MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 17 and 18, 1996

The Civil Rules Advisory Committee met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by members Judge Paul V. Niemeyer, chair, Judge John L. Carroll, Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Lee H. Rosenthal, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Judge Patrick E. Higginbotham, outgoing chair, also attended. Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure, was present. Sol Schreiber, Esq., attended as liaison member of the Committee on Rules of Practice and Procedure, and Judge Jane A. Restani attended as liaison member of the Bankruptcy Rules Advisory Committee. Judge Jerome B. Simandle attended as representative of the Committee on Court Administration and Case Management. Joseph Spaniol, consultant to the Committee on Rules of Practice and Procedure, attended. Peter McCabe, John K. Rabiej, and Mark D. Shapiro represented the Administrative Office of the United States Courts; Mark Siska and Melanie Gilbert of the Administrative Office also were present. Joe S. Cecil, Donna Stienstra, and Thomas E. Willging represented the Federal Judicial Center. Observers included Alfred W. Cortese, Jr., Steve France, Charles Harvey (liaison, American College of Trial Lawyers), Russell Jackson, Fred S. Souk, H. Thomas Wells, Jr. (liaison, ABA Litigation Section), and Sam Witt.

Judge Niemeyer opened the meeting by welcoming Judge Rosenthal as a new member, and announcing the reappointment of several members.

Judge Higginbotham was greeted with expressions of great praise and deep gratitude for the energy and dedication he brought to leading the committee through several challenging projects during his term as chair, and for the remarkable programs he put together to reach out to all parts of the bench and bar in taking the Committee's class action study through to publication of recommended revisions in Civil Rule 23.

The Minutes of the April, 1996 meeting were approved.

CHAIRMAN'S REMARKS

Judge Niemeyer opened the discussion of the Committee's agenda by developing issues of program and structure.

The work of the Committee meetings has been heavy, and promises to continue to be heavy. To make best use of the limited time the Committee can work together, several working committees will be formed to enhance the work that can be done at full Committee meetings.

The Agenda and Policy Committee is responsible for reviewing all materials that are put on the agenda for each Committee meeting. It also will be responsible for considering the long-range program of the Committee in discharging its statutory responsibility to assist the Judicial Conference with the duty imposed by 28 U.S.C. § 331 to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." The members of the Agenda and Policy Committee are Judge Scirica,

chair, Judge Levi, and Phillip Wittmann.

The Technology Committee is responsible for considering the many issues that will arise in attempting to adapt court practices to the growing shift away from hard paper communication to electronic communication. The members of the Technology Committee are Judge Carroll, chair, Judge Rosenthal, and Professor Rowe. The Bankruptcy Rules Advisory Committee has worked with these problems regularly, and has been eager to adopt rules that will facilitate use of electronic means for filing and, eventually, service. The Standing Committee has created its own Technology Committee, to be composed of representatives from each of the Advisory Committees. Judge Carroll is the Civil Rules Committee's representative.

The RAND report on experience with the Civil Justice Reform Act will require close study by this Committee. The first need is to maintain contact with the Court Administration and Case Management Committee as that committee prepares to make recommendations to the Judicial Conference looking toward the report that the Judicial Conference is required to make to Congress by the end of June, 1997. This Committee will attend the March, 1997 meeting organized by the American Bar Association to study the RAND report. The committee on the RAND report is Justice Durham, chair, Assistant Attorney General Hunger, and Professor Rowe.

Discovery questions have been continually before the Committee for many years. It has been several years, however, since the Committee last explored the most fundamental issues going to the scope of discovery and the relationship between "notice" pleading and discovery. The time may have come to consider changes more fundamental than those made in recent years. The Civil Justice Reform Act manifests concern with the costs and delays associated with discovery, and may justify further study. The new disclosure practice authorized by Civil Rule 26(a) also must be studied. These matters are discussed further below. The Discovery Committee is Judge Levi, chair, Judge Doty, Judge Rosenthal, Carol J. Hansen Posegate, and Francis Fox. Because the work of this committee will be particularly heavy, efforts should be made to appoint an associate reporter especially charged with working with this committee.

Several changes in the admiralty rules are on the agenda for this meeting. The specialized nature of admiralty practice justifies appointment of a committee to review these proposals and become responsible for the admiralty rules. The Admiralty Committee is Mark Kasanin, chair, Judge Vinson, and Professor Rowe.

The Committee Reporter is ex officio a member of each of these committees, and of the Standing Committee technology committee.

With the help of the Agenda and Policy committee, the Committee must continue to think about the character of the tasks it undertakes. Of the four proposals that were published for comment in August, 1995, only one -- a modest revision of the interlocutory admiralty provisions of Civil Rule 9(h) -- has been sent to the Supreme Court by the Judicial Conference. Proposed changes in the discovery protective order provisions of Rule 26(c) provoked substantial controversy, and have been held for further study in conjunction with the broader study of discovery issues to be launched over the next year. A proposal to amend Rule 47(a) to create a right of party participation in the voir dire examination of prospective jurors revealed a sharp division of views between judges and members of the bar. The committee concluded that rather than persist with a rule change, it would be better to address the misunderstandings between bench and bar by encouraging mutual educational efforts. Judges should be made more aware of the inadequacies that many lawyers perceive in judge-conducted voir dire examination. Lawyers should be more willing to deny the temptation to misuse the opportunity to participate that a majority of federal judges now afford. The proposal to amend Rule 48 to restore the 12-person civil jury was rejected by the Judicial Conference, a matter discussed later in the meeting. It was known from the beginning that these

proposals would generate controversy. Such controversies may in turn reflect competing interests that are not easily reconciled in explicit rule provisions. One concern the Committee may want to bear in mind is that proposals that reveal sharp divisions among identifiable groups may not be the fair balancing of competing interests that the Committee had intended.

It also is necessary to keep in mind the constant concern that frequent changes in the rules are unsettling. Each transition to a new way of doing things imposes costs, not only in learning of the new rules and coming to understand them, but also in shaking out the problems that arise in actual implementation. It is tempting to amend a rule merely because it can be made, in some way, better. The cost of actually implementing change must be weighed carefully before indulging the temptation.

