☐ 17.1 Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission:
(a) state the number of the request;
(b) state all facts upon which you base your response;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of those facts;
(d) identify all **DOCUMENTS** and other tangible things that support your response and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

20.0 How the Incident Occurred — Motor Vehicle

☐ 20.1 State the date, time, and place of the **INCIDENT** (closest street **ADDRESS** or intersection).

☐ 20.2 For each vehicle involved in the **INCIDENT**, state:
(a) the year, make, model, and license number;
(b) the name, **ADDRESS**, and telephone number of the driver;
(c) the name, **ADDRESS**, and telephone number of each occupant other than the driver;
(d) the name, **ADDRESS**, and telephone number of each registered owner;
(e) the name, **ADDRESS**, and telephone number of each lessee;
(f) the name, **ADDRESS**, and telephone number of each owner other than the registered owner or lien holder;
(g) the name of each owner who gave permission or consent to the driver to operate the vehicle.

☐ 20.3 State the **ADDRESS** and location where your trip began, and the **ADDRESS** and location of your destination.

☐ 20.4 Describe the route that you followed from the beginning of your trip to the location of the **INCIDENT**, and state the location of each stop, other than routine traffic stops, during the trip leading up to the **INCIDENT**.

☐ 20.5 State the name of the street or roadway, the lane of travel, and the direction of travel of each vehicle involved in the **INCIDENT** for the 500 feet of travel before the **INCIDENT**.

☐ 20.6 Did the **INCIDENT** occur at an intersection? If so, describe all traffic control devices, signals, or signs at the intersection.

☐ 20.7 Was there a traffic signal facing you at the time of the **INCIDENT**? If so, state:
(a) your location when you first saw it;
(b) the color;
(c) the number of seconds it had been that color;
(d) whether the color changed between the time you first saw it and the **INCIDENT**.

☐ 20.8 State how the **INCIDENT** occurred, giving the speed, direction, and location of each vehicle involved:
(a) just before the **INCIDENT**;
(b) at the time of the **INCIDENT**;
(c) just after the **INCIDENT**.

☐ 20.9 Do you have information that a malfunction or defect in a vehicle caused the **INCIDENT**? If so:
(a) identify the vehicle;
(b) identify each malfunction or defect;
(c) state the name, **ADDRESS**, and telephone number of each **PERSON** who is a witness to or has information about each malfunction or defect;
(d) state the name, **ADDRESS**, and telephone number of each **PERSON** who has custody of each defective part.

☐ 20.10 Do you have information that any malfunction or defect in a vehicle contributed to the injuries sustained in the **INCIDENT**? If so:
(a) identify the vehicle;
(b) identify each malfunction or defect;
(c) state the name, **ADDRESS**, and telephone number of each **PERSON** who is a witness to or has information about each malfunction or defect;
(d) state the name, **ADDRESS**, and telephone number of each **PERSON** who has custody of each defective part.

☐ 20.11 State the name, **ADDRESS**, and telephone number of each owner and each **PERSON** who has had possession since the **INCIDENT** of each vehicle involved in the **INCIDENT**.

50.0 Contract

☐ 50.1 For each agreement alleged in the pleadings:
(a) identify all **DOCUMENTS** that are part of the agreement and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(b) state each part of the agreement not in writing, the name, **ADDRESS**, and telephone number of each **PERSON** agreeing to that provision, and the date that part of the agreement was made;
(c) identify all **DOCUMENTS** that evidence each part of the agreement not in writing and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(d) identify all **DOCUMENTS** that are part of each modification to the agreement, and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(e) state each modification not in writing, the date, and the name, **ADDRESS**, and telephone number of each **PERSON** agreeing to the modification, and the date the modification was made;
(f) identify all **DOCUMENTS** that evidence each modification of the agreement not in writing and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

☐ 50.2 Was there a breach of any agreement alleged in the pleadings? If so, for each breach describe and give the date of every act or omission that you claim is the breach of the agreement.

☐ 50.3 Was performance of any agreement alleged in the pleadings excused? If so, identify each agreement excused and state why performance was excused.

☐ 50.4 Was any agreement alleged in the pleadings terminated by mutual agreement, release, accord and satisfaction, or novation? If so, identify each agreement terminated and state why it was terminated including dates.

☐ 50.5 Is any agreement alleged in the pleadings unenforceable? If so, identify each unenforceable agreement and state why it is unenforceable.

☐ 50.6 Is any agreement alleged in the pleadings ambiguous? If so, identify each ambiguous agreement and state why it is ambiguous.

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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address)	TELEPHONE NO
ATTORNEY FOR (Name)	
NAME OF COURT AND JUDICIAL DISTRICT AND BRANCH COURT, IF ANY	
SHORT TITLE OF CASE:	
FORM INTERROGATORIES — ECONOMIC LITIGATION **Asking Party:** **Answering Party:** **Set No.:**	CASE NUMBER

Sec. 1. Instructions to All Parties

(a) These are general instructions. *For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure section 2030 and the cases construing it.*

(b) These interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or objection.

Sec. 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use in proceedings under the provisions for Economic Litigation in Municipal and Justice Courts, Code of Civil Procedure sections 90 through 100. However, these interrogatories also may be used in superior courts.

(b) There are restrictions on discovery for most civil actions in municipal and justice courts. These restrictions limit the number of interrogatories that may be asked. For details, read Code of Civil Procedure section 94.

(c) Some of these interrogatories are similar to questions in the Case Questionnaire and may be omitted if the information sought has already been provided in a completed Case Questionnaire.

(d) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that are applicable to the case and within the restrictions discussed above.

(e) The interrogatories in section 116.0, Defendant's Contentions—Personal Injury, should not be used until defendant has had a reasonable opportunity to conduct an investigation or discovery of plaintiff's injuries and damages.

(f) Additional interrogatories may be attached, subject to the restrictions discussed above.

Sec. 3. Instructions to the Answering Party

(a) Subject to the restrictions discussed above, an answer or other appropriate response must be given to each interrogatory checked by the asking party.

(b) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties who have appeared. See Code of Civil Procedure section 2030 for details.

(c) Each answer must be as complete and straightforward as the information reasonably available to you permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form *at the end of your answers:*

"I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

(DATE) _____ (SIGNATURE) _____

Sec. 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(a) **INCIDENT** includes the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding.

(Continued)

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(b) **YOU OR ANYONE ACTING ON YOUR BEHALF** includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(c) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(d) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(e) **HEALTH CARE PROVIDER** includes any **PERSON** referred to in Code of Civil Procedure section 667.7(e)(3).

(f) **ADDRESS** means the street address, including the city, state, and zip code.

Sec. 5. Interrogatories

The following interrogatories have been approved by the Judicial Council under section 2033.5 of the Code of Civil Procedure:

CONTENTS

101.0 Identity of Persons Answering These Interrogatories

☐ 101.1 State the name, **ADDRESS**, telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the responses to these interrogatories. (Do not identify anyone who simply typed or reproduced the responses.)

102.0 General Background Information — Individual

☐ 102.1 State your name, any other names by which you have been known, and your **ADDRESS**.

☐ 102.2 State the date and place of your birth.

☐ 102.3 State, as of the time of the **INCIDENT**, your driver's license number, the state of issuance, the expiration date, and any restrictions.

☐ 102.4 State each residence **ADDRESS** for the last five years and the dates you lived at each **ADDRESS**.

☐ 102.5 State the name, **ADDRESS**, and telephone number of each employer you have had over the past five years and the dates you worked for each.

☐ 102.6 Describe your work for each employer you have had over the past five years.

☐ 102.7 State the name and **ADDRESS** of each academic or vocational school you have attended, beginning with high school, and the dates you attended each.

☐ 102.8 If you have ever been convicted of a felony, state, for each, the offense, the date and place of conviction, and the court and case number.

☐ 102.9 State the names, **ADDRESS**, and telephone number of any **PERSON** for whom you were acting as an agent or employee at the time of the **INCIDENT**.

☐ 102.10 Describe any physical, emotional, or mental disability or condition that you had that may have contributed to the occurrence of the **INCIDENT**.

☐ 102.11 Describe the nature and quantity of any alcoholic beverage, marijuana, or other drug or medication of any kind that you used within 24 hours before the **INCIDENT**.

103.0 General Background Information — Business Entity

☐ 103.1 State your current business name and **ADDRESS**, type of business entity, and your title.

104.0 Insurance

☐ 104.1 State the name and **ADDRESS** of each insurance company and the policy number and policy limits of each policy that may cover you, in whole or in part, for the damages related to the **INCIDENT**.

105.0 ***[Reserved]***

106.0 Physical, Mental, or Emotional Injuries

☐ 106.1 Describe each injury or illness related to the **INCIDENT**.

☐ 106.2 Describe your present complaints about each injury or illness related to the **INCIDENT**.

☐ 106.3 State the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER** who treated or examined you for each injury or illness related to the **INCIDENT** and the dates of treatment or examination.

☐ 106.4 State the type of treatment or examination given to you by each **HEALTH CARE PROVIDER** for each injury or illness related to the **INCIDENT**.

☐ 106.5 State the charges made by each **HEALTH CARE PROVIDER** for each injury or illness related to the **INCIDENT**.

☐ 106.6 State the nature and cost of each health care service related to the **INCIDENT** not previously listed (for example, medication, ambulance, nursing, prosthetics).

☐ 106.7 State the nature and cost of the health care services you anticipate in the future as a result of the **INCIDENT**.

☐ 106.8 State the name and **ADDRESS** of each **HEALTH CARE PROVIDER** who has advised you that you may need future health care services as a result of the **INCIDENT**.

107.0 Property Damage

☐ 107.1 Itemize your property damage and, for each item, state the amount or attach an itemized bill or estimate.

108.0 Loss of Income or Earning Capacity

☐ 108.1 State the name and **ADDRESS** of each employer or other source of the earnings or income you have lost as a result of the **INCIDENT**.

☐ 108.2 Show how you compute the earnings or income you have lost, from each employer or other source, as a result of the **INCIDENT**.

☐ 108.3 State the name and **ADDRESS** of each employer or other source of the earnings or income you expect to lose in the future as a result of the **INCIDENT**.

☐ 108.4 Show how you compute the earnings or income you expect to lose in the future, from each employer or other source, as the result of the **INCIDENT**.

109.0 Other Damages

☐ 109.1 Describe each other item of damage or cost that you attribute to the **INCIDENT**, stating the dates of occurrence and the amount.

110.0 Medical History

☐ 110.1 Describe and give the date of each complaint or injury, whether occurring *before or after* **INCIDENT**, that involved the same part of your body claimed to have been injured in the **INCIDENT**.

☐ 110.2 State the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER** who examined or treated you for each injury or complaint, whether occurring *before or after* the **INCIDENT**, that involved the same part of your body claimed to have been injured in the **INCIDENT** and the dates of examination or treatment.

111.0 Other Claims and Previous Claims

☐ 111.1 Identify each personal injury claim that **YOU OR ANYONE ACTING ON YOUR BEHALF** have made within the past ten years and the dates.

☐ 111.2 State the case name, court, and case number of each personal injury action or claim filed by **YOU OR ANYONE ACTING ON YOUR BEHALF** within the past ten years.

112.0 Investigation — General

☐ 112.1 State the name, **ADDRESS**, and telephone number of each individual who has knowledge of facts relating to the **INCIDENT**, and specify his or her area of knowledge.

☐ 112.2 State the name, **ADDRESS**, and telephone number of each individual who gave a written or recorded statement relating to the **INCIDENT** and the date of the statement.

☐ 112.3 State the name, **ADDRESS**, and telephone number of each **PERSON** who has the original or a copy of a written or recorded statement relating to the **INCIDENT**.

☐ 112.4 Identify each document or photograph that describes or depicts any place, object, or individual concerning the **INCIDENT** or plaintiff's injuries, or attach a copy. (If you do not attach a copy, state the name, **ADDRESS**, and telephone number of each **PERSON** who had the original document or photograph or a copy.)

☐ 112.5 Identify each other item of physical evidence that shows how the **INCIDENT** occurred or the nature or extent of plaintiff's injuries, and state the location of each item, and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

113.0 *[Reserved]*

114.0 Statutory or Regulatory Violations

☐ 114.1 If you contend that any **PERSON** involved in the **INCIDENT** violated any statute, ordinance, or regulation and that the violation was a cause of the **INCIDENT**, identify each **PERSON** and the statute, ordinance, or regulation.

115.0 Claims and Defenses

☐ 115.1 State in detail the facts upon which you base your claims that the **PERSON** asking this interrogatory is responsible for your damages.

☐ 115.2 State in detail the facts upon which you base your contention that you are not responsible, in whole or in part, for plaintiff's damages.

☐ 115.3 State the name, **ADDRESS**, and the telephone number of each **PERSON**, other than the **PERSON** asking this interrogatory, who is responsible, in whole or in part, for damages claimed in this action.

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116.0 Defendant's Contentions — Personal Injury

[See Instruction 2(e)]

☐ 116.1. If you contend that any **PERSON**, other than you or plaintiff, contributed to the occurrence of the **INCIDENT** or the injuries or damages claimed by plaintiff, state the name, **ADDRESS**, and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.2 If you contend that plaintiff was not injured in the **INCIDENT**, state the name, **ADDRESS**, and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.3 If you contend that the injuries or the extent of the injuries claimed by plaintiff were not caused by the **INCIDENT**, state the name, **ADDRESS**, and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.4 If you contend that any of the services furnished by any **HEALTH CARE PROVIDER** were not related to the **INCIDENT**, state the name, **ADDRESS**, and telephone number of each individual who has knowledge of the facts upon which you base your contention.

☐ 116.5 If you contend that any of the costs of services furnished by any **HEALTH CARE PROVIDER** were unreasonable, identify each service that you dispute, the cost, and the **HEALTH CARE PROVIDER**.

☐ 116.6 If you contend that any part of the loss of earnings or income claimed by plaintiff was unreasonable, identify each part of the loss that you dispute and each source of the income or earnings.

☐ 116.7 If you contend that any of the property damage claimed by plaintiff was not caused by the **INCIDENT**, identify each item of property damage that you dispute.

☐ 116.8 If you contend that any of the costs of repairing the property damage claimed by plaintiff were unreasonable, identify each cost item that you dispute.

☐ 116.9 If you contend that, within the last ten years, plaintiff made a claim for personal injuries that are related to the injuries claimed in the **INCIDENT**, identify each related injury and the date.

☐ 116.10 If you contend that, within the past ten years, plaintiff made a claim for personal injuries that are related to the injuries claimed in the **INCIDENT**, state the name, court, and case number of each action filed.

117.0 ***[Reserved]***

120.0 How the Incident Occurred — Motor Vehicle

☐ 120.1 State how the **INCIDENT** occurred.

☐ 120.2 For each vehicle involved in the **INCIDENT**, state the year, make, model, and license number.

☐ 120.3 For each vehicle involved in the **INCIDENT**, state the name, **ADDRESS**, and telephone number of the driver.

☐ 120.4 For each vehicle involved in the **INCIDENT**, state the name, **ADDRESS**, and telephone number of each occupant other than the driver.

☐ 120.5 For each vehicle involved in the **INCIDENT**, state the name, **ADDRESS**, and telephone number of each registered owner.

☐ 120.6 For each vehicle involved in the **INCIDENT**, state the name, **ADDRESS**, and telephone number of each lessee.

☐ 120.7 For each vehicle involved in the **INCIDENT**, state the name, **ADDRESS**, and telephone number of each owner other than the registered owner or lien holder.

☐ 120.8 For each vehicle involved in the **INCIDENT**, state the name of each owner who gave permission or consent to the driver to operate the vehicle.

150.0 Contract

☐ 150.1 Identify all **DOCUMENTS** that are part of the agreement and for each state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

☐ 150.2 State each part of the agreement not in writing, the name, **ADDRESS**, and telephone number of each **PERSON** agreeing to that provision, and the date that part of the agreement was made.

☐ 150.3 Identify all **DOCUMENTS** that evidence each part of the agreement not in writing, and for each state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

☐ 150.4 Identify all **DOCUMENTS** that are part of each modification to the agreement, and for each state the name **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

☐ 150.5 State each modification not in writing, the date, and the name, **ADDRESS**, and telephone number of the **PERSON** agreeing to the modification, and the date the modification was made.

☐ 150.6 Identify all **DOCUMENTS** that evidence each modification of the agreement not in writing and for each state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

☐ 150.7 Describe and give the date of every act or omission that you claim is a breach of the agreement.

☐ 150.8 Identify each agreement excused and state why performance was excused.

☐ 150.9 Identify each agreement terminated by mutual agreement and state why it was terminated, including dates.

☐ 150.10 Identify each unenforceable agreement and state the facts upon which your answer is based.

☐ 150.11 Identify each ambiguous agreement and state the facts upon which your answer is based.

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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): TEL. NO:	UNLAWFUL DETAINER ASSISTANT
ATTORNEY FOR (Name):	(Check one box): An unlawful detainer assistant ☐ did ☐ did not for compensation give advice or assistance with this form. (If one did, state the following):
NAME OF COURT AND JUDICIAL DISTRICT AND BRANCH COURT, IF ANY:	ASSISTANT'S NAME:
	ADDRESS:
SHORT TITLE OF CASE:	TEL. NO.:
	COUNTY OF REGISTRATION:
	REGISTRATION NO.:
	EXPIRES (DATE):

FORM INTERROGATORIES — UNLAWFUL DETAINER	CASE NUMBER:
Asking Party:	
Answering Party:	
Set No.:	

Sec. 1. Instructions to All Parties

(a) These are general instructions. *For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure section 2030 and the cases construing it.*

(b) These interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or objection.

Sec. 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use in unlawful detainer proceedings.

(b) There are restrictions that generally limit the number of interrogatories that may be asked and the form and use of the interrogatories. For details, read Code of Civil Procedure section 2030(c).

(c) In determining whether to use these or any interrogatories, you should be aware that abuse can be punished by sanctions, including fines and attorney fees. See Code of Civil Procedure sections 128.5 and 128.7.

(d) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that are applicable to the case.

(e) Additional interrogatories may be attached.

Sec. 3. Instructions to the Answering Party

(a) An answer or other appropriate response must be given to each interrogatory checked by the asking party. Failure to respond to these interrogatories properly can be punished by sanctions, including contempt preceedings, fine, attorneys fees, and the loss of your case. See Code of Civil Procedure sections 128.5, 128.7, and 2030.

(b) As a general rule, within five days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See Code of Civil Procedure section 2030 for details.

(c) Each answer must be as complete and straightforward as the information reasonably available to you permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form *at the end of your answers:*

"I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

(DATE) _____ (SIGNATURE) _____

Sec. 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(a) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(b) **PLAINTIFF** includes any **PERSON** who seeks recovery of the **RENTAL UNIT** whether acting as an individual or on someone else's behalf and includes all such **PERSONS** if more than one.

(Continued)

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(c) **LANDLORD** includes any **PERSON** who offered the **RENTAL UNIT** for rent and any **PERSON** on whose behalf the **RENTAL UNIT** was offered for rent and their successors in interest. **LANDLORD** includes all **PERSONS** who managed the **PROPERTY** while defendant was in possession.

(d) **RENTAL UNIT** is the premises **PLAINTIFF** seeks to recover.

(e) **PROPERTY** is the building or parcel (including common areas) of which the **RENTAL UNIT** is a part. (For example, if **PLAINTIFF** is seeking to recover possession of apartment number 12 of a 20-unit building, the building is the **PROPERTY** and apartment 12 is the **RENTAL UNIT**. If **PLAINTIFF** seeks possession of cottage number 3 in a five-cottage court or complex, the court or complex is the **PROPERTY** and cottage 3 is the **RENTAL UNIT**.)

(f) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(g) **NOTICE TO QUIT** includes the original or copy of any notice mentioned in Code of Civil Procedure section 1161 or Civil Code section 1946, including a 3-day notice to pay rent and quit the **RENTAL UNIT**, a 3-day notice to perform conditions or covenants or quit, a 3-day notice to quit, and a 30-day notice of termination.

(h) **ADDRESS** means the street address, including the city, state, and zip code.

Sec. 5. Interrogatories

The following interrogatories have been approved by the Judicial Council under section 2033.5 of the Code of Civil Procedure for use in unlawful detainer proceedings:

CONTENTS

70.0 General

[Either party may ask any applicable question in this section.]

☐ 70.1 State the name, **ADDRESS**, telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the responses to these interrogatories. (Do not identify anyone who simply typed or reproduced the responses.)

☐ 70.2 Is **PLAINTIFF** an owner of the **RENTAL UNIT**? If so, state:
(a) the nature and percentage of ownership interest;
(b) the date **PLAINTIFF** first acquired this ownership interest.

☐ 70.3 Does **PLAINTIFF** share ownership or lack ownership? If so, state the name, the **ADDRESS**, and the nature and percentage of ownership interest of each owner.

☐ 70.4 Does **PLAINTIFF** claim the right to possession other than as an owner of the **RENTAL UNIT**? If so, state the basis of the claim.

☐ 70.5 Has **PLAINTIFF'S** interest in the **RENTAL UNIT** changed since acquisition? If so, state the nature and dates of each change.

☐ 70.6 Are there other rental units on the **PROPERTY**? If so, state how many.

☐ 70.7 During the 12 months before this proceeding was filed, did **PLAINTIFF** possess a permit or certificate of occupancy for the **RENTAL UNIT**? If so, for each state:
(a) the name and **ADDRESS** of each **PERSON** named on the permit or certificate;
(b) the dates of issuance and expiration;
(c) the permit or certificate number.

