MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 10 and 11, 2000

The Civil Rules Advisory Committee met on April 10 and 11, 2000, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Professor Myles V. Lynk; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, Judge Michael Boudin attended as liaison from the Standing Committee, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Norman C. Roettger attended as liaison member from the Bankruptcy Rules Advisory Committee. Professor Patrick J. Schiltz attended as Reporter for the Appellate Rules Advisory Committee. Marilyn Holmes, Peter G. McCabe, Nancy Miller, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Joseph F. Spaniol, Jr., attended as Consultant to the Standing Committee. Thomas E. Willging, Laural Hooper, Marie Leary, Robert Niemic, and Molly Treadway-Johnson represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (ABA Litigation Section); John Beisner; Alfred W. Cortese, Jr.; Francis Fox (American College of Trial Lawyers); Jeffrey Greenbaum (ABA Litigation Section — class actions); James Rooks (ATLA); and Fred Souk.

Judge Niemeyer greeted Professor Jeffries to his first meeting, and expressed appreciation for the life and regret on the passing of Edward H. Levi.

Introduction

Judge Niemeyer noted that the discovery proposals sent forward last year are now before the Supreme Court, as transmitted from the Judicial Conference. It is hoped that the Supreme Court will act by the end of the month to transmit the proposals to Congress.

If the discovery amendments take effect December 1, the process will have taken rather more than four years. The deliberate pace of the rulemaking process may at times seem frustrating, but it seems better than a process that, with greater efficiency, might efficiently make troubling mistakes.

Judge Scirica said that the Civil Rules Committee will have to start thinking about the style project. The project to rewrite the rules of procedure into clearer language goes back a full decade. The Appellate Rules have been completed, adopted, and applied in practice. That experience is a success. The Criminal Rules should

be submitted to the Standing Committee in June with a recommendation for publication this August. If the Criminal Rules restyling is successful, the Civil Rules will be next in line. It is accepted that the Evidence Rules will not be restyled.

Judge Niemeyer responded that the style project will be an enormous undertaking. The benefits of consistency and clarity are real. But early work has proved the difficulty of making changes that affect style only, not substance. This difficulty is particularly acute when the present text is ambiguous; resolving uncertainty as to present meaning can easily change the meaning. It is possible to identify the "gaps and inconsistencies" separately, asking comment whether there is a change in meaning and whether the change is desirable. But the sheer number of these problems may hamper the public comment process that will be indispensable to successful completion of the project. Some well-established phrases, moreover, should remain sacrosanct, whatever their stylistic sins may be. The difference between "transaction or occurrence" and "conduct, transaction, or occurrence" may seem elusive, but it would be a mistake to adopt a single phrase to replace all of the variations that presently appear in the rules. Even the numbers of the rules are important. Renumbering Rule 12(b)(6), Rule 56, and like familiar rules could complicate research and confuse newer generations of lawyers as they come to earlier cases.

Judge Scirica noted that the Style Project has been coordinated with the expectation that the separate sets of Rules will be done in sequence.

Judge Niemeyer turned to mass torts problems. This committee has worked with Rule 23 for many years. It has come to seem that many of the questions surrounding Rule 23 are better addressed by legislation than by rulemaking. The desirability of legislative solutions seems particularly clear with respect to mass torts. The Mass Torts Working Group was formed to bring in the contributions of other Judicial Conference committees. The Working Group recommended creation of an ad hoc committee constituted by members of several other committees, but that recommendation has not been taken up. The other committees, however, can continue to coordinate their efforts. The chairs of other committees attended the mass torts symposium at the University of Pennsylvania Law School last November. They expressed willingness to work together. The chairs and other representatives met at the March Judicial Conference, and agreed to maintain coordination, in part by meeting at each Judicial Conference. The efforts of this committee and the work of the Mass Torts Working Group have generated much good learning. Major portions of the fruits are preserved in documentary form. The Federal Judicial Center, and Thomas Willging, help to provide continuity and consistency.

Judge Scirica agreed that mass tort issues involve the need to

consider procedure, substance, court management, and judicial education. The Federal-State Jurisdiction Committee is working actively in this area, considering such bills as the venerable single-event mass tort bill, state class-action bills, a bill to supersede the Lexecon decision by expanding § 1407 to permit transfer and consolidation for trial, and asbestos bills. The Court Administration and Case Management Committee, Bankruptcy Committee, and Judicial Panel on Multidistrict Litigation are all involved as well. The Federal Judicial Center is rewriting the Manual for Complex Litigation. All of these forces will continually share information about their work. Coordination by this means will prove more difficult than it would be through an ad hoc committee, but it can achieve real results. It is time to put to use all of the knowledge that has been accumulated.

Judge Niemeyer introduced the legislation report by noting that Congress is interested in many civil-procedure topics. Bills are regularly introduced to amend one rule or another by direct legislative action. With the help of the Rules Committee Support Office, coordinating with the legislation staff of the Administrative Office, we attempt to have the underlying issues and concerns rerouted into the Enabling Act process.

John Rabiej gave the legislation report. The Support Office is currently monitoring some 30 bills, which are listed in the agenda materials. The asbestos bill reported out by the House Judiciary Committee is modeled on the Georgine settlement; it is being considered by the Federal-State Jurisdiction Committee. The Support Office has been interested in a provision that, as first drafted, would severely limit the aggregation of parties or claims. The bill's sponsors were persuaded to ameliorate this provision quite extensively. There also is a peculiar class-action provision that seems to be an artifact of the structure that was adopted for the aggregation provision, but that might be read to prohibit a request to be excluded from a Rule 23(b)(3) class. Efforts are being made to win clarification of this provision. The bill, and indeed the problems of asbestos litigation in general, are quite contentious in Congress.

Another rules topic in Congress involves the Marshal's Service. Congress came close to passing a bill that would virtually require a judge to approve any use of a marshal to make service. This provision was reduced in conference to a requirement that a report be made. The Marshal's Service wants to eliminate the provision in Rule 4(c)(2) that requires a direction for service by a marshal or other specially appointed person when the plaintiff is authorized to proceed in forma pauperis or as a seaman. They proposed a bill to amend Rule 4. It now seems likely that the Service will instead request that the question be considered by this committee.

The Minutes of the October 1999 meeting were approved with correction of a typographical error.

Rules 5(b), 6(e), 77(d) Recommended for Adoption

Amendments to Rules 5(b) and 77(d) were published for comment in August 1999, along with a request for comment on a possible related amendment of Rule 6(e). The proposals were designed to open the way for electronic service of papers other than initial process. Other means of service were added as well. Parallel proposals were published for comment by other advisory committees.

Rule 5(b) is restyled. Rule 5(b)(2)(D) is entirely new. It provides for service by any means not listed in subparagraphs (A), (B), or (C), with the consent of the person served. Service by electronic means would be complete on transmission.

In response to public comments, possible changes were prepared for the text of the rule and for the Committee Note. Rule 5(b)(2)(D) would require that the consent to service by electronic or other means be in writing. A new paragraph (3) would provide that service under Rule 5(b)(2)(A), (B), or (D) is not effective if the party making service learns that the attempted service did not reach the person to be served and the person to be served did not deliberately defeat the attempted service. The Note might be expanded by stating that the consent must be express, not implied; by observing that service through a court's facilities might include a notice of filing with an electronic link that allows viewing, downloading, or printing; and making suggestions about the information that should be provided on giving consent.

Discussion began with the observation that Department of Justice concerns would be substantially satisfied by adding to the Rule a requirement that consent be in writing, and by one version of the draft note on the information to be provided in giving consent. A Note statement that consent must be express, not implied, also is useful. There has been at least one instance in which a court took an e-mail address on a letterhead to imply consent to receive electronic service, an approach that should not be condoned by the rule. A motion was made to add the writing requirement to the rule, and to add to the Note the statement that consent must be express and the advice on the information to be provided on giving consent.

Nancy Miller is working on implementation of the electronic case files project. She noted that the project is now operating in four district courts and five bankruptcy courts; the District of New Mexico also is operating an electronic filing system. The number of courts will increase gradually over the next few years. The project will take filings over the internet. Rule 5(b) electronic service will, for the next several years, occur in two distinct contexts. In many courts, parties will be serving each other electronically even though they are not filing electronically. In other courts, the parties will both file and serve electronically. The capability to effect electronic service through the court's system is built into the CM/ECF system. Adoption of this system, however, will be optional with each

district. She urged that the Committee Note should include the statement, made in one of the alternative versions, that a district court may establish a registry that allows advance consent to receive electronic service in future actions.

It was noted that the District Court for the District of Columbia automatically sends out a form that becomes an electronic directory. Whenever a lawyer fills out the form, the lawyer can be found in the directory for purposes of all future actions.

Responding to experience in the Western District of Missouri, one of the present electronic filing courts, a sentence was added to the Committee Note stating that electronic service through court facilities can be accomplished by a notice that provides a link to the filed paper. The initial draft referred to this as a "hyperlink"; concern was expressed that the term may be as evanescent as so much computer technology has been, and the more generic "electronic link" was substituted.

The sentence referring to a district court registry was first drafted to refer to establishment of a registry by local rule. It was observed that the bankruptcy rules have a similar provision for electronic notice that does not require a local rule. There is no apparent reason to require a local rule for this purpose. The reference to local rules was deleted by common consent.

The draft also refers to description of the "format" for consented service. It was asked whether this term is universally accepted. One response was that much depends on the mode of "electronic" service. Facsimile transmission needs only the telephone number as "format." Internet messages may be little more complicated. Attachments, however, can present real problems as different word-processing systems are used. The extent of these problems depends again on context. The electronic case filing system uses a portable document format that is designed to preserve the original paging system for all users; it is a major inconvenience if different users cannot readily refer to the location of items in the document by a common page number. It was suggested that when the court system is up and running, every user will have adopted a uniform capacity. But for the time being, it is desirable to suggest in the Committee Note that a person consenting to electronic service should specify the format in which attachments can be received.

The court registry for electronic service is likely to be a registry of attorneys, rather than parties. Consent under Rule 5(b)(2)(D) is to be consent of the person served; carrying forward the long-standing provisions of Rule 5(b), Rule 5(b)(1) will continue to provide that service on a party represented by an attorney is made on the attorney. But there are circumstances in which the distinction between attorney and party is ambiguous — the United States employs its own attorneys, as do many corporations. If an Assistant United States Attorney or a member of a corporate counsel office registers for electronic service, does that bind the

party? May law firms encounter similar problems? This discussion was curtailed by the observation that electronic service is happening already. Every effort should be made to keep the process simple and to encourage people to use it. Courts should be able to develop their own registries or similar systems without the questionable help that might be supplied by the dubious foresight of this or any other committee familiar only with current technology. What is important is that a court adopting a system make it clear to those who sign on just what the system means.

The committee then agreed to recommend Rule 5(b) to the Standing Committee with several particular changes. Consent under Rule 5(b)(2)(D) must be in writing; the Note will observe that the writing can be provided by electronic means. Reference will be made to local district registries and like means to facilitate advance consent to electronic service. Reference will be made to electronic notice from the court with an electronic link to the paper electronically filed with the court. The second sentence of the Department of Justice recommended Note language, set out at page 8 of the agenda materials, will be incorporated in the Note with minor revisions.

It also was agreed that the Committee will consider adding consent to electronic service as an item in the Form 35 Report of Parties' Planning Meeting.