Once the Committee determines that a rule change is worthwhile, it must be committed to pursuing the change with vigor. The Committee should determine that each proposal is important and clearly right, and then support it in every way appropriate.

Rule 23 Report

Judge Niemeyer introduced the current state of the Committee's class-action proposals. The process of studying Rule 23 began in 1991. The elaborate efforts made by the Committee to reach out to concerned constituencies proved enormously beneficial in showing what the issues are. Many of the issues proved to be larger than the grasp of the Rules Enabling Act process. A taste of these larger issues is provided by Parts I and II of the August 7 memorandum that was written to introduce the proposed changes and included in the agenda materials for this meeting.

Events inevitably continue apace outside the process of amending the rules. One current phenomenon involves increasing resort to state courts with actions on behalf of national classes. The Supreme Court has recently granted review in a case that raises the question whether a state court can recognize a mandatory national class on terms that deny any right to opt out while seeking to bind all members of the class. A direct answer to this question may have dramatic effects on the development of mass tort class actions, settlement classes, and related matters.

Just before the Rule 23 proposals were presented to the Standing Committee, a letter signed by a large group of concerned law professors urged that the Standing Committee not approve the proposals for publication. The concerns raised by the letter are in large part addressed by the Committee Note, which had not been completed -- and necessarily had not been made available -- when the letter was written. Several of these concerns may have abated, at least with respect to many of the signers, in the wake of actual publication of the proposals and note.

The Rule 23 proposals can be grouped into five categories. First are the modifications of the factors listed in Rule 23(b)(3) as bearing on the superiority of class treatment and the predominance of common issues. These modifications will generate controversy, particularly the balancing of costs and benefits introduced by factor (F). As a group, these changes can be read either to encourage or to discourage small-claim class actions. A more accurate assessment is that they increase trial court flexibility, expanding discretion in ways that will further reduce the scope of effective appellate review. Second is the (b)(4) settlement class. This has been the most misunderstood proposal. In fact it retains all the requirements of subdivision (a), as well as (b)(3), and -- as a (b)(3) class -- includes the requirements of notice and opportunity to elect exclusion from the class. Third is the change from the requirement that a certification decision be made as soon as practicable to a requirement that it be made when practicable. Fourth is the addition of an explicit requirement that a hearing be held before approving a proposed class settlement. These two changes are not likely to be controversial. Finally is the provision for permissive interlocutory appeal from certification decisions. Although the appeal provision has often engendered doubts when

first described, it has not been difficult to demonstrate its virtues.

Public comment is likely to focus on (b)(3) and (b)(4). All Committee members should encourage interested students of Rule 23 to participate in one of the three scheduled public hearings. And as many members as can attend should do so. It is important, in a process that naturally focuses on differences of opinion, to find out whether there is general support for the proposals, general opposition, or a deep division of opinion.

Judge Higginbotham then described the course of the Rule 23 proposals since the April meeting of this Committee. The first caution is to remember that the proposal package represents a minimalist approach to change. The issues the Committee decided not to address are far more complex, and in many ways more important. There are good reasons for the decisions not to address these larger issues. The proposals do not deal with classes that seek to include and bind future claimants, including those who have not yet even experienced the injuries that eventually will make them members of the class. Early proposals that would have allowed a court to deny the right to be excluded from a (b)(3) class were not pursued. Several letters were written to the Standing Committee to challenge a proposal that this Committee had not made; the misdirection made it easy to respond, but the misdirection also can obscure the real issues. The letter signed by so many academics was prepared without full knowledge of the process, and should not be taken to represent a widespread judgment about the merits of the proposals actually made. Much press attention similarly was devoted to attacking a proposal that the press thought had been made, but was not. And a good part of the initial reactions has come from people concerned with pending litigation, and the impact that the proposals might have on positions important to the litigation. The August 7 memorandum in the agenda materials was written to ensure public understanding of the proposals, protecting against the risk of premature summaries, and to underscore drafting options as well as to note some of the proposals that were put aside. It was not published with the proposals because it had not been before the Standing Committee at the June meeting.

The Standing Committee seemed to understand the message that the amount of attention devoted to the Rule 23 proposals so early in the process reflects the importance of the underlying issues. Attention and controversy should not defeat the proposals. Instead close attention must be paid to all the public comments and challenges. The Committee then must decide what is best, recommend the best, and support it. The (b)(3)(F) proposal will draw a lot of attention and comment. The Committee will benefit from it. And it is important to adhere to the minimalist approach.

It seems likely that the next major developments in class action doctrine will come in substantial part from developments on the constitutional front. The Supreme Court review of the Alabama mandatory class ruling will be an important beginning. It is important to remember that the (b)(4) settlement class proposal retains the right to opt out. The proposal in fact protects the right to opt out better than many classes that are certified for litigation and then settled after expiration of the opt-out period. Under the (b)(4) proposal, the settlement agreement must be reached before certification; the decision whether to opt out can be made with knowledge of the settlement terms. In litigation classes that settle after expiration of the opt-out period, the right to opt out is protected only if the terms of the settlement provide it.

Discussion of the Rule 23 proposals reflected the minutes of the Standing Committee draft minutes that were included in the agenda materials. It was observed that although the Standing Committee approved the proposals for publication and comment, many members expressed strong reservations about several features of the proposals. It will be important to find ways to make clear the dependence of the (b)(4) settlement class proposal on (b)(3) class status. And it will be even more important to provide information in the Note that will help district judges know what to do with proposed settlement classes. Consumer advocates will be up in arms about the (b)(3)(F) class; many of the objections again can be met by small changes that make it clear that many small-claims classes will remain proper.

The law professors who expressed concern by writing the Standing Committee have been invited to file further comments and to appear at the public hearings. Their suggestions will be important.