☐ 70.8 Has a last month's rent, security deposit, cleaning fee, rental agency fee, credit check fee, key deposit, or any other deposit been paid on the **RENTAL UNIT**? If so, for each item state:
(a) the purpose of the payment;
(b) the date paid;
(c) the amount;
(d) the form of payment;
(e) the name of the **PERSON** paying;
(f) the name of the **PERSON** to whom it was paid;
(g) any **DOCUMENT** which evidences payment and the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(h) any adjustments or deductions including facts.

☐ 70.9 State the date defendant first took possession of the **RENTAL UNIT**.

☐ 70.10 State the date and all the terms of any rental agreement between defendant and the **PERSON** who rented to defendant.

☐ 70.11 For each agreement alleged in the pleadings:
(a) identify all **DOCUMENTS** that are part of the agreement and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(b) state each part of the agreement not in writing, the name, **ADDRESS**, and telephone number of each **PERSON** agreeing to that provision, and the date that part of the agreement was made;
(c) identify all **DOCUMENTS** that evidence each part of the agreement not in writing and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(d) identify all **DOCUMENTS** that are part of each modification to the agreement, and for each state

the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT** (see also § 71.5);

(e) state each modification not in writing, the date, and the name, **ADDRESS**, and telephone number of the **PERSON** agreeing to the modification, and the date the modification was made (see also § 71.5);

(f) identify all **DOCUMENTS** that evidence each modification of the agreement not in writing and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT** (see also § 71.5).

☐ 70.12 Has any **PERSON** acting on the **PLAINTIFF'S** behalf been responsible for any aspect of managing or maintaining the **RENTAL UNIT** or **PROPERTY**? If so, for each **PERSON** state:

(a) the name, **ADDRESS**, and telephone number;

(b) the dates the **PERSON** managed or maintained the **RENTAL UNIT** or **PROPERTY**;

(c) the **PERSON'S** responsibilities.

☐ 70.13 For each **PERSON** who occupies any part of the **RENTAL UNIT** (except occupants named in the complaint and occupants' children under 17) state:

(a) the name, **ADDRESS**, telephone number, and birthdate;

(b) the inclusive dates of occupancy;

(c) a description of the portion of the **RENTAL UNIT** occupied;

(d) the amount paid, the term for which it was paid, and the person to whom it was paid;

(e) the nature of the use of the **RENTAL UNIT**;

(f) the name, **ADDRESS**, and telephone number of the person who authorized occupancy;

(g) how occupancy was authorized, including failure of the **LANDLORD** or **PLAINTIFF** to protest after discovering the occupancy.

☐ 70.14 Have you or anyone acting on your behalf obtained any **DOCUMENT** concerning the tenancy between any occupant of the **RENTAL UNIT** and any **PERSON** with an ownership interest or managerial responsibility for the **RENTAL UNIT**? If so, for each **DOCUMENT** state:

(a) the name, **ADDRESS**, and telephone number of each individual from whom the **DOCUMENT** was obtained;

(b) the name, **ADDRESS**, and telephone number of each individual who obtained the **DOCUMENT**;

(c) the date the **DOCUMENT** was obtained;

(d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT** (original or copy).

71.0 Notice

[If a defense is based on allegations that the 3-day notice or 30-day **NOTICE TO QUIT** *is* ***defective in form or content****, then either party may ask any applicable question in this section.]*

☐ 71.1 Was the **NOTICE TO QUIT** on which **PLAINTIFF** bases this proceeding attached to the complaint? If not, state the contents of this notice.

☐ 71.2 State all reasons that the **NOTICE TO QUIT** was served and for each reason:

(a) state all facts supporting **PLAINTIFF'S** decision to terminate defendant's tenancy;

(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;

(c) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 71.3 List all rent payments and rent credits made or claimed by or on behalf of defendant beginning 12 months before the **NOTICE TO QUIT** was served. For each payment or credit state:

(a) the amount;

(b) the date received;

(c) the form in which any payment was made;

(d) the services performed or other basis for which a credit is claimed;

(e) the period covered;

(f) the name of each **PERSON** making the payment or earning the credit;

(g) the identity of all **DOCUMENTS** evidencing the payment or credit and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

☐ 71.4 Did defendant ever fail to pay the rent on time? If so, for each late payment state:

(a) the date;

(b) the amount of any late charge;

(c) the identity of all **DOCUMENTS** recording the payment and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

☐ 71.5 Since the beginning of defendant's tenancy, has **PLAINTIFF** ever raised the rent? If so, for each rent increase state:

(a) the date the increase became effective;

(b) the amount;

(c) the reasons for the rent increase;

(d) how and when defendant was notified of the increase;

(e) the identity of all **DOCUMENTS** evidencing the increase and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

[See also section 70.11(d)—(f).]

☐ 71.6 During the 12 months before the **NOTICE TO QUIT** was served was there a period during which there was no permit or certificate of occupancy for the **RENTAL UNIT**? If so, for each period state:

(a) the inclusive dates;

(b) the reasons.

☐ 71.7 Has any **PERSON** ever reported any nuisance or disturbance at or destruction of the **RENTAL UNIT** or **PROPERTY** caused by defendant or other occupant of the **RENTAL UNIT** or their guests? If so, for each report state;

(a) a description of the disturbance or destruction;

(b) the date of the report;

(c) the name of the **PERSON** who reported;

(d) the name of the **PERSON** to whom the report was made;

(e) what action was taken as a result of the report;

(f) the identity of all **DOCUMENTS** evidencing the report and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

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☐ 71.8 Does the complaint allege violation of a term of a rental agreement or lease (other than nonpayment of rent)? If so, for each covenant:
(a) identify the covenant breached;
(b) state the facts supporting the allegation of a breach;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 71.9 Does the complaint allege that the defendant has been using the **RENTAL UNIT** for an illegal purpose? If so, for each purpose:
(a) identify the illegal purpose;
(b) state the facts supporting the allegations of illegal use;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

[Additional interrogatories on this subject may be found in sections 75.0, 78.0, 79.0, and 80.0.]

72.0 Service

[If a defense is based on allegations that the **NOTICE TO QUIT** *was* ***defectively served,*** *then either party may ask any applicable question in this section.]*

☐ 72.1 Does defendant contend (or base a defense or make any allegations) that the **NOTICE TO QUIT** was defectively served? If the answer is "no," do not answer interrogatories 72.2 through 72.3.

☐ 72.2 Does **PLAINTIFF** contend that the **NOTICE TO QUIT** referred to in the complaint was served? If so, state:
(a) the kind of notice;
(b) the date and time of service;
(c) the manner of service;
(d) the name and **ADDRESS** of the person who served it:
(e) a description of any **DOCUMENT** or conversation between defendant and the person who served the notice.

☐ 72.3 Did any person receive the **NOTICE TO QUIT** referred to in the complaint? If so, for each copy of each notice state:
(a) the name of the person who received it;
(b) the kind of notice;
(c) how it was delivered;
(d) the date received;
(e) where it was delivered;
(f) the identity of all **DOCUMENTS** evidencing the notice and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

73.0 Malicious Holding Over

[If a defendant denies allegations that defendant's continued possession is malicious, then either party may ask any applicable question in this section. Additional question in section 75.0 may also be applicable.]

☐ 73.1 If any rent called for by the rental agreement is unpaid, state the reasons and the facts upon which the reasons are based.

☐ 73.2 Has defendant made any attempts to secure other premises since the service of the **NOTICE TO QUIT** or since the service of the summons and complaint? If so, for each attempt:
(a) state all facts indicating the attempt to secure other premises;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 73.3 State the facts upon which **PLAINTIFF** bases the allegation of malice.

74.0 Rent Control and Eviction Control

☐ 74.1 Is there an ordinance or other local law in this jurisdiction which limits the right to evict tenants? If your answer is no, you need not answer sections 74.2 through 74.6.

☐ 74.2 For the ordinance or other local law limiting the right to evict tenants, state:
(a) the title or number of the law;
(b) the locality.

☐ 74.3 Do you contend that the **RENTAL UNIT** is exempt from the eviction provisions of the ordinance or other local law identified in section 74.2? If so, state the facts upon which you base your contention.

☐ 74.4 Is this proceeding based on allegations of a need to recover the **RENTAL UNIT** for use of the **LANDLORD** or the landlord's relative? If so, for each intended occupant state:
(a) the name;
(b) the residence **ADDRESSES** from three years ago to the present;
(c) the relationship to the **LANDLORD**;
(d) all the intended occupant's reasons for occupancy;
(e) all rental units on the **PROPERTY** that were vacated within 60 days before and after the date the **NOTICE TO QUIT** was served.

☐ 74.5 Is the proceeding based on an allegation that the **LANDLORD** wishes to remove the **RENTAL UNIT** from residential use temporarily or permanently (for example, to rehabilitate, demolish, renovate, or convert)? If so, state:
(a) each reason for removing the **RENTAL UNIT** from residential use;
(b) what physical changes and renovation will be made to the **RENTAL UNIT**;
(c) the date the work is to begin and end;
(d) the number, date, and type of each permit for the change or work;

(Continued)

(e) the identity of each **DOCUMENT** evidencing the intended activity (for example, blueprints, plans, applications for financing, construction contracts) and the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 74.6 Is the proceeding based on any ground other than those stated in sections 74.4 and 74.5? If so, for each:
(a) state each fact supporting or opposing the ground;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** evidencing the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

75.0 Breach of Warranty to Provide Habitable Premises

[If plaintiff alleges nonpayment of rent and defendant bases his defense on allegations of implied or express breach of warranty to provide habitable residential premises, then either party may ask any applicable question in this section.]

☐ 75.1 Do you know of any conditions in violation of state or local building codes, housing codes, or health codes, conditions of dilapidation, or other conditions in need of repair in the **RENTAL UNIT** or on the **PROPERTY** that affected the **RENTAL UNIT** at any time defendant has been in possession? If so, state:
(a) the type of condition;
(b) the kind if corrections or repairs needed;
(c) how and when you learned of these conditions;
(d) how these conditions were caused;
(e) the name, **ADDRESS**, and telephone number of each **PERSON** who has caused these conditions.

☐ 75.2 Have any corrections, repairs, or improvements been made to the **RENTAL UNIT** since the **RENTAL UNIT** was rented to defendant? If so, for each correction, repair, or improvement state:
(a) a description giving the nature and location;
(b) the date;
(c) the name, **ADDRESS**, and telephone number of each **PERSON** who made the repairs or improvements;
(d) the cost;
(e) the identity of any **DOCUMENT** evidencing the repairs or improvements;
(f) if a building permit was issued, state the issuing agencies and the permit number of your copy.

☐ 75.3 Did defendant or any other **PERSON** during 36 months before the **NOTICE TO QUIT** was served or during defendant's possession of the **RENTAL UNIT** notify the **LANDLORD** or his agent or employee about the condition of the **RENTAL UNIT** or **PROPERTY**? If so, for each written or oral notice state:
(a) the substance;
(b) who made it;
(c) when and how it was made;
(d) the name and **ADDRESS** of each **PERSON** to whom it was made;
(e) the name and **ADDRESS** of each person who knows about it;
(f) the identity of each **DOCUMENT** evidencing the notice and the name, **ADDRESS**, and telephone number of each **PERSON** who has it;
(g) the response made to the notice;
(h) the efforts made to correct the conditions;
(i) whether the **PERSON** who gave notice was an occupant of the **PROPERTY** at the time of the complaint.

☐ 75.4 During the period beginning 36 months before the **NOTICE TO QUIT** was served to the present, was the **RENTAL UNIT** or **PROPERTY** (including other rental units) inspected for dilapidations or defective conditions by a representative of any governmental agency? If so, for each inspection state:
(a) the date;
(b) the reason;
(c) the name of the governmental agency;
(d) the name, **ADDRESS**, and telephone number of each inspector;
(e) the identity of each **DOCUMENT** evidencing each inspection and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 75.5 During the period beginning 36 months before the **NOTICE TO QUIT** was served to the present, did **PLAINTIFF** or **LANDLORD** receive a notice or other communication regarding the condition of the **RENTAL UNIT** or **PROPERTY** (including other rental units) from a governmental agency? If so, for each notice or communication state:
(a) the date received;
(b) the identity of all parties;
(c) the substance of the notice or communication;
(d) the identity of each **DOCUMENT** evidencing the notice or communication and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 75.6 Was there any corrective action taken in response to the inspection or notice or communication identified in sections 75.4 and 75.5? If so, for each:
(a) identify the notice or communication;
(b) identify the condition;
(c) describe the corrective action;
(d) identify of each **DOCUMENT** evidencing the corrective action and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 75.7 Has the **PROPERTY** been appraised for sale or loan during the period beginning 36 months before the **NOTICE TO QUIT** was served to the present? If so, for each appraisal state:
(a) the date;
(b) the name, **ADDRESS**, and telephone number of the appraiser;
(c) the purpose of the appraisal;
(d) the identity of each **DOCUMENT** evidencing the appraisal and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 75.8 Was any condition requiring repair or correction at the **PROPERTY** or **RENTAL UNIT** caused by defendant or other occupant of the **RENTAL UNIT** or their guests? If so, state:
(a) the type and location of condition;
(b) the kind of corrections or repairs needed;
(c) how and when you learned of these conditions;
(d) how and when these conditions were caused;
(e) the name, **ADDRESS**, and telephone number of each **PERSON** who caused these conditions;

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(f) the identity of each **DOCUMENT** evidencing the repair (or correction) and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

[See also section 71.0 for additional questions.]

76.0 Waiver, Change, Withdrawal, or Cancellation of Notice to Quit

[If a defense is based on waiver, change, withdrawal, or cancellation of the **NOTICE TO QUIT**, *then either party may ask any applicable question in this section.]*

☐ 76.1 Did the **PLAINTIFF** or **LANDLORD** or anyone acting on his or her behalf do anything which is alleged to have been a waiver, change, withdrawal, or cancellation of the **NOTICE TO QUIT**? If so:
(a) state the facts supporting this allegation;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of these facts;
(c) identify each **DOCUMENT** that supports the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 76.2 Did the **PLAINTIFF** or **LANDLORD** accept rent which covered a period after the date for vacating the **RENTAL UNIT** as specified in the **NOTICE TO QUIT**? If so:
(a) state the facts;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify each **DOCUMENT** that supports the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

77.0 Retaliation and Arbitrary Discrimination

[If a defense is based on retaliation or arbitrary discrimination, then either party may ask any applicable question in this section.]

☐ 77.1 State all reasons that the **NOTICE TO QUIT** was served or that defendant's tenancy was not renewed and for each reason:
(a) state all facts supporting **PLAINTIFF'S** decision to terminate or not renew defendant's tenancy;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** that support the facts and state the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

78.0 Nonperformance of the Rental Agreement by Landlord

[If a defense is based on nonperformance of the rental agreement by the **LANDLORD** *or someone acting on the* **LANDLORD'S** *behalf, then either party may ask any applicable question in this section.]*

☐ 78.1 Did the **LANDLORD** or anyone acting on the **LANDLORD'S** behalf agree to make repairs, alterations, or improvements at any time or provide services to the **PROPERTY** or **RENTAL UNIT**? If so, for each agreement state:
(a) the substance of the agreement;
(b) when it was made;
(c) whether it was written or oral;
(d) by whom and to whom;
(e) the name and **ADDRESS** of each person who knows about it;
(f) whether all promised repairs, alterations, or improvements were completed or services provided;
(g) the reasons for any failure to perform;
(h) the identity of each **DOCUMENT** evidencing the agreement or promise and the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 78.2 Has **PLAINTIFF** or **LANDLORD** or any resident of the **PROPERTY** ever committed disturbances or interfered with the quiet enjoyment of the **RENTAL UNIT** (including, for example, noise, acts which threaten the loss of title to the property or loss of financing, etc.)? If so, for each disturbance or interference, state:
(a) a description of each act;
(b) the date of each act;
(c) the name, **ADDRESS**, and telephone number of each **PERSON** who acted;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** who witnessed each act and any **DOCUMENTS** evidencing the person's knowledge;
(e) what action was taken by the **PLAINTIFF** or **LANDLORD** to end or lessen the disturbance or interference.

79.0 Offer of Rent by Defendant

[If a defense is based on an offer of rent by a defendant which was refused, then either party may ask any applicable question in this section.]

☐ 79.1 Has defendant or anyone acting on the defendant's behalf offered any payments to **PLAINTIFF** which **PLAINTIFF** refused to accept? If so, for each offer state:
(a) the amount;
(b) the date;
(c) purpose of offer;
(d) the manner of the offer;
(e) the identity of the person making the offer;
(f) the identity of the person refusing the offer;
(g) the date of the refusal;
(h) the reasons for the refusal.

80.0 Deduction from Rent for Necessary Repairs

[If a defense to payment of rent or damages is based on claim of retaliatory eviction, then either party may ask any applicable question in this section. Additional questions in section 75.0 may also be applicable.]

☐ 80.1 Does defendant claim to have deducted from rent any amount which was withheld to make repairs after communication to the **LANDLORD** of the need for the repairs? If the answer is "no," do not answer interrogatories 80.2 through 80.6.

☐ 80.2 For each condition in need of repair for which a deduction was made, state:
(a) the nature of the condition;
(b) the location;
(c) the date the condition was discovered by defendant;
(d) the date the condition was first known by **LANDLORD** or **PLAINTIFF**;

(Continued)

(e) the dates and methods of each notice to the **LANDLORD** or **PLAINTIFF** of the condition;
(f) the response or action taken by the **LANDLORD** or **PLAINTIFF** to each notification;
(g) the cost to remedy the condition and how the cost was determined;
(h) the identity of any bids obtained for the repairs and any **DOCUMENTS** evidencing the bids.

☐ 80.3 Did **LANDLORD** or **PLAINTIFF** fail to respond within a reasonable time after receiving a communication of a need for repair? If so, for each communication state:
(a) the date it was made;
(b) how it was made;
(c) the response and date;
(d) why the delay was unreasonable.

☐ 80.4 Was there an insufficient period specified or actually allowed between the time of notification and the time repairs were begun by defendant to allow **LANDLORD** or **PLAINTIFF** to make the repairs? If so, state all facts on which the claim of insufficiency is based.

☐ 80.5 Does **PLAINTIFF** contend that any of the items for which rent deductions were taken were not allowable under law? If so, for each item state all reasons and facts on which you base your contention.

☐ 80.6 Has defendant vacated or does defendant anticipate vacating the **RENTAL UNIT** because repairs were requested and not made within a reasonable time? If so, state all facts on which defendant justifies having vacated the **RENTAL UNIT** or anticipates vacating the rental unit.

81.0 Fair Market Rental Value

[If defendant denies **PLAINTIFF** *allegation on the fair market rental value of the* **RENTAL UNIT**, *then either party may ask any applicale question in this section. If defendant claims that the fair market rental value is less because of a breach of warranty to provide habitable premises, then either party may also ask any applicable question in section 75.0]*

☐ 81.1 Do you have an opinion on the fair market rental value of the **RENTAL UNIT**? If so, state:
(a) the substance of your opinion;
(b) the factors upon which the fair market rental value is based;
(c) the method used to calculate the fair market rental value.

☐ 81.2 Has any other **PERSON** ever expressed to you an opinion on the fair market rental value of the **RENTAL UNIT**? If so, for each **PERSON**:
(a) state the name, **ADDRESS**, and telephone number;
(b) state the substance of the **PERSON's** opinion;
(c) describe the conversation or identify all **DOCUMENTS** in which the **PERSON** expressed an opinion and state the name, **ADDRESS**, and telephone number of each **PERSON** who has each **DOCUMENT**.

☐ 81.3 Do you know of any current violations of state or local building codes, housing codes, or health codes, conditions of dilapidation or other conditions in need of repair in the **RENTAL UNIT** or common areas that have affected the **RENTAL UNIT** at any time defendant has been in possession? If so, state:
(a) the conditions in need of repair;
(b) the kind of repairs needed;
(c) the name, **ADDRESS**, and telephone number of each **PERSON** who caused these conditions.

6

(6) Rule 16(b) and scheduling issues

During the meeting in Utah, a concern was raised about whether Rule 16(b) currently has sufficient flexibility to permit courts to enter a conditional scheduling order before a Rule 26(f) conference. See Oct. 6 minutes at 15:675-77. The present language dates from the 1993 amendments, and the Advisory Committee notes attending that change show that the main concern regarding timing was to extend the deadline for entering the scheduling order, but there is some discussion in the notes of problems with premature orders. As presently written, the rule says that the order should be entered only after the Rule 26(f) conference, or after the court has consulted with the attorneys by conference, telephone, mail "or other suitable means." It does not appear to authorize a unilateral and automatic scheduling order, even if provisional.

To address this issue, the concluding paragraph of Rule 16(b) could be amended as follows:

> The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. The court may, in advance of a conference with the parties or receipt of a report from the parties under Rule 26(f), enter a provisional scheduling order subject to revision after such a conference or receipt of a Rule 26(f) report. Except with regard to such a provisional scheduling order, a~~A~~ schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

It is not clear how widespread the practice of issuing such provisional orders presently is, and it might be a good thing to know that before circulating a proposed amendment. On the other

hand, given the ease of revision of such a provisional order, there seems little downside to providing explicit authorization for it.

7

(7) Scope of discovery

(a) Deleting the "subject matter" provision in Rule 26(b)(1)

The ACTL proposal is based on the proposal the Committee itself circulated in 1977 (based on a proposal from the special committee of the ABA Section of Litigation), and needs no work by the Committee at present. For purposes of reference, it is as follows:

> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to ~~the subject matter involved in the pending action, whether it relates to~~ the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Should this provision be adopted, it would probably be a good idea to provide specifically that the court is not precluded from ordering production of material even if not within the above-defined scope. That might be accomplished by addition of something like the following at the end of Rule 26(b)(1);

> Notwithstanding the scope of discovery, the court may, for good cause shown, order discovery of any information it concludes is relevant to the subject matter involved in the pending action.