In deliberating the draft Rule 5(b) that was proposed for publication, this committee considered whether the rule should address the problem that arises when a person who has attempted to make electronic service learns that service was not completed. The published proposal provides that service is complete on transmission. But notice of nondelivery may be received after transmission. The committee concluded then that this problem could be addressed in the Committee Note. Virtually all lawyers who learn that attempted service was not made will do whatever is required to correct the failure. It was believed that no court would hold that service is effective when the party attempting to make service actually knows that the attempt had failed. The Committee Note, as published, observed that "actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service."

The Appellate Rules Advisory Committee is considering a rule provision, supported by the committee chair, that would read: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." This divergence from the proposed Civil Rule raises the question whether this committee should reconsider. Draft Rule 5(b)(3), offered for consideration, would apply to all methods of service other than leaving a copy with the clerk for a person who has no known address. It would provide that attempted service is

not effective if the party making service learns that the attempted service did not reach the person to be served and the person to be served did not deliberately defeat the attempted service.

The first observation was that if Rule 5(b) is to address the question of knowledge that attempted service has failed, it should address it for ordinary mail as well as electronic mail, facsimile, and even — for the bizarre situations that at least can be imagined — personal service. A provision that speaks only to electronic service might create unintended negative implications for other modes of service.

It was asked whether it is prudent to propose an addition to the rule without publication and comment. There are a number of significant questions that need to be addressed. A litigant is supposed to keep the clerk informed of a current address. If a party moves and does not tell the court, the unsuccessful attempt at mail service should count as effective service. At least if we are going to address failures of ordinary mail, this should be published for comment. There may be far-reaching practical consequences that we do not fully understand.

The discussion turned to the variety of problems that may be encountered. One is the party who fails to provide an effective address; mail or other modes of service cannot be made. Another arises when an effort to reach a valid address fails — paper mail is mangled in postal machinery or meets a physical accident en route, and is returned to the sender for want of a workable address; an electronic message is bounced back as undelivered; an office worker served on behalf of an employer brings it back to the serving party objecting to any obligation to deliver it. It is important to distinguish two separate problems. One is whether an attempt to make service counts as effective. The other is whether, after an unsuccessful attempt to make service, a duty remains to try again. The duty to serve may be excused in some circumstances, as when a party has failed to maintain a current address with the court clerk. There also may be circumstances in which a person to be served deliberately seeks to avoid service.

The view was repeated that if these topics are to be addressed, they should be addressed at least with respect to postal mail as well as electronic mail. The combined topics, however, are too complex to take on without publication for comment. The proposal should be sent to the Standing Committee with a recommendation for adoption without any provision that addresses a party's actual knowledge that attempted service has failed. The problem of failed service can then be studied more carefully.

Professor Schiltz noted that the Appellate Rules Committee felt that something should be said about electronic service because e-mail "so often comes back." For postal mail, the problem almost never arises. There is a danger that if the rule speaks to the problem in general terms, people will seek to take unfair advantage of the opportunity for creating confusion.

Rule 5(b)(3) could be revised to address only electronic mail. It was protested again that this approach would create negative implications for other failed methods of service. But it was rejoined that the Committee Note can say that no negative implications are intended.

A motion was made to recommend Rule 5(b)(3) to the Standing Committee, limited to electronic service. The motion was supported with the observation that in the real world there has been no problem with ordinary mail. But it was agreed that the problem of deliberate efforts to defeat service need not be addressed; this portion of the draft was deleted. As changed, the motion was adopted.

At the April 1999 meeting the committee considered a proposal to amend Rule 6(e) to treat electronic service in the same way as postal service. Rule 6(e) now allows an additional 3 days to respond when service is made by mail. The committee was divided on the question. The conclusion was a recommendation that Rule 6(e) not be amended, but that a revised Rule 6(e) be published with a request for comment on the need for revision. Public comments were divided, but several comments suggested that additional time should be allowed. The essence of these comments ran in at least three directions. The popular image of e-mail as instantaneous is exaggerated; often there are substantial delays in transmission. In addition, messages are often received in garbled form, a problem that arises most commonly with attachments; it can take a few days to arrange for delivery in intelligible form. Finally, the added time to respond is likely to encourage use of electronic service — the added time is not likely to deter a party from seeking consent to electronic service, and it is likely to encourage some parties to give consent. It might be possible to add only one day for electronic service; one proposal was to add one day for electronic service or service by overnight courier, and three days for ordinary courier delivery. The Department of Justice is among those urging that at least some additional time be allowed to respond after electronic service.

The Bankruptcy Rules Committee clearly favors allowing the additional three days. It also believes that it is important to maintain consistency between the Civil Rules and the Bankruptcy Rules on this question.

A motion was made to recommend to the Standing Committee adoption of the revised Rule 6(e) as it was presented for public comment. Support of the motion was voiced by Judge Roettger, who noted that the Bankruptcy Rules Committee unanimously favored a 3-day extension. A practitioner observed that his firm regularly receives electronic messages that can be deciphered only with the assistance of the firm "help desk," if at all. And it was noted that there are likely to be cases in which different parties are served by different means, and perhaps at different times, destroying any uniform response time anyway.

The motion to recommend adoption of the revised Rule 6(e) was adopted.

Rule 77(d) was published in a form that would allow the clerk to serve an order or judgment in the manner provided for in Rule 5(b). The published version failed to change the provision for a docket note to refer to "service" rather than "mail." This change was agreed upon. A Committee Note reference to local rules that should have been deleted before publication also was deleted. With these changes, the committee voted to recommend adoption of the Rule 77(d) amendments to the Standing Committee.

Copyright Rules, Rule 65(f), and Rule 81(a)(1): Recommended for Adoption

The proposals published in August 1999 include a second package that would abrogate the obsolete Copyright Rules of Practice adopted under the 1909 Copyright Act. A new Rule 65(f) would be adopted, confirming the common practice that has substituted Rule 65 preliminary relief procedures for the widely ignored Copyright Rules. Rule 81(a)(1) would be amended to delete the obsolete references to copyright rules, and also to improve the expression of the relationship between the Civil Rules and the Bankruptcy Rules. Such little public comment as was provided on these changes was favorable. Rule 81(a)(1) would be further amended to delete an obsolete reference to mental health proceedings in the District of Columbia. The committee voted to recommend the changes for approval by the Standing Committee and transmission to the Judicial Conference.

Rule 82 Recommended for Adoption

The final sentence of Rule 82 provides that an admiralty or maritime claim "shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93." A member of the public has suggested that since § 1393 was repealed in 1988, Rule 82 should be amended to refer to "§§ 1391-1392." The committee approved this suggestion, and decided to recommend to the Standing Committee that the amendment be transmitted to the Judicial Conference as a technical and conforming change that does not require publication for comment.

Rule 7.1: Recommendation for Publication

Judge Niemeyer opened discussion of the draft Rule 7.1 on disclosure by observing that there have been news reports of cases in which judges have inadvertently failed to disqualify themselves because of a failure to connect with financial information that requires disqualification. The Codes of Conduct Committee is working on these problems, and has urged the Standing Committee to adopt procedural rules governing disclosure. Marilyn Holmes, who provides staff support for the Codes of Conduct Committee, is attending this meeting to help the discussion. At present, Appellate Rule 26.1 is the only procedural rule that addresses financial disclosure. The Codes of Conduct Committee believes that

Rule 26.1 is a satisfactory model for the district courts. The Standing Committee is taking the lead on this topic, because coordination is required among four advisory committees; only the Evidence Rules Committee can disclaim any interest.

Judge Scirica agreed that this project has, in part, come "from the top down," contrary to the usual Standing Committee policy of waiting for proposals to originate in the advisory committees. It makes sense to have the same provision for the Civil and Criminal Rules. There are special concerns that may justify different provisions in the Bankruptcy Rules. If the district court rules head in a different direction from present Appellate Rule 26.1, a process that seems to be developing as to some details, the Appellate Rules Committee must become involved as well. John Rabiej and Marilyn Holmes brought the chairs of the Standing Committee and the Codes of Conduct Committee together to seek a common approach.

There have been two recent waves of embarrassing publicity about inadvertent failures to recuse. Congress is sensitive to the problem. Members of Congress understand that the failures were inadvertent, but do not want the problem to recur. They would prefer that the Judicial Conference come up with an answer, and the rules process seems to provide the best available Judicial Conference approach.

The Standing Committee hopes the Advisory Committees will develop the same proposal, or at least very similar proposals, so that in June the Standing Committee can frame a common proposal. The proposals would be published for public comment in August.

There is a persuasive argument that this topic is one that should not be addressed in the rules of procedure. But there is strong reason to act. And Appellate Rule 26.1 has opened the door. The Committee Note to Rule 26.1, which was first adopted in 1989, recognizes that some courts may wish to exact more detailed disclosures by local circuit rule. This approach may be the most satisfactory means of establishing a national policy.

Adoption of rules for the district courts similar to Appellate Rule 26.1 will not address the specific incidents of implementation. Development of the right software for computer matching, and judicial alertness, are critical to successful implementation.

It must be recognized, further, that district judges face problems distinct from those commonly encountered in the courts of appeals. Default judgments, dismissals, and requests for emergency or routine administrative action often come before the judge with little warning and little occasion for deliberation or inquiry. Judicial action is routine in many matters.

The Federal Judicial Center study shows that many circuits have expanded on the requirements of Appellate Rule 26.1. They broaden the scope of disclosures, and the character of the parties

that must make disclosures. (Appellate Rule 26.1 applies only to nongovernmental corporations.) And, although there is no rule for the district courts akin to Rule 26.1, several districts have adopted their own local disclosure rules, often requiring more extensive disclosure than that mandated by Rule 26.1. And of course disclosures are required by a variety of other district court practices.

There is a difficult question whether local rules should be prohibited when a national rule is adopted. The Committee on Codes of Conduct is inclined to the view that local rules should be prohibited. But there are at least two concerns that must be considered. First, disqualification decisions are a matter of great sensitivity. Judges are anxious to have all the information needed to protect their own integrity and the integrity of their courts. Second, some of the local variations may be valuable; allowing local practices to continue may generate information that can be useful in expanding the approach of Appellate Rule 26.1.

There also is a question, framed by draft Rule 7.1., whether expansion of the Appellate Rule 26.1 model of disclosure should be accomplished only through the protracted and cumbersome Enabling Act process. The draft rule provides for adoption of disclosure forms by the Judicial Conference if greater disclosure seems desirable.

Professor Coquillette reported on the deliberations of the Bankruptcy Rules Committee. That committee reached several conclusions. There should be a national rule for the district courts modeled on Appellate Rule 26.1. The rule might well allow the Judicial Conference to adopt forms requiring greater disclosure if the Judicial Conference comes to believe that greater disclosure is desirable. The Judicial Conference process could allow more frequent and smaller adjustments than can be accomplished by continually revising national court rules. The Judicial Conference should have sole discretion whether to adopt any form at all. Local rules should be permitted. But — and perhaps most important — room should be left to adopt distinctive Bankruptcy Rules. Bankruptcy practice often involves thousands of parties in a single proceeding, and some adjustments may be required to reflect this fact. Judge Roettger seconded the observation that bankruptcy practice encounters unique problems that may require a unique rule.

Professor Schiltz observed that the Appellate Rules Committee continues to support Appellate Rule 26.1. Over time the Appellate Rules Committee has tried to require more expansive disclosures than Rule 26.1 now requires, but that has proved impossible to "sell." The Appellate Rules Committee supports local rules. It seems likely that the Appellate Rules Committee will support amendment of Rule 26.1 to authorize development of disclosure forms by the Judicial Conference, in terms similar to draft Rule 7.1, and also will support amendment of Rule 26.1 to require supplementation when there is a change in the circumstances reflected in the

initial disclosure statement.