It was further suggested that there are three main sets of class action problems today. First are federal-state problems. Plaintiffs are moving more and more to state courts, particularly in the wake of the Supreme Court decision that seems to entrench the full-faith-and-credit effects of state class-action judgments. There are serious questions whether it is desirable to allow a single state to bind all states by certifying a national class. Second are classes involving future claimants. The proposals leave this problem to be worked out in the courts. Third are attorney fees; perhaps proposals should be made to guide judges toward better fee awards.

Further discussion of the federal-state relations problems recognized the need to develop means of cooperation outside the rules. Means of liaison with state judges are important. The Conference of Chief Justices has a Mass Torts Litigation Committee. All the district judges who have been assigned MDL cases meet regularly, and discuss problems of relationships with state courts and state litigation. A special master has been appointed in the federal silicone gel breast implant litigation for the particular purpose of facilitating coordination among state courts and between state courts and federal courts.

The Committee was reminded that it had put aside proposals to amend Rule 23(e) by adding a check-list of factors to be considered in evaluating a proposed settlement.

Turning to the Judicial Conference rejection of the proposal to amend Rule 48 to restore the 12-person jury, Judge Higginbotham observed that the rejection was affected by expressions of opposition from various circuit district judges associations. He noted that the associations did not have all of the background materials that provided important information to this Committee in its deliberations. He expressed concern that it is difficult to find ways of communicating the extensive deliberations of this Committee to district judges who have not sat through the deliberations. The important values served by proposals on topics such as jury size may not be as apparent as the seeming immediate lessons of their own experience. Six-person juries are obviously more convenient, and do not lead to manifestly wrong verdicts. It is difficult to communicate to busy judges the vastly improved representational quality of 12-person juries.

The 12-person jury enterprise should not be abandoned entirely. The Judicial Conference came close to returning the proposal to this Committee for further study, and the grounds for the opposition were never explained. Although concern about increased cost was a common element of the public comments, there was no concern on that score. Instead there seemed to be a general perception that smaller juries are working. Many judges now have not had any experience with 12-person civil juries. There is an apparent fear that given an opportunity for a 12-person jury, many defendants will remove actions from state courts that otherwise would remain in state court. This fear seems ill-founded; many factors control the removal decision. Another argument is that the number of peremptory challenges would not be increased; this argument ignores the fact that the number was set more than a century ago, and persisted for many years with 12-person juries. The reduction to smaller juries simply increased the effect of the unchanging statutory provision. A return to 12-person juries would merely return to the situation that had prevailed for a long time.

One possible strategy would be to reconsider the unanimous verdict requirement, considering a package that would combine a 10/12 jury verdict with restoration of the 12-person jury. This approach, however, ignores the effect of the unanimity requirement. As the Committee has regularly observed, hung juries are rare even with 12-person criminal juries that must agree beyond a reasonable doubt. The impact of the requirement is on the dynamics of decision within the jury, not the ability to reach a verdict. A unanimity requirement forces the jury to pay close attention to each member, considering the views of

each and responding or adjusting all views to reach a consensus. More viewpoints are represented in a 12-member jury, and all viewpoints are considered when unanimity is required.

It is not possible to argue that a 6-person jury is better than a 12-person jury. It is very difficult to argue that it is as good.

Committee discussion of the Rule 48 proposal noted that in some districts it may be difficult to find 12 qualified jurors for some cases because the population is thin, and some cases involve employers or institutions that involve many members of the community.

It also was asked, as a general matter, whether it is possible to find ways to get information to the circuit district judges associations in ways that will encourage better informed responses to Committee proposals. No concrete means were suggested.

Discussion of the 12-person jury proposal led back to review of the proposal for party participation as a matter of right in voir dire examination. The committee devoted a lot of time to the endeavor. The result has been not a rule change, but work with the Federal Judicial Center that has given a more important role to voir dire in the programs of instruction for district judges. There may be other means of educating judges about the importance of 12-person juries. Judges have the discretion to seat more than 6 jurors now, and many routinely select 8 or 10 in cases that are likely to be at all protracted. Continued attention to the subject may encourage more use of larger juries. Experience may in turn help prepare the way for reconsideration of the 12-person jury proposal in a few years.

RAND CJRA REPORT

Members of the Committee have reviewed the September, 1996 draft report prepared by the RAND Institute for Civil Justice to evaluate local experiments under the Civil Justice Reform Act. The report is Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace, and Vaiana, *Just, Speedy, and Inexpensive? An Evaluation of Case Management under the Civil Justice Reform Act*. This draft is described as "a final report of a project. It has been formally reviewed but has not been formally edited." At the same time, it is "not cleared for open publication."

Judge Jerome Simandle, of the Court Administration and Case Management Committee (CACM), attended this meeting to explain the work being done by CACM with the Rand Report. CACM is the Judicial Conference Committee that has overseen the RAND study, and will prepare recommendations for the report that the Judicial Conference is required to make to Congress by June 30, 1997. The Judicial Conference will meet in early March. CACM meets early in December. It is expected that CACM will share its anticipated report and recommendations with this committee as soon as it is practicable to do so. CACM plans to deliver its materials to the Judicial Conference no later than February 11.

Preliminary discussion raised the question whether any of the findings in the RAND report suggest changes in the Civil Rules. The RAND researchers were frustrated because the Civil Justice Reform Act did not set up a formal experiment along the lines that support careful social science research and conclusions. Cases were not assigned at random to different management tracks. Few judges made any significant changes from the ways they had managed cases before the local plans were adopted. What was possible, then, was a comparison of large numbers of cases that in fact were managed in different ways. The only clear conclusion is that in cases that lie outside the "minimal management" category, it is possible to achieve a shortened time to disposition without increasing costs only by a combination of three management techniques: early case management, early discovery cutoff, and an early trial date. All of these techniques are authorized under the present Civil Rules. The only change that might be made in response to this finding would be to change the present authorization into a mandate.

The lack of obvious occasions for change was approached from another perspective. Many had expected that the report would provide a real opportunity for reexamining many aspects of present procedure. Instead, the findings seem noncontroversial. At least on first view, they seem generally to reinforce received views about good case management practice. Even the indications that in some settings it costs more to achieve speedier disposition than to allow litigation to take its course according to the natural pace of the parties is not surprising.