This addition seems important to ensure that parties cannot, after revealing the existence of materials that the court clearly believes should be produced, nevertheless say the court is powerless to order production because they are now outside the scope of discovery. Given the arguably broad authorization for discovery in the last sentence, that argument may lack force (but see the next sub-section), but relying on "inherent power" in such matters is always somewhat disquieting.

Should something like this be added, however, it may be important to address the question how this court involvement is to happen. Probably the usual way would be on a motion to compel in which there is a dispute about whether matters fall within the scope of discovery. Then the court could conclude that the matters technically fall outside the scope of discovery but nevertheless should be discoverable under the circumstances of the case. But what if the material is, for some reason, clearly outside the newly-defined scope of discovery but for some reason legitimately subject to production? There may be few situations that fit that model, but it would seem that a motion to compel would not be proper but an order would, leaving the question how one gets to the point of entry of such an order.

(b) Amending the last sentence of Rule 26(b)(1)

The Subcommittee is to consider whether, either instead of the above proposal, or in addition to it, last sentence of Rule 26(b)(1) should be amended. PLAC made three proposals for changing that sentence as follows (alternatives in brackets):

> The information sought need not be admissible at the trial if the information sought ~~appears reasonably calculated to lead to the discovery of admissible evidence.~~ [is relevant to disputed facts alleged with particularity in the pleadings.] or [is relevant to a disputed issue framed by

the pleadings.] or [is otherwise demonstrably relevant to the claims or defenses of the parties.]

Whether these changes to the last sentence would be productive is highly debatable, although their impact must be understood against the background that they seem to place limits only on discovery of material that is not itself admissible. The first option would seem to deny discovery altogether unless the complaint is pled with particularity, a result that appears inconsistent with Rule 8(a)(2). The second opens the door to disagreement about what is a "disputed issue framed by the pleadings." The third seems to be at tension with the minimally-demanding definition of relevance in the Federal Rules of Evidence; it would be odd to insist that material be more relevant to be discoverable than to be admissible.

Instead of using any of these three options, a more direct approach would be amend the last sentence as follows:

The information sought need not be admissible at the trial ~~if the information sought appears reasonably calculated to lead to the discovery of admissible evidence~~.

The premise behind this amendment is based on my reading of the note accompanying the 1946 amendment, and is one on which I think some research would be worthwhile, but have not had time to do it. That note suggests that the problem the amendment sought to solve was that some courts were holding material not discoverable unless it would be admissible. With items that might be inadmissible on hearsay grounds, or where there were questions about foundation for admission, this was clearly unreasonable, and the "reasonably calculated" language might have been intended as a limiting factor to circumscribe the effect of the first part of the sentence. I would like to have a look at the cases cited in the Note and see whether there is something in

them inconsistent with the view that the end of the sentence was not intended to override the previous provisions regarding scope of discovery. In addition, it might be desirable to do library research concerning the importance reported cases indicate should be attached to the "reasonably calculated" language in determining scope of discovery. There is at least some reason to think that courts do accord it considerable importance, but it may be useful to try to get a feel for whether reported cases (only a small number of decided issues) confirm there is a problem.

In the alternative (or additionally), one could add to the current language to emphasize the importance of proportionality:

> The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible , providing the discovery sought is consistent with the principles stated in subdivision (b)(2).

This formulation might be deficient because it appears keyed only to the problem of admissibility (the subject of the last sentence). As an alternative, the following sentence could be added to the end of Rule 26(b)(1):

> No such discovery shall be allowed unless it is consistent with the principles stated in subdivision (b)(2).

As indicated in sub-section (a) above, should amendment of the last sentence take away the "reasonably calculated" scope of discovery, it seems worth adding that the court has authority to go that far if it feels that is warranted, perhaps as follows at the end of Rule 26(a)(1):

> Notwithstanding the scope of discovery, the court may, for

1771 good cause shown, order discovery of any information it
1772 concludes is relevant to the subject matter involved in the
1773 pending action or is reasonably calculated to lead to the
1774 discovery of admissible evidence.
1775
1776 (c) Limiting scope for document discovery only
1777
1778 If the above general limitation on the scope of discovery is
1779 not attractive, it might be desirable to try to narrow the scope
1780 of discovery for documents only. According to what the Committee
1781 has been told, the problems caused by broad scope are important
1782 principally in connection with document discovery. The problem
1783 with depositions is length, and if durational limitations seem
1784 the way to deal with them (see item 3 above), changing Rule
1785 26(b)(1) to deal with a problem limited to document discovery may
1786 be unwarranted.
1787
1788 It therefore seems that the alternative of limiting the
1789 scope in Rule 34(a) should be considered. Unfortunately, the
1790 structure of Rule 34(a) is such that making the change is tricky
1791 even if the content of the change is clear. Just to give the
1792 idea, here's a first cut:
1793
1794 (a) **Request and ~~S~~sScope**. Any party may serve on any
1795 other party a request
1796
1797 (1) to produce and permit the party making the request, or
1798 someone acting on the requestor's behalf, to inspect and
1799 copy, any designated documents (including writings,
1800 drawings, graphs, charts, photographs, phonorecords, and
1801 other data compilations from which information can be
1802 obtained, translated, if necessary, by the respondent
1803 through detection devices into reasonably usable form), or
1804 to inspect and copy, test, or sample any tangible things
1805 which constitute or contain matters ~~within the scope of Rule~~

~~26(b) and~~ which are in the possession, custody or control of the party upon whom the request is served; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon~~, within the scope of Rule 26(b)~~.

(3) Parties may obtain discovery pursuant to this rule regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or any other party. The information sought need not be admissible at the trial, providing that the discovery is consistent with the principles stated in Rule 26(b)(2).

In addition, it occurs to me that to deal with the risk that interrogatories might be used as an end run around this sort of limitation we might also consider an amendment to Rule 33(c):

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), except that inquiry concerning documents, as defined in Rule 34(a)(1), shall be permitted only to the extent document discovery is allowed under Rule 34(a)(3), and the answers may be used to the extent permitted by the rules of evidence.

Whether this would accomplish a useful purpose largely depends upon the sorts of concerns addressed in the previous sub-section. At least this limitation of the scope constriction would permit the possibility that during a deposition one could range further afield and, on the basis of that information, seek a court order for production of documents. As above, it would

probably be desirable to add the following sort of authorization somewhere:

> Notwithstanding the scope of document discovery, the court may, for good cause shown, order production of any document if it concludes production is reasonably calculated to lead to the discovery of admissible evidence.

(8) Privilege waiver

The Subcommittee is to consider ways to guard against undue costs in document discovery due to the risk of privilege waiver. See Oct. 6 minutes at 17:782-85.

(a) Order insulating document review in all cases

It is necessary at least to consider whether there is a way to reduce the document review cost that attends broad waiver doctrines. This task has two distinct parts. One is to try to draft such a provision. The other is to try to justify it as a provision of a Civil Rule. This memorandum will offer specific suggestions about the former and some general ideas about the latter.

One method for accomplishing this purpose would be to amend Rule 26(c), but that seems undesirable for a number of reasons. One is that there are a lot of other issues in connection with that subdivision, so that getting into this topic there may lead to other entanglements. Another is that since the problem is one of documents only it seems to belong more properly in Rule 34. (Collaterally, as noted below, this might strengthen the argument for the validity of such treatment.) This could be done as follows by amending Rule 34(b):

> **(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).
>
> The party upon whom the request is served shall serve a

written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

On agreement of the parties [motion of a party for good cause shown], a court may order that the party producing documents may preserve all privilege objections despite allowing initial examination of the documents, providing any such objection is interposed as required by Rule 26(b)(5) before copying. When such an order is entered, it may provide that such initial examination shall not be urged to constitute a waiver of such privilege in any court.

The foregoing is limited to situations in which there is agreement of the parties for several reasons. First, that is the sort of situation that was presented to us as creating the most vexing drawbacks for the current regime. Second, imposing the arrangement on unwilling parties seems more difficult. On the one hand, it might seem to be giving up the possibly

"substantive" right of the party seeking discovery to obtain access without this concession. On the other hand, it would seem unduly intrusive for the party making production if that party insisted on taking the time needed to screen out all the privileged documents, but the court said it had to proceed with alacrity and entered an order protecting against waiver. Indeed, there is a slippery slope on which this sort of order might lead to the conclusion that the court can grant "use immunity" and compel production of privileged materials. For example, can the court simply order production of all materials listed on a Rule 26(b)(5) privilege log "without prejudice" pursuant to such a power to order?

Should the Subcommittee want a broader treatment, however, that could be done by substituting the bracketed material. Again, there has been no effort in the rule to specify what would be good cause shown. The basic factors (which could be identified in the notes) would presumably be (a) volume of documents and breadth of discovery requests (involving a lot of seemingly tangential matters), (b) likely cost in time and personnel to perform document review, and perhaps (c) willingness of producing party to disclose pursuant to such an arrangement or of party seeking production to accept initial production pursuant to such an arrangement.

Other permutations may warrant mention. The amendment might also provide that any party claiming that documents sought to be copied are privileged be required to file a motion for a protective order against production within a specified time. In addition, it could provide that when such access is allowed there is no obligation for the producing party to go to a further effort under Rule 26(b)(5) since that is a substitute for knowing what the document is, and the "quick peek" provision would allow the party to know exactly what the document is.

On the authority side of the ledger, there may be a need to do substantial research there has not been time to do yet. The big issue is whether even this sort of limited provision is proper in a civil rule. Some general background seems in order. The biggest obstacle is 28 U.S.C. § 2074(b), which says, of rules adopted to the Rules Enabling Act, that "[a]ny such rule shall have no force or effect unless approved by an Act of Congress." The fundamental question, therefore, is whether a provision like the one described above does what § 2074(b) forbids. In a general way, the background for § 2074(b) is the firestorm that erupted in Congress when the proposed Rules of Evidence included extensive privilege provisions, including one regarding waiver. Congress substituted current Fed.R.Evid. 501 for those privilege provisions.

It may be possible to argue that a provision regulating and making efficient the production of documents is not what the statute forbids, but there have been arguments that cut the other way in other contexts. As was pointed out during the Utah meeting, the SEC disclosure cases weigh very broadly against preservation of privilege when there is actual delivery of copies. See In re Sealed Case, 877 F.2d 976, 980 (D.C.Cir. 1989). Moreover, judicial efforts to insulate such disclosures to the SEC has been labeled improper as creation of a new privilege. See Note, The Limited Waiver Rule: Creation of an SEC-Corporation Privilege, 36 Stan. L. Rev. 789 (1984).

Against this background, the viability of even a modest rule like the one proposed above is debatable. As a starting point, it is true that there is support for the view that, even absent rule-based authority, an order of this sort is effective to avoid a waiver even as to materials turned over by mistake. Transamerica Computer Corp. v. International Business Machines Corp., 573 F.2d 646, 652 (9th Cir. 1978) ("obvious" that IBM did not waive privilege for documents produced after district court

entered an order insulating inadvertent production against waiver effect). But this case has been questioned, see, e.g., Genentech, Inc. v. U.S. International Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (saying that the limited waiver doctrine of Transamerica is an example of the approach of "a small number of courts"), and the approach is hard to square with conventional waiver doctrine, which treats any disclosure as a waiver. See Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605, 1611-12 (1984). Accordingly, although the Manual for Complex Litigation (Second) seemed to endorse such orders, the Manual (Third) cautions that courts have refused to enforce them. See Manual (Third) § 21.431 n.137.

Against this background, the Greg Joseph objection to even a modest provision like the one above ("You can't do that through the rules, see § 2074(b)") presents a significant barrier. None of the materials in the foregoing paragraph precisely addresses the issue presented because they don't deal with the scope of rule-making. Tom Rowe suggests that another obstacle is whether there is a "substantive" right for third parties to obtain access to materials shown to somebody else by relying on a waiver doctrine. It seems to me that Tom's concern about § 2072 is less pressing than the more pertinent § 2074(b), but we need to seek a way out in order to take effective action in this area. (In addition, it might be wise to consider the Supreme Court's handling of Baker v. General Motors Co., 86 F.3d 811 (8th Cir. 1996), cert. granted, 117 S.Ct. 1310, No. 97-653, in which the issue is Full Faith and Credit to an injunction against testimony by a former GM employee, but there may be discussion of the right of a civil litigant to obtain evidence for use at trial.)

The solution would seem to involve reliance on the court's control over its own processes, and the need to facilitate the discovery process. In the same vein, nobody seems to think that adoption of Rule 26(b)(5) itself was beyond the power of the

Committee, but failure to comply with its provisions could affect the availability of the privilege and thus affect waiver. By analogy, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), emphasizes in the protective order context the importance of judicial control over discovery. Perhaps that provides support for a modest provision like the one above (or even a more ambitious one regarding inadvertent production). Whether these arguments would work is, at best, presently unclear.

For the present, it does appear that some considerable legal research would be needed to assess these questions and, frankly, it is likely that no definitive answer would emerge. If there is no way out, the Committee might consider recommending that Congress act, but that would probably entail looking into broader treatment of the inadvertent production issue and the variety of additional issues that area involves.

(b) Order insulating document review in federal question cases

As a less aggressive alternative, the Committee could take the lead of Fed. R. Evid. 501, which says that state law should govern the question of privilege "with respect to an element of a claim or defense as to which State law supplies the rule of decision." This provision was the product of the Erie type concern about federal procedural rules eroding state law, and a different version of the above proposal might build on this idea and limit the ambit of our proposed rule change by modifying the proposed additional paragraph as follows:

> Except with respect to an element of a claim or defense as to which State law supplies the rule of decision, on agreement of the parties [motion of a party for good cause shown], a court may order that the party producing documents may preserve all privilege objections despite allowing

initial examination of the documents, providing any such objection is interposed as required by Rule 26(b)(5) before copying. When such an order is entered, it may provide that such initial examination shall not be urged to constitute a waiver of such privilege in any court.

This alternative has a number of drawbacks. For one thing, it does not address the § 2074(b) problem. To a considerable degree, the statutory limitations on the authority of the rulesmakers are not designed to protect state law, but to reserve matters to Congress, which is exactly what § 2074(b) says it does. Recall that when the Rules Enabling Act was first adopted in 1934, with its limitations on rulemaking authority, Swift v. Tyson still ruled the day with its notion of a "general common law," so the statute was not designed to protect state law.

For another thing, this limited version does not do the job. Cases with state-law elements (e.g., products liability) are an important part of the federal courts' caseload. Even cases that one might conceive of mainly in federal question terms (e.g., securities fraud) often involve state-law elements. Excluding all of those cases from the proposed rule might make it useless in a large proportion of the instances in which one would want it to apply. Alternatively, trying to parse the cases so that the court enters the order in connection with the federal-law matters but the order is not effective with regard to state-law matters sounds like more trouble than it is worth.

(c) Dealing more generally with inadvertent disclosure

For purposes of further completeness, it is worth mentioning the problem of inadvertent production, which was raised during the Utah meeting. The Subcommittee was not commissioned during the Utah meeting to develop something along these lines, but there may be an interest in discussing the question. There seems

to be nothing that precludes the Subcommittee's taking some action or developing a plan to deal with the problem either.

The question relates to the one addressed in the prior discussion in issue 8--whether mistaken production of material works a waiver of the privilege. If it does, the "subject matter" breadth of much privilege doctrine can make the waiver quite important, as it would (1) apply to all communications on the same subject matter as the disclosed document and (2) apply as to the world, not just the party to whom the document was disclosed. (Note that there are narrower definitions of the scope of this waiver.) Certainly that is an important problem. "The inadvertent production of a privileged document is a specter that haunts every document-intensive case." F.D.I.C. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 479-80 (E.D.Va. 1991). It is, moreover, a problem on which the federal courts have divided. See 8 Federal Practice & Procedure § 2016.2 at 241-46 (describing three lines of cases).

In all probability, the Subcommittee would find itself tempted to adopt the middle course rather than saying that disclosure always works a waiver (else why adopt the rule?) or that it never does. Accordingly, in keeping with the courts that take this middle view, it would need to prescribe the circumstances that bear on the question of waiver depends on a variety of circumstances. To do so would involve resolving questions such as (1) how much effort the party seeking to "take back" the waiver must show it made to cull privileged documents; (2) how quickly the producing party must act to undo the mistake; (3) how to handle the question regarding extent of disclosure in the interim; and (4) how to apply the "overriding issue of fairness" courts taking the middle view apply. In addition, as noted above, there would also be the question of (5) defining the proper scope of a resulting waiver. Resolving all these sorts of things would be difficult, and would substantially erode any

argument that this is a proper mission for the Civil Rules.

(9) Issues from the C list

The Subcommittee was invited to consider the adoption of amendments to deal with issues included on the C list of technical amendments and report back to the full Committee. Unfortunately, there has been little input on these items. They were circulated in a separate memorandum attached to the memorandum listing more significant possible amendments that I generated after our meeting in Tuscaloosa. Copies of both were provided to the Section of Litigation and the other groups that sent representatives to the Boston Conference, and both were in the first set of materials sent to participants at the Boston Conference.

The reality, frustratingly but not surprisingly, is that nobody seems to have taken note of these technical matters. Paul Carrington did, because I asked for his input and he was present at the creation. Accordingly, I included his comments in the memorandum for the Boston meeting and reproduce them below. Nobody else has, to my knowledge, expressed an opinion about any of these. Under these circumstances, I will make some recommendations about how these issues might be dealt with, but I do so with diffidence since much depends upon practical implications that I don't know enough about. Accordingly, I would hope that Subcommittee members could focus on these topics and provide input on whether to pursue them. To a considerable degree, it is probably worthwhile to try to let sleeping dogs lie.

<u>Lacunae in the 1993 amendments</u>

(a) Handling insurance agreements in districts without initial disclosure

From 1970 to 1993, insurance agreements possibly covering a

party's liability were discoverable because Rule 26 said so, resolving a previous dispute in the courts. In 1993, that discoverability provision was replaced by Rule 26(a)(1)(D), which requires disclosure of such agreements. The current problem exists because a district that opts out of Rule 26(a)(1) is left without the former provision on discoverability of insurance agreements, and arguably presented with a debate about whether they are discoverable. It is unclear how many times this problem has actually arisen. Should initial disclosure including insurance agreements be made uniform, that would solve the problem. Otherwise some provision should probably be made to fill the gap. Reference: 8 C. Wright, A. Miller & R. Marcus, Federal Practice & Procedure, § 2010 at 187. Paul Carrington reacted: "Certainly insurance agreements should be discoverable. It was not intended otherwise. Local option with respect to this, as with respect to all aspects of discovery, should be eliminated, as the 1988 Act directed."

Recommendation: I think that this problem can be solved in connection with the resolution of the Rule 26(a)(1) issue, item 2 above. If a national rule is imposed requiring disclosure, insurance agreements should be included. Alternatively, if disclosure is entirely deleted, something like former Rule 26(b)(2) should be added since there is a risk that the controversy about discoverability of these materials might flare again.

(b) Certification regarding supplementation

Although Rule 26(e) was amended to require considerably broadened supplementation in 1993, no attention seems to have been paid to how supplementation should be treated for purposes of the certification requirements of Rule 26(g). Presumably it would be desirable that supplementation carry with it such a certification, although the nature of the supplementation

obligation may make this unduly difficult to provide in the rules. Thus, Rule 26(e) presently permits the parties to provide supplementation "in writing" and says it is not necessary as to newly-acquired information that has "otherwise been made known to the other parties during the discovery process." There is accordingly no necessary event that would trigger the certification provisions of Rule 26(e). Attention to this issue might improve the current arrangement. Reference: 8 id., § 2052 at 631-32. Paul Carrington writes: "A little thought was given to this, but no satisfactory answer was apparent."

Recommendation: This may well be a sleeping dog that should be left alone. The most troubling aspect of it is that there does not seem to be any explicit authority to sanction a party for failure to supplement a formal discovery response as required by Rule 26(e)(2). On reflection, this lacuna may be important, but it raises issues that are more akin to disclosure than certification under Rule 26(g). Accordingly, it may be that the best way of coping with the question would be to expand Rule 37(c)(1) to include failure to supplement under that provision as well as failure to supplement pursuant to Rule 26(e)(1):

> (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1)<u>, or to supplement a prior discovery response as required by Rule 26(e)(2),</u> shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may

include informing the jury of the failure to make the disclosure.

Please note that this treatment is addressed also in item (l) below, and that discussion should be combined with this topic. As Paul Carrington suggested in response to item (l), it may be that the supplementation duty imposed by Rule 26(e)(2) is significantly more diffuse than that imposed by Rule 26(e)(1) and that adding it to Rule 37(c)(1) is therefore a bad idea.

If the problem is instead seen as a certification problem under Rule 26(g), that could be addressed by amending it as follows:

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3), and every supplementation thereto pursuant to Rule 26(e)(1), shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure or supplementation and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure or supplementation is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection, and every supplementation to a discovery response pursuant to Rule 26(e)(2), made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, ~~or~~

objection, or supplementation, and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Taking this approach would leave another ambiguity. Rule 26(e) presently says that supplementation is needed only if the additional information "has not otherwise been made known to the other parties during the discovery process or in writing." Thus making it known "in writing" is presumably not supplementation since supplementation is not required if this has occurred. This actually raises some question about what "supplementation" means, and seems to me a reason for preferring the amendment to Rule 37(c)(1) above. One could, however, simply take away that provision of Rule 26(e) and indicate in the notes that any written provision of such information is supplementation:

(e) Supplementation of Disclosures and Responses. A

party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process ~~or in writing~~. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process ~~or in writing~~.

As indicated above, it seems to me that the Rule 37(c)(1) route is the simpler and more direct one. This would complete the provision of authority to deal with this problem which has been addressed in the past under the rather troubling and uncertain heading of inherent power. See 8 Fed. Prac. & Pro. § 2050.