Marilyn Holmes agreed with the common observation that Appellate Rule 26.1, and the parallel draft Rule 7.1(a)(1), is a narrow rule. The rule reaches only financial interests, and not all of those. The Committee on Codes of Conduct is interested only in disclosure of financial information that automatically disqualifies a judge. Thus it would like to discourage local rules. The local rules do not seem to work well. Additional information would, to be sure, lead at times to disqualification. But the Committee is interested in developing conflicts screening software; a similar program will be built into the electronic case filing program that the Administrative Office is developing. Information will be put into the system as the parties and firms involved in any particular litigation supply it; the system then will compare this information to all of the information the judge has put into the system.

The draft Rule 7.1 was then introduced. The agenda materials include several different model rules, and a variety of Committee Note drafts. Provisions from the different rules and paragraphs from the different Notes could be mixed and combined in many different ways. The model that seems to command the greatest support, however, is the one that is put first. This model is based on Appellate Rule 26.1. The core disclosure requirement is the same as Rule 26.1. But there are several variations. The first variation requires a nongovernmental corporation to file a "null" report when it has no information to report. This provision was added to the draft at the suggestion of the Codes of Conduct Committee, and should prove helpful to show that the lack of any disclosure information reflects a lack of information to disclose rather than inadvertent failure to file. The task of court clerks will be considerably eased by this provision. A duty to supplement the initial disclosure is added. Other variations reflect differences in the circumstances of the district courts as compared to the courts of appeals. Because district judges often are called upon to act immediately on filing, or soon after, the time for filing provision is made more demanding. The number of required copies is reduced to two because district courts rarely act in panels of three. And a provision is added to require the clerk to transmit the disclosure information to the judge assigned to the case.

The most important departure of this model from Appellate Rule 26.1 is Rule 7.1(a)(2). This provision requires all parties to file a form providing any additional information required by the Judicial Conference. The prospect that additional disclosures may be found desirable seems supported by the fact that most of the courts of appeals have adopted local rules that expand on the requirements of Rule 26.1.

Unlike some of the other models, this draft rule does not speak to the local rules question. A number of different

approaches to local rules are reflected throughout the other drafts. Some of these approaches explicitly note the part of the Note to the original Appellate Rule 26.1 that recognizes that the circuits may wish to require additional disclosures by local rule.

Judge Niemeyer observed that the question requires sensitive accommodation to the views of the other advisory committees, the Standing Committee, and the Codes of Conduct Committee. The question whether to require more information than Appellate Rule 26.1 requires may be compromised by adopting Rule 26.1 but providing a discretionary power to supplement by Judicial Conference form if the Judicial Conference comes to believe that supplementation is desirable. The means of accomplishing disclosure remains essentially a matter of court administration, not procedure, and action by the Judicial Conference with the support of the Codes of Conduct Committee and the Administrative Office may prove more flexible than the Enabling Act process. This approach does not mandate any additional disclosures, but leaves the path open.

Judge Niemeyer further observed that the question of local rules is particularly difficult. Over the years this committee has tried to preserve the view that national problems deserve answer by uniform national rules. Local rules are appropriate only when there is a reasonable prospect that variations in local conditions warrant divergent rules. Local rules are a hardy species, however, and constant vigilance is required. It is uncomfortable to adopt a national rule and, at the same time, to countenance local rules without any hint of different local circumstances that might justify disuniformity. But at the same time, it will be difficult to require abandonment of present local rules. Rather than bless local rules in the text of the Rule, it may be best simply to recognize the legitimacy of local rules in the Committee Note.

Judge Roettger suggested that the brief and noncommittal recognition of local rules in a sentence appearing on page 7 of the agenda materials was consistent with what the Bankruptcy Rules Committee had in mind.

Professor Coquillette confessed to being "the archetypical opponent of local rules," but urged that a modest exception would be wise in this instance. The Appellate Rules Committee recognized the legitimacy of local rules when it developed the original 1989 version of Rule 26.1. The Bankruptcy Rules Committee supports this approach. Many courts, moreover, are firmly attached to their rules, and likely will fight for them in the Judicial Conference. This is an exceptional situation.

Discussion began with the note that the Judicial Conference form provision extends beyond nongovernmental parties. All parties and lawyers could be included. This would be a very broad expansion beyond the reach of Appellate Rule 26.1. It would be useful to add to the Note some version of the Note paragraph on page 16 of the agenda materials that suggests that any form that is

adopted may not apply to all parties, and in any event may be limited to information that is not relevant to some parties. It will be up to the Judicial Conference to decide what to do in that situation. But there will be a great advantage in either allowing noncovered parties not to file the form or, if it is not likely to be evident whether a party is covered, to file a form that simply says that none of the requested items of information is relevant to a particular party. This approach would greatly ease the burden on court clerks, who otherwise could not readily determine whether the absence of a form represents the absence of relevant information or inadvertence to the filing obligation. There would be little burden on the parties if it becomes established routine to file a "null" report on a party's first appearance.

The local rules issue was addressed with the suggestion that it makes sense to permit local rules. The Judicial Conference form, if one is developed, and the Administrative Office case filing software, will exert a strong pull toward uniformity. But if recognition of local rules is expressed only in the Note, it will be difficult to retract the comment without revising the rule. The Judicial Conference may develop a form that, at some stage of evolution, warrants preemption of local rules. If we put permission for local rules into the text of Rule 7.1, as some of the drafts do, the Rule can be amended in the future to defeat local rules. It also is intrinsically desirable to address so important an issue in the text of the rule.

Another suggestion about local rules was that it will be difficult to stop a judge or court from asking for more information.

Marilyn Holmes said that the Codes of Conduct Committee defers to the rules committees on the local rules question. But she urged that if the Note does speak to the question, it should speak in a discouraging way. Even as sympathy was expressed for this view, it was noted that many courts believe that their present local rules are important and are working well. It would be difficult to persuade the Judicial Conference to disregard their views. One approach might be to say nothing in the Note, leaving the possible preemptive effect of Rule 7.1 for future decision. Since Rule 7.1 is closely modeled on Appellate Rule 26.1, however, the Committee Note to Rule 26.1 that expressly recognizes local rules likely would carry over at least until the Judicial Conference should act to adopt a disclosure form.

Looking to the various draft Note provisions on local rules, it was thought that the language of one, noting that districts are "free to adopt" local rules was too permissive. The Note should say that Rule 7.1 does not prohibit local rules. And it should say that if the Judicial Conference adopts a form, the Judicial Conference can decide whether the form preempts local rules.

It was asked whether there is any need to include the proposed subdivision (c), which directs the clerk to deliver a copy of the

form to each judge assigned to the action or proceeding. Clerks are charged with many responsibilities that do not appear on the face of the rules: why note this one in an express rule provision? It was responded that in some districts the clerks do not do this. Delivery to the judge should be made routine. A mechanism should be provided to help the judge. A different response was that in a different district, the clerk does this now. It also was asked whether it is sufficient to require delivery to each judge assigned to the action or proceeding. A judge or magistrate judge may be asked to act in a case assigned to another judge, often in emergency circumstances. It was agreed that the rule should direct the clerk to deliver a copy of the disclosure to each judge "acting in the action or proceeding." It was recognized that there may be some circumstances of emergency action in which this direction cannot feasibly be honored, but the general direction seems useful. Professor Schiltz ventured the prediction that the Appellate Rules Committee likely will not add to their Rule 26.1 a provision that parallels this provision, for fear that it might create negative implications about the nature and extent of the clerk's duties in other situations.

The committee voted to recommend publication of the preferred form of Rule 7.1, as modified to reflect the discussion.

Rules 54, 58: Recommendation for Publication

The Appellate Rules Committee has devoted intense study to the problems that arise from the interplay of Civil Rules 54 and 58 with Appellate Rule 4(a)(7). Rule 4 governs appeal time. The Supreme Court has ruled that the appeal time periods set by Rule 4 are "mandatory and jurisdictional"; an out-of-time appeal must be dismissed for lack of jurisdiction. The event that signals the beginning of the appeal time period is important. In 1963, to assure a clear signal, Civil Rule 58 was amended to require that every "judgment" be set forth on a separate document. Entry of the separate document would avoid any ambiguity. Appellate Rule 4(a)(7) borrows Rule 58: "A judgment or appeal is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure."

This well-intended and simple requirement has encountered several obstacles. One of them arises from Civil Rule 54(a), which defines a "judgment" to include "a decree and any order from which an appeal lies." This definition does not stand up well. Opportunities for appeal have expanded since this part of Rule 54(a) was adopted in 1938. As one example, Rule 54(a) includes as a "judgment" any interlocutory order that would be found appealable under the collateral-order doctrine. One puzzling consequence seems to be that the time to appeal a collateral-order appeal does not begin to run unless the order is entered on a separate document, an awkward conclusion. A worse consequence is that Rule 58 also provides that a judgment "is effective only when" set forth on a separate document. Read literally, this combination of Rules

54(a) and 58 would mean that, for example, an order denying a claim of privilege made to resist discovery cannot be "effective" until it is entered on a separate document if a court of appeals would conclude (as the Third Circuit now routinely does) that the order is appealable.

This relationship between Rule 54(a) and Rule 58 has been the source of one of the specific concerns of the Appellate Rules Committee. Many judges do not follow the separate document drill when ruling on motions of the sort that — when timely made — suspend appeal time. These motions, enumerated in Appellate Rule 4(a)(4)(A), include post-trial motions under Rules 50, 52, 54(d)(2)(B), 59, and 60. Failure to enter the order on a separate document is no problem in the circuits that hold that an order denying one of these motions is not separately appealable, that the appeal must be timely taken from the underlying judgment. Some circuits, however, have concluded that a separate document is required because the order is appealable.

Another untoward consequence of the separate document requirement has caused greater concern to the Appellate Rules Committee. If a clearly and truly final judgment is not entered on a separate document, appeal time does not start to run. This consequence of the rules would not be troubling if district courts routinely adhered to the simple and easily implemented separate document requirement. Routine adherence, alas, has not been achieved despite more than a third of a century to become accustomed to Rule 58. There are large numbers of judgments entered years ago, in litigation long-since believed to have been concluded, that remain eligible for appeal. The Appellate Rules Committee views these judgments as "time bombs" waiting to explode.

The Appellate Rules Committee initially undertook to address this problem solely through Appellate Rule 4. The price for this approach, however, arises from the way in which Civil Rule 58 interacts with other Civil Rules as well as with the Appellate Rules. The times set for post-judgment motions by Civil Rules 50, 52, 54(d)(2), 59, and 60 begin to run from the entry of judgment. If the Appellate Rules and the Civil Rules set different events as the entry of judgment, the integration between post-judgment motions and appeal time is destroyed. The initial Appellate Rules proposal would have set the entry of judgment on one of two events: compliance with Civil Rules 58 and 79(a), or 150 days after entry of the judgment on the docket under Rule 79(a) notwithstanding failure to set the judgment forth on a separate document. This approach would reduce the "time bomb" period for appeal purposes, but would not affect the time for post-trial motions. Termination of the opportunity to appeal would not terminate the time to make a post-judgment motion, which could be cut short only by entry on a separate document. The judgment might remain subject to revision in the district court, even though time to appeal had passed. And if the district court denied relief, that order itself would be appealable — and, under the most troubling view, might support some

measure of review of the original judgment as well as the denial of post-judgment relief. (This troubling view could draw directly from Appellate Rule 4(a)(4), which provides that if a party timely files a motion under Rules 50, 52, 54(d)(2)(B), 59, or 60, the time to appeal runs from entry of the order disposing of the last timely motion. For want of entry of judgment, the motion perforce is timely.)

