DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 19 and 20, 1999

The Civil Rules Advisory Committee met on April 19 and April 20, 1999, at Gleneden, Oregon. The meeting was attended by all Committee members: Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Judge David F. Levi; Myles V. Lynk, Esq.; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Shira Ann Scheindlin; Andrew M. Scherffius, Esq.; and Chief Judge C. Roger Vinson. Frank W. Hunger attended this meeting as the first after conclusion of his service as a member. Edward H. Cooper was present as Reporter, and 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, and Sol Schreiber, Esq., attended as liaison member from the Standing Committee. Peter G. McCabe, John K. Rabiej, and Mark Shapiro represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); John Beisner; Robert Campbell (American College of Trial Lawyers); Alfred W. Cortese, Jr.; Francis H. Fox (American College of Trial Lawyers); Marsha Rabiteau; Fred Souk; and Jackson Williams (Defense Research Institute).

Judge Niemeyer greeted all present, and introduced David Ogden. On behalf of the committee, he thanked Frank Hunger for his enormous contributions over the years to the committee's work. He will be sorely missed in future committee deliberations. A certificate of recognition and appreciation for service on the committee from 1993 to 1999 was presented. General Hunger responded that work with the committee has been a most enjoyable and rewarding professional experience. Work with the committee really is a public service; the committee work affects the everyday practice of law.

It was announced that Judge Fern M. Smith, currently chair of the Evidence Rules Advisory Committee, will become the new director of the Federal Judicial Center.

It also was noted with pride that the National Center for State Courts has presented a Distinguished Service Award to Justice Durham.

The Report of the ad hoc Mass Torts Working Group was presented to Chief Justice Rehnquist punctually on February 15. There has not yet been any direct response from the Chief Justice, but he has agreed that the Report and appendices be public documents. The Report will be distributed to all who attended Working Group meetings, and to the staffs of the judiciary committees. If a successor committee is appointed, the Civil Rules

committee may well take up Rule 23 again, considering further the items that have been put on the table and perhaps new ideas that may emerge from the mass torts committee.

Report on Standing Committee

At its January meeting, the Standing Committee approved publication of this Committee's proposals to abrogate the Copyright Rules of Practice adopted under the 1909 Copyright Act, to amend Civil Rule 65 to make clear the availability of Rule 65 pretrial remedies in Copyright infringement actions, and to make conforming amendments to Civil Rule 81.

The Standing Committee also considered two drafts of Civil Rule 83 that would impose uniform effective date limits on local district-court rules. The first draft substantially tracked a proposal advanced by the Appellate Rules Committee; the second would add further constraints on local rules. These local rules problems are well suited to Standing Committee deliberation. There is some apparent tension between the local-rules power established by 28 U.S.C.A. § 2071 and the general supersession power established by § 2072. There also are tensions between the strong desires of many districts to adopt extensive local rules and the goal of a nationally uniform set of procedural rules. The questions raised by this Committee's drafts may best be explored, in conjunction with parallel proposals by other advisory committees, under the direction of the Standing Committee. Judge Scirica observed that the Standing Committee hopes to find funding to continue its longstanding Local Rules Project; it is an important undertaking.

John Rabiej noted that the Standing Committee has established a subcommittee to consider the question whether the Enabling Act process should be used to adopt a body of Federal Rules of Attorney Conduct. The subcommittee includes two representatives from each of the advisory committees — Judge Rosenthal and Myles Lynk are the representatives from the Civil Rules committee. There will be an informational meeting this May, and a meeting in late summer that is designed to make recommendations to be considered at the fall meetings of the advisory committees. The three alternatives that have remained in contention are to do nothing about the present situation, in which each district determines for itself what rules to apply to regulate attorney conduct; to adopt a simple national rule that incorporates for each district local state professional responsibility rules; or to adopt a uniform body of Federal Rules of Attorney Conduct that speak directly to some matters of special federal interest, while incorporating local state rules for all other matters. The statute that subjects government attorneys to state rules took effect recently, but it is acknowledged that the statute has problems. Congress is continuing to consider these matters. Much of the difficulty with state regulation of government attorneys has centered on the Department of Justice

policy that allows government attorneys to conduct investigations that include private interviews with persons who are represented by attorneys.

Report on Legislation

Congress continually considers bills that affect procedure, at times directly amending a Federal Rule of Civil Procedure. The Administrative Office maintains constant vigil to ensure that the Standing Committee and advisory committees are kept informed of these proposals, and facilitates communication between the committees and Congress.

John Rabiej presented a report on present matters of interest to the Enabling Act Committees. This Congress is still relatively young, and there have not yet been many bills of direct interest. Representative Coble has introduced a bill to require stenographic recordings of Civil Rule 30 and Rule 31 depositions. This bill has moved out of subcommittee. The Administrative Office continues to respond with letters that explain the reasons for the Civil Rules amendments that permit recording by other means chosen by the party who notices the deposition, and that permit other parties to arrange alternative means of recording. There has not yet been any apparent action on these issues in the Senate.

The bills designed to deal with computer problems anticipated to arise with the advent of the year 2000 include heightened pleading provisions and would establish federal jurisdiction over class actions based on minimal diversity. The class-action provisions are very similar to the provisions in bills that would establish minimum-diversity jurisdiction for class actions in general. Some "Y2K" legislation is expected to pass, but it is not clear whether the class-action provisions will remain in the bill. The general class-action bill has been reintroduced in the Senate, but does not seem headed for immediate consideration. Committee discussion noted that this committee has been reluctant to adopt heightened pleading requirements for specific substantive areas. It may be appropriate to adopt a low-key position with respect to substance-specific heightened pleading requirements, although it is always appropriate to remind Congress of the basic notice-pleading procedure system. It also was noted that it is useful to remind Congress continually of the basic nature of the Enabling Act process. The Enabling Act recognizes that the judiciary should bear primary responsibility for shaping rules of judicial procedure, subject to deferential review by Congress.

The concluding observation was that Congress is generally aware of the Enabling Act process and respects the virtues of the process. At the same time, procedural provisions often are incorporated in bills because the sponsors feel a need to act faster than is possible under the Enabling Act. Generally these procedural provisions are not adopted.

Approval of Minutes

The draft minutes of the November, 1998 meeting were approved.

Published Proposals: Rules 4, 12

Proposals to amend Rules 4 and 12 were published in August 1998. The purpose of the amendments is to require service on the United States when a federal employee is sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. Most of the comments were favorable.

Some of the comments suggested that it would be desirable to expand this provision to require service on a state when a state official is sued in an individual capacity for acts done in connection with the performance of state duties. This possibility was discussed at the March, 1998 meeting and put aside. Brief discussion found no reason to revisit the original decision.

Two comments suggested the need for drafting improvements. The first of these comments pointed out that, read literally, proposed Rule 4(i)(2) subparagraphs (A) and (B) would require that both the United States and the employee be served twice when suit is brought against an employee in both official and individual capacities. Although it might be hoped that this foolish consequence would not be read into these separate provisions, it was concluded that it would be better to adopt an express subordination of subparagraph (A) to subparagraph (B). This change was accomplished in two steps. Subparagraph (A) is revised to apply when an officer is sued "only" in an official capacity. In addition, subparagraph (B) is revised to apply when an officer or employee is sued in an individual capacity, "whether or not the officer or employee is sued also in an official capacity." (The committee left it to the Reporter and Style Committee to resolve the drafting choice between "whether or not" and "regardless of whether.") A motion to delete this new phrase was made on the ground that it is redundant. The Note can point out that subparagraph (A) applies only when the officer is sued only in an official capacity. The motion was opposed on the ground that it is better to make things clear, even if