(c) Calculating numerical limitations on depositions and interrogatories; whether to focus on "parties" or "sides"

As amended in 1993, the rules now impose numerical limitations on depositions and interrogatories. These are phrased differently, however. For depositions, the limitations apply to a "side," and for interrogatories to a "party." Each formulation has potential difficulties. If one looks to parties, does this make the limitation meaningless when a single lawyer represents ten co-parties? If one looks to a "side," it may become difficult (particularly in more complex cases) to determine what the proper alignment should be. Assuming separate representation by different parties on a "side," unilateral deposition activity may cause problems. Particularly since numerical limitations may continue to be embraced, should further attention be given to these issues? Reference: 8A id., § 2104 at 47-48; § 2168.1 at 261. Paul Carrington writes: "Much thought was given to this, but no satisfactory answer was apparent."

Item 3 above recommends using the limitation by side with regard to possible durational limitations on depositions, and shifting from that approach is therefor not recommended here. The question, then, is whether to shift to that treatment for interrogatories as well. Consistency seems the most cogent argument; because depositions are often more important than interrogatories it is odd that the numerical limitation is stricter with regard to them.

There are counterarguments. As a category, depositions are the most expensive form of discovery, as the FJC survey confirmed, so clamping a tighter lid on those may be more suitable. Although they can be noticed unilaterally, they are customarily scheduled in a more collaborative manner so that "lone ranger" activity is somewhat less likely to occur than with

interrogatories, where somebody might jump the gun and get out a set before the co-parties have been heard from. Indeed, a party presented with competing sets of interrogatories from different opposing parties might be able to pick and choose which to answer, and invoke the numerical limitation as to the rest. In addition, because interrogatories may be an inexpensive way of gathering specific details on a number of adverse parties, it may be inappropriate to limit them on a side basis.

If the Subcommittee wishes to proceed with a change to bring Rule 33 into correspondence with Rule 30, the following amendment to Rule 33(a) could be employed:

> **(a) Availability.** Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number by the plaintiffs, or by the defendants, or by third-party defendants, including all discrete subparts. Interrogatories shall~~, to~~ be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).
>
> (d) Application of limitations on disruptive instructions to nonparties in depositions

As amended in 1993, Rule 30(d)(1) forbids a "party" to instruct a witness not to answer except on specified grounds. It would appear that this limitation does not apply to the behavior of counsel for nonparty witnesses. That may be a desirable

result, but seems to create some risk of frustrating the objectives of the rule change. The rule could explicitly be made applicable to all witnesses and all lawyers during the deposition process. Reference: 8A id., § 2113 at 98-99. Paul Carrington writes: "Good point. I see no objection to what you propose."

It seems to me that the simplest way to accomplish this result would be to amend Rule 30(d)(1) as follows:

> (1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. An attorney ~~party~~ may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

Alternatively, one could develop language that would be more inclusive to catch the problem of pro se litigants and other non-attorney participants in depositions. But that wrinkle seems not to warrant the extra locution, and it is frankly dubious whether Rule 30(d)(1) will often have much impact on such individuals.

> (e) Sanctions for impeding or delaying examination during a deposition

As amended in 1993, Rule 30(d)(2) permits the court to impose time limitations on depositions by local rule or order, and directs that additional time shall be allowed "if the deponent or another party impedes or delays the examination." It then provides that if the court finds "such an impediment," it may impose sanctions upon the responsible person. In form, it seems that this sanction power depends upon prior imposition of a durational limitation on the deposition, but it does not appear that this limitation should exist. It could be made clear that delay or frustration of the deposition is a ground for sanctions

whether or not there is such a prior limitation. Reference: 8A id., §2113 at 99. Paul Carrington writes: "I suppose. But there should generally be a presumptive time limit on depositions, preferably one crafted by the lawyers."

Recommendation: Item 3 above makes alternative proposals regarding limiting the length of depositions. Assuming one of those is adopted, Rule 30(d)(2) would need to be amended anyway, and it could be further amended to take account of the above problem:

> (2) ~~By order or local rule, the court may limit the time permitted for the conduct of a deposition, but~~ The court shall allow additional time beyond that permitting by subdivision (a)(2)(_) consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(f) Relationship between Rule 26(d) and Supplemental Rules B(3) and C(6)

Supplemental Rule B(3) for admiralty garnishment and attachment proceedings expressly authorizes the plaintiff to serve interrogatories on the garnishee with the complaint, and Rule C(6) similarly addresses interrogatories in actions in rem. When Rule 33 was amended in 1970 to permit the plaintiff to do so generally, these provisions in the supplemental rules became unimportant. But in 1993, Rule 26(d) was adopted imposing a moratorium on all discovery until after the Rule 26(f) conference of counsel. Because Supplemental Rule A says that the Civil

Rules apply only if they are not inconsistent with the Supplemental Rules, the adoption of Rule 26(d) should not have affected service of interrogatories pursuant to Supplemental Rule B(3). But it may be that this opportunity to proceed with alacrity undermines the purposes of Rule 26(d) (assuming that is retained). If so, the rules could be amended to address this question more clearly. Reference: 12 C. Wright, A. Miller & R. Marcus, Federal Practice & Procedure § 3213 (2d ed. 1997). Paul Carrington writes: "No thought was given to the Admiralty Rules."

Recommendation: These very issues have been addressed recently in connection with the redrafting of the Supplemental Rules, and the question whether to perpetuate the different treatment accorded there has been examined. There seems no reason for the Subcommittee to revisit the issues.

Other possible improvements or resolution of ambiguities in the discovery rules

Besides the above lacunae from the 1993 amendments, a review of the rules suggests several other minor areas in which some changes might work useful improvements or resolve troubling ambiguities:

(g) Possible uncertainty about who should be listed as expert witnesses under Rule 26(a)(2)

Rule 26(a)(2) directs that parties list all persons they "may call" as expert witnesses. Although this could be likened to a previously-rejected overbroad "may call" formulation, it appears that it was intended to correspond to Rule 26(a)(3)'s directive to list witnesses the party "expects to present" or "may call if the need arises." If this is a source of difficulty, a rewording of Rule 26(a)(2) might be worthwhile.

Reference: 8 id., § 2031.1 at 440. Paul Carrington writes: "I worried a lot about this, but could not improve on Sam Pointer's language, which is in the rule."

Recommendation: As noted above, there has been no input on this being a problem. That being the case, there seems no good reason to try to improve on Sam Pointer's language.

(h) Copies of prior testimony of expert witnesses

Under the 1993 amendments, Rule 26(a)(2) directs a party to include a list of all cases in which an expert witness it plans to use has testified in the past four years in its disclosures, but nothing is said about providing a transcript of that testimony if the proponent of the witness possesses such a transcript (or if the witness does). It is not clear whether this would be (or has been) a problem, but the rule could deal with the question. Reference: 8 id., § 2031.1 at 442. Paul Carrington writes: "Why not?"

Recommendation: Echoing Paul Carrington's reaction (and in the absence of an answer to his question), herewith proposed amendment language for Rule 26(a)(2)(B) to accomplish this objective:

> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as

a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. In addition, if reasonably available to the sponsoring party, that party shall produce for inspection and copying as under Rule 34 the transcript of any such testimony given by the expert within the preceding four years.

(i) Ten-deposition limit and expert witnesses

The 1993 amendments limit each side to ten depositions, explicitly authorize depositions of expert witnesses, and direct that the deposition of most expert witnesses should be deferred until after they have provided the report required by Rule 26(a)(2). That being the case, it could happen that the ten-deposition limitation might interfere with taking depositions of designated expert witnesses. If that limitation has been a problem, it might be worthwhile for the rules to address the question. Reference: 8 id., § 2031.1 at 443. Paul Carrington writes: "The ten deposition limit was only a presumptive limit and should be expanded whenever circumstances warrant."

Recommendation: No action. On reflection, it would seem that the common sense issues regarding expert depositions cannot be usefully embodied in a rule. It might have been desirable for the Advisory Committee Notes to have taken note of this situation, but that is water under the bridge now. My understanding is that the Committee does not go back and revise or expand notes.

(j) Full-time employee as retained nontestifying expert

under Rule 26(b)(4)(B)

The question whether a full-time employee can be "specially retained" as an expert consultant and thereby covered by the protections of Rule 26(b)(1)(B) has troubled and divided the courts. The rules could try to address the issue, or continue to leave it to caselaw. Reference: 8 id., § 2033 at 463-67. Paul Carrington writes: "This did get some consideration. We thought we dealt with it, but apparently did not."

Recommendation: No action. There has been no response from the bar indicating that this is worth attention. Providing by rule that a full-time employee can never be specially retained is probably a bad idea. Trying to specify the circumstances warranting such treatment in a rule is also probably a bad idea.

(k) Determining fees for expert witnesses who are deposed

Although the actual fees charged by expert witnesses are customarily not recoverable costs of suit, Rule 26(b)(4)(C) directs that experts be paid for certain activities in connection with their depositions. The courts have found that there is little authority on how to determine what amount should be paid, and have occasionally found the amounts demanded outrageous. The rule could address this question, although there may be nothing the Committee could profitably say on the subject. Reference: 8 id., § 2034 at 469-70. Paul Carrington writes: "If an adequate report is prepared, there is little reason for the adversary to depose an expert; the fees charged could be fairly deterrent."

Recommendation: No action. Unless the purpose is to deter a deposition, setting a fee would probably be too difficult. With attorneys' fees, for example, the 1993 amendments to Rule 54 did not try to legislate about what the fees would be. Given the much greater diversity of professional contexts for expert

witnesses, the task would be much greater and beyond the expertise of this Committee. Perhaps there would be reason to undertake such an effort if the bar said there was a need to do so, but to date it has not so indicated.

(l) Sanctions for failure to supplement as required by Rule 26(e)(2)

In 1993, Rule 37(c)(1) was added to provide sanctions for failure to supplement as required by Rule 26(e)(1) (dealing with Rule 26(a) disclosures), but there remains no provision in Rule 37 for failure to supplement as required by Rule 26(e)(2) (dealing with responses to formal discovery). Courts have relied instead on inherent power, a somewhat uncertain alternative. Rule 37 (or perhaps Rule 26(e)) could be amended to correct this omission. Reference: 8 id., § 2050 at 607-09. Paul Carrington writes: "This omission did get some consideration. It was thought by some that the duty to supplement should be more rigorously imposed with respect to those few, simple obvious matters identified in (a)(1). But this was not the subject of serious debate."

Recommendation: This is addressed in item (b) above and should be considered in connection with that item.

(m) Distinction between witnesses and exhibits a party will use, and those it may use "if the need arises," in Rule 26(a)(3)

Rule 26(a)(3) appears to direct parties providing this pretrial disclosure regarding trial evidence to distinguish between witnesses and exhibits they will use and those they may use "if the need arises." The Advisory Committee Notes explicitly say that the witness list should be subdivided in this way. Although sensible trial preparation calls for employing

such categories, it may be that they do not provide assistance in the preparation of such a listing. Given that responding to unforeseen events at trial may justify use of unlisted witnesses and exhibits, the continued use of this distinction may be unwarranted. Reference: 8 id., § 2054 at 645-46. Paul Carrington writes: "I never did like this distinction and would be pleased to see it go. I did not understand what function it served. Sam [Pointer] thought, as I recall, that it was useful as a caution against using the telephone directory as a possible witness list."

Recommendation: There has been no reaction to this question. Barring some indication that it poses a problem for lawyers, there seems little reason to change it. But the lack of a reaction may be due to the emendations extant under local rules. In San Francisco, for example, the local rules call for the following (N.D. Cal. Civ. L.R. 16-9(a)(4)(A):

> (A) Witnesses to Be Called. In lieu of FRCivP 26(a)(3)(A), a list of all witnesses likely to be called at trial, other than solely for impeachment or rebuttal, together with a brief statement following each name describing the substance of the testimony to be given.

If the Subcommittee were inclined to gravitate toward the above treatment (I admit to being chair of the district's Local Rules Advisory Committee), I would suggest the following change to Rule 26(a)(3):

> (3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness~~, separately identifying those whom the party expects to present and those whom the party may call if the need arises~~ likely to be called at trial, other than solely for impeachment or rebuttal, together with a brief statement following each name describing the substance of the testimony to be given;

(n) Right to transcription of deposition, and payment for that transcription

Before the 1993 amendments, it was generally expected that most depositions would be transcribed and that the party which noticed the deposition would pay the costs of transcription. The 1993 amendments deleted a sentence previously in the rule saying "If requested by one of the parties, the testimony shall be transcribed." In addition, due to the 1993 amendments there could be some debate about what is the "official" deposition if the noticing party uses one means to memorialize the testimony, and another party uses another. Further attention to when the deposition will be transcribed, who should pay, and what should be regarded as the official deposition might be in order. In addition, the rules could reaffirm what was clear under the 1970 version--that a nonparty witness does not have a right to require transcription if none of the parties so desire. Reference: 8A id., § 2117 at 128-32; § 2115 at 117. Paul Carrington writes: "Maybe more thought is needed here, as you suggest. What the Committee was trying to accomplish was to encourage non-transcription of depositions that prove to be insignificant. We should be moving in the direction of making the videotape the official record."

Recommendation: I do not presently have a recommendation on this point. I continue to believe that the whole question of what is the "deposition" in the era of videotaping is a bit

murky, but don't presently have a solution. Some input from those experienced in the use of videotaped depositions would probably be of considerable value. On this topic, I await input from the Subcommittee or the Committee for the present. Eventually it should probably be firmed up.

(o) Relation between limitation on speaking objections and waiver of objections as to form

The 1993 amendments require in Rule 30(d)(1) that an objection be "stated concisely and in a non-argumentative and non-suggestive manner." But Rule 32(d)(3)(B) says that objections to matters of form are waived unless made at the deposition, and the risk of waiver seems to justify some latitude in explaining the basis for the objection. Some reconciliation of these competing concerns might be in order. Alternatively, the waiver provision itself might be dropped in order to shorten depositions. See item 3(a)(2)(c) above. Reference: 8A id., § 2156 at 206. Paul Carrington writes: "As I suggested in Alabama [at the ABA conference on the CJRA experience], the waiver rule should be abrogated. An exception should perhaps be made where the party asking a question asks whether there is any objection to a question, as she might if she were planning to use the deposition at trial in lieu of the witness."

Recommendation: Handle in connection with item 3 above regarding duration of depositions. A proposal is made there on handling objections.

(10) Additional topics not assigned for present action

Besides the forgoing topics, it seems to worth noting that there are additional topics that might profit from discussion but which are not presently action items for the Subcommittee, so far as I understand. Several are listed below.

(a) Cost shifting

Although there was some discussion of cost-shifting, it does not appear that the Subcommittee is expected to develop something about it presently, One possibility would be to factor cost shifting into Rule 26(b)(2), but that might not fit too well. Perhaps something like the following might serve:

> **(2) Limitations.** By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. In the alternative, the court may condition discovery that appears inconsistent with

these principles upon payment by the party seeking discovery of some or all of the costs incurred by the responding party in providing the discovery. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(Note that, for reasons of achieving uniformity, either the entire first sentence or parts of it relating to local rules should be deleted, as discussed in item 1 above.)

In the alternative, it is conceivable that one could prescribe "ordinary" packets of discovery (see discussion of pattern discovery in item 5) and direct that there be cost-shifting for discovery beyond that.

In addition, there have been further suggestions, which I carry forward from my memo for the Utah meeting. PLAC has made a specific proposal:

> An amendment to Rule 34(a) requiring the plaintiff to share the cost of identifying, retrieving and reviewing documents in an amount (to be determined by the court) that is consistent with the plaintiff's financial means, thereby providing some incentive for the plaintiff to undertake a cost-benefit analysis of his discovery requests. (PLAC submission at 7)

Several places for such a provision appear possible:

Rule 26(g)(3): This sanction provision could be expanded to authorize the court to impose on the party who has violated the proportionality certification requirements the responding party's costs in responding to the improper request.

Rule 26(b)(1): A provision regarding shifting costs of further discovery might be added here, not in the sense of sanctions but as a condition for further discovery.

Rule 34: A cost shifting provision could be added here, perhaps as a new Rule 34(d).

Rule 37(a)(4): A provision could be added here that on a motion to compel production of documents the court could condition production on payment by the party seeking discovery of some portion of the cost of production.

Alternatively or additionally, Rule 45(c)(1) could serve as a model for an additional provision in Rule 26(g), and Rule 26(c) could be amended to implement these protective features as well.

(b) Core discovery

The concept of "core discovery" continues be have allure, but not seemingly to be the focus of specific proposals different from those considered under other headings. For example, if pattern discovery (item 5) could be developed sufficiently, that might provide a starting point for the core. Perhaps a variant of initial disclosure could form a basis for that, although it seems too case-specific and limited, particularly if only information favorable to the producing party is included. In any event, as a sort of place-holder it seemed worthwhile to include this at this point.

(c) Issue formulation

Shortly before the Utah meeting, the Committee received copies of Judge Keeton's proposals regarding formulation of issues, but there was limited discussion of these. Issue formulation has been an ongoing concern of rulesmakers (and

federal judges in general) for a long time. In some ways, disputes about pleading requirements fifty years ago represented efforts to get issues formulated. Various features of case management are similarly designed to get cases focused, and there is discussion in the Manual for Complex Litigation about the topic.

Under these circumstances, it seems that these topics are more ambitious than those consigned to the Subcommittee for present action. If the Subcommittee could find the magic bullet for issue formulation, it would probably belong in Rule 16, and the implications of such a change might radiate into Rule 56 and elsewhere. Accordingly, no specific proposal is included here.

(d) Rule 26(a)(2)

There was some discussion of this rule from the floor in Utah, but I don't believe we are directed to propose a specific idea yet. By way of background, this was something of the "sleeper" of disclosure in 1991-93 (along with Rule 26(a)(1)(C)). The amendment moved far beyond the prior provisions of the rules (albeit not so far beyond the actual practices in many places) for the rules formerly provided only for an interrogatory seeking general information about the opinions of expert witnesses and no specified discovery thereafter. In most places, however, depositions of expert witnesses became common.

The rule adds a very comprehensive report requirement, and I am not aware of much research on the actual changes in practice that resulted from this added requirement. The rule also says that one has a right to take the deposition of an expert, but only after reading the report, and the framers hoped that depositions of experts would occur less frequently or be shorter. I don't know if anyone can say whether that has happened.

Under these circumstances, I have not tried to draft up anything to change the rule because I'm not sure any changes are in order or what direction they should take. It may be that some discussion of these topics in Santa Barbara would be profitable, and for this reason this item is included here.

(e) Electronic materials

This topic is clearly not part of the Subcommittee's current agenda. Rather, it was referred to the Technology Subcommittee of the Standing Committee. Recently I sent along some thoughts about such issues to Judge Carroll, who is on the Technology Subcommittee. For your information, I attach a copy of my letter to him. The pertinence of these topics to the work of the Subcommittee is only that they may bear on timing questions if there is some reason to await Technology Subcommittee actions or recommendations before undertaking some other actions that are contemplated.

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RICHARD L. MARCUS
Distinguished Professor of Law

Dec. 5, 1997

Hon. John L. Carroll
U.S. Magistrate Judge
P.O. Box 430
Montgomery, Alabama 36101

Dear John:

As promised in response to your email inviting input about the work of the Technology Subcommittee of the Standing Committee, I am writing to send along the materials on electronic discovery that I mentioned and promised to forward after the meeting in Utah but didn't get around to sending, along with some other things. These include:

(1) A packet of materials I got from Lorna Schofield of Debevoise & Plimpton after the Boston Conference. These are mainly copies of articles from a number of sources. (This is what I was referring to in Utah.)

(2) The announcement of the Glasser LegalWorks program on The Essentials of Computer Discovery and Electronic Data Retention Risk Control, which was here in San Francisco on Nov. 21 and should be in New York next Monday. I have heard from John Rabiej that he expects to have the written materials and audiotapes from that conference in the relatively near future (from Greg Joseph of the Section of Litigation, which is a co-sponsor). This announcement was sent to me by George Davidson, who was a panelist on document discovery at the Boston Conference.

(3) Some materials I got at a computer fair here in San Francisco in March that related to various applications of computer products to law practice.

(4) An article from the Nov. 3, 1997 National Law Journal entitled E-Mail is the Hottest Topic in Discovery Disputes.

(5) Paul Niemeyer's letter to Rick Moher of Ontrack Data Recovery, Inc. of May 16, 1997, attaching a copy of Moher's letter to Niemeyer. (One of the things in item 3 above is a packet of information on Ontrack.)

(6) A copy of the treatment of computerized discovery in my Complex Litigation book.

(7) Davis, Copy, Paste, Send . . . Oops? Ethics in the Age of the Internet, Calif. Lawyer, March 1997, at 53.

As should be obvious from the above list, this is anything but a coherent collection of materials. I simply enclose the things that have found their way into my file folder on this subject. I may well enclose more stuff than you currently want, but these materials surely are not a comprehensive treatment of anything. One other place you might want to look is in § 2218 of vol. 8A of Federal Practice & Procedure, which deals with discovery of computerized materials.

Having given you something you didn't ask for, I will try to respond to what you did ask--for suggestions about possible rule changes, particularly to the civil rules. I've given this a little thought and reflection, and will try to offer some initial thoughts. Just to keep him in the loop, I'm sending a copy of this letter to David Levi.

You ask whether there has been more input to the Advisory Committee on the impact of electronic technological developments on discovery besides the comments at the Boston Conference. So far as I can recall, besides what I enclose there has been none. Although I've therefore not been thinking about the topic, I do have some reactions that are a bit off-the-cuff. They may be far too basic for your Technology Subcommittee, but that's because I haven't been thinking about the issues and you folks have. I hope that these thoughts nevertheless prove of some background use.