The findings about the effects of Civil Rule 26(a)(1) disclosure, and the many variations adopted by different district plans, will be of great interest to this committee. At the same time, they are remarkably tentative. There is a repeated emphasis on the findings through lawyer surveys that lawyers in districts that have adhered to mandatory disclosure do not like the policy, but that lawyers who have actually engaged in mandatory disclosure seem to like it. This seeming puzzle may reflect a general hostility arising from anticipated fears about disclosure that are assuaged by actual experience with disclosure. But a close look will be necessary to determine whether this is the explanation, or whether there is some other explanation. Other studies also are being made of mandatory disclosure, particularly as districts evaluate experience under their own plans. There will be much to be learned from them.

This discussion of mandatory disclosure led to comments anticipating the later general discussion of discovery. Concerns have been expressed with the lack of uniformity arising from the explicit provision in Rule 26(a)(1) that authorizes local rules that opt out of the national rule. When the CJRA expires, local choices to opt out must be expressed by local rule. The Federal Judicial Center surveys of disclosure practices indicate that most of the districts that have opted out of the national rule indeed have adopted local rules. When the opt-out provision was adopted, it was partly with a view to learning from experience with different local approaches. The Standing Committee Self-Study suggested that this Committee may wish to reevaluate the opt-out. At the same time, it will take several years of experience to support intelligent evaluation of experience with the national rule. The rule was greeted with widespread hostility. Even if it had been warmly received, time is required for lawyers to adjust to the best means of using disclosure and the Rule 26(f) conference. Time also will be required before large numbers of cases have gone through all discovery and trial. Actual trial of substantial numbers of cases will be required to provide information about failures to disclose and the sanctions that result. The RAND report found a de minimis level of pretrial disclosure motions; the predictions that Rule 26(a)(1) would engender substantial pretrial dispute have not been borne out in these years in these districts. But the fear that evidence will be challenged and often excluded at trial for failure to disclose remains to be tested.

Close coordination with the Court Administration and Case Management Committee will play an important role in addressing the RAND report. Other work will remain to be done, however. This committee will attend the ABA conference on the RAND report in Tuscaloosa next March, shortly after the Judicial Conference meets to consider its report to Congress. The Judicial Conference report will be an important event in the aftermath of the CJRA experiments, but it will not be the final chapter. The ABA conference will be a very important next step, drawing from a wide cross-section of bench, bar, and legislative representatives. It will have the benefit of time to reflect on the RAND report, the CACM recommendations, and perhaps on other early reactions to the report. One of the topics for the conference will be study of the ways in which the RAND findings and the underlying data can be brought to bear on the rulemaking process.

Discussion of the RAND report concluded with focus on the ways in which this Committee can interact with the Court Administration and Case Management Committee. Judge Simandle noted that the RAND report points in certain directions on judicial management. It measures time and money, however, and cannot address such matters as detailed discovery policy. RAND has designed a report true to the intent of Congress. There never has been a study like this. They were devoted in collecting the data. The data,

however, do not point ineluctably in any precise directions. The final Judicial Conference Report must report on the six principles and six management guidelines identified in the Act, and on whether any of these principles or guidelines should be implemented by changes in the Civil Rules. If adoption of these principles and guidelines is not recommended, the Judicial Conference report also is to identify alternative, more effective programs to reduce cost and delay. The Judicial Conference also is invited to initiate proceedings for adoption of rules implementing its recommendations. For all of these possible effects on this Committee, it is the Court Administration and Case Management Committee that is charged with Judicial Conference administration of the Judicial Conference response. The role of this Committee will be to coordinate as effectively as possible through the new Committee on the Rand Report.

DISCOVERY

When appointment of the Discovery Committee was announced, it was observed that most studies of the causes of popular dissatisfaction with the administration of civil procedure focus in large part on discovery. Discovery is expensive. Discovery is often conducted in a mean-spirited way. Discovery is used as a strategic tool, not to facilitate resolution of a controversy. Attorney self-regulation too often fails to work, as adversariness gets in the way of more professional behavior. Egos and tactics intrude. Over-use by discovery out of any reasonable proportion to the needs of the case may be more common than more direct abuse. The new disclosure practice is badly fractured as many districts have opted out of the national rule and adopted different local variations. The American College of Trial Lawyers has proposed that it is once again time to reconsider the basic scope and nature of discovery. If any aspect of the rules is broken, discovery is it. The most optimistic inquiry will be the search for relatively modest changes that could bring substantial improvements. This quest will be successful if changes can be found that meet with general acceptance by plaintiffs and defendants. If a proposed change is generally regarded as unfair by one side or the other, there is a real prospect that in fact it is unfair. If we are to look at discovery, the project will require several years to bring to fruition. The problems are complex.

As complex as the problems are, caution is necessary. Lawyers and judges do not like frequent rule changes. Discovery practice has been changed many times. The Civil Rules, moreover, have become "organic" in the sense that they are understood and implemented as a seamless whole. Changes are appropriate only when there is a clear case for the change.

One possible approach would be to adopt a three-stage process. First would come disclosure, perhaps modified to require actual production of documents, deleting the option to simply identify them. The second stage would be lawyer-directed discovery. This stage could be limited in various ways. The numbers of interrogatories and depositions permitted by present rules might be reduced. The length of depositions could be limited. Document discovery could be cabined. Even the number of requests for admissions might be curtailed. The third stage would require court management. Discovery conferences, or other pretrial management formats, would be a mandatory element of more expansive discovery tailored to the actual needs of individually complex cases.

The old ABA proposal to narrow the scope of discovery authorized by Rule 26(b)(1) has been reviewed by this Committee in the past. It does not seem likely that it would effect substantial changes if it were adopted. At a minimum, it needs more study before it might be embraced.

As discussed in reviewing the RAND study, disclosure practice is fragmented. If the mandatory disclosure system of Rule 26(a)(1) proves successful, it might be useful to amend it to require actual production of documents, at least as to "core" documents.