Convinced of the need to undertake a joint approach, the Civil and Appellate Rules Committees have proposed integrated amendments to Civil Rule 58 and Appellate Rule 4(a)(7). A conforming change would be made to Civil Rule 54(d)(2)(B), but the Civil Rule 54(a) definition of "judgment" would remain untouched.

The recommendation to bypass revision of Rule 54(a) rests on great uncertainty as to the consequences that might follow. Not surprisingly, the word "judgment" appears at many places throughout the Civil Rules. The Rule 54(a) definition does not integrate well with all of them. There are compelling arguments that the definition, by encompassing any order from which an appeal lies, includes too much. There are persuasive arguments that the definition, expressed as "includes," is not exclusive — that "judgment" at times should be read to include an event that is not a decree and is not an order from which an appeal lies. Very few reported decisions tangle with these problems, and the outcome is often uncertain. Despite a parade of theoretical problems, the rule does not seem to have caused any real problems in practice. The committee agreed that it is better to leave Rule 54(a) untouched.

Rule 58 is styled, and would be changed in two major ways. Rule 58(a) would continue to require that every judgment and amended judgment be set forth in a separate document, but also would make it clear that a separate document is not required for an order disposing of a motion for judgment under Rule 50(b), to amend or make additional findings of fact under Rule 52(b), for attorney fees under Rule 54, for a new trial or to alter or amend a judgment under Rule 59, or for relief under Rule 60. This change would address directly the lesser of the Appellate Rules Committee's concerns.

The major change in Rule 58 is reflected in draft Rule 58(b)(2). This rule provides that judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62, when it is entered on the civil docket under Rule 79(a) and, if a separate document is required, when one of two other events has occurred. It is enough that the judgment is set forth on a separate document. But if a separate document is required but has not been provided, judgment is entered after 60 days from entry on the civil docket. Although these terms do not speak directly to appeal time, draft Appellate Rule 4(a)(7) completes the circle by providing that judgment is entered for purposes of appellate Rule 4 when it is entered for purposes of Civil Rule 58(b).

Judge Niemeyer opened committee discussion by suggesting that there is no perfect solution to the problems created by the inability of the system to accomplish routine compliance with the separate document requirement. The reporters for the two committees have labored diligently to craft a reasonably effective solution. The rules intertwine in ways that should be approached with care. The proposed solution might well be accepted unless clear flaws can be found.

Professor Schiltz, summarizing the Appellate Rules Committee approach, observed that there are indeed many complicated problems. The combined present proposals, however, seek to approach only the least complicated of the problems. As matters now stand, failure to enter judgment on a separate document means that the time for post-judgment motions and the time for appeal never starts to run. There is widespread disregard of the separate document requirement. In reading some 500 separate document cases, many appeared in which appeals were taken 3, 4, 5, and even 6 years after final judgment was entered. We want to make sure that these time periods do not stretch on forever. The First Circuit has addressed the problem by ruling that after three months the separate document requirement is waived. Other courts of appeals have admired this approach, but have concluded that it is not an available interpretation of the rules. The Appellate Rules Committee cannot address the problems alone, unless it is prepared to decouple the time for appeal from the time for post-judgment motions.

The question whether a separate document is required for an order that denies a post-judgment motion has generated nightmarish complexities. Some circuits hold that such an order is appealable, but in terms that frequently involve contradictions within a single circuit. To make it worse, some circuits have read a separate document requirement into Appellate Rule 4, independent of the Civil Rule 58 requirement that is limited by the Civil Rule 54(a) definition of a judgment. But these circuits cannot agree on when the imputed Appellate Rule 4 separate document requirement applies.

If proposed Civil Rule 58 is adopted, the Appellate Rules Committee can put aside its plan to adopt its own bypass of the separate document requirement.

The first question in the ensuing discussion asked whether there is an inconsistency between draft Rule 58(a) and 58(b). Rule 58(a) says a judgment must be set forth on a separate document. Rule 58(b) seems to say that this requirement is excused for some purposes. The response was that the requirement is not actually excused. Draft Rule 58(d) provides that any party may ask that the judgment be set forth on a separate document, and Rule 58(a) establishes the court’s duty to do so. All that happens is that an efficient central means is used to avoid writing repetitively into Rules 50, 52, 54(d)(2)(B), 59, and 60 the provision that motion time starts to run when the judgment is set forth on a separate document and entered on the civil docket, or 60 days after it is

entered on the civil docket.

An example was offered of the benefits that may flow from this new approach. Many actions are dismissed under the Prison Litigation Reform Act, often without even serving the defendant. The separate document requirement is not always observed. Under the present rules, appeal time does not start to run — a defendant who does not even know the suit has been filed and dismissed remains subject to the prospect of an appeal several years in the future. Under the proposal, appeal time will start to run 60 days after the order of dismissal is entered on the civil docket.

It was asked how widespread is this reported disregard of the separate document requirement. Answers were offered that the requirement is observed in the vast majority of cases, and "all the time in certain circumstances." Professor Schiltz thought that the cases he has read suggest that most of the problems will be addressed by the draft Rule 58(a) exemption of orders that dispose of the enumerated post-judgment motions. One judge agreed that a separate document is never used for an order denying a new trial.

The question was raised whether it would be better to abandon the separate document requirement. Or, perhaps, the requirement could be limited to cases in which a party asks for one. The virtue of the separate document requirement is partly the clear signal for motion and appeal time limits, and partly as reassurance that the court indeed believes that it has entered a final and appealable order. This virtue could be achieved for the benefit of any party who cares for clarity and understands the rule by requiring a separate document only when requested. It was suggested that if the Rule 58 proposal is published for comment, the transmittal letter should solicit comment on the alternative of abandoning or limiting the separate document requirement.

Discussion turned to questions of style. The draft in the agenda materials converted the present Rule 58 requirement that a judgment be "set forth" on a separate document to a requirement that it be "entered" on a separate document. It was readily agreed that this effort at streamlining was ill-advised. Entry and setting forth are distinctive requirements and events. The "set forth" locution will be restored.

A motion was made to recommend to the Standing Committee publication of the Reporter’s version of the Style Subcommittee’s version of Rule 58, on terms that ask for comment on whether the separate document requirement should be retained. It was noted that although publication itself would call attention to the buried time bombs and perhaps stir some belated appeals, the Appellate Rules Committee has concluded that the risk must and will be run. It also was noted that the Supreme Court order transmitting proposed rules amendments to Congress ordinarily addresses the question of application to pending cases, and that this process in turn is limited by the provision in 28 U.S.C. § 2074(a) that the pre-amendment rule applies when, "in the opinion of the court in

which * * * proceedings are pending," application of the new rule "would not be feasible or would work injustice." After these observations, the motion was adopted.

Two minor changes were proposed in Rule 54(d)(2)(B). The first would parallel the Rule 58(a) proposal by eliminating the requirement that an order on attorney fees be entered on a separate document. The second would conform Rule 54(d)(2)(B) procedure to recent changes made in Rules 50, 52, and 59 that establish a uniform requirement that a post-judgment motion be "filed" no later than 10 days after entry of judgment. These two changes can be effected by simply striking a few words from the present rule. The Style Subcommittee has proposed a complete style revision of Rule 54(d)(2)(B) since the rule will be published for comment. It was observed that the modified Style Subcommittee version presented to the committee was a vast style improvement on the present rule. But concern was expressed that considerable time must be invested to ensure that unintended consequences do not flow from a style revision. In addition, there is a risk that problems might arise from the obvious differences in style and structure between this part of Rule 54 and other parts. A motion to recommend the restyled version for publication failed. The motion to recommend publication of the simpler revision of Rule 54(d)(2)(B) was adopted.

A brief discussion ensued about the general difficulty of integrating new style conventions with the ongoing process of rule amendment. Real advantages can be achieved by piecemeal style revision. Piecemeal revision, however, runs the risk of multiplying still further the many stylistic variations that have emerged in rules that have been revised on the advice of many different committees. With rules that touch fundamental aspects of the civil adversary system, moreover, attempts to restyle provisions that are not slated for changes of meaning may prove dangerous. The recent project to amend the discovery rules and the ongoing project to consider class-action rules, for examples, have deliberately put aside any effort to make stylistic changes. These topics have widespread impact and generate intense feelings. It was urged that the Standing Committee not adopt any requirement that a general style revision be made of any rule, or even rule subdivision, whenever any amendment is offered.

Rule 81(a)(2): Recommendation for Publication

Rule 81(a)(2) now includes provisions governing the time to make a return to a petition for habeas corpus. These provisions are inconsistent with statutory provisions, and also are inconsistent with provisions in the separate habeas corpus rules that are still more inconsistent with the statutory provisions. The Criminal Rules Committee will propose some changes in the rules that govern habeas corpus proceedings and those that govern § 2255 motions to vacate sentence. The Criminal Rules Committee has recommended that all reference to these matters be stricken from

Rule 81(a)(2). The committee agreed, voting to recommend publication of the draft Rule 81(a)(2) revision in the agenda materials at the same time as the parallel Criminal Rules Committee proposal is published.

Report: FRAC

The Standing Committee Subcommittee on Rules of Attorney Conduct continues to gather information and to deliberate, without any need to move immediately toward conclusion of the project. Judge Scirica and Judge Niemeyer opened the report, noting that the Standing Committee has pursued this topic over a period of several years. The initial draft set of ten Federal Rules of Attorney Conduct remains "in the wings." Variations of a simpler dynamic conformity model are being considered.

Professor Coquillette reminded the committee that the attorney rules topic began not in the Standing Committee but in Congress. In 1986 and 1987 Congress studied the questions raised by local rules, leading both to amendments of the Enabling Act and to creation of the Local Rules Project. So many local rules dealing with professional responsibility were found by the Local Rules Project that the topic was put aside while other local rules issues were pursued. But several years ago the question was taken up. The process has included several meetings to seek the advice of lawyers, judges, and academics who have special knowledge of professional responsibility issues. The attorney conduct issues are very sensitive. The local rules take many and inconsistent approaches. The inconsistencies have caused problems, particularly for the Department of Justice. The regimes adopted by local rules often are inconsistent with state rules — in Delaware, for example, the district court adopts the Model Rules, while the state adheres to the Model Code.

Professional responsibility issues cut across all committees. The joint subcommittee met in February to host a group of experts. The discussion focused on issues raised by a set of drafts of a Federal Rule of Attorney Conduct 1. Five versions were presented, moving in progression from a detailed model that expressly addresses several issues to a very simple model that simply incorporates local state rules. There will be another subcommittee meeting in August or early fall. The deliberate pace has been adopted deliberately, to work toward a strong and generally acceptable solution.

As work continues, there may be a FRAC 2 to regulate areas in which the Department of Justice has encountered difficulties with state rules of professional responsibility. Particular problems have emerged with respect to contact with represented persons and calling lawyers as grand-jury witnesses. The American Bar Association, the Conference of Chief Justices, and the Department are discussing possible solutions, aiming toward revision of Model Rule 4.2. Congress is interested in these questions. 28 U.S.C. § 530B was an effort to address state regulation of federal

government attorneys, but it is unfortunately drafted. By commanding compliance with both state rules and local federal court rules, the statute at times requires the impossible task of complying with inconsistent rules. Pending bills would either repeal § 530B or refer these problems to the Judicial Conference for recommendations.