Basically, it seems to me that there are three somewhat discrete areas of concern: (1) client-created materials, (2) lawyer-created materials designed to assist in preparation of the case, and (3) materials created for use as evidence at trial.

Client materials: In 1981, Judge Becker predicted that "by the year 2000 virtually all data will be stored in some form of computer memory." National Union Electric Corp. v. Matsushita Elec. Indus. Co., 494 F.Supp. 1257, 1262 (E.D. Pa. 1980). Like other information developed by parties to litigation, this computerized information is discoverable if within the scope of discovery.

The basic issues here have to do with document and interrogatory discovery. In 1970 Rule 34 was amended to include electronically-stored material as discoverable on request. It was a cautious addition: "In light of the explosive nature of changes in computer technology and the lack of judicial experience with the problem, the amendment of Rule 34 properly took a cautious approach and left a good deal of the courts to work out on their own." Fed. Prac. & Pro., § 2218 at 450. Whether judicial experience has progressed to the point where rule amendments are in order is not entirely clear. There do seem to be a number of areas that might deserve consideration at the rule-making level.

Cost: The cost issue is a two-edged sword that probably does not call for any rule changes and rather for regulation under Rule 26(c) and pursuant to the instructions of Rule 26(b)(2). To a significant extent, computers are used because they afford a less costly method of obtaining or retrieving information. Thus, although some sorts of searches for computerized materials may be costly (as discussed regarding deleted material and email below), one must recognize at the outset that computerized information may be much less costly to mine than old-fashioned paper records. As the Supreme Court recognized in Openheimer Fund, Inc. v. Sanders, 437 U.S. 340, 362 (1978):

> [A]lthough it may be expensive to retrieve information stored in computers when no program yet exists for the particular job, there is no reason to think that the same information could be extracted any less expensively if the records were kept in less modern forms. Indeed, one might expect the reverse to be true, for otherwise computers would not have gained such widespread use in the storing and handling of information.

In Oppenheimer Fund the Court held that generating a list of class members was not discovery, so that plaintiffs had to pay defendants for the cost of these computer activities. But cost of computerized information retrieval would not seem likely, as a general matter, to justify limitations on discovery. To the contrary, Judge Schwarzer suggests that the availability of computerized retrieval may make discovery that would otherwise be disproportionately costly permissible:

> Discovery that otherwise might be impermissibly burdensome, such as requiring detailed identification of all known documents referring to relevant issues, may not be burdensome if the computerized system is able to generate the identifications. Similarly, the existence of a computerized litigation support system will affect a party's obligation to identify business records produced in lieu of

answering interrogatories.

> A party maintaining a computerized litigation support system may claim that the system will not aid in responding to such detailed discovery sought by an opponent, and that the discovery therefore is unduly burdensome or costly to provide. In this circumstance, the court may require disclosure of the relevant features of the system in camera. It may be, for example, that the computerized system readily will identify documents in narrower or broader categories than those specified in a discovery request and that the party seeking discovery could sue what the computerized system could produce. Inquiry by the court about the capabilities of the system thus may deter stonewalling and may facilitate fair discovery.

W. Schwarzer, L. Pasahow & J. Lewis, Civil Discovery and Mandatory Disclosure: A Guide to Effective Practice 1-23 (2d ed. 1994).

At present it seems that the problem of cost allocation for computerized operations necessary to retrieve requested information is handled as a Rule 26(b)(2) and 26(c) matter. There might be some reason to consider changing that, but given the uncertainty about whether parties with computerized information save money by using computers that looks to me like a dubious proposition.

Information about party's computerized information: As the quotation from Judge Schwarzer suggests, information about the computerized information that a party possesses, and perhaps about how it can be mined, is important. At present the rules provide several avenues for obtaining that information early in the litigation. Rule 26(a)(1)(B) calls for information about "data compilations," but that only applies as to disputed facts alleged with particularity. This topic would seem appropriate for discussion at the initial conference called for by Rule 26(f). Indeed, the Manual for Complex Litigation states that "[a]ny discovery plan must address the relevant issues, such as the search for, location, retrieval, form of production and inspection, preservation, and use at trial of information sorted in mainframe or personal computers or accessible 'online.'" Manual for Complex Litigation (Third) § 21.446. Failing other methods, this would seem an appropriate focus of the court's attention at the initial Rule 16(b) conference.

I am not sure about whether the above provisions are adequate, and reaching that conclusion would probably call for examination of more than the provisions since their actual operation is important as well. For the present, it seems to me worth noting that the above provisions themselves are not written

in concrete and may be changed. Rule 26(a)(1) is clearly on the table for possible change, and Rule 26(f) might be modified as well. In that context, it seems to me that attention to the use of computerized information is important as these other changes are considered. The problem here is really an information deficit: I gather the Technology Subcommittee is trying to get a good feel for the actual operation of the courts on these topics, and believe that information base is important. But while that information base is being built the Civil Rules Advisory Committee will be making decisions about changes in these rules.

Form of discovery and responses: Rule 34(a) says that production of electronically-stored information may involve the provision that information be "translated, if necessary, by the respondent through detection devices into reasonably usable form." When information is stored on a computer, it may be best to provide it in electronic format. The Manual for Complex Litigation says that "[d]iscovery requests may themselves be transmitted in computer-accessible form; interrogatories served on computer disks, for example, could then be answered using the same disk, avoiding the need to retype them." Manual, supra, § 21.446. I'm not aware of any provision in the rules for this one way or the other. Perhaps it could be added to the rules with regard to interrogatories, although some questions of format and computer language might be necessary (unless we all simply succumb to Microsoft). There might also be problems with the requirement in Rule 33 that the answers be "signed," although I suppose we will have to cross that bridge more generally in connection with electronic filing.

The problem of form for providing information has been addressed in caselaw in connection with interrogatories. In the NUE case cited above, Judge Becker held that where defendants submitted interrogatories asking for detailed information about plaintiff's products and pricing and got back over 1,000 pages of detailed numerical information the court could order plaintiffs to provide the same information in computer-readable format so that defendants would not need to retype it to get it into their computers. Although plaintiff said that Rule 34 did not permit the court to order it to "produce" something that did not exist, Judge Becker reasoned that "the only difference between what defendants already have and what they request is that a computer cannot read what NUE has previously produced. That is a mechanical, not a qualitative, difference." 494 F.Supp. at 1260. See also Fautek v. Montgomery Ward & Co., 96 F.R.D. 141 (N.D. Ill. 1982) (in employment discrimination suit, defendant required to supply plaintiffs with relevant code book to permit them to use the computer tape supplied by defendant through discovery).

The question of producing material in computerized format is potentially complicated, however. Consider Judge Schwarzer's

cautions:

> [E]ven if the producing party maintains the equipment and capacity in the ordinary course of business, it is not necessarily obligated to make them available. Though the court has power to require to require a party to use its software and other aids necessary to require a party to make the information intelligible to the requester [citing Rule 34(a) and NUE], whether the court exercises this power may depend on several factors:
>
> (1) Can the requesting party perform the necessary organization and analysis of data equally well without the use of the producing party's equipment and capacity?
>
> (2) Would use of the producing party's equipment and capacity result in substantial savings of time and expense?
>
> (3) Would use of the producing party's equipment to serve the requesting party's needs entail disclosing trade secrets or confidential commercial information?
>
> (4) Can the producing party be adequately compensated for use of its equipment and capacity?
>
> If the court orders use of the producing party's computer, it may be necessary to impose protective conditions. If use by the discovering party of the opponent's computer imposes substantial expense and disrupts the latter's operations, any expense in excess of what may be considered the usual expense of complying with the request for production ordinarily should be charged to the discovering party.

W. Schwarzer, et al, supra, at 6-32 to 6-33.

At the same time, it is worth noting that, with some computerized information, producing hard copy might be a considerably greater burden. Judge Schwarzer outlines the considerations:

> If information maintained on computers also is in readable form--for example, on printouts or microfilm--and the quantity of data is not great, requesting its production in readable form may be economical. Even if the information is not currently stored in readable form, a printout may be desirable if the information can readily be printed and if the quantity is not great. If, however, the quantity is substantial, production in that form may be desirable and

less expensive.

W. Schwarzer, et. al, supra, at 6-31.

I have not given any detailed thought to how or where more explicit or specific treatment of these form-of-response issues might be included in Rules 26-37, but have an initial suspicion that specifics may be difficult to develop and that leaving it to the court to tailor the provisions to the case may be preferable. Again, this inquiry might benefit materially from some sort of empirical or experiential input. It may well be that the courts are doing just fine without any intrusion by the Rules Committee.

Email and deleted material: The hot new topic is email, and caselaw seems just to be developing. As you will see from some of the enclosures, trial court decisions quickly make it into the legal tabloids. The email issue is special in that there has been an explosion of email communication that may have great power as evidence because it often contains spontaneous and unguarded statements. This is a problem for both document requests and interrogatories. It seems to me that the basic problem is a search burden issue that has two components.

One of the components is the deleted material problem. People who use email a lot frequently delete messages, but those messages are not obliterated. All that happens is that the computer can reuse the space on the disk, so the message is still there until it is used for other purposes. So far as I know there is no way to tell when that will happen, although it presumably is more likely as the unused space on the disk is reduced. Searching for things that were "deleted" involves more effort than searching for things that weren't, and you will see from the enclosed materials that there are firms (many of them in Minnesota for some reason) that specialize in providing that service. This sort of issue can exist in lesser form as to other types of information. Whenever one "deletes" a file from a computer it will treat the file like the email message. But if one replaces a file, the computer will usually write over the prior message. Thus, drafts or contracts, etc., may be saved as backups but are less likely to be retrievable even though not listed as current files. Nonetheless, as a search burden matter, the possibility of finding such things exists.

The other component of the problem is that there are a lot of disks around that might contain files called for by discovery requests. Each PC nowadays probably has a hard disk, and floppy disks may exit in profusion. Moreover, many firms have backup tapes that contain material, perhaps in undifferentiated form, which may contain pertinent former versions even after they have been replaced on the computer on which they were first written.

I should say that my grasp of the foregoing is shaky at best, but the bottom line is that there are differences between electronically generated material and other material. Whether these are differences in degree or nature is not absolutely clear to me. Even after a piece of paper is thrown into the trash, for example, one could perhaps find it by rummaging through the dump. That might be seen as similar to the sort of effort involved in finding "deleted" or superseded computer files, and merely a question of degree. On the other hand, the computer files may last forever unless written over, and the number of extant "discarded" files on a party's premises is likely to be much larger than the number of pieces of paper that can still be found.

If one takes this difference to be qualitative rather than merely quantitative, one could perhaps change the rules to reflect that difference. One way would be to declare that any electronic material that has been "deleted" be no longer discoverable. But "discarded" pieces of paper are discoverable even though the person who tried to throw them away doesn't want them discovered. Surely there are cases (particularly in the age of the photocopier) in which documents a party thought were discarded show up and prove crucial. So the wisdom of this proposal could be debated. Moreover, it is not clear whether the search burden we are discussing is so different from others that we routinely countenance that it warrants such a change in the rules.

Another approach might be to try to define the search burden with regard to computerized material more particularly than is presently done. But doing so would be difficult, and it would remain true that a party preparing for a document production would have to look in a lot of places for papers, so why should it be so different for computerized materials?

Preservation: The foregoing points up a related issue, and one which the Advisory Committee has considered from time to time. Most recently in connection with possible amendment of Rule 26(c), the Committee has briefly considered a document retention policy. Some vigorously urge the Committee to adopt one. Given the malleability of computerized information, it presents particularly pressing preservation problems that might be the subject of provisions in the Civil Rules. As the discussion of "deleted" materials shows, in some ways preservation might be said to be less important with computerized materials because they can be found again more frequently. But because changes in documents may be seamless, in other ways (perhaps more pertinent to the Evidence Rules), preservation is more important.

One important problem with preservation orders flows from

what was said above about deleted documents. Because there is no way to know when the computer will use the freed-up space for something new, an extreme preservation rule could preclude use of any computer that might have such material on its disk until that disk had been searched or copied in connection with discovery. That would create huge problems for almost every organizational litigant (and most individual ones). So as the Committee addresses questions of preservation it would probably be a good idea to be alert to the peculiar problems of electronic information.

Refining Rule 33(d): Another idea that occurs to me is to consider the importance of electronic data storage on application of Rule 33(d). On its face, this rule seems designed for just the sort of situation in which computerized data is used. As in the NUE case for example, compiling the number of sets sold and the prices charged is something that a party would do from its records and might say could as easily be done by the other side. If most such records are really computerized and the effort of compiling information is vastly reduced, perhaps Rule 33(d)'s option to produce records should be modified to forbid use of the option for information that can be retrieved by a computer. At least, it might be worthwhile to specify that computerized records should be used or produced whenever available.

Lawyer-created litigation support materials: Lawyers use computers in their business also, and in particular they use litigation support systems to manage documentary and other discovery information. This material should be work product, and may include opinion work product. See United States v. American Tel. & Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980). The opinion work product aspects may result from the selection of the materials to be included or the designation of categories into which these might be included. See Sherman & Kinnard, The Development, Discovery and Use of Computer Support Systems in Achieving Efficiency in Litigation, 79 Colum. L. Rev. 267 (1979). One might specify that shared systems should be preferred despite work product concerns, but the considerably reduced costs of these systems seem to make that unimportant. See Buckosky, Automated Litigation Support: The Issue Now is How (Not When) to Computerize Document Discovery, 30 Law Office Economics and Management 386 (1990). There does not seem to be any other reason to vary Rule 26(b)(3) to take account of these computerized materials.

Use at trial: Different concerns arise if computerized materials are developed for use as evidence. This is not a Civil Rules problem, but is potentially an Evidence Rules problem. I presume that those rules may need to be tailored to computerized simulations, etc., in terms of foundational matters like accuracy and the assumptions underlying the program (including possible

Daubert issues). I am of course entirely out of my element here, but thought I might mention these questions for purposes of completeness. For a discussion of some of these topics, see Joseph, A Simplified Approach to Computer-Generated Evidence and Animations, 156 F.R.D. 327 (1994).

A different use of technology employs it to facilitate, and perhaps to alter, the trial process itself. For example, Judge Robert Parker experimented with extensive use of technology in a trial a few years ago, allowing the lawyers to compile from the videotaped depositions a presentation they said "closely resembled a television documentary or news report." Buxton & Glover, Managing a Big Case Down to Size, 15 Litigation 22, 22 (Summer 1989). They amplified (id. at 23):

> Thus, when the president of one of the defendant railroads testified at trial about a meeting that ultimately led to the formation of the alleged conspiracy, he did so by deposition--but in living color on an eight-foot-square video screen. What the jury saw was the creation of a production studio, and not merely the playback of a tape made in the deposition room. Included with the deposition excerpts on the videotape were narrative summaries of the deposition by one of [plaintiff's] lawyers.

As Judge Parker himself explained, laser disk technology permits instant retrieval of an image of almost anything important in the case; coupled with other computerized techniques it could transform certain trials:

> In addition, expert witnesses can use computer-generated graphics as a powerful means of illustrating the subject matter of the testimony for the jury. Plaintiff's counsel in [the case mentioned above] used such technology to visually construct a spider-web illustration of an alleged antitrust conspiracy, and to cause a pipeline to snake its way from Wyoming to the Gulf Coast before the jury's eyes, thus indelibly imprinting plaintiff's basic theories of recovery on the minds of the jury.

Parker, Streamlining Complex Cases, 10 Rev. Lit. 547, 549 (1991).

For the present, this sort of innovation using technology is presumably being handled on a case-by-case basis, but perhaps it should be addressed in the rules (although I'm not sure what rules).

* * * * *

This is far longer than I intended, and (I fear) quite short on specifics. It should be obvious that I have not to date given

much careful thought to adapting the rules to the realities of the computer age. Perhaps that is largely because I don't know enough about those realities. Indeed, it might be a good idea for the Technology Subcommittee to try (if it hasn't yet) to get some expert input. One source might be the audiotapes and booklet from the conference that is described in item (2) enclosed. Beyond that, it might try to convene a mini-conference with experts (or experienced lawyers). I guess I would be a bit diffident about pursuing the overtures of the outfit that contacted Judge Niemeyer (item 4), for it has a clear economic stake in this sort of thing. But it is probably true that most who are truly knowledgeable also have an economic stake, so that may not matter.

For the present, I hope that this overlong letter proves of some value. If I can be of further assistance (assuming this is some), please don't hesitate to call.

Sincerely,

Richard L. Marcus
Distinguished Professor
of Law

cc: Judge David Levi

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 6 and 7, 1997

NOTE: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on October 6 and 7, 1997, at the Stein Eriksen Lodge, Deer Park, Utah. The meeting was attended by all members of the Committee: Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Judge David S. Doty; Justice Christine M. Durham; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge David F. Levi; Carol J. Hansen Posegate, Esq.; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Chief Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper was present as Reporter, and Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Sol Schreiber, Esq., attended as liaison member from the Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Eduardo C. Robreno attended as liaison member from the Bankruptcy Rules Committee. Leonidas Ralph Mecham, Director of the Administrative Office of the United States Courts attended, as did Administrative Office representatives Peter G. McCabe, John K. Rabiej, Mark J. Shapiro, and Mark Miskovsky. Thomas E. Willging represented the Federal Judicial Center. Observers included Alan Mansfield, Mark Gross, Fred S. Souk, Robert Campbell (American College of Trial Lawyers), Reece Bader (ABA Litigation Section), Beverly Moore, Alfred Cortese, and Nick Pace.

Chairman's Introduction

Judge Niemeyer opened the meeting by welcoming Leonidas Ralph Mecham. He observed that the policy of rotating committee membership serves the good purpose of bringing new perspectives the committee work, but also carries a significant price. The committee has worked on Rule 23 for six years, accumulating much knowledge, and now the time has begun when experienced committee members will leave while Rule 23 remains on the agenda of active items. Carol Posegate is finishing her second three-year term. The committee expressed thanks to Ms. Posegate, who responded that work with the committee has been one of the highlights of her professional career. Sheila Birnbaum was welcomed as a new committee member, with the observation that her regular attendance at committee meetings over a period of several years will serve her and the committee well as she becomes an official member.

Mark Kasanin was appointed to the discovery subcommittee to fill Carol Posegate's place, since the work of the subcommittee is not finished.

The Standing Committee is paying close attention to this committee's work, as to the work of each advisory committee; its

confidence in the committee must continually be earned to be deserved. Congress also is paying close attention to this committee's work; its respect and deference also must be continually earned by careful and responsible behavior.

A proposed amendment to Civil Rule 23(c)(1) and a proposed new Rule 23(f) were taken to the Standing Committee in June with a recommendation that they be advanced to the Judicial Conference to be adopted. Members of the Standing Committee raised concerns about the proposal that Rule 23(c)(1) be amended to require certification "when practicable," replacing the present "as soon as practicable." After some discussion, it was decided that this proposal should remain part of the full package of Rule 23 proposals still being considered by this committee. The proposed permissive interlocutory appeal procedure was approved and transmitted to the Judicial Conference. The proposal has been approved by the Judicial Conference as a consent calendar item, and will be sent on to the Supreme Court.

Judge Niemeyer met with the Judicial Conference Executive Committee before the Judicial Conference session, along with other committee chairs. This committee's agenda was described, with the observation that the committee understands the risks of undertaking controversial topics.

After the Judicial Conference meeting, Judge Niemeyer met with other committee chairs. He urged on them the importance of the national rules, not simply as a convenience for practitioners but as an intrinsically national body of federal law that should remain uniform throughout the country. The Boston discovery conference provided support for national uniformity. The disclosure rule amendments of 1993 effected a breach in the wall of uniformity. Although the permission for local rules departing from the national standard was prudent at the time, the result has been great diversity of practice. It is incumbent on the rulemakers to provide a national rule. Some reservation might be expressed on the ground that not enough time has yet been allowed for experimentation that may show the way to better disclosure practices. But disclosure has been studied by the RAND report on the CJRA, and by the Federal Judicial Center. Local CJRA plan studies also are being made, including detailed studies in the Eastern District of Pennsylvania. District judges should be enlisted in the quest for uniformity.

The report to the Standing Committee described the discovery project. The difficulty of persuading district courts to surrender adherence to local rules was observed. One of the committee chores – as exemplified by the discovery project – will be to get district courts to understand the need to adhere to uniform national procedure.

Judge Niemeyer met with the Long Range Planning Liaison Group. They were interested in creating an ad hoc committee on mass torts.

This topic has been much in the public eye. Judge Hodges, chair of the Long Range Planning Committee, suggested an ad hoc committee. The advantages of consideration by this committee were considered, recognizing that it will be important to coordinate efforts with other committees. Other committees that may be interested include the Federal-State Jurisdiction Committee, the Judicial Panel on Multidistrict Litigation, the Bankruptcy Administration Committee, and perhaps the Court Administration and Case Management Committee. This committee has devoted many years to studying class actions, and in the process has heard much about mass tort actions. The difficulties of responsible change have become apparent, as has the futility of trivial change.

Judge Niemeyer further observed that this committee can no longer think of itself as having a constituency of lawyers, judges, and academics. There is more public scrutiny of court procedure and of the committee's work. The committee and its members must become leaders of a dialogue beyond the confines of the Enabling Act process. Congress is increasingly interested and active, at least as measured by the introduction of bills that would affect procedure. Many members of Congress remain sympathetic to the role of the Enabling Act process, but there also are signs of impatience, arising in part from the deliberately deliberate pace of the process. An illustration is provided by the proposal to amend Rule 23 to provide for permissive interlocutory appeals — although the proposal is now on the way to the Supreme Court, a bill to establish the same appeal procedure remains pending in Congress.

Legislative Report

John Rabiej provided a report on pending legislation. There are 15 or 16 pending bills that directly affect the civil rules. It does not seem likely that action will be taken on any of them this year.