Rule 26(c) protective order practice remains on the Committee agenda. The Committee's proposal was

sent back by the Judicial Conference for further study. The proposal was republished, extensive comments were provided, and the Committee concluded that protective orders are so directly related to broader discovery topics that they must be studied together.

The organic aspect of the rules is nowhere more apparent than in the relation between discovery and pleading. Notice pleading was adopted with the view that discovery would become the primary means of developing and exchanging information before trial. Discovery in fact has assumed the major role. Discovery relies on the lawyers to regulate themselves. In some cases, at least, the result seems to be disproportionate expenditure of money and effort in the quest for the elusive "smoking gun" that litigants hope may exist, or in the effort to beguile a deponent into saying unwilling things.

If the Committee is to undertake a broad reexamination of discovery, it will be important to follow the model that was used with consideration of Rule 23. At the very outset, means must be found to solicit the views and proposals of organized groups. The American College of Trial Lawyers has provided an excellent dossier of information and suggestions. The ABA, ATLA, other bar groups, and judges groups should be consulted. The views of this Committee and the suggestions received from other groups could be used by the Discovery Committee to provide the focus for a conference that would address the most important-seeming ideas. The conference might be scheduled for early next September. At the October meeting following the conference, this Committee could reflect on the papers and ideas presented at the conference and establish a set of projects for study by the Discovery Committee. The spring, 1998 meeting could begin work on specific proposals drafted by the Discovery Committee. Throughout this process, efforts should be made to help the bench and bar become aware of the proposals being considered. If possible, it should be made clear that the proposals have been made to the Committee by the many sources that are to be consulted. They will become Committee proposals only when adopted as recommendations.

General discussion of discovery topics followed. One observation was that indeed discovery practice is deteriorating, and that one source of the problem is that much discovery is conducted by "litigators" who are not trial lawyers. These litigators have no idea of what is possible or necessary at trial, and cast the discovery net far wider than any plausible trial use.

Notice pleading remains a problem for disclosure. Particularly in product liability litigation, the initial pleadings commonly give no coherent picture of what the problems will be.

Another view was that, at least as a matter of intuition, there does not seem to be much abuse. The proposal to narrow the scope of Rule 26(b)(1) does not seem likely to change much. There are problems of overusing discovery in marginal cases.

It was suggested that state experience should be studied. At the Dallas conference in 1995, Stephen Susman described Texas proposals to control discovery. New Jersey has a tracking system. Other courts have tracking systems. There may be much to be learned from experience with these systems.

The "rocket docket" system in the Eastern District of Virginia also deserves attention. Many lawyers report, often informally, that it works well in many cases but also has problems. The problem most often identified is a lack of flexibility -- a perception that it is too difficult to win variations in the set schedule even for cases that genuinely need more time. But it is a great place to file a case if your client cannot afford extensive discovery. With adjustments, this model might prove very attractive.

In contrast, Louisiana was described as a state in which a state-court trial cannot be scheduled while discovery remains "open," and in which trial can be avoided indefinitely simply by refusing to close discovery.

One of the observers suggested that discovery reform is a noble cause, but that it is too timid. Notice pleading should be on the agenda, and the very framework of trials. The simplest solution may be the most direct and radical -- discovery might be abolished entirely. Of course this would require different pleading rules, and time limits on trial, along with limits on the numbers of witnesses. Anything remotely resembling current discovery practices cannot survive into the 21st Century.

This suggestion met the response that in some continental systems, discovery is actually integrated with trial. Trial is held in phases. There is a hearing, more facts are gathered in response to the issues indicated by the hearing, another hearing is held, and so on. Of course this approach would prove difficult with jury trial. But it has been used in bench trials in this country, and might prove useful in more general practice.

The Criminal Rules were held up as a model of a procedure with limited discovery, with the suggestion that they are not satisfactory. Time limits on depositions were suggested as a more practicable remedy for at least one part of the problem.

Members of the Committee have suggested in the past that perhaps the rules for document discovery should be separated from the general scope of discovery, and narrowed. It also has been suggested that discovery might be controlled by requiring that the demanding party state the facts that make desired discovery relevant. These are interesting ideas. The statement of fact relevance could help avoid the snares of notice pleading.

Discussion returned to the fragmentation of disclosure practice under Rule 26(a). It was suggested that it had been a mistake to allow for local variations. One of the results will be that each district will become comfortable with its own particular practice, and resist change to a uniform national system. Uniformity is a high value, and we should seek to restore it to disclosure. Diverse local rules are valid under Rule 83, at least after expiration of the Civil Justice Reform Act, only because Rule 26(a) authorizes them. The Standing Committee self-study has commended the importance of national uniformity, and indeed the desire to reduce local variations is one of the driving forces behind the Local Rules Project. At the same time, there are strong pressures from the district courts for local autonomy, for "district rights," that will be hard to resist.

The desire to establish a nationally uniform disclosure practice does not immediately dictate what the uniform practice shall be. It is important to know whether the system adopted by Rule 26(a) is the right one. Initial reactions were hostile. Growing experience seems to be softening attitudes. The survey by the Eastern District of Pennsylvania of local disclosure experience revealed a high level of satisfaction among lawyers, and an even higher level of satisfaction among judges. Other CJRA reports may tell us more.

Representatives of the Federal Judicial Center, Joe S. Cecil and Thomas E. Willging, discussed the types of empirical research the Center might be able to do in support of the discovery project. It has been twenty years since the Center last did a broad discovery project, see Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (FJC 1978). Disclosure and discovery will play central roles in the evaluation of experience under the Civil Justice Reform Act, and a study of protective orders was done for the Committee's work on Rule 26(c). The methods used for the 1978 study cannot be replicated today, since they relied on court filings under a system that required that discovery materials be filed with the court. They expected to be able to do a review of all other empirical work on discovery, and to undertake at least a survey to gather additional information. Within the constant constraints of time and competing projects, they may be able to undertake additional studies. The data gathered by RAND for the CJRA report may provide useful information. It may be possible to gather some additional data. They plan to work with this Committee and the Discovery Committee to design the

most useful project that can be managed.