There also may be a FRAC 3 to deal with bankruptcy issues. Bankruptcy is distinctive because the bankruptcy statutes address some matters of professional responsibility, there are unique conflicts-of-interest problems that arise from the multiparty nature of bankruptcy proceedings, and there is a national bar. The Bankruptcy Rules Committee is considering these matters, but is not aiming at immediate action.

The Standing Committee continues to study the alternatives, honoring its obligation to promote consistency of rules and otherwise serve the interests of justice. In the end, the decision may be that there is no need for new rules.

The ABA has set an October target to distribute a preliminary draft of "Ethics 2000" proposals. It may be that the target will not be hit. There is no point in attempting to move out ahead of these proposals in considering such specific issues as Model Rule 4.2. Discussion of these specific issues includes not only the ABA committees but also the Department of Justice and the Conference of Chief Justices. The ABA recognizes that simple adoption of a Model Rule does not accomplish adoption by any state. The Model Rules have not been unanimously adopted; the states that have not adopted them include such large states as New York and California.

And it has not been decided whether any federal rules addressing professional responsibility should be incorporated into the existing sets of rules of procedure or whether an independent set of Federal Rules of Attorney Conduct should be adopted.

Report: Discovery Subcommittee

Judge Niemeyer introduced the report of the Discovery Subcommittee by noting that although the Subcommittee has guided deliberations on the discovery amendments that now rest in the Supreme Court, it has important issues left to consider. The question of privilege waiver in document production is an important one that attorneys still worry about, but it is also complex. Computer-based information presents another great set of problems. Enormous bodies of information are now kept in computer-based systems. Discovery problems are beginning to emerge. The subcommittee met on March 27 with groups of experts to learn more about the problems, and to begin to consider the question whether rules changes are appropriate.

Judge Levi began the report by stating that the subcommittee is in an information-gathering mode. He and Professor Marcus attended the January leadership meeting of the ABA Litigation Section and listened to a discussion about the opportunity to do

something by rules changes to address discovery of computer-based information. Lawyers who typically seek information are worried about spoliation. Lawyers who typically provide information are worried about the costs and burdens of responding.

The March meeting presented three panels. The first panel, comprised primarily of lawyers, provided information about the problems that have been encountered in practice. The second panel, comprised primarily of judges but with a few lawyers, addressed possible solutions, including the possibility of rules changes. The third panel, comprised entirely of forensic computer experts, provided information about technological problems and prospects, costs, and the like.

One persisting problem arises from information that the creator has attempted to delete from the computer. Vast amounts of intentionally "deleted" material remain subject to retrieval. Heroic measures are required to completely and assuredly delete information beyond the prospect of retrieval. Like an ancient palimpsest, the investigator need only chisel away the overlying material to reach the original underlying information.

There is some interest in developing safe-harbor guides to information preservation. Uniformly accepted retention protocols would be welcomed by many.

Privilege problems remain very much under study. One particular source of privilege problems arises from the fact that the systems that "back up" computer information to protect against system failures typically back up all information in the order received, without any differentiation or ordering. Searches through back-up tapes for relevant information must indiscriminately review everything.

Battles continue to be waged over the form in which computer-based information is produced. The party that has the information may prefer to produce it in hard-copy form, while the requesting party may prefer to receive it in electronic form for easier searching. The party who has the information may, on the other hand, prefer to produce it in its current electronic form, shifting to the requesting party the burden of search; the requesting party may have a contrary preference that the producing party do the search.

Cost-bearing has come back to the discussion. Texas Rule 196.4 includes cost-shifting as part of its regulation of computer-based information discovery. It has been suggested that the abandoned effort to make explicit provision for cost-bearing as part of the balance between discovery costs and discovery benefits might be revived for computer-based information.

It has been suggested that the Rule 34 definition of "document" may deserve further consideration. More explicit wording might make it easier for lawyers to convince clients of the extent of the obligation to provide computer-based information in

discovery.

Additions to Rules 16(c), 26(a), and 26(f) have been suggested to focus the parties and courts on the need to prepare for, and to manage, computer-based discovery.

With all of this, many remain uncertain whether any rules amendments would be helpful. The subcommittee thinks that a second conference would be helpful, again on a reasonably modest scale. The Federal Judicial Center is willing to help. One possible study would be to undertake an in-depth analysis of ten cases that have involved high levels of computer-based discovery. It also may be possible to develop a survey of magistrate judges through the computer system that links them together.

A subcommittee member observed that the March 27 meeting was very informative. The judge participants made it clear that early intervention case management is very important.

Another observation was that often the discovery fight is over the nature of the search. It might help to provide in the rules that the notice of discovery can define the search method, subject to objection. Various methods of search are followed in practice. In some circumstances, the requesting party is allowed direct access to an adversary's computer system. In other circumstances, a party with computer-based information may regard the very set-up of its computer system as highly sensitive and confidential information. The magistrate judges at the conference were not inclined to adopt a special rule for computer-based discovery.

Professor Marcus began his summary of the conference by observing that we have come a long way without getting closer to the finish line. There was agreement on some points.

Issues surrounding discovery of computer-based information do matter, and will continue to matter. People make such pronouncements as that 35% of business information is never rendered in hard-copy form. No one has a "silver bullet." But there is a view that the internet will force greater uniformity in the means of generating and preserving computer-based information.

There is disagreement whether we need rules changes at all, and on what rules changes might be desirable if any are to be made. This is a moving target. Rules changes are costly. If the proposed amendments now in the Supreme Court take effect, many districts will have to adjust to deletion of the right to opt out of the national rules. Immediate adoption of still further discovery rules changes might prove burdensome for them.

Why is computer-based information different?

Discovery could be made easier by computers. Electronic searching can be both more thorough and much faster than a document-by-document paper review. A "word search" may be sufficient for many inquiries.

But one limit arises from information preserved in forms that can be searched only with obsolete software or hardware.

The problems presented by back-up tapes probably are unique. They are created in a form that makes search difficult. They may or may not be preserved over long periods of time.

Computers create "embedded" data that the user frequently does not know about. There is back-up information, cache files, and the like as well as encoded information about time of creation, changes over time, recipients of e-mail, and so on.

A lot of information can be found after a long time, including embedded information, supposedly deleted information, preserved back-up tapes, and so on.

Preservation is a problem. Simply turning on a computer can destroy information, and the destruction is in a random and unpredictable sequence. But not turning on the computer can be crippling. Even something as seemingly simple as turning off an automatic deletion program can immobilize a system after a relatively brief interval.

On-site inspection may be very important. Querying the system of another party, or of a nonparty, may be the most effective means of finding information.

The existence of experts in the field of computer-based discovery is itself a symptom of the differences between traditional forms of information and computer-based forms.

All of this leaves the questions of what to do. Work at educating judges and lawyers on the problems and prospects of computer-based discovery? Urge creation of a manual, similar to the Manual for Complex Litigation? Make changes in the discovery rules?

Current suggestions begin with those that are relatively modest. Rule 16 could be amended to make computer-based discovery a specific topic for the pretrial conference; Rule 26(f) could be amended to make it a subject of the parties' meeting to plan discovery. Initial disclosure requirements could be expanded to include information about a party's computer-based information system. Rule 30(b)(6) could focus on discovery addressed to the people within an organization that know how computer-based information is maintained and retrieved. Rule 34 could require production of information in computer-readable form; requests could be put in computer-readable form to expedite the exchange. More modern terminology could be adopted into the rules. And Rule 26(a)(3) could be expanded to require advance disclosure of computer-generated trial evidence; Maryland is working on these issues now.

Broader issues may be considered as well. (1) Presumptive limits might be established for discovery of back-up tapes, perhaps

providing that there is no need to search except on court order, or perhaps providing presumptive time limits for the backward search. (2) Something might be addressed to information preservation, although the rules do not now address preservation issues. One focus for a preservation rule might be coupled to the Rule 26(d) discovery moratorium, requiring that information be preserved through the moratorium period; immediate creation of mirror copies might be required, although it will be difficult to define the portions of widely dispersed computer systems that must be preserved in this fashion. (3) The problem of "deleted" information might be addressed, perhaps in Rule 26(b)(2). The purpose would be to limit the circumstances in which a responding party is required to incur great expense to recover deleted information. One challenge would be to define deletion of material that may have come into many computers and have been deleted from fewer than all. (4) Cost-bearing provisions may be more appropriate with respect to computer-based information than in more general terms. (5) Perhaps there is room to inject courts into the task of regulating "on-site" inspection and query processes. Some protocol or predicate might be created. (6) Privilege waiver by inadvertent production remains a challenging problem. The long-pending provision for a "quick look" that does not qualify as production and does not support waiver may not work for computer-based information: the quick look is the only look. There may be vast amounts of information that cannot be comfortably screened in any other way. An alternative has been suggested, allowing a defined period of time after production to assert privilege and retrieve the assertedly privileged information. But the amounts of material involved may mean that this approach simply shifts the time frame without reducing the burdens. (7) Some claims have been made that computer-based information cannot be produced because access is possible only through use of copyrighted software. These claims may well be bogus. But it may be difficult to attempt to define the substantive reach of fair use or similar copyright concepts, or to control the interpretation of copyright licenses, by court rule. (8) It might be possible to define the extent of a reasonable search by adopting a preference for key-word, boolian, or other search methods. (9) So-called "legacy" data may present special problems of burden, involving the need for archival searches for obsolete equipment and software to retrieve information preserved independently of the means of access. But it is difficult to know what a rule provision might do.

All of this reduces to the general proposition that if possible, it would be desirable to reduce unnecessary burdens on parties who face requests to discover computer-based information, and also to reduce the unnecessary hurdles that may confront those who make the requests. But we are far from reaching that goal. Advice will be welcomed.

General discussion began with Rule 34(b), which provides that a party who produces documents shall produce them in orderly form. The "shuffled response" used to occur regularly, but is supposed to

be prohibited now. Perhaps an equivalent provision can be adopted for discovery of computer-based information. But back-up tapes will present a problem; there is little apparent reason in the business purposes they serve to adopt a more orderly system of preservation.

It also was noted that a "freeze" order to preserve computer information against accidental or deliberate destruction can be disruptive. The disruption grows as information is dispersed more broadly throughout numerous desk- and lap-top computers. There seems to be a transition from centralized record-keeping of the sort that characterized the "main-frame" computer era. Migration to personal computers has led to dispersed and unorganized records.

Stories are growing that plaintiffs with modest assets are deterred from bringing litigation on strong claims by the costs of computer discovery. A plaintiff who has even a small number of personal computers in a business office may find that a thorough search in response to routine discovery requests can be prohibitively expensive. If we start fiddling with the rules we may expand the actual hours required for discovery — present levels are quite modest in most litigation, as revealed by the FJC study.

The March 27 meeting and other sources of information make it clear that there is intensive work with consultants to effect computer-based discovery, both in making discovery requests and in responding. Discovery may be made easier if the experts are brought together early in the process. But all of this is very expensive. And it may seem frightening that the parties and lawyers cannot manage discovery without the help of nonlawyer experts.

It has been suggested that the cost of retaining computer experts may decline as the market responds to expand the number of experts. But such reductions may not occur. There are a growing number of actions between parties who both have much computer-based information and who are seeking extensive discovery of each other. This seems a new phenomenon.

It will be important, if it is possible, to differentiate by rule between the basic information that is really needed for litigation and the costly and marginal information. Cost-bearing may be an appropriate approach: it puts the burden of deciding how much a computer search is worth on the party who wants the information.