Hearings will be held on HR 903, which includes offer-of-judgment provisions, but the hearings will focus on the arbitration issues in the bill. Last spring a letter was sent to Congress indicating that the rules committees take no position on the merits of the offer-of-judgment provisions, but also noting that after substantial study of Rule 68 this committee concluded that this is a very complicated subject. Some technical problems with the bill also were pointed out. Judge Hornby will testify on the arbitration parts of HR 903 for the Court Administration and Case Management Committee.

Bills dealing with Rule 11 seem to lack momentum.

A question was asked about progress on HR 1512, the current embodiment of longstanding attempts to adopt a minimum-diversity jurisdiction basis for consolidating single-event mass tort litigation in federal courts. It was noted that this topic

requires coordination with the Federal-State Jurisdiction Committee, but that it fits squarely within the mass torts topic that will continue to attract this committee's attention.

The committee noted with appreciation the good help that John Rabiej and the Administrative Office continue to provide in tracking relevant legislation.

Minutes Approved

The Minutes for the May and September committee meetings were approved.

Agenda Items

The Copyright Rules remain an enigma on the agenda. Further consideration of the proposal to rescind these rules is set for the spring agenda. Congress has shown an interest in the topic, reflecting concern that nothing should be done that will make it more difficult to enforce copyrights against pirate and bootleg infringers. Parallel concerns have been identified by those working with the TRIPS portion of the Uruguay round of the GATT agreement. GATT countries are required to provide effective copyright remedies. There is a fear that simple rescission of the Copyright Rules might seem to other countries to belie the United States commitment to vigorous enforcement. These fears will need to be addressed when the topic comes up for consideration. It must be made clear that any action taken will be designed to remove the doubts that now surround the continuing force of Copyright Rules that were adopted under, and refer only to, the 1909 Copyright Act, and that are subject to serious constitutional challenge.

It was observed that the docket of agenda items should not state that the committee "rejected" the proposed amendment of Rule 47(a) that would create a party right to participate in voir dire examination of prospective jurors. Although the committee elected not to pursue the proposal in light of substantial controversy, it did urge the Federal Judicial Center to frame its sessions for new judges to stress the importance of party participation. This has been done. Judge Patrick Higginbotham, the former chair of this committee, has spoken on the topic at several meetings.

Discovery Subcommittee

Introduction. Judge Niemeyer introduced the report of the Discovery Subcommittee by observing that the discovery project aims at three central questions. We hope to find out how expensive discovery is, both in general and in the most expensive cases; to decide whether the cost exceeds the benefits often enough to warrant attempts at remedial action; and if remedies should be sought, whether changes can be made that do not interfere with the full development of information for trial. The undertaking is more likely to focus on the framework of discovery than on attempts to control "abuses."

The Boston conference in September was as good as a conference can be. It was part of a process of generating a "smorgasbord" of ideas. The subcommittee has generated a comprehensive memorandum gathering the wide array of ideas that have been suggested. For this meeting, the objective is to explore the ideas to determine which of them deserve development through specific proposals to be considered at the spring meeting.

Judge Levi and Richard Marcus presented the work of the subcommittee. Judge Levi noted that the smaller January conference in San Francisco and the larger September conference in Boston had been the main work of the subcommittee to date. The purpose of these conferences has been in part to afford the bar an opportunity to take the lead on discovery reform, to advise the committee on what needs to be done and perhaps to suggest more detailed means of doing it.

The first big question is whether to do anything at all about discovery. Discovery seems to be working rather well in general, but there are problem spots. Lawyers are open to change, but doubt whether much can be accomplished. There may be a division between trial lawyers, who believe that real savings can be had in discovery, and litigators, who spend most of their time in preparing for trial and are inclined to doubt whether significant savings are possible. Many lawyers believe that the committee should not "tinker"; changes should be significant. At the same time, it is recognized that desirable technical changes should not be thwarted by fixing them with the "tinkering" label.

The Special Reporter was asked to list all of the many separate suggestions that have been made for discovery changes. The purpose of this list is to preserve the suggestions, not to imply that all of them should be adopted. As a guide to discussion, five central areas have been chosen as most deserving of attention.

The first central problem is uniformity. There is some chagrin among alumni of the 1991-1992 committee deliberations that the 1993 amendments deliberately invited disuniformity. Uniformity was thought desirable by many participants in the Boston conference. But it is not clear how broad or deep is the desire for uniformity. Many at the ABA Litigation Section meeting in Aspen this summer suggested that good local rules can be better than a blandly uniform national rule. The sense of that meeting was that it would be important to know what the national rule would be before deciding whether uniformity is a good thing.

If uniformity is to be pursued, the committee must address disclosure. The original wave of fear seems to be subsiding. It is agreed that all of the information that Rule 26(a) requires to be disclosed could properly be sought by interrogatory. But some lawyers like to have an interrogatory to show to the client to justify the need to reveal the information, and to demonstrate that

the lawyer is not penalizing the client for the lawyer's better understanding of the case. Yet if Rule 26(a) has not been the disaster that some anticipated, no one thinks it has been a major improvement. The studies may show some cost saving — it is too tentative to be sure — but it is clear that nothing terribly significant has happened. And Rule 26(a) will not be much help in the problem discovery cases that are the focus of concern. The complex and contentious cases are likely to be exempted from disclosure in any event.

There may be support to limit disclosure to "your case" information. But it is difficult to know how meaningful it is to ask that each party reveal at the beginning of the litigation, before discovery, what information it plans to introduce at trial.

Another approach to disclosure is to view it as the first step in a staged sequence of managed discovery.

Managed discovery is a third area for study. The central idea is that discovery might proceed in three stages. First would be disclosure, however disclosure may be reshaped. Second would be some level of core discovery, defined to be available to the lawyers without court management. This stage might well include stricter limits on the numbers of interrogatories and depositions than those set by current rules. It also might include time limits on depositions, and even might include some attempt to limit the quantity of document exchange. The third stage would require court management when any party wishes to engage in discovery beyond the core limits. In many ways this would involve a party-selected means of tracking; court management would be provided at the request of any party coming up against the limits of core discovery. This managed discovery system could be viewed together with Judge Keeton's proposal, including changes in Rule 16, using the whole pleading-discovery-pretrial conference process to get a better definition of the issues.

The managed discovery approach is consistent with the frequent observations that discovery works well in most cases. It would mean that for most cases, the parties would be left alone to manage the litigation without need for judicial involvement.

Core discovery rules could be drafted to include a clear and firm cutoff on the time for discovery.

Pattern discovery also should be considered. It seems to have support from both plaintiffs and defendants. The project would be to develop pattern discovery requests for each of several distinctive subject-matter areas. The pattern requests would be agreed upon by working committees that include experienced lawyers from all sides of litigation in the particular subject area.

A fourth area of inquiry is the basic scope of discovery. The American College of Trial Lawyers has long supported the 1977 proposal to narrow the scope of discovery defined by Rule 26(b)(1).

There is a related view that the major problem of discovery arises with document production, and that the scope of discovery should be narrowed only for document discovery.

The fifth major area of inquiry is document production. This seems to be the area of greatest concern. No specific proposal is ripe for discussion.

Document production involves particular questions about privilege. There seems to be a consensus that there is a problem with the effort required to protect against inadvertent waiver. There also may be difficulties arising in courts that disregard the terms of Rule 26(b)(5) and insist on privilege logs that both impose excessive burdens and threaten to reveal the very privileged information to be protected. It has been suggested that it works to provide for informal review of potentially privileged documents by the demanding party under a protective rule that this mode of disclosure does not waive privilege. The demanding party then specifies any of the examined documents that it wants to have produced, opening the way to formal assertion and litigation of the privilege claim. Apart from this privilege problem, there are continuing problems with the sheer volume of documents that may be relevant to a discovery demand. The problem of volume is exacerbated when the production demand is addressed to a multinational enterprise that has documents, often in many different languages, scattered around the globe. And the problem of volume may be further exacerbated by electronic storage and erasing techniques that may complicate determination of what "documents" a party actually "has." Information that has been erased often remains available upon sophisticated inquiry.

Beyond these five major areas, many other worthy suggestions were grouped into a "B" list of second-level priority. The most important idea on the list is the firm trial date, an item relegated to this list only because it is not a discovery matter, even though it is closely related to discovery cutoff issues.

There also is a "C" list of technical changes that need not be reviewed at this meeting.

Professor Marcus extended the introduction. The inquiry has followed an interactive process up to now. The subcommittee has been in a receptor mode. The time has come to switch to an action mode. Yet the subcommittee will remain open to receive further information. The Federal Judicial Center continues to analyze the data from the discovery survey it did at the subcommittee's request, and the several bar groups that participated in the Boston Conference have been invited to continue to provide further ideas.

The five items on the A list include three "bullet" items: uniformity; initial disclosure; and the scope of discovery.

"Tinkering" is in order if the committee decides to make one or more significant changes. Once the amendment process is

launched, it is appropriate to act as well on any technical changes that have accumulated and that deserve attention.

There are two main themes that underlie these separate questions: Should the committee seek only to tinker, or should it seek global changes in discovery? And should the change process be launched now, or is it better to wait, recognizing that there have been many discovery rules changes over the last quarter-century?

There are other thematic questions as well. Uniformity creates tensions, not only with the desire for local autonomy but also with the more general managerial view that it is better to leave individual judges free to manage litigation as best they can. The experience with "high discovery" cases may suggest that the committee should turn back the clock on activities that the 1983 and 1993 changes require in all cases. And the consideration of "core" discovery proposals might move beyond limits on the number and extent of discovery requests that can be initiated without judicial involvement to describe what the requests can demand.

Judge Niemeyer stated that the subcommittee had done a splendid job. The committee should start with its recommendations. Although attention can properly focus initially on the major areas of inquiry identified by the subcommittee, the items on the B list should not be removed from the agenda. As the process continues, it may prove desirable to move some B-list items up for active discussion and adoption.

General discussion began with the observation that this list of topics for consideration is not a definitive proposal. There has not been time, nor committee discussion, to support a narrow focus. The purpose of the current report is to open the question whether the time has come to do anything with the discovery rules, and to begin to identify the areas that seem best to deserve more concrete proposals.

Uniformity: Disclosure. The need for uniformity was identified as a central issue. The view was expressed that there is no pressing need for uniformity. Lawyers have learned to live with their present situations. Frequent change of the rules is not desirable, not even when the object is to establish national uniformity.

It was asked whether uniformity is important even apart from whatever difficulties or frustrations may — or may not — face lawyers who move among different disclosure regimes. How important is it that there be a nationally uniform practice in all areas governed by national rules adopted under the Enabling Act? And there also is a need to serve the courts' interest in good policy, in having an effective procedure even if it makes lawyers unhappy. And the committee must recognize that it will be difficult to achieve much consensus among the bar on this topic, perhaps even as support for doing nothing.

It was urged that "we need to bring these horses back into the

barn." The flirtation with local practice can intoxicate, and it will be increasingly difficult to restore uniformity. If uniformity is to be restored, the committee should move quickly.

Of course a decision to pursue uniformity in disclosure practice will entail determination of what the uniform practice should be. We cannot pursue uniformity in the abstract. If the only uniform rule that can be pursued successfully through the full Enabling Act process is one that uniformly abandons disclosure, or uniformly narrows disclosure, is uniformity worth the price? Before deciding whether uniformity is the most important goal, the committee must decide what disclosure rule would be best.

One sense of the importance of uniformity is that Congress was anxious in 1988 to move away from divergent local rules and practices. The Standing Committee local rules project has sought for many years to cabin diversity in practice arising from local rules. If the committee cannot successfully pursue uniformity, there is a prospect that Congress will. For that matter, Rule 26(a)(1) was proposed as a uniform rule. The local option was added from concern for the variety of practice that had emerged from Civil Justice Expense and Delay Reduction plans, some of it stimulated by the disclosure rule the committee had published for comment in 1991. In addition, there was substantial opposition to any disclosure rule; the opposition was so substantial that for a while the committee thought it should abandon disclosure.

An alternative to amending the national discovery and disclosure rules is to explore the opportunities for offering advice through the Manual for Complex Litigation. The Third Edition of the Manual contains many suggestions for regulating discovery practice similar to those offered to the committee. The subcommittee plans to study the Manual both as a source of ideas and as an alternative to further revision of the discovery rules.

A related opportunity is to expand the use of magistrate judges. The RAND study found that hands-on discovery management is important, and that litigant satisfaction increases when a magistrate judge is available to resolve discovery disputes. There are many very good magistrate judges, and there are many competing demands for their time. In some districts, magistrate judges are "on the wheel" for trial assignments. They do not view themselves, and their courts do not use them, primarily as discovery managers. Discovery management in a complex case, moreover, often goes to the heart of the dispute. The most important contribution a district judge can make may be to assume responsibility for managing discovery in litigation that will come to her for trial.

It was concluded that the subcommittee should bring back to the committee proposals to abandon all disclosure, to require uniform national adherence to the present rule, and to adopt the best identifiable modification of the present disclosure rules that might be adopted as a uniform national practice. It is hoped that

information about the effects of present practice will continue to accumulate while the subcommittee and committee continue to study the issue.

Core discovery. Turning to core discovery, the first question raised was whether there is any need to tighten further the limits on the number of discovery events. The reality of discovery practice is not what might seem from talking with lawyers who pursue high-stakes and complex litigation in the major metropolitan centers. The reality is the small and medium case. In these cases, every study and much experience suggests that discovery is working well. And it seems likely that there is nothing the formal rules can do about the cases that now present problems. The rules provide ample power to control discovery; what is needed is actual use of the power.

The response was that there is no intention to affect discovery as it is practiced in most cases. All of the proposed limits on lawyer-managed discovery would permit discovery without judicial involvement at levels that include the vast majority of cases under actual present practice. Of course that leads to the question of identifying the cases in which the limits will be helpful, since it is highly probable that judicial management will be required in bigger cases under any likely variation of present rules.

The hope is to create a mechanism that develops a plan — a track — for the now-routine cases. These cases might proceed even more freely, more frequently, than under present practices. At the same time, limits that cannot be exceeded without judicial involvement create a system that makes it impossible for reluctant judges to avoid the obligation of involvement. All the studies show little or no discovery in most cases; this is true even of the Federal Judicial Center survey, which was designed to exclude categories of cases in which there is likely to be no discovery. The object is to identify a threshold that will require the court to become involved. And even that threshold can be made subject to party stipulations that allow discovery beyond the core limits when the parties are able to manage discovery without any need for further judicial involvement.

As an alternative, it might be possible to put aside the "core" discovery theory in favor of a system that allows any party to demand formulation of a discovery plan. This system would have the same advantage in requiring judicial involvement when the parties are unable to agree, without the need for elaborate changes in present discovery rules.

The opportunity for judicial involvement is amply provided by present Rule 16. No more may be needed than a mechanism that prompts actual use of Rule 16 powers. And Rule 26(f) conferences provide the framework for stimulating judicial involvement. Perhaps nothing more is needed. These observations were challenged

by the suggestion that both the Rule 26(d) moratorium and the Rule 26(f) conference might be abolished for core discovery cases, and also by the observation that many lawyers are reluctant to approach a judge with a demand for judicial supervision.

The Rule 16(b) scheduling order requirement was discussed as part of this package. One judge observed that despite the language of Rules 16(b) and 26(f), he enters a scheduling order at the beginning of each lawsuit. Many cases involve out-of-town attorneys, making it costly and difficult to arrange conferences. Once a conditional scheduling order is entered, any problems are brought to the judge. But many cases do not require any action by the judge. Rule 26(f) accounts for much of the ability of lawyers to manage discovery without judicial involvement; it is the best part of the 1993 amendments. Others observed that such practices probably are common, and certainly have been followed by several committee members. In some courts, indeed, personnel from the clerk's office manage status calls. One approach would be to make these practices more explicit in the rules, going beyond the direct tie between Rules 16(b) and 26(f).

This discussion concluded with the suggestion that there is substantial support for the Rule 26(f) conference as it now stands, but that it may not be necessary to have the parties report to the court when they do not want judicial help.

It was suggested that if disclosure is retained, it could serve the role of core discovery. All discovery beyond that would require a plan, approved by the court unless the parties could agree.

Another suggestion was that the plaintiff could be required to file specified interrogatories with the complaint, with a like obligation on the defendant to file interrogatories with the answer. The questions would be limited to core discovery. Interrogatory answers would be stayed if there were a motion to dismiss. Many federal cases involve small claims. These routine interrogatories could save six months of discovery. The Rule 33 limits on numbers of interrogatories are a good thing.

A variation is provided by form interrogatories. California state practice includes three different sets of form interrogatories that ordinarily can be used in matching cases without fear that they will be held objectionable.

Judge Keeton has advanced a proposal to address the loose fit between notice pleading and discovery that also deserves attention.

The question of limitations on depositions, and particularly of duration limitations, came next. It was reported that in the Agent Orange litigation, there were 200 depositions conducted under a ruling that permission must be sought to extend any deposition beyond one day. To make this feasible, the deposing party was required to send the deponent all documents relevant to a

deposition before the deposition was taken, so that the deponent could study the documents before hand. Under this system, 168 depositions were conducted in one day each. Most of the remaining depositions were conducted in two days; only a few required three days.

It was urged that some limit on deposition length is better than any further limit on numbers of depositions because it is difficult to plan the number of depositions at the beginning of an action. Even though number limits would be only presumptive, and any limits adopted under a case-specific plan also could be modified, the number of depositions may not be the best means of triggering judicial involvement. But it was urged in response that a more persuasive showing of need for discovery beyond the limits can be made after the limits have been reached and the need can be specifically identified.

A related question was whether a core discovery system would reduce the opportunities for judicial involvement now available so long as discovery remained within the core perimeters. In the same vein, it was asked whether there is any point in changing the present number of permitted interrogatories and depositions, if the goal of changing the numbers is to trigger judicial involvement, and there is little difficulty now with discovery in cases that fall within present limits. Present limits work. 85% of the cases go through the system without difficulty. The Rule 26(f) conference is a good thing; if you cannot afford the time for a simple meeting, you should not take your case to federal court.

Further in the same vein, it was suggested that the discussion of judicial management was moving the committee's focus away from the main point. There is no need for judicial management in the core case. It is the big case that needs it. There is not much need to worry whether there should be 25, or 20, or 15 interrogatories in a normal case. The problem is focusing discovery on the issues that may be dispositive in the big case. But it was suggested in return that there should be some form of judicial involvement — even if only through the clerk's office — in every case. A great majority of cases can be handled by some other court officer without a judge, although it is better to have a judge when that is possible. We should do nothing that might discourage judicial involvement.

This discussion led on to the observation that judicial management can be simple. It can be done on paper, by telephone, or by a courtroom deputy. The need is to ensure uniformly high quality and timely judicial management in cases that involve a potential for over-discovery. The key issue is what should command court time.

Given present limits on the numbers of depositions and interrogatories, and given Rule 26(f) conferences and Rule 16(b) scheduling orders, it was suggested that the remaining targets of

stated discovery limits may be the duration of depositions and the quantity of document discovery. Rather than focus on the length of each individual deposition, it may work better to allocate a total number of deposition hours to each side, to be allocated among as many depositions as will fit. To be sure, lawyers operating under such rules have reported difficulties in allocating the time consumed by each party. But information will be gathered on actual experience under such systems. The subcommittee will frame proposals addressing both deposition length and quantity limits on document production.

It also was suggested that the subcommittee could look at Lord Wolfe's report in England. It includes provisions requiring a party to pay some of the costs of discovery beyond stated limits, a limited form of costshifting.

Discovery cutoff. The RAND report reflected substantial confidence that a combination of early judicial management with earlier discovery cut-offs and firm trial dates can reduce expense and delay without adverse impact. This topic clearly demands attention.

As attractive as early-set and relatively short discovery cutoffs may seem, there are substantial difficulties in attempting to set a uniform period in a national rule.

One difficulty is that cutoffs work only if discovery works. If one party deliberately delays, the discovery period may expire without allowing opportunity for necessary discovery. Many lawyers will say off the record that the famed "rocket docket" in the Eastern District of Virginia is administered in ways that defeat proper discovery in a significant number of cases; obstreperous lawyers are allowed to take advantage of the system by deliberate delay.

Another difficulty is that early discovery cutoffs make sense only if they are combined with reasonably proximate and firm trial dates. Completion of discovery should leave the lawyers ready for summary judgment motions, and then for trial. If these events cannot both be scheduled promptly, there is much waste and little advantage in the early cutoff. To the contrary, the early cutoff may force the parties into discovery that otherwise would not be undertaken at all. Individual case scheduling orders now can effect workable discovery cutoffs in relation to realistic trial dates. But a fictitious trial date, set in a uniform national rule, cannot do this. The circumstances confronting different districts vary widely. Any trial date set to conform to a uniform national requirement would be unrealistic in many districts.

In defense of possible uniform national time limits for discovery and trial dates, it was urged that the limits would exert pressure on judges to become involved in individual cases to set alternative and realistic dates. As with the proposed core

discovery limits, the purpose would be to force judicial action, not to set limits that really can be met in most courts for most cases.

Thomas Willging noted that the RAND findings should be kept in perspective. RAND found that 95% of the variation in cost and delay is driven by factors independent of judicial management. There is only a limited amount of room for addressing the remaining 5% by improved judicial management. The Federal Judicial Center has continued to analyze the data in its discovery study. It has undertaken multivariate regression analyses of many procedures, including discovery cutoffs, meet-and-confer requirements, and other devices. No relationship could be found between any of these devices and cost or delay.

A motion was made to stop further consideration of discovery cutoffs, on the ground that Rules 16(b) and 26(f) provide ample and better means of addressing cutoffs. Differences in the docket burdens of different districts are alone enough to make a national rule unworkable.