A motion to approve the discovery project outlined above was passed unanimously.

Magistrate Judge Appeals

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, to be signed into law this month,[(1)] reshapes the provisions in 28 U.S.C. § 636 for appeal from a judgment entered by a magistrate judge following consent to trial before the magistrate judge. Section 636(c) formerly provided two alternative appeal paths. Absent agreement by the parties at the time of consenting to trial before the magistrate judge, the judgment of the magistrate judge is entered as the judgment of the district court and appeal lies to the court of appeals in the ordinary course. The parties, however, could agree at the time of reference to the magistrate judge that any appeal would be taken to the district court. The judgment of the district court on appeal from the magistrate judge could be reviewed only by petition to the court of appeals for leave to appeal. The power to choose initial review in the district court has been rescinded.

Removal of the opportunity to consent to appeal to the district court requires conforming amendments to the Civil Rules. Civil Rules 74, 75, and 76 govern appeals from the magistrate judge to the court of appeals; they are now redundant and should be abrogated. Portions of Civil Rule 73 also must be made to conform, with appropriate changes in the title and catchlines. The reference to § 636(c)(7) in Rule 73(a) now should be made to § 636(c)(5). Rule 73(d), which describes the optional appeal route to the district court, must be abrogated. In Rule 73(c), the clause "unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule" likewise must be deleted. Portions of Forms 33 and 34, as well as their captions, must be changed to reflect these changes.

The Committee agreed by consensus that these changes must be made. Discussion centered on the timing of the changes.

The first timing question goes to the effect of the changes on cases pending at the time of the statute's enactment. There will be many cases -- for the most part concentrated in a few districts -- in which the parties have consented both to trial before the magistrate judge and to appeal to the district court. The opportunity for appellate review quickly and inexpensively close to home may have been, in some of these cases, a significant reason for agreeing to trial before a magistrate judge. It seems likely that the courts will conclude that although the statute effects a procedural change that should apply to all pending cases in which the parties have not yet consented to a district-court appeal, they also may be persuaded that established consents should be honored. Many of these cases will have concluded before final action can be taken to remove the now redundant portions of the Civil Rules. Some, however, may be expected to linger on for many months. Not only may some cases prove complex, but in some the initial judgment may be reversed by the district court with a remand for further proceedings before the magistrate judge.

This timing question sets the framework for the second question. The ordinary requirements that rules changes be published for public comment can be suspended for changes that merely conform the rules to statutory changes. The proposed amendments do no more than recognize the elimination of the district-court appeal alternative. If publication is not ordered, it would be possible for the Standing Committee to recommend the changes for adoption by the Judicial Conference at its March, 1997 meeting. If the Judicial Conference approves the changes, they could be forwarded to the Supreme Court promptly. Given advance warning that the rules changes may be coming, the Court would have more than a month to review the changes before the deadline for submission to Congress. If submitted to Congress, the earliest the changes could take effect would be December 1, 1997, more than a full year after enactment of the new statute. The alternative path of publication and public comment would mean that the earliest effective date for the changes would be December 1, 1998.

It was pointed out that under 28 U.S.C. § 2074(a), when the Supreme Court adopts rules of procedure, the Court fixes the extent to which a new rule applies to pending proceedings, "except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies." This provision confirms the conclusion that the present rules will continue to apply to any case in which the courts conclude that the opportunity to appeal to the district court remains available. It is the application of the statutory changes to pending cases that will control, not the effective date of the Civil Rules changes.

The Committee concluded unanimously that there is no need for public comment on the proposed conforming changes, and that it is better to seek to delete the misleading provisions of these rules as soon as possible. It is the Committee's recommendation that the Standing Committee recommend the conforming changes to the Judicial Conference for adoption without any period for public comment, and for timely action by the Supreme Court.

The Committee also discussed the question raised by several Seventh Circuit cases in which new parties are added to an action after the original parties have all consented to trial before a magistrate judge. Even when the new parties proceed without objection through trial, the Seventh Circuit has ruled that the right to a district-court trial has not been waived and that an appeal from the final judgment of the magistrate judge must be dismissed. This problem could be corrected by amending Civil Rule 73(b). One approach would be to require that the reference to the magistrate judge be withdrawn unless the new parties are given the opportunity to consent and expressly consent. Another approach would be to provide that failure to object to trial before the magistrate judge waives the right to district-court trial. This approach could be triggered in many ways: failure to object within a stated period; failure to object within a stated period after actual notice that the original parties have consented to trial before a magistrate judge; failure to object before beginning trial before the magistrate judge; or yet some other event. Judge Restani reported that the Bankruptcy Rules Committee has twice considered this issue and concluded not to act. There is some sense that this problem may be unique to the Seventh Circuit -- that other courts have found effective ways to deal with the problem that do not require wasting a trial completed before the magistrate judge.

The issue of consent by parties added after all original parties have agreed to trial before the magistrate judge will be kept on the Committee agenda.

Admiralty Rules B, C, E

The Maritime Law Association and the Department of Justice have proposed several changes in Admiralty Rules B, C, and E. Among the many changes, four should be regarded as the most important.

Rule B(1) would be amended to adopt the alternatives to service by a marshal that were earlier adopted for Rule C(3); there is no clear reason to explain the failure to adopt these provisions in Rule B(1) at the time they were adopted for Rule C(3).

Rule B(2) would be amended to reflect the ways in which Civil Rule 4 was restructured in 1993. Rule B(2)(b) has incorporated the service of process provisions of former Rule 4(d). Those provisions have been redeployed throughout Rule 4, and conforming changes must be made.

Rule C(2) would be amended to reflect the many recent statutes that provide for forfeiture proceedings in one district involving property situated outside the district.

Rule C(6) would be amended by adopting a new subdivision (a) governing forfeitures. The Department of Justice has long been anxious to adapt the in rem procedures of Rule C to the needs of forfeiture proceedings. The most significant difference is that Rule C(6)(a) would provide for direct participation by all persons who have claims against the property to be forfeited. Rule C(6)(b), on the other hand, would provide for direct initial participation only by those claiming possessory or ownership interests in the property attached in an in rem proceeding. Those having other claims against the property would continue to be subject to an intervention requirement, although this requirement has not been spelled out on the face of the rule.