Another observation was that the ranks of computer experts may expand to include experts based in the big accounting-consulting firms, and that this could in turn exert pressure toward the multidisciplinary practice firms that are the subject of current debate.

Both business practices and litigation practices seem to be evolving at a revolutionary rate. One development that could bring important relief is quite outside the civil rules. There is said

to be real pressure toward greater uniformity of document creation, and toward commonly accepted standards for document preservation. If brought to fruition, these developments could be quite helpful.

With all of these possibilities, it remains important to ask whether we need new discovery rules. It was suggested that the present rules provide adequate tools. What judges need for effective management is not so much new rules as real knowledge of the technology. These problems should be addressed in the opening stages of case management. It may be enough to educate judges, and perhaps amend Rules 16(c) and 26(f) to encourage early attention to these issues.

It was urged that it takes so long to make a rule that the subcommittee should continue to work vigorously. Rule 34 might be revised; "data compilations from which information can be obtained" has a 1970-like ring and is no longer adequate. Perhaps Rule 34 should be amended to establish a presumption that computer-based records are to be produced in computer-based form.

Another suggestion was that the ease of instantaneous, dispersed access to computer-based information has implications for discovery in mass litigation. Document depositories may be outmoded; more efficient means may be available to ensure easy access to the information that makes multiple actions easy.

The need for continued work was expressed from a different perspective. "Games are being played." Discovery burdens are being imposed deliberately — first a demand is made for hard-copy information, then a demand is made for the same information in computer format. This is happening in litigation that pits business firm against business firm. In consumer litigation, wafted on the wings of notice pleading, discovery is changing rapidly. The costs can be staggering. In all sorts of litigation, nationwide and worldwide firms, in which everyone has a computer, present enormous difficulties in knowing where to go, who to talk to, how to retrieve and download the relevant information.

The theme of dispersed information continued in the observation that there is no way to view every computer in a party's organization. Going through a complete information system may be clearly out of any proportion to the reasonable pursuit of good-faith litigation. There is bad-faith litigation behavior that makes matters even worse.

A problem unique to computers is that a lot of private and often intensely personal information seems to reside in business computers. Few businesses, if any, have found any effective means to control the mingled business and personal use of office computers. The corresponding discovery problems are as difficult to manage as the habits of computer users.

It was noted that in criminal prosecutions, it is becoming common to seize computers to preserve evidence. Defendants then commonly assert that the computers must be returned because that is

the only source of records needed to carry on daily life and business. Making mirror-image copies of all the information in the computer may provide an alternative to seizure, but the alternative itself is fraught with questions.

The discussion concluded with the agreement that the subcommittee should arrange a second conference, to be organized as a special meeting of the advisory committee, early next fall. Professor Marcus will prepare some draft rules for consideration. This work does not reflect a prejudgment that rules amendments are desirable, but only that the questions are important and should be pursued. "Little" changes will be in the mix. And the committee must be prepared to hear that it may prove difficult to draft even roughly satisfactory models. The fear of unintended consequences in an area of continual rapid evolution must haunt us continually.

Subcommittee Report: Rule 23

Judge Niemeyer introduced the Rule 23 subject by noting that there have been "several generations of Rule 23 proposals." The only amendment accomplished by the process so far has been adoption of Rule 23(f). This provision for permissive interlocutory appeals from orders granting or denying class certification bids fair to assist in the development of more orderly Rule 23 jurisprudence.

The work on Rule 23 has generated much information and has stirred, or revealed, much controversy. There was nothing simple about the reactions to early proposals. We still need to ask whether there are changes that would improve the practice and the rule. Are there problems that we can address effectively? The committee should provide such guidance as can be to the subcommittee.

Judge Rosenthal reported for the subcommittee. The subcommittee has focused its task less on gathering new information than on sorting through the incredible mass of information that has been gleaned through seven years of work, published proposals and reactions to them, conferences, and related efforts. Rule 23(f) will generate new data on proper certification practices.

The proposal to soften the Rule 23(c)(1) requirement that class certification be decided as soon as practicable by requiring that certification be decided only "when practicable" was advanced because it seemed to make the rule fit actual practice. The proposal was resisted, however, because it was feared that it would open the way to some consideration of the merits of the underlying claims. Still, the one-time proposal to allow some examination of the merits before certification has not been fully resolved.

Consideration was given to adding new factors to the calculus of predominance and superiority in Rule 23(b)(3). Some of these factors would have tended to discourage certification. A maturity factor would have pointed toward caution in mass-tort class actions. A "just ain’t worth it" factor, (F), was found not ready for advancement.

Another proposal would have confirmed the power to certify for settlement a class that could not be certified for trial. Work on this proposal was postponed to await the decision in the Amchem case, and then further postponed to consider the impact of the Amchem decision in the lower courts. The Amchem and Ortiz decisions have put important limits on certification for settlement.

Through all of this, nothing has become easier or simpler. The RAND class-action study has been completed, and will be helpful. But sorting through all of the RAND information will itself require substantial study. Much additional information is found in the committee's own four-volume set of working papers, the FJC study done for the committee, and the Report and papers of the Mass Torts Working Group.

There also appears to be an ongoing shift of class-action litigation from federal courts to state courts. There seems to be a concomitant proliferation of overlapping and competing class actions.

The volume of dollars flowing through class actions has continued to grow. Asbestos has ceded to breast implants as a focus of high-volume litigation, and tobacco litigation looms increasingly large. The amounts at stake can be huge.

There are fundamental choices to be made in considering every stage of class actions. Many of the abuses and problems do not yield readily to rulemaking. Amchem, for example, teaches that settlement classes cannot safely deal with many kinds of future claims, particularly the "future futures" who are not even aware of past exposure to the products or conditions that may cause future injury.

Congress is studying the problems of overlapping and competing classes. There may not be much that can be done about these problems in the Enabling Act process.

Other of the real or perceived abuses may yield to more determined use of existing rules.

Earlier committee efforts were incredibly ambitious, addressing head-on some of the most important questions about class-action practice. But the rulemaking process itself will make it difficult to implement whatever answer may be found to some of these questions. The subcommittee has concluded that it is better to focus future efforts on the process of class actions. The final section of the RAND report says something familiar: Rules can help by identifying when judicial intervention is most needed, and by facilitating intervention when it is needed. Rule 23 does not say much about this. Case law helps to fill in the gaps, but not as effectively as a more explicit rule might do. We can set out criteria for addressing the process.

The first issue the subcommittee offers for discussion is the

certification of settlement classes that would not be certified for trial. Rule 23 was read by the Court in the Amchem case to permit certification for settlement rather than trial only when "manageability" is the sole obstacle to certification for trial. Because the decision rests on interpretation of the present rule, amendment is possible to adopt a different approach. Models are provided with the subcommittee report that would allow certification beyond the limits of the Amchem decision. One model is a new Rule 23(b)(4); the other works through amendment of Rule 23(b)(3). There are strong arguments both for and against pursuing this possibility.

On the side of principle, the Amchem decision reminds us of the tension between individual and representative litigation. If the bonds that tie class members together are not strong enough for trial, can we say in a meaningful sense that there is a class at all?

If settlement classes are made more easily available, one consequence will be an increased number of opt-out classes. The financial risk to class lawyers is reduced when settlement is available. Do we want to encourage the continued growth of class actions in this way? And a permissive rule will in turn be expanded as courts, in the pursuit of convenience or other goals, find ways to approve settlements that lie outside the intended reach of any new rule. The limits carefully written into a new rule will, at times, be ignored.

Failure to expand the uses of Rule 23, on the other hand, may lead to still more class actions in state courts. The state courts may, with some delay, come to emulate the more stringent attitudes of the federal courts, but this cannot be predicted with confidence.

So we could decide to do nothing, to continue to rely on the Amchem decision to supply the rule that guides us. Case law will clarify what weight can be given to settlement or the prospect of settlement. Rather than criteria, we could focus on the process, on such matters as attorney appointment and attorney fees. This, at any rate, is the first question: should we encourage certification for settlement of a class that could not be certified for trial?

Regulation of the settlement process itself presents another set of questions. The draft Rule 23(e) in the agenda materials addresses such issues as support for, and containment of, those who make objections to a proposed class settlement. It also enumerates an extensive list of factors drawn from case law to articulate the matters to be considered on reviewing a proposed class settlement. There are many different issues to consider.

A very rough draft addresses appointment of class-action counsel in a way that is designed to enlist the court in enhancing the prospect of effective class representation and to emphasize the

fiduciary obligations of class counsel.

Another proposal that needs further development in the subcommittee would regulate the acts that counsel can undertake on behalf of a class before it is certified.

Attorney fee issues also are being considered. The executive summary of the RAND report suggests that fees are the most important source and symptom of abuse. And this may be the most easily addressed problem. Much good can be done if courts are able and willing to understand proposed settlements and fee awards. And a new rule can help equip courts to discharge this responsibility. One frequent suggestion, for example, is that fee awards should be based on the amount actually distributed to class members, not on the amount theoretically available if all class members choose to participate in the distribution.

There is a continuing need to examine the evolution of the cases. Mass torts are particularly likely to shift quickly. Three years ago, the Court said in the Amchem opinion that asbestos litigation is a terrible problem, but one that cannot be addressed through present Rule 23 without doing violence to the system. Can we amend Rule 23 to address it without doing violence to the system? Amchem may be read to give warnings on that score.

And so we can consider the "23(b)(4)" model that would go beyond Amchem. This is simply one picture of what a rule might look like if we were to decide to follow this path. Even with this model, it would not be possible to duplicate the Amchem settlement, at least to the extent of resolving the claims of victims who do not yet know even that they have been exposed to injury. Defendants seem to be saying now that they no longer think it necessary to be able to capture all of these future claims in a single settlement. Closure as to present claims is a sufficiently real benefit to promote settlement. But it remains to decide whether it is useful to pursue broader settlement opportunities, in the face of the difficulty of predicting what the impact might be. It is hard to know whether Amchem has restricted pre-Amchem settlement practices. The subcommittee believes that more class actions are going to state courts, and that the migration is fueled in part by perceived restrictions in federal courts. Although prediction remains uncertain, it is a fair guess that adoption of a proposal like this would increase the number of class actions brought to federal court.

The settlement class proposals are not limited to "mass torts." They are drafted in general terms that apply to all varieties of class actions, reflecting the established uses of settlement classes before the Amchem decision. But it was urged that the committee should focus on the problems presented by mass torts that involve different state laws. It was suggested, by way of elaboration, that the "manageability" aspect of Rule 23(b)(3) certification rulings is all that Amchem focuses on, and that manageability does not speak to choice-of-law issues.

Several comments were addressed to the package as a whole. Of the two drafts that would go beyond Amchem, it was observed that the (b)(4) draft would include (b)(1) and (b)(2) classes as well as (b)(3) classes, and this scope was thought to be a mistake. If, for example, there is a "not really limited" fund, it would be wrong to certify a mandatory class on the theory that (b)(4) goes beyond (b)(1) limits. The same is true of a (b)(2) class — if declaratory or injunctive relief is not appropriate with respect to the class as a whole, why approve settlement with respect to a class? The provision proposed for discussion in Rule 23(e) that would permit a class member to opt out of a settlement was thought undesirable as to (b)(1) and (b)(2) classes because it would defeat the very purpose of certifying such a class. This set of comments then moved on to recognize that there are choice-of-law problems, but to suggest that an attempt to paper them over by certification of a settlement class may trespass so far on substantive rights as to violate the limits of the Enabling Act. Finally, it was asked whether the drafts on attorney appointment and attorney fees were intended to displace the inconsistent provisions of the Private Securities Litigation Reform Act. If this is not intended — as it is not — the draft should be modified to provide for inconsistent statutory procedures in the text of the rule, rather than leaving the issue to an observation in the Committee Note.