Discussion of the motion noted that discovery cutoffs involve more than discovery alone. Unless there is an integrated plan, there is no point in hurry-up-and-wait. Increasing specificity in a national rule is not the answer.

In response, it was repeated that a national rule stating the need to "march along" with a case will serve as a default mechanism that forces recalcitrant judges to pay attention to the needs of cases that do require individual attention. A reply to this argument was that it is rare to find that attorneys are ready for trial, but not the judge.

The committee decided to defer action on the motion to terminate consideration of discovery cutoffs. It was recognized that many observers are keenly interested in discovery cut-offs, and that the subcommittee should explore further the possibility of creating a workable national rule. A close look should be taken, even if it proves impossible to do anything constructive. The subcommittee and the committee should explore all possibilities before giving up on this possible opportunity. But Judge Levi stated that the discovery subcommittee will not look at specific cutoff times.

Pattern Discovery. Pattern discovery might be pursued by developing protocols for acceptable discovery in particular subject-matter areas. Or general sets of interrogatories might be developed, consulting California practice, that are useful for many different types of litigation. Several bar groups and commentators have expressed support for some effort along these lines.

The California practice was described as involving sets of general interrogatories. A party can simply choose from among interrogatories in a set. It is generally accepted that these

interrogatories are proper, and they are routinely used and answered. Further inquiries will be made into the nature of the California practice, the frequency of use, and the level of satisfaction with the results.

Grave doubts were expressed about the need for the committee to become bogged down in the enterprise of drafting form interrogatories. The system works well on its own. There is no lack of forms to be consulted by those who wish.

It was agreed that the subcommittee would further study the prospects of developing some system of discovery forms.

Rules 16(b), 26(d), 26(f). Discussion turned briefly to the interplay among Rules 16(b), 26(d), and 26(f). It was agreed that the subcommittee should consider the desirability of revising Rule 16(b) to clearly authorize entry of a conditional scheduling order before the Rule 26(f) conference. The Rule 26(d) discovery moratorium will be considered in conjunction with the review of disclosure. To the extent that Rule 26(f) ties to Rule 26(d), it will be implicated as well. But there was no sense of dissatisfaction with the general working of Rule 26(f); earlier discussion suggested that it may be among the most successful features of the 1993 amendments.

Scope of discovery. The American College of Trial Lawyers has renewed the suggestion that the Rule 26(b)(1) scope of discovery be narrowed to focus on claims (or issues) framed by the pleadings. The weight of this suggestion figured centrally in the decision to undertake the present discovery project. The specific proposal was first advanced by the American Bar Association Litigation Section in 1977, and was promptly taken up and published for comment by this committee in the form now advanced by the American College. The proposal was abandoned after publication. It has been considered repeatedly by this committee over the years, but never again has advanced as far as publication. Current discussion of the proposal has gone further, suggesting revision of the final (b)(1) provision that the information sought need not be admissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

This proposal has been much argued over the years. The committee agreed that there is little need for additional work by the subcommittee in preparation for the spring meeting. The subject will be discussed at the spring meeting. But the subcommittee should draft alternative proposals to modify the (b)(1) provision allowing discovery of information reasonably calculated to lead to the discovery of admissible evidence.

Documents. Document discovery is more a category of problems than a single proposal. It includes privilege waiver problems. It also includes costshifting, although costshifting can be studied for all discovery devices. Former Rule 26(f), governing "conference[s] on

the subject of discovery," provided that the court should enter an order "determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action." This provision seems not to have had any general impact on the practice of leaving discovery costs where they lie.

It was suggested that document discovery works well in ordinary federal cases. If change is needed for anything, it is only for the "big" cases.

It was asked whether it is possible to limit the volume of document discovery in any way analogous to the present limits on numbers of interrogatories and depositions.

A recurring suggestion has been that the scope of discovery could be narrowed for documents production, but not for other modes of discovery. The American College proposal, for example, could be adopted only as part of Rule 34. Robert Campbell stated that document production problems may be a dominant part of the concern underlying the proposal. But it was suggested that it may be difficult to implement rules that apply different tests for the scope of discovery to different discovery devices.

Notice was taken of the pre-1970 practice that required a court order on showing good cause for document production. The thought was ventured that if disclosure remains in the rules, good cause might be required for production of documents outside those disclosed. But all agreed that it would be a step backward to require a court order for document production. The pre-1970 practice should not be revived.

Costshifting was recognized as a very complex problem. Any adoption of costshifting could easily have unintended consequences. But it is good to be able to condition discovery on payment of the costs by the inquiring party — this practice is authorized now by Rules 26(b)(2) and (c). Costshifting in general should remain open for further discussion, but the subcommittee should be responsible now only for drafting changes in (b)(2) to refer explicitly to the possibility of conditioning discovery on payment of the costs.

Privilege problems arise predominantly from the fear of inadvertent waiver by document production. It seems to be common, among parties of good will, to stipulate that production be made under a protective order providing that production does not waive privileges. It is uncertain, however, whether such orders protect against waiver as to nonparties; general opinion suggests that there is no sure protection against nonparties. Absent a stipulated protective order, the burden of screening to protect privileges is greatly enhanced and, in a "big documents" case, can impose untoward costs. This problem could be much reduced by a rule providing a procedure for preliminary examination of documents by the requesting party without waiver. The requesting party then would demand formal production of the documents actually desired,

focusing the producing party's privilege review and paving the way for direct contest on whatever documents are thought privileged.

Questions were raised as to Enabling Act authority to act with respect to privileges. The Evidence Rules Committee should be consulted on any proposal that might emerge. Any rule that creates, abolishes, or modifies a privilege can take effect only if approved by Congress, 28 U.S.C. § 2074(b). Even if this committee and the other bodies charged with Enabling Act responsibilities conclude that a no-waiver rule that simply governs the effects of federal discovery practice does not modify a privilege, it would be important to state that conclusion and offer it for examination both by the Supreme Court and by Congress. And there may be some question whether "Erie" and Enabling Act concerns should deter action with respect to state-created privileges — and state law governs most privileges. If state law forces waiver by any disclosure, even under a case-specific protective order or under a general procedure rule, does a no-waiver rule enlarge a state-created substantive right?

It was noted that there is some federal law on waiver, including waiver arising from public filings.

Experience often shows that overbroad assertions of privilege can be greatly reduced by scheduling a privilege hearing. Most of the assertions are abandoned before the hearing. But this approach does not alleviate the fear of inadvertent waiver by producing, rather than over-aggressive privilege assertions.

It was generally agreed that case-specific protective orders are a good device, and that a general procedure rule would be a better thing. The subcommittee is to consider these questions further.

Privilege log practice also has been identified as a potential problem. The suggestion is that some courts go beyond the limits of Rule 26(b)(5), demanding specific information about withheld documents that not only imposes undue burdens but that threatens to compel disclosure of the very information protected by the privilege. Some courts have exacerbated the problem by insisting on tight time schedules that cannot be met, and then finding waiver as a sanction for failure to timely produce the privilege log.

The question is whether anything should be done to amend (b)(5) to force all courts to honor its present meaning. One suggestion was that The Manual For Complex Litigation prescribes a good procedure that is easy to follow, and that the real problem is that many judges are too lenient, failing to demand even the level of detail required by (b)(5).

Another suggestion was that an effective protection against inadvertent waiver would greatly reduce the problems of compiling privilege logs. Privilege disputes would be much narrower and better focused. When lawyers are unable to stipulate to protective

orders now, on the other hand, the privilege log can be a serious burden in the big documents case.

Further discussion reflected substantial uncertainty as to the dimensions of any privilege log problems that may exist. It was suggested that the 1993 Committee Note to Rule 26(b)(5) might be amplified, but the committee concluded that it continues to be inappropriate to attempt to modify a former Note when no action is taken on the underlying rule. In addition, it was concluded that the 1993 Note is all that could be asked. If there is a problem, it is not because of inadequacies in the Rule or the Note.

The committee concluded to suspend further consideration of the privilege log issues. The topic will be revived if additional information suggests the need for further action.

Failure to produce. Several participants in the Boston conference suggested that serious problems remain in failures to produce information properly demanded by discovery requests. The problem is not with the present rules but with failure to honor them. The question is whether there is anything to be done to enhance compliance. One suggestion has been that represented clients, as well as their lawyers, should certify the completeness and honesty of discovery responses under Rule 26(g). Another possibility is to generate still more sanctions.

It was asked why there is an asymmetry in the operation of sanctions. Rule 37(c) imposes sanctions directly for failure to make disclosure. The balance of Rule 37 imposes sanctions for failure to respond to discovery requests only if there is a motion to compel compliance, an order to comply, and disobedience to the order. Complete failure by a party to respond also can be reached under Rule 37(d).

The practical problem was identified as arising from the fact that the failures of discovery become apparent close to trial, or at trial. The disputes that arise then tend to make discovery the issue, not the merits. And "huge" fines are imposed. On the other hand, some cases deny sanctions because the demanding party waited too long to move.

Brief note also was made of the complaint that some lawyers seek to set deliberate "sanctions traps" by demanding production of documents they already have obtained by other means, hoping that the responding party will fail to produce them. Failure to produce even marginally relevant documents is then made the basis for sanctions requests and attempts to show the responding party in an unfavorable light.

These questions were put on hold. The subcommittee need not prepare more specific proposals to deal with failures to produce, nor to require party certification of discovery responses.

Rule 26(c). The committee twice published proposals to amend Rule

26(c) to specify procedures for modifying or vacating protective orders. Further action was postponed for consideration as part of this more general discovery project. Congress has been interested in the possibility that protective orders may defeat public knowledge of products of circumstances that threaten the public health or safety, and some in Congress fear that the committee has been considering these problems for too long without acting. The second published proposal also stirred concerns by expressly recognizing the widespread practice of stipulating to protective orders.

It was noted that protective orders relate to the broader problems of sealing court records and closing court proceedings. The Committee once considered a partial draft "Rule 77.1" that sketched some of the issues that must be addressed if these problems are to be covered by a rule of procedure.

It also was noted that practicing lawyers do not find any problems in Rule 26(c) as it stands.

Rule 26(c) will remain on the committee docket, but the subcommittee will not be responsible for considering this topic.

Document preservation. The committee has, but has never considered, a draft Rule 5(d) prepared to require preservation of discovery responses that are not filed with the court. It would be possible to consider a rule that prohibits destruction of discovery materials after litigation is commenced but before discovery is demanded. A beginning has been made in the Private Securities Litigation Reform Act of 1995. Special difficulties would arise with respect to electronic files. Present action does not seem warranted. The subcommittee need not prepare proposals on this topic.

Electronic Information Discovery. The Boston Conference sketched the problems that are beginning to emerge with discovery of information preserved in electronic form. These problems will evolve rapidly. Capturing solutions in rules will be particularly difficult as the pace of technology outdistances the pace of the rulemaking process. The committee must keep in touch with these problems, but it is too early for the subcommittee to attempt to find solutions. The technology subcommittee will be considering these and related problems; many of the problems will need to be explored through the Standing Committee's technology committee in conjunction with all of the several advisory committees.

Masters. The use of discovery masters was encouraged by some participants at the Boston conference. "Everybody is doing it, but Rule 53 does not address it." It was agreed that the role of special masters involves too many issues in addition to discovery issues to be part of the present discovery project. The committee has held a detailed redraft of Rule 53 in abeyance since 1994. The subcommittee need not address the matter further.

Objecting statement of withheld information. It has been suggested that a party who objects to a discovery demand be required to state whether available information is being withheld because of the objection. The underlying problem is that a party may object, force the demanding party through the work of getting an order to compel, and then reveal that there is no information available. The lack of information is not revealed even during the premotion conference. The difficulty with requiring a statement whether available information is being withheld is that the purpose of the objection may be to forestall the burden of finding out whether responsive information is available. It would be necessary to allow a statement that the party does not know without further inquiry whether responsive information is available, that further inquiry is possible, and that it is unwilling to undertake the inquiry before the objection is resolved.

Members of the committee observed that their practice is consistent with this suggestion. If they know that they have no responsive information, they say so at the time of objecting. If they do not know, they state that no search will be made until the objection is resolved.

The most aggravated form of this possible problem may arise when a party makes pro forma objections to all discovery demands, but also responds in terms that leave the inquiring party uncertain whether the responses are complete.

The dimensions of this possible problem remain uncertain. The costs of dealing with it are equally uncertain. For the moment, at least, the subcommittee will not be responsible for formulating a specific proposal.

Firm trial date. The committee turned to the "B" list of discovery subcommittee proposals.

The first of these proposals is that the national rules require early designation of a firm trial date in all actions. It was agreed that a firm trial date is a very good thing. Some courts are able to set firm trial dates, and the results are good. But there are great difficulties in requiring this practice by uniform national rule, recognizing the wide variations in docket conditions in different districts. The committee needs to choose between a national rule and recommending that these matters be handled by the Court Administration and Case Management Committee and the Federal Judicial Center as a judicial management problem. This choice can be made at the spring meeting without requiring further work by the discovery subcommittee.

Notice pleading. It was suggested that the vague notice pleadings authorized by Rule 8 are hopelessly at odds with the need to define and refine the issues for trial. Although disclosure may be used to amplify the pleadings without undoing the "great 1938 design," the role it will play depends on how disclosure practice evolves in

conjunction with Rule 26(f) conferences and on further consideration of the disclosure rules. One approach would be to expand and emphasize the court's authority to order more definite statements of the issues after the initial pleadings. Although courts may order clear formulation of the issues under present Rule 16, perhaps more should be done. The subcommittee was not given any directions on this topic.

Other. It was observed that sets of interrogatories often are prefaced by elaborate definitions and instructions on how to answer. The practicing members of the committee all responded that they ignore these prefaces, choosing to answer the interrogatories as they actually are written.

Questions have been raised about the need to have a treating physician prepare an expert testimony report for disclosure under Rule 26(a)(2). The Rule is clear that such reports are not required, and the Note reinforces this conclusion. There is no need to make these provisions even more clear; if some courts misapprehend the clear rule, there is little to be done apart from pointing the judge to the clear language.

Rule 26(a)(2) does present a possible problem, however, because of the double expense that arises from requiring disclosure of an expert report, followed by deposition of the expert. Experts are being deposed after the reports. It is not clear whether this expense is justified. This topic will remain open to further consideration, but without directions for further work by the subcommittee.

The "C List" of technical discovery rule changes was left in the hands of the subcommittee for further consideration.

The discovery subcommittee is to prepare proposed rule amendments for consideration by the committee in the spring, including alternative formulations where that seems appropriate.

Rule 6(b)

The Supreme Court has sent to Congress a proposed amendment of Civil Rule 73, and proposed abrogation of Rules 74, 75, and 76. These changes reflect repeal of the statute that for some years permitted parties who agree to trial before a magistrate judge to agree also that any appeal will go to the district court, to be followed by the opportunity for permissive appeal to the court of appeals. During this process, Rule 6(b) was overlooked. Rule 6(b) prohibits extension of specified time periods, including the Rule 74(a) appeal time periods. The committee agreed that Rule 6(b) should be amended to conform to the impending abrogation of Rule 74(a). The amendment will be recommended to the Standing Committee, to be sent forward in the process when there is a suitable package of items to accompany it.

Attorney Conduct Rules

Professor Coquillette, as Reporter of the Standing Committee, described for the committee the Standing Committee's work on attorney conduct rules. Much of the work is gathered in a September, 1997 volume of Working Papers, "Special Studies of Federal Rules Governing Attorney Conduct." The Standing Committee has taken the lead on this project because it cuts across several sets of rules, and because it involves the work of the Standing Committee's Local Rules project.

The many inconsistent approaches taken by local rules to regulating attorney conduct have become a special focus of the broader local rules project. At the Standing Committee's request, Professor Coquillette has drafted a set of uniform rules to be adopted by every district court, focusing on the particular problems of attorney conduct that commonly arise and directly affect the district courts. Apart from these specific problems, the rules will adopt the rules of the state in which the district court sits (a choice-of-law provision is included for the courts of appeals). The Standing Committee will consider the draft at its January meeting. After Standing Committee approval, the matter will go to the relevant advisory committees.

The most likely form for implementing this project will be amendment of Civil Rule 83, Appellate Rule 46, and the Bankruptcy Rules. The courts of appeals do not encounter these problems frequently, making incorporation into the Appellate Rules an uncontroversial matter. The Bankruptcy courts, on the other hand, encounter many problems, particularly those involving conflicts of interest, and care a lot about the answers. They operate under the Bankruptcy Code, and are likely to want a special set of rules for bankruptcy.

It was suggested that it might be desirable to use the district court rules as the foundation for the bankruptcy court rules, with such supplemental rules as may be desirable.

Professor Coquillette said that the draft rules would not require a separate federal enforcement system in each district. The matters covered by the specifically federal rules will involve matters that can be directly enforced by the court. He also said that work is still being done on the problem of lawyers not admitted to practice in the district court's state.

Admiralty Rules B, C, E

Mark Kasanin introduced discussion of the proposed amendments to Admiralty Rules B, C, and E. He noted that these proposals began several years ago with the Maritime Law Association and the Department of Justice. Much of the work has been done by Robert J. Zapf, who attended this meeting as representative of the Maritime Law Association, and Philip Berns of the Department of Justice, who also attended this meeting. The Admiralty Rules subcommittee has worked with them, refining the drafts to remove most points of

possible dispute.

Many of the proposed changes reflect changes in statutes or in Civil Rules that are explicitly incorporated in the Admiralty Rules. Styling changes also have been made, and are so extensive that it is not helpful to set out the changes in the traditional overstrike and underscore manner.

Perhaps the most important changes have been separation of forfeiture and admiralty in rem procedures in Rule C(6), and deletion of the confusing "claim" terminology from Rule C(6).

Philip Berns introduced the history of the changes, noting that the roots of this project began back in 1985 or 1986 with the need to relieve marshals of the requirement of serving process in all maritime attachments. Attachment of a vessel or property on board a vessel still demands a marshal, a person with a gun, because these situations can be sensitive and potentially fractious. The service requirements in fact were changed in Rule C(3), but for some unknown reason parallel changes were not made in Rule B(1).

Another need to amend the rules arises from the great growth of forfeiture proceedings. Forfeiture procedure has adopted the maritime in rem procedure of Rule C. But the admiralty procedure for asserting claims against property is not well suited to forfeiture proceedings. In addition, there is a greater need to move rapidly in admiralty in rem proceedings, so as to free maritime property for continued use.

Robert Zapf underscored these reasons for amending the rules.

The adoption of the alternative Rule C(3)(b) service provisions into proposed Rule B(1)(d) was discussed and approved.

Proposed Rule B(1)(e) responds to the problem arising from incorporation of state law quasi-in-rem jurisdiction in the final provisions of present Rule B(1). Rule B(1) now incorporates former Rule 4(e), failing to reflect the amendment of Rule 4(e) and its relocation as Rule 4(n)(2) in 1993. Rule 4(e) allowed use of state quasi-in-rem jurisdiction as to "a party not an inhabitant of or found within the state." It provided a useful supplement to maritime attachment under Rule B(1). New Rule 4(n)(2), however, allows resort to state quasi-in-rem jurisdiction only if personal jurisdiction cannot be obtained over the defendant in the district in which the action is brought. Because maritime attachment is available in many circumstances in which personal jurisdiction can be obtained in the district — it is required only that the defendant not be "found within the district" — substitution of Rule 4(n)(2) for Rule 4(e) would serve little purpose. Discussion focused on the argument that Rule B(1)(e) should incorporate state quasi-in-rem jurisdiction without any limitations, discarding reliance on Rule 4. Objections were voiced in part on the same grounds that led to the restrictions incorporated in Rule 4(n)(2),

and also from doubt that the quasi-in-rem jurisdiction aspect of Rule B(1) needs to be expanded. Further discussion showed that the main use of state law is as a means of effecting security, not jurisdiction. Although present practice seems to recognize that state law security remedies are available in admiralty through Civil Rule 64, it was decided that the draft Rule B(1)(e) should be revised to incorporate Rule 64, deleting any reference to state-law quasi-in-rem jurisdiction. The Note will reflect that this incorporation is effected to ensure that repeal of the former Rule 4 incorporation is not thought to make use of Rule 64 inconsistent with the supplemental rules. It was further agreed that deletion of state law quasi-in-rem jurisdiction seems to justify abandonment of the present reference to the restricted appearance provisions of Rule E(8). This issue was delegated to the admiralty subcommittee for final action.

Draft Rule C(2)(d)(ii) adds a new requirement that the complaint in a forfeiture proceeding state whether the property is within the district, and state the basis of jurisdiction as to property that is not within the district. This requirement responds to several statutory provisions allowing forfeiture of property not in the district. The draft was approved.

The notice provisions of draft Rule C(4) include a new provision allowing termination of publication if property is released after 10 days but before publication is completed. This change simply fills in an apparent gap in the present rule, both for the purpose of avoiding unnecessary expense and for the purpose of reducing possible confusion as to the status of the seized property.

The draft divides Rule C(6) into separate paragraph (a) procedures for forfeiture and paragraph (b) procedures for maritime arrests. Two major distinctions are made. A longer time is allowed to file a statement of interest or right in forfeiture, and the categories of persons who may file such statements include everyone who can identify an interest in the property. In admiralty arrests, on the other hand, a shorter time is allowed for the initial response because of the need to effect release of the seized property for continuing business. The categories of persons who may participate directly is narrower than in forfeiture, being restricted to those who assert a right of possession or an ownership interest. Lesser forms of property interests can be asserted in admiralty arrests only by intervention, in keeping with traditional practice. The Maritime Law Association has urged that the reference to ownership interests in C(6)(b) include "legal or equitable ownership." The Reporter objected that it is better to refer only to "ownership," as a term that includes legal ownership, equitable ownership, and any other form of ownership recognized by foreign law systems that do not respond to the Anglo-American distinction between law and equity. The Note makes clear the all-embracing meaning of "ownership." After discussion it was agreed

that the multiple meanings of ownership could be made secure by amending the draft to refer to "any ownership" in C(6)(b)(i) and (iv). It was emphasized that the Note discussion of the changes in C(6) is an important part of the process, making it clear that elimination of the confusing reference to "claimant" and "claim" in the present rule is not intended to change the substance of admiralty rights or the essence of the allied procedure.