Discussion of these proposals followed several paths.

The proposals were drafted in the style of the current Supplemental Rules, in an effort to hold changes to a bare minimum. The present style, however, is often confusing. In reviewing the proposals, the Admiralty Rules Committee was asked to review and incorporate the suggestions of the Standing Committee's Style Committee.

A question was raised as to the continuing need for any admiralty rules. It was suggested that the rules have continued to play a vital role since the basic integration of admiralty procedure with the general Civil Rules.

The reference in the draft of Rule C(6) to "equity ownership interest" also was questioned. This term appears both in subdivision (a), which applies to forfeitures, and in subdivision (b). Although it is asserted that admiralty practitioners will understand that equity ownership embraces legal ownership, it was suggested that "ownership interest" is a safer and more encompassing term. This suggestion may prove true not only for judges and attorneys not fully familiar with admiralty practice, but also and especially true for land-based lawyers who confront the term in the forfeiture rule. One alternative would be to refer to "legal or equity ownership interest," but even that alternative might seem to exclude some forms of ownership, particularly those that may arise under the laws of other countries. Consideration should be given to changing the draft so that it refers only to "ownership interest," to be supplemented by a comment in the Committee Note that all forms of ownership interest are included.

A question also was raised as to the portions of Civil Rule 4 to be incorporated into Rule B(2). As it stood, the B(2) incorporation of Civil Rule 4(d) included the provisions for service on the United States and on states. The proposal is that these provisions, now separately numbered, not be incorporated in the new B(2) because of the problems with immunity against attachment of property owned by the federal or state governments. The justification for making this change in the rule should be explored further.

Rule C(6) now allows interrogatories to be served with the complaint, and calls for answers to the interrogatories at the time of answering the complaint. It was asked whether this procedure corresponds to special needs of admiralty practice that justify departure from the timing provisions of Civil Rule 26(f).

The materials submitted with the proposals include the observation that at times a federal court may entertain a proceeding for forfeiture under state law. This question should be explored further.

Judge Stotler observed that the Criminal Rules Committee has been considering forfeitures under Criminal Rule 32, and that the project is being developed further to address the problems of third-party claims. There also may be jury-trial questions in civil forfeitures, although nothing in the proposed rules addresses these questions in any way.

The Admiralty Committee was asked to have a proposal ready for action in time for the spring meeting

of this Committee. The Agenda Committee will then be able to determine whether there is time on the spring meeting agenda to consider the questions that may remain.

Copyright Rules

A report was made on the lack of progress in seeking expert advice on the way to approach the Copyright Rules of Practice. In 1964, the Committee recommended to the Standing Committee that these rules should be repealed; at the same time, it recognized that the Standing Committee might deem it wise to defer to Congress, which even then was considering proposals that eventually led to adoption of the 1976 Copyright Act. The Standing Committee did choose to defer, apart from repeal of former Copyright Rule 2. Even in 1964, the Committee believed that the no-notice impoundment procedures provided by the Copyright Rules were fundamentally unfair. The due process tests that limit ex parte judicial action have developed significantly since 1964, and the seizure provisions of the 1976 Act, 17 U.S.C. § 503, seem inconsistent with the Copyright Rules. The 1964 proposal was that a new Civil Rule 65(f) should be adopted, explicitly invoking the procedures for temporary restraining orders and interlocutory injunction orders. This proposal would have the advantage of bringing copyright practice fully into the uniform rules of procedure. It also would retain the power to grant no-notice impoundment on a showing that notice might defeat the opportunity to grant effective relief.

After discussion about the difficulty of finding impartial sources of advice -- a difficulty that was felt by the Committee in 1964 -- it was moved that advice should be sought from such organizations as could be found. Unless cogent contrary advice should be provided, the next step should be to draft an amendment of Rule 81(a) that would delete the limits on application of the Civil Rules to copyright actions, and also to draft a repeal of the Copyright Rules. These drafts should be submitted to the ABA, selected copyright lawyers, and the Department of Justice for reactions. Unless some good reason is found for maintaining a special set of copyright procedures, the 1964 approach still seems sound. If indeed reason is found to continue to have special copyright rules, then advice must be sought on the ways in which the present rules should be reformed.

Rule 81(a)(1)

The Reporter was instructed to determine whether the United States District Court for the District of Columbia continues to exercise jurisdiction in mental health proceedings. If this jurisdiction has been transferred to the District courts, the final sentence of Rule 81(a)(1) should be repealed.

Rule 5: Service by Private Carrier or Electronic Means

Two quite distinct proposals have been made to amend Rule 5. One is that service by private express service should be made available as an alternative to service by mail. The other is that the way should be opened for service of documents other than the original summons and complaint by electronic means. The Bankruptcy Rules Committee has been considering provisions that would allow adoption of local rules authorizing service by electronic means. These proposals were referred to the Technology Committee.

Expert Witness Panels; Mass Litigation Trial Depositions

The Judicial Conference has appropriated funds to support a court-appointed panel of neutral experts in the consolidated MDL litigation involving silicone gel breast implants. This procedure is regarded as an experiment; it is being reviewed by another Judicial Conference committee.

This development was brought to the Committee's attention because it may lead to future proposals to amend the Civil Rules as well as the Evidence Rules. The order in the breast implant cases contemplates

that the court-appointed experts may be deposed for the purpose of generating testimony that will be admissible, through the depositions, in all of the MDL cases once they are remanded for trial in the districts of original filing. It is hoped that many state courts as well will find means of admitting the depositions in evidence. The MDL order invokes an analogy to Civil Rule 32(a)(3)(D) and (E). There may be an occasion in the future to consider adoption of revisions to Rule 32, and perhaps other rules, to facilitate once-for-all depositions of both expert and fact witnesses whose testimony is relevant in many repeated trials. The time to consider such possibilities remains in the future.