Further discussion of the "(b)(4) Beyond Amchem" draft recognized that the settlement-class questions are complex, and have been the occasion for frequent discussions over the years of committee deliberations. Views vary. Often plaintiffs' attorneys disagree on these questions among themselves, as do defendants' attorneys. The committee should attempt to focus on the public policy: what is appropriate for class actions generally? On the defense side, many defendants want a strong settlement rule that can be used to "get rid of problems." Many others fear the massive pressures that can flow from certification of a class for any purpose, whether for settlement only or for trial. Plaintiffs' lawyers include those who prefer truly individual representation of small numbers of plaintiffs, those who prefer to aggregate representation of many plaintiffs by formal or informal means, and those who prefer large-scale class-action resolution. These differences should be evaluated as a matter of public interest, not self-interest.

The adoption of Rule 23(b)(3) in 1966 introduced a new element. Many critics worry about what happens to class members: how well are their interests represented? If the parties stipulate that the case will not be tried, and we allow anyone who wishes to be heard, what are we doing in replacing adjudication with settlement? Facilitating settlement generates many problems. Class members who are not represented, except by the self-appointed, are in a very dangerous position. There is force in the argument that a device as powerful as the settlement class should be approved by legislation, not rulemaking. "This is pretty heady stuff. We should confront it head-on."

Returning to the choice-of-law problem, the committee was reminded that concern was expressed in earlier discussions of these issues that settlement circumvents state law. The manageability advantages of settlement run roughshod over state law. And if a case cannot be tried, there are weird incentives for the lawyers who represent a plaintiff class. But the Amchem decision accepts these consequences of settlement. Now we seem to be worried about conflicts of interest within the class and the need to subclass. In mass torts, differences in the nature of injury among class members can be a problem on this score. It is a fair question whether the advantages of settlement are so great that we should put aside theoretical concerns in favor of designing procedural tools that will advance better justice.

The choice-of-law discussion continued with the argument that the Amchem decision does not speak to the effect of state-law differences on the predominance of "questions of law or fact common to the members of the class." The statement that only "manageability" concerns can justify certification for settlement of a class that would not be certified for trial is not clear, but it seems to refer to concerns more mundane than choice of law.

The question whether to attempt to amend Rule 23 to expand the role of settlement classes beyond limits of the present rule, as interpreted in the Amchem decision, came back. If expansion is pursued, it could be along lines similar to the "(b)(4)" draft, or instead could be done in terms similar to the (b)(3) draft. If expansion is not pursued, there is another choice — the Amchem interpretation could be made explicit in the rule, or the rule could be left unchanged. There might be some advantage in amending the rule to confirm the Amchem interpretation, but the advantages are not clear. Something might turn on whether other changes are to be made; an express confirmation of the Amchem interpretation could help if other changes might seem to imply some doubt.

Mass-tort classes present special problems of binding class members who, without the class disposition, would be likely to undertake individual litigation. One of the problems involves notice. The Federal Judicial Center has agreed to help by gathering models of notice for certification, for settlement, and for both certification and settlement together. A number of illustrative forms will be prepared for different substantive areas, and will be made widely available.

The desirability of encouraging settlement was discussed directly. It was urged that it is anachronistic to express doubts about the values of settlement — settlement is the fact. But what is the impact of expanding the opportunity to settle class actions in federal court when state courts remain available?

Settlement was simultaneously praised and damned in a comment that sought to set practical advantages and broad-scale theoretical advantages against the more familiar conceptual objections. The practical advantages lie in the abilities to resolve claims at

lower, and perhaps far lower, transaction costs, leaving more money for victims and less for lawyers; to assure an orderly distribution of perhaps limited assets so compensation is available to those who are worst injured and those who are slowest to sue (including "future" plaintiffs), without disproportionate early payments to those who are least injured or for punitive damages; to provide like treatment as to both liability and damages for victims who have suffered similar injuries inflicted by a common course of action, free from artificial distinctions based on the choices of different law and differently inclined tribunals; and to marshall judicial capacities in an orderly manner. The theoretical advantages are implicit in these practical advantages, emphasizing the like treatment of like cases. The familiar conceptual objections assert that these practical and theoretical advantages come at too high a sacrifice of traditional values. The like treatment of like cases involves a homogenization that defies the customary opportunity of plaintiffs to pick the time, the court, the coparties, and the adversaries. Settlements defy governing state law by disregarding the different social policies that are reflected in different legal rules. The settlement, moreover, is controlled by class counsel who — most pointedly in a class certified only for settlement — get nothing if there is no settlement. The ability of defendants to influence the choice of settlement terms in this setting cannot be controlled effectively by judicial review because the range of plausible alternative settlements is far too wide to support any but the most general appraisal of actual settlement terms. Choice between these warring views is exquisitely difficult.

Adoption of the proposed (b)(4) would support an argument to approve the actual Amchem settlement, at least without the "future futures" (those who, at the time of settlement, do not know of their exposures to the injury-causing event or condition). The Amchem settlement is so attractive that it has furnished the model for pending asbestos legislation. The importance of these questions is reflected in the opening of Judge Becker's opinion in the Third Circuit reversal of the Amchem settlement. In paraphrase, he observed that every decade presents a few great cases that force courts to choose between resolving a pressing social problem and preserving their own institutional values. Certification for settlement on behalf of a class that could not be certified for trial solves a problem, but at a price.

Turning to the question of the interplay between state and federal courts, it was thought difficult to predict what would be the consequences of adopting an expanded federal settlement-class rule. State courts are beginning to enter the arena of nationwide class settlements. A great many choices might be made in the federal rule, facing such questions as control of competing and overlapping classes, control of multiple actions by injunction, and the like. A federal rule that treats a class certification as an event establishing exclusive federal jurisdiction over the certified class might support effective federal control, if such a

rule can be written within Enabling Act limits. The res judicata effects of a refusal to certify, or a refusal to approve a particular settlement proposal, also could affect federal-state relationships in pervasive ways. Many dimensions of federalism are involved. That fact of itself demonstrates the need for care.

The role of the rulemaking process was questioned from another direction. The attempted settlements in the Amchem and Ortiz cases seemed to many observers to go beyond the limits of what should be done by settlement. A rule that explores ways of improving settlement class practice within the limits of the Amchem opinion could present reasonably comfortable alternatives. But it would be a bold step to go at all beyond the Amchem limits. Caution should be observed in pursuing the practical values of class actions and class settlements.

A veteran committee member who "was here for the Rule 23 wars" noted that proposals that emerged from years of hard work failed for want of any consensus for reform. The chances for de facto rule changes by court decision are better than the chance for achieving consensus within the Enabling Act process.

The subcommittee is determined to continue the committee's effort to be "sensitive to reality." The settlement-class question is the most prominent question that the committee decided to put aside to await first the decision in the Amchem case and then lower-court reactions to the decision. The Amchem opinion itself recognizes the question whether Rule 23 should be changed. Any attempt to go beyond Amchem will meet the practical difficulties that were recognized in the earlier deliberations. The question is not really whether to favor or disfavor settlement. It is a question of class certification criteria at the point where the most money is involved.

It was urged again that it is difficult to say that a set of representative plaintiffs do not qualify to try a case but do qualify to settle the case. A lot of public policy is established by litigants in class actions; establishing public policy by settlement, not adjudication, is a precarious undertaking.

The Amchem decision was approached from a different angle with the observation that the opinion is not entirely clear and the dissent is persuasive. Has the decision caused problems in practice? A response was that the Amchem decision does not seem to be preventing settlements. A settlement has been reached in the fen-phen litigation, the biggest mass tort since breast implants. State court plaintiffs are objecting strenuously to the settlement, however, and it remains to be seen whether the settlement will be approved. And some cases are going to state courts. Another response was that there are decisions that retract initial certifications on the basis of the Amchem decision. A limited-fund settlement was initially approved in the pedicle screw litigation, but was decertified after the Ortiz decision on the view that the only true limited fund requires assigning complete ownership of the

defendant to the plaintiff class. And there is anecdotal evidence that fear of the Amchem decision is driving cases to state courts. But there seems to be an increase in federal class actions of the sort emphasized in the Amchem opinion — not mass torts, but consumer actions on claims that would not be brought by class members as individual plaintiffs, employment cases, and the like.

Another dimension of the questions left open in the Amchem and Ortiz opinions was noted with the suggestion that the "case-or-controversy" perspective makes the approach to Rule 23 seem odd. What is odd is that usually the committee acts by reacting to problems that are brought to it. Is anyone coming to the committee now, saying that there is a problem with Rule 23 that needs to be addressed? Why not let the subcommittee continue its work, waiting to see whether real problems emerge?

The response was offered that we are in a period of transition. Interlocutory appeals under new Rule 23(f) offer a new safety valve that may release some of the pressures that to many defendants have made settlement the only available course after class certification. The Amchem and Ortiz decisions are the first Supreme Court interpretations of Rule 23 in several years. They have changed what some courts were doing. The Amchem opinion is opaque in parts, and Justice Breyer's dissent has a strong practical grounding in the real importance of settlement in the process itself. The subcommittee is asking now only for a threshold determination of the most useful present direction to follow, not for a committee determination that will permanently close off any alternative. The RAND report is an indication that there still are problems. So of the many problems that were described by lawyers at committee conferences and hearings, and the problems that were discussed in the conferences held by the Mass Torts Working Group.

The subcommittee thus is looking for directions to focus its work for the immediate future. It seeks to find proposals that may survive and that will improve ongoing administration of Rule 23. There is no present belief that some specific part of Rule 23 needs to be fixed as an independent source of problems. The Rule is, for what it does, a very short and general rule. The proposals set out in the agenda materials would make specific in the rule practices that have emerged in the cases or developing practice. They would add flesh to the structure in places where the rule now says nothing. The draft Rule 23(e) provisions for reviewing class settlements are very much in this vein.

With all of this, it was argued that settlement classes should not be further explored. There is no clear reason to take on these questions, unless it be to make the practical impact of the Amchem decision more clear. Why go beyond, into uncharted territory? A parallel argument was made that no practical case has yet been articulated for going forward with the (b)(4) draft. We should see real benefits before making any investment or running any risk in

this area.

The subcommittee agreed that for the time being, it should be assumed that Rule 23 will remain within the limits sketched in the Amchem decision. The subcommittee will work to improve the workings of Rule 23 within those limits.

That objective leads to the question whether an attempt should be made to restate the Amchem decision in the body of Rule 23. It was urged that it is difficult to be confident of the decision's meaning, and that in any event it is awkward for an advisory committee to purport to interpret Supreme Court pronouncements. The Amchem decision can be read to authorize settlement classes on a broad scale; perhaps it should be left alone. But a majority of the committee concluded that the subcommittee should continue to work toward a proposal that would constructively capture the meaning of the Amchem decision in Rule 23. A careful review of lower-court developments will be a central part of this task.

Apart from the settlement-class question, the subcommittee is pursuing several "process" questions. The approach to these questions has been to attempt to capture in Rule 23 the best practices that courts sometimes, but not always, honor now.

Draft Rule 23(e) sets out a long list of criteria for review of a proposed settlement. Objectors are noted in a way that reflects the difficulty of sorting out beneficial from harmful manifestations of the objection process. Many of the points covered in the draft respond to concerns that have been repeatedly expressed during the Rule 23 review process.

The draft provisions for court appointment of class attorneys and for determination of attorney fees are in "very preliminary" form. These issues are very sensitive. The attorney appointment draft reflects an attempt to increase court control. An application is required. There must be a hearing if more than one application is filed. The fiduciary role of class counsel is emphasized.

The draft fee rule also is intended to increase court control. It does not purport to resolve the choice between measuring fees by a percentage of the class recovery and by "lodestar" calculation. The factors identified in the draft, indeed, emphasize that there are many common elements that affect both approaches.

Both drafts reflect the fear that there are continuing abuses, and a continuing need to strengthen judicial regulation.

Discussion began with the assertion that the drafts respond directly to real problems. These are highly controversial topics, but the committee should not shy away from them on that account. There are existing paradigms in the case law. The subcommittee should focus its attention on these issues as its first priority.

Regulation of appointment and fees involves issues that

overlap concerns of professional responsibility. The "Ethics 2000" committee is considering rules that overlap these issues with such matters as fees, competency, and conflicts of interest. Proposals in these areas will be as controversial as anything the committee has considered. It may be desirable to seek a preview of what the controversy will be like. One possibility might be to seek advice at one of the conferences held to discuss possible federal rules of attorney conduct, recognizing that more drafting work remains to be done before such discussion would be useful.

It was agreed that the subcommittee should continue to develop rules regulating appointment of class counsel and determination of fees for class counsel.

Report: Agenda Subcommittee

The Agenda Subcommittee advanced the proposal to amend Rule 82 described with the other proposals of rules to be recommended for adoption.

The Agenda Subcommittee further reported that, with the help of support staff, the subcommittee process is functioning smoothly.

Report: Rule 53 Subcommittee

The Federal Judicial Center study of special masters, undertaken at the request of the Rule 53 Subcommittee, has been completed. The report was distributed to committee members for this meeting.

Thomas Willging launched the report presentation. Phase 1 of the study was a statistical study of the incidence of special master activity in all federal-court cases closed during a two-year period. There is consideration of appointment in about 3 cases out of every 1,000, and appointment in about 2 cases out of every 1,000. The statistics cover such matters as the stages of proceedings at which masters act (all stages), who initiates appointment, and the like. Phase 2 selected a sample of all the cases identified, and undertook interviews with judges, masters, and attorneys to examine the use of masters in greater detail. One focus of the inquiry is how actual practice is influenced, if at all, by the apparent focus of Rule 53 on trial activities. The sample of cases was not random. Instead, it was targeted, including a purpose to examine some cases in which appointment of a master was discussed but not made.

Marie Leary described the findings as to the reasons that led to appointment of special masters. Approximately half of the appointments were made at the judge’s suggestion. One reason for appointing discovery masters was experience with insurmountable discovery disputes and hostility between counsel in discovery; masters appointed for this reason were given authority to manage every phase of discovery. A pretrial appointment may instead be designed to help the court’s understanding of complex technical issues. In several civil rights cases, magistrate judges were

appointed to act as special masters because of statutory encouragement and the opportunity to save scarce judicial resources.

For trial, Evidence Rule 706 experts were used to help the court. Another case involved appointment of a master for one of the most traditional reasons, performance of a partnership accounting. Another master was appointed to handle all activity in an insurance interpleader action. The motivations were similar to many pretrial appointments — to accommodate limitations of judicial resources and to keep the cases moving.

Post-trial masters were appointed to obtain competences the courts could not muster on their own. One example involved administration of a class-action settlement. Another was to implement settlement of a tax-assessment case involving a large defendant class. Implementing institutional changes is another reason, including a desire to get information about actual implementation and its effects that the court may not be able to obtain from the parties. Nearly unique reasons were given for the multiple uses of masters in the silicone gel breast implant litigation.

Generally the judges, attorneys, and masters themselves agreed that the masters had functioned effectively. The appointments would have been made again with all the benefits of hindsight.

The greatest concern about appointing masters was that the parties must bear the cost.

Laural Hooper presented two of the areas of problems found in the study.

One set of problems arises from the methods used to select masters. The methods are set out in Table 6 of the study at p. 34. Problems are most likely to be perceived when the judge appoints a former law clerk or someone recommended by another judge. Lawyers who did not object to such appointments nonetheless reported doubts whether the person appointed was the best person. About three-fourths of the masters are attorneys. Some are magistrate judges. In Phase 1 of the study, some screening for conflicts of interest was visible in the record of about 11% of the cases. In Phase 2, it was found that courts rarely inquire into possible conflicts unless the parties raise the issue. Nonetheless, the overall finding was that parties generally were satisfied with the selection process, apparently because they were actively involved.

A second set of problems arises from ex parte communications between the master and either the judge or the parties. The nature of the appointment controls the approach to ex parte communications. If the master is to perform administrative, procedural, or settlement functions, ex parte communication with the parties is permitted, especially in post-trial decrees. Party consent is often sought. Most of the parties said they would not engage in ex parte communications unless the order of appointment

permitted it. Some orders specifically forbid ex parte communications with judge or the parties. Courts that entered these orders did so to protect the masters against being lobbied. One court permitted a Rule 706 expert to communicate with the court during breaks in trial, but then put the communications on the record. In another case the judge talked to the expert off the record; this was a rare event. Several masters thought a rule on ex parte communications would be desirable; they want guidance.

Thomas Willging concluded the report. He began by noting that party consent (or acquiescence) is important to appointment. Phase 1 found, Table 3, p. 24, that 70% of motions or sua sponte orders for appointment were unopposed. Appointment is twice as likely when there is no opposition.

Authority for the appointment was found in Rule 53 in 40% of the cases, Table 5, p. 29. In another 40% of the cases, no authority at all was cited. The explanation for the failure to cite any authority may well lie in the fact that most appointments were done with consent. Often there is express consent of all parties. In other cases, the judge expressed an interest in getting the help of a master and the parties consented; interviews with the attorneys suggested that in some of these cases consent was given despite unvoiced misgivings. The rules provide a backdrop for the negotiation.

The Phase 2 interviews disclosed only a bit of reaction to the apparent limits of Rule 53. One very experienced judge suggested that pre- and post-trial uses can involve "fact finding," so there is some Rule 53 support for these appointments. The persons interviewed did not see problems for their cases, but some would like the rule to provide express authorization for what was done. Page 69 of the report quotes a very experienced judge, who observed that it would help to clarify authority, but the task should be approached carefully. If the rule is written in broad terms, it may seem to authorize too much; if it is written in narrow terms, it may seem to impose undesirable restrictions.

Some judges believe they have inherent authority to appoint masters outside Rule 53. Those who focus on development of Rule 53 want broad, flexible authority. Flexibility is thought particularly desirable as to the role of "monitor." The monitor practice has evolved in a lot of directions.

At times the respondents talked of specific rules changes. Ex parte communications were noted, with expressions of feeling inhibited or restrained by the lack of clear guidance in rule or the appointing order. In one case a motion to remove was brought because the master engaged in settlement discussions with two of the three parties. And it was noted that Evidence Rule 706 does lay out an appointment process.

Judge Scheindlin expressed the subcommittee’s thanks to the Federal Judicial Center for this fine empirical research.

Judge Scheindlin did some more impressionistic research by sending the Rule 53 draft prepared some years ago to people who have worked in the field. Six written responses were received and provide additional useful insights. Generally the responses indicate that revision of Rule 53 is long overdue. Rule 53 as it stands covers the least frequent, and the least popular, use of masters to prepare findings of fact. Findings prepared for review by the court may prove wasteful. Findings prepared for reading to a jury are "scary." One respondent said that current practice is essentially lawless; there is much that remains outside Rule 53.

The respondents in this informal survey thought that consent is important in making appointments. They believed that an "exceptional circumstances" test should continue to restrain appointments when there is no consent.

All respondents favored use of masters for discovery or mediation. The parties will readily consent when a discovery master is actually needed. And post-trial uses also were approved.

As to selection of the master, it was thought that something has to be done about possible conflicts of interest. One suggestion was that Rule 53 should invoke the 28 U.S.C. § 455 standard. And it should be required that the master be competent.

Standards of review should be adjusted to the circumstances. The respondents did not want an abuse-of-discretion standard, preferring clear error. But for "trial facts," a preference was expressed for de novo review by the court on the record compiled by the master.

The respondents thought that generally the parties should share equally in paying the master’s compensation, but that the master should be given power to recommend a different allocation.

Ex parte communications should be addressed by Rule 53. It would be sufficient to provide that the order of appointment should address the question, prohibiting ex parte communications or authorizing them in defined circumstances.

With this background, the subcommittee asks whether it should proceed with the work of developing a new rule to replace the current outmoded rule. The subcommittee believes that it would be desirable to proceed with preparation of a rule.

Judge Niemeyer recalled that the Rule 53 project was put aside several years ago because it seemed a daunting subject, and because the committee was committed to working on other demanding projects. The subject is complicated by the need to relate the use of special masters to the opportunities to rely on magistrate judges. Masters in fact are doing many different things.

It was agreed that Rule 53 is out of date. It seems to conflict with the magistrate-judge statute and Rule 72.

At the same time, Judge Roettger observed that Rule 53 is

flexible in some ways that may be surprising. Many years ago he wanted to take testimony outside of his district, but could not contrive a way to do it until the Administrative Office said that he could do it if the parties would consent to an order by which he appointed himself as special master. It worked, and was very useful.

A committee member described extensive experience with special masters in California state practice. Specialized lawyers are routinely appointed as masters, with consent to all the terms of appointment, in Leaking Underground Storage Tank litigation. There are hundreds of these actions. Ex parte communications are prohibited. Most of the actions wind up successfully by mediation. The practice works well. More recently, litigation about the MTV gasoline additive has involved enormous discovery. The state court discovery commissioners bogged down. Special masters — retired appellate judges — have worked out successfully.

The committee approved a motion directing the subcommittee to develop draft Rule 53 for consideration by the committee.

Report: Simplified Rules of Procedure Subcommittee

The subcommittee on simplified rules of procedure plans to work toward a draft of simplified rules for further consideration. An effort will be made to identify people who may have relevant experience to help guide the process. If a modest number of people can be identified who are willing to confer together, a small meeting will be convened in late summer to gain new perspectives.

Discussion began with Judge Niemeyer's report that district judges at the Judicial Conference and elsewhere have reacted with enthusiasm to the concept of simplified rules for some cases. The ABA and the American College of Trial Lawyers also seem enthusiastic.

Some valuable information may be found in studies of experience with differential case management under the Civil Justice Reform Act. Experience in the Southern District of New York, however, is not promising. Parties or lawyers do not want to be assigned to a track that seems to diminish their procedural rights, even though the "rights" are not likely to be useful or used, and are costly. This project may be a solution in search of a problem.

It was responded that an incentive to use simplified rules might be provided by empowering plaintiffs to invoke the rules by making a binding election that caps total recovery. The cap would in turn provide an incentive for defendants.

Concluding Thanks

Judge Niemeyer closed the meeting by observing that the committee should not take for granted the great work of the Rules Committee Support Office. John Rabiej is unfailing in his great

and imaginative support. And Mark Shapiro, who has been of great help as well, will be moving to London, England. The appreciation and good wishes of the committee were extended to him.

Next Meeting

The next meeting was tentatively set for October 16 and 17 in Phoenix, Arizona.

Respectfully submitted,

Edward H. Cooper
Reporter