It was noted that draft Rule C(6)(c), continuing the admiralty practice of allowing interrogatories to be served with the complaint, was expressly considered in relation to the discovery moratorium adopted by Rule 26(d) in 1993. It was concluded that the special needs of admiralty practice justify adhering to this longstanding practice.

Draft Rule E(3) was presented in alternatives, a Reporter's draft and an MLA draft. The MLA draft deliberately uses more words to say the same things, in order to emphasize that process in rem or quasi-in-rem may be served outside the district only when authorized by statute in a forfeiture proceeding. The MLA version was supported by the admiralty subcommittee, and adopted by the committee.

Draft Rule E(8) must be adjusted to conform to draft Rule B(1)(e). Incorporation of Rule 64 in Rule B(1)(e) requires deletion of the incorporation of former Civil Rule 4(e) in Rule E(8). If the reference to Rule E(8) is deleted from revised B(1)(e), there is no apparent need to refer to Rule 64 in Rule E(8). The admiralty subcommittee will make the final decision on this point.

Draft Rules E(9) and (10) were approved for the reasons advanced in the draft Note.

Changes to Civil Rule 14 to reflect the changes in Supplemental Rule C(6) also were approved.

The package of Admiralty Rules amendments was approved unanimously. It was agreed that it would be desirable — if possible under Enabling Act processes — to reduce the period required to make these changes effective. This question will be addressed in the submission to the Standing Committee with the request that the proposed rules be published for comment.

Assistant Attorney General Hunger reported on the status of pending statutes that would bear on the proposed forfeiture rule amendments. The Department of Justice will continue to work with Congress on these matters.

Mass Torts

This committee began to review Civil Rule 23 at the suggestion of the Standing Committee in response to the urging of the Ad Hoc Committee on Asbestos Litigation. Mass torts present problems that

are inherently interstate in nature. There often are tensions among state courts, and between state and federal courts, arising from overlapping actions. Special problems arise from the strong need of defendants to achieve global peace; these defense interests affect plaintiffs who want to settle. There are many problems that have not been resolved. Bankruptcy is often held out as a model, with such intriguing variations as "product-line bankruptcy." Interpleader, "bill-of-peace," and other traditional models have been offered for reexamination and possible expansion.

Increasing opportunities to inflict widely dispersed injuries have increased the burden of dispersed litigation and the desire to find solutions. Many of the proposed solutions require legislation. Civil Rules amendments cannot alone provide solutions.

The Judicial Conference has considered appointment of an ad hoc mass torts committee. The work of any such committee would bear on the work of many other Judicial Conference committees, including the rules committees. It would be necessary to coordinate its work with these committees, and particularly to ensure that specific rules proposals be subjected to the full Enabling Act process for adoption. The committees most obviously affected include the Federal-State Jurisdiction Committee, the Bankruptcy Administration Committee, and the Judicial Panel on Multidistrict Litigation. The Court Administration and Case Management Committee also might become interested, and of course the Manual for Complex Litigation is involved. These problems have made the Executive Committee wary of appointing a new committee. At the same time, it is anxious that the Judicial Conference process be actively involved with these problems.

This committee has learned much about mass tort litigation in its Rule 23 inquiries, and is a logical focal point for further efforts. Judge Niemeyer has proposed that a Mass Torts Subcommittee of this committee be created, to include liaison members from the most directly involved Judicial Conference Committees. The subcommittee would be charged with sorting through recommendations for addressing mass torts by coordinated legislation, rules changes, and other means. The task is formidable, and success is by no means guaranteed. A special reporter would be needed. Judge Niemeyer has asked Judge Scirica to chair the subcommittee, if it is authorized, recognizing that this will be a long-range project. The work must be tentative at first, and slow. Although there is a natural reluctance to continue to develop subcommittees, there are too many large-scale projects for this committee to work on each one as a committee of the whole. Here, as with the admiralty and discovery subcommittees, the subcommittee can be put to work on a "task-specific" basis.

It was noted that the subcommittee must remain sensitive to

the risk that enthusiasm for particular proposals may entice it toward rules that trespass over the line into substantive matters.

A prediction was made that unless Congress will enact substantive laws, the only workable answers will be found through amendment of Civil Rule 23 or development of a specific class-action procedure for mass torts.

Rule 23

The proposed new Rule 23(f) is on its way to the Supreme Court. Rule 23(c)(1) has been commended by the Standing Committee for further study in conjunction with remaining Rule 23 questions. At the May meeting, the committee voted to abandon the proposed new factors (A) and (B) for Rule 23(b)(3); the "maturity" element proposed for new factor (C) was redrafted and carried forward. Proposed factor (F), colloquially referred to as the "just ain't worth it" factor, remains on the agenda for further consideration. The proposed settlement-class provision, which would be new Rule 23(b)(4), also remains on the agenda, along with the proposed amendment of Rule 23(e).

"Factor (F)." At the May meeting, the committee determined to consider five alternative approaches to factor 23(b)(3)(F) as published in 1996. The published version added as a factor relevant to the determination of predominance and superiority "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The first approach would be to adopt the factor as published. This approach would require several changes to the Committee Note to reflect concerns raised by the testimony and comments. There was a widespread misperception that this factor would require a comparison between the probable relief to be received by one individual class member with the total costs and burdens of class litigation. If a class of 1,000,000 members stood to win $10 each, the comparison would weigh the $10, not the $10,000,000 in a process that inevitably must find the individual benefit outweighed by the costs and benefits of class litigation. The Note would have to be changed to dispel any remaining confusion, making it clear that the aggregation of individual benefits is to be compared to the aggregate costs. In addition, the Note should be changed to take a position on an issue that the Committee had earlier voted to leave aside — whether measurement of the probable relief to individual class members entails a prediction of the outcome on the merits. Many of those who testified or commented believed that the proposed rule would require such a prediction on the merits. Other issues as well might need to be addressed in the Note, responding to additional concerns presented by the testimony.

A second approach would be to abandon the published proposal.

Another approach would delete the reference to "probable relief," substituting some formula that does not seem to invoke a

prediction of the outcome on the merits. One possible formulation would be: "whether the relief likely to be awarded if the class prevails justifies the costs and burdens of class litigation."

A fourth approach would eliminate the reference to individual relief, focusing only on aggregate class relief. This approach could be combined with the third: "whether the relief likely to be awarded the class if it prevails justifies the costs and burdens of class litigation."

The fifth approach would be to create an opt-in class alternative for situations in which the recovery by individual class members seems so slight as to raise doubts whether class members would care to have their rights pursued. Certification of an opt-in class would provide evidence of class members' desires; if they opt in, that is proof that they wish to vindicate their rights.

All of these approaches were discussed against the underlying purposes that led to proposed factor (F). We do not wish to foster lawyer-driven class actions, where the lawyer first finds a "claim" and then finds a passive client without any substantial purpose to advance the interests of class members or the public interest. But it is different if persons holding small claims desire vindication and seek out a lawyer. Rule 23 should be available for small claims that cannot be effectively asserted through individual litigation. Is it possible to distinguish these situations by rule? One possibility is to resort to the opt-in class alternative, providing direct evidence whether class members desire enforcement.

A new suggestion was made that all of these alternative approaches involve speculation about the outcome on the merits. Focus on cases of meaningless individual relief should instead be placed in Rule 23(e). The problems arise from settlements – often the "coupon" settlements – and they can be addressed by refusing to approve settlements that award meaningless relief to the class and fat fees to counsel.

It was suggested that the specter of fat fees and meaningless class recovery is only a myth. The Federal Judicial Center study showed what other studies show – fee awards generally run in a range of 15% to 20% of the aggregate class recovery. Many cases now are denied certification because the judge thinks they are useless; the superiority requirement authorizes this. Adding any variation of factor (F) will destroy the consumer class; it is contrary to the philosophy of Rule 23. The opt-in alternative is a delusion. In California, once a statutory or constitutional violation by the state has been adjudicated, an opt-in class can be formed. Even in this situation, with liability established, lawyers do not resort to the opt-in class because it is too expensive in relation to the results. Potential class members simply do not undertake the burden of opting in.

It was responded that opt-in never has been given a chance. A class member who is not willing to opt in does not belong in court.

The rejoinder was that there is a vast difference between opt-in and opt-out. Most classes are lawyer driven. This is recognized by rules of professional responsibility that allow lawyers to advance the costs and expenses of the litigation.

It was suggested that the opt-in alternative should be separated. The first decision to be made is whether the merits should be considered as part of the (F) calculation.

Another observation was that there is a philosophical chasm on small-claims classes. Adoption of any of the (F) alternatives would be the death-knell of consumer classes. These alternatives should be considered before moving to consideration of the opt-in class alternative.

This discussion led to the plaint that the committee has pursued these issues around the same tracks for several meetings. After much hard work, there still is no clear definition of what the proposal is designed to accomplish. Comparison to the relief requested for the class will accomplish nothing, since no one begins by asking for coupons or other trivial relief. The opt-in alternative is odd, because with very small claims it is not worth it to opt in. The proposed draft that would incorporate the opt-in alternative in the Rule 23(c)(2) notice provisions turns on finding reason to question whether class members would wish to resolve their claims through class representation, but does not provide any guidance to the circumstances that might raise the question. There has been no definition of what is meant by the "costs and burdens" of class litigation. We do not know how to implement this concern. The effort should be abandoned.

A motion to abandon further consideration of proposed factor (F), keeping the opt-in alternative alive for further consideration, passed with one dissent.

Opt-in classes. Discussion of the opt-in alternative pointed to several issues that must be resolved. Some of the drafts were integrated with the now-abandoned factor (F) proposal, authorizing consideration of an opt-in class only after certification of an opt-out class had been rejected under factor (F). If (F) disappears, some other means must be found to distinguish the occasion for an opt-in class from the occasions for opt-out classes. Even the (c)(2) notice draft adopted for purposes of illustration one alternative formulation of the (F)-factor drafts: "When the relief likely to be awarded to individual class members does not appear to justify the costs and burdens of class litigation and the court has reason to question whether class members would wish to resolve their claims through class representation, the notice must advise each member that the member

will be included only if the member so requests by a specified date." Any of the alternative (F) formulations would do, and some alternative switching point might do better. But some means must be found, unless opt-in is to replace opt-out for all (b)(3) classes, or unless the court is given a discretionary choice between opt-in and opt-out for all (b)(3) classes. And at some point, it may seem inappropriate to aggravate the already curious Rule 23 structure that incorporates the distinction between opt-out and mandatory classes only in the notice provisions of subdivision (c).

Opt-in classes also require attention to several subsidiary issues. It must be made clear that the "class" includes only those who in fact opt in, not those who were eligible to opt in but did not. The class notice must specify the terms on which members can request inclusion; it would be helpful to indicate, in Rule or Note, whether the terms can reach sharing of costs, expenses, and fees. It might be useful to address the effects of opt-in classes on statutes of limitations, and the availability of party-only discovery devices and counterclaims against those who opt in. Thought also must be given to the question whether the judgment in an opt-in class can support nonmutual issue preclusion in later litigation, whether brought by those who were eligible to opt in or by others.

The opt-in class alternative in (c)(2) raised the same question as the (F) factor: what level of individual recovery triggers the opt-in alternative? The "$300" that was the median recovery in one of the districts in the Federal Judicial Center study?

Even the opt-in alternative continues to present the question whether the merits should be considered, as a matter of likely relief or as a matter of justifying the costs and burdens of class litigation.

The opt-in approach was supported as a way of showing whether there is support for litigation among the supposed class members. This is better than present practice, which allows a lawyer to volunteer as a "private attorney general" on behalf of a class that does not care and in service of a public interest that public officials do not find worth pursuing.

It was urged that the opt-in approach should be applied to all (b)(3) classes, without the complications of attempting to separate opt-in from opt-out classes.

It was responded that opt-in classes are a revolutionary idea. The Supreme Court sang the virtues of small-claims classes in the Shutts decision. Even constitutional doubts might be raised about substituting opt-in for opt-out classes. Who pays for notice? What about repetitive classes, made up of those who choose not to opt in to the first class? In effect, settlement classes today

ordinarily are opt-in classes because they reach only those who file proofs of claim.

The fear that due process might defeat opt-in classes was doubted by others.

Opt-in was further supported as simple and clear. The opt-out provision was a last-minute addition to (b)(3). We should find a device that avoids any preliminary consideration of the merits, and opt-in does it.

Another member suggested that the (c)(2) draft that would allow a judge to opt out of opt-out class certification in favor of an opt-in class is a worthy idea, but is overcome by problems. A rule of procedure can generate preclusion consequences — Rule 13(a) and 41 are obvious examples. But we cannot allow nonmutual preclusion to rest on an opt-in class judgment. And we cannot bind those who choose not to opt in. The small-claim area, moreover, is the area where opt-in will work least well. And what is to be done under the draft when a small number of individual claimants in fact appear: does this upset the "reason to question whether class members would wish to resolve their claims through class representation"?

The fear that opt-in classes would spur successive class actions was met by the observation that multiple and overlapping classes occur now.

The private attorney-general function was brought back for discussion with the observation that the committee has never rejected this concept. Opt-in classes would greatly reduce this function.

It was predicted that adoption of an opt-in class alternative would drive small-claims classes to state courts. But federal courts should provide the forum for resolution of nationwide issues. Economically, moreover, a lawyer can afford to invest $200,000, $500,000, or $1,000,000 in notice to an opt-out class; the investment is not possible for an opt-in class, because there will not be enough opt-ins.

The fear of driving national classes to state courts was countered by the suggestion that amendment of the federal rules would lead to parallel amendments by many states, discouraging resort to state alternatives.

An alternative to opt-in classes to control lawyer-driven actions might be to base fees on the amount of relief actually distributed. It has been suggested that counsel fees are often based on the maximum possible distribution, and are a far larger percentage of relief actually distributed in small claims cases. The Committee has not been able to get any clear sense whether this suggestion is often borne out in practice; adoption of the fee rule might give better evidence.

The conclusion was that the opt-in issues should remain open for further exploration. Earlier committee proposals had envisioned opt-in classes as a promising approach to mass tort litigation. The Mass Torts Subcommittee may be the best place for the next phase of study.

Opt-in classes were further defended on the ground that collective action on behalf of many should turn on agreement to be included. The opt-out default presumes consent that is not real.

Settlement classes. In 1996, the committee published for comment a proposed Rule 23(b)(4) that would allow certification of a class when "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial." This proposal followed a long period during which the committee repeatedly considered the problems of settlement classes but found no clearly sound approach to the many problems involved with drafting a rule to regulate the practice. The proposal was intended only to overrule the Third Circuit rule that a class can be certified for settlement purposes only if the same class would be certified for trial. See Georgine v. Amchem Products, Inc., 3d Cir.1996, 83 F.3d 610; In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation, 3d Cir.1995, 55 F.3d 768. The Supreme Court affirmed the Georgine decision, but the opinion states that a (b)(3) class can be certified for settlement even though "intractable management problems" would defeat certification of the same class for trial. Amchem Prods., Inc. v. Windsor, 1997, 117 S.Ct. 2231, 2248. Although the Court took note of the published committee proposal, the opinion also notes that the proposal had been the target of many comments "many of them opposed to, or skeptical of, the amendment," 117 S.Ct. at 2247. The Court's opinion, moreover, discusses settlement classes in terms that are not clearly as limited as the published proposal. The opinion could be found to reach classes certified under subdivisions (b)(1) or (b)(2), and is not limited — as the published proposal was — to situations in which the parties agree on a proposed settlement before seeking class certification. The reach of the Court's opinion may be uncertain in other dimensions as well.

In these circumstances, it was urged that simple adherence to the committee's published proposal would be unwise. The central purpose has been accomplished by the Supreme Court. It is not clear whether adoption of the proposal would merely bring the Court's interpretation into the text of Rule 23. There is only minor benefit in adding this particular gloss to the text of the rule, when so many other important aspects of class-action practice have not been added to the rule. And there is great risk that inconsistencies may exist between what the Court intended and what the amended rule might come to mean. Because the Committee cannot be confident of what the Court intended, cannot be confident whether the published proposal means something else, and cannot be

confident of the ways in which an adopted amendment might be interpreted against the background of the Court's opinion, further work is necessary if Rule 23 is to be amended to address settlement classes.

It was suggested that the Amchem decision means that a nationwide mass tort class action cannot be settled. Problems of conflicting interests within the class and related inadequacies of representation will be insurmountable.

This suggestion led to the more general suggestion that the time is not ripe for immediate action on settlement classes. District court decisions since the Amchem decision seem to be moving toward stricter certification standards. It will be desirable to give more thought to the problem, and to gain the benefit of greater experience. In the Amchem case itself, the result so far has been that individual claims are being settled according to the protocols of the settlement; the only difference is that far greater amounts are being devoted to attorney fees. Many of the settlement-class issues are properly considered with the problems of mass torts. There are genuine problems to be addressed. The "limited fund" problem is real in the most widespread mass torts. Transaction costs are a great problem, as reflected in the RAND study of asbestos litigation. The best solutions may lie beyond the limits of the Enabling Act.

It was observed that the Fibreboard settlement is back in the Fifth Circuit, and may return to the Supreme Court in a way that will shed light on use of limited-fund (b)(1) settlement classes. In the same vein, it was noted that the Court has twice granted certiorari in cases that were meant to present the question whether mandatory classes can be used for mass torts; this level of interest suggests that another vehicle soon may be found to address this issue.

These difficulties and opportunities led to a consensus that it is better to defer further consideration of settlement classes. The committee has never been able to find attractive proposals to do more than overrule the Third Circuit rule that limits settlement classes to those that could be tried with the same class definition. The Supreme Court has provided plenty of food for further lower court thought. Although further proposals are not precluded by the Supreme Court opinion, it is better to await developments. The Mass Torts Subcommittee is likely to be considering these issues. If problems emerge as lower courts develop the Amchem opinion, the committee can return to the issue.

Other Rule 23 issues. The committee considered briefly two drafts that it requested at the May meeting. One provided alternative approaches to enhancing the "common evidence" dimension of Rule 23(b)(3) classes. The more demanding approach would require that for certification of a (b)(3) class, "the trial evidence will be substantially the same as to all elements of the claims of each

individual class member." The softer approach would add a new factor, focusing on "the ability to prove by common evidence the fact of injury to each class member [and the extent of separate proceedings required to prove the amount of individual injuries]."

The other draft dealt with repetitive requests to certify the same or overlapping classes. It would add a new factor to (b)(3), allowing consideration of "decisions granting or denying class certification in actions arising out of the same conduct, transactions, or occurrences."

It was asked whether data can be got on the frequency of multiple certification attempts. Thomas Willging observed that the Federal Judicial Center study had some data, that showed at least one overlapping action in 20% to 40% of the classes, varying from district to district.

State court class actions were again noted as an alternative to federal actions, with the suggestion that changes in Federal Rule 23 might be followed by many states.

It was suggested that both drafts were interesting and deserved study. It was noted that the committee still has on its agenda the proposal to amend Rule 23(c)(1) to allow certification "when practicable," and the revised "maturity" factor for (b)(3) classes. Settlement classes and opt-in questions remain on the table, but are not ready to go ahead with recommendations for publication of specific proposals.

Brief discussion of the (c)(1) proposal asked whether "practicable" is the best word to use. It was noted that during the Standing Committee review of (c)(1), it was suggested that the key is to identify the purposes underlying the desire for early determination of certification requests. It also was suggested that these purposes may implicate so many different factors that it will be difficult to find a better single word.

These Rule 23 issues were continued on the agenda.

Judicial Conference CJRA Report

The Judicial Conference CJRA Report was summarized in the agenda materials. Each of the recommendations that bear on the work of this committee were included. Most of the recommendations were discussed extensively during the report of the discovery subcommittee because they bear directly on its work. All of the recommendations will be subjected to prompt and thorough continuing study.

Certificate of Appreciation

A certificate signed by all committee members was presented to Carol J. Hansen Posegate, commemorating and thanking her for six years of great service on the committee.

Electronic Filing

Peter McCabe presented a report on the status of electronic filing experiments, observing that developing experience is revealing many areas in which the Civil Rules must be studied to ensure effective application to electronic filing and, eventually, electronic service. The report was illuminated by a presentation by Karen Molzen on the Advanced Court Engineering project. Among the practical problems discussed were the use of the log-in and "key" for the attorney's signature; means of covering filing fees — credit cards and attorney deposit accounts are the most likely means; difficulties confronting pro se litigants; and systems for detecting attempts to alter filed documents. The work of the clerk's office has already been affected; the need for paper has been reduced significantly. An attorney who submits an affidavit electronically must retain the original. When a judge authorizes filing, a facsimile signature is affixed to the order. There is a "firewall" system to ensure security. Different persons are allowed different and controlled levels of access to the system. FAX and email noticing are being used; if the message does not go through in three tries, a notice is printed out with a mailing label. A list of potential problems with the rules of procedure is being developed; it will be sent on to Judge Carroll as chair of the Technology Subcommittee.

Next Meetings

The date for the next meeting was set at March 16 and 17, 1998. It was agreed that if a second spring meeting becomes necessary — most likely because great progress has been made with Discovery Subcommittee proposals that might be made ready to recommend for publication with one more meeting — it will be held on April 30 and May 1. Locations were not set for either meeting.

Respectfully submitted,

Edward H. Cooper, Reporter