Committee discussion reflected some concerns about the practice of using court-appointed experts. It was also noted, however, that there are real problems in persuading the best qualified experts to appear as expert trial witnesses under present trial procedures.

Evidence Rule 103

In 1995, the Evidence Rules Committee published a proposal to add a new Evidence Rule 103(e) to govern the effects of in limine rulings on proffers of, or objections to, anticipated trial evidence. The proposal would have required both objections and proffers to be renewed at trial unless the court explicitly states that its ruling is final, or unless the context clearly demonstrates that the ruling is final. This proposal reflects the majority rule among the circuits, but would revise the practice in some circuits. Public comments on the rule were mixed. Some comments supported the rule. Other comments suggested that the presumption should be reversed -- that the rule should provide that pretrial objections or proffers need not be repeated at trial unless the court explicitly indicates that its ruling is tentative. The Evidence Committee divided into three groups. A majority favored adopting a rule, but divided equally on the choice between these two rules. A strong minority preferred to adopt no rule. The Evidence Committee decided to solicit the advice of the Civil and Criminal Rules Committees.

Discussion found the Committee as uncertain as the Evidence Rules Committee. It was pointed out that the problem is that things change at trial. Because the full context of trial may not be the context that was assumed in making the in limine ruling, it should be required that objections or proffers be renewed. There is a risk that the trial court will rule in the pretrial context, but be reviewed by the appeals court on the basis of a trial context that was not considered by the trial court because the question was not renewed at trial.

It was suggested that the most serious problem arises in the situation of criminal defendants who seek pretrial rulings on the admissibility of prior convictions for impeachment purposes. The Supreme Court has ruled that a criminal defendant cannot obtain review of a pretrial ruling unless the defendant takes the stand at trial. That range of problems is better addressed by the Criminal Rules Committee, along with the related question whether the pretrial objection is waived by a defendant who chooses to introduce at trial evidence that the court refused to exclude by a pretrial ruling. A defendant may wish to introduce the evidence to reduce the impact of having it introduced by the prosecution, but may fear waiver of the pretrial ruling. The Committee was advised, however, that the Criminal Rules Committee has concluded that it has no advice to offer on the proposed evidence rule.

Another observation was that trial lawyers are too cautious now, routinely renewing every objection and proffer without offering any additional ground for consideration. By encouraging even more of this behavior, the published proposal is a step backward. It was rejoined, however, that it would be dangerous for a trial lawyer to rely on a pretrial ruling. If a pretrial ruling is unfavorable, a good lawyer will try to reach the desired result in a different way, particularly by offering excluded evidence in a different form. The opposing lawyer may feel uncertain whether the pretrial ruling covers the new gambit. The trial judge also may feel caught unaware when a pretrial question is not renewed.

To further confuse the issue, it also was suggested that in almost all cases the context of the pretrial ruling makes it clear whether renewal at trial is required. Many judges simply defer most in limine questions to trial. Others make expressly conditional rulings. It was suggested that it is a trap to try to cover all possibilities in the rule.

Reference also was made to the provisions of Civil Rule 46, which abolish the need for formal exceptions, and the analogous provisions of Criminal Rule 51. The spirit of these provisions seems inconsistent with the published evidence proposal.

A straw vote on the question whether to advise adoption of some rule by the Evidence Committee produced 2 votes in favor of adopting a rule and 7 votes against. A second straw vote on whether the published proposal should be the rule adopted, if some rule is to be adopted, produced 2 yes votes.

Two specific suggestions were made for transmission to the Evidence Rules Committee. One was that there may be special difficulties in the draft Rule 103(e) reference to a "final" ruling. Finality is a risky concept that may mislead the court or the parties about the court's continuing power at trial to reconsider and revise an in limine ruling. If the Evidence Rules Committee goes forward with a proposal, it would be better to delete the reference to finality and to address the problem by providing that a pretrial motion need -- or need not -- be renewed. The other suggestion was that any new rule should be drafted in a way that does not make the trial judge responsible for making it clear whether an in limine ruling excuses any need for renewal at trial. A party who wants a clear pretrial determination whether renewal at trial is excused should bear the responsibility for explicitly requesting an explicit determination at the time of the in limine proceeding.

The Reporter will communicate the substance of this discussion to the Reporter for the Evidence Rules Advisory Committee.

Self-Study

Judge Wm. Terrell Hodges, chair of the Judicial Conference Executive Committee, has sent the quinquennial questionnaire asking this Committee to consider its continuing role and function. The Committee considered the several questions and responded: (1) this Committee should continue to function. (2) The workload of the Committee seems appropriate, neither too great nor too small. (3) The size of the Committee is desirable. (4) Committee membership seems generally to be adequately representative, although it would be desirable to have greater representation of lawyers who regularly represent plaintiffs. (5) The work performed by the Committee seems appropriate to its assigned jurisdiction. (6) Many of the topics addressed by the Committee overlap with other committees. Overlap is particularly common with the other rules advisory committees, as might be expected; the Standing Committee continues to devise and revise means of coordinating the work of the advisory committees. Liaison members among the advisory committees are very helpful in this respect. There also is some overlap with other Judicial Conference committees. There is frequent overlap with matters handled by the Court Administration and Case Management committee, as illustrated by the discussion of the Rand report at this meeting. It would be desirable to establish a formal liaison between the Rules Committees and the Court Administration and Case Management Committee. There also is frequent overlap on issues of technology. The newly created Standing Committee Technology Committee will help to coordinate with other Judicial Conference committees in this area. Finally, this Committee urges continuing consideration of a question raised by the Standing Committee's Self-Study committee, whether the chairs of each of the advisory committees should be made voting members of the Standing Committee.

Next Meeting

It is too early to tell whether there will be so much work to do before the June meeting of the Standing Committee that this Committee cannot discharge all its responsibilities in conjunction with its meeting in conjunction with the ABA Rand Report program in March. April 24 and 25 were tentatively chosen as the dates for a second meeting should one be required.

Respectfully submitted,

Edward H. Cooper, Reporter

1. The legislation was in fact signed on October 19, 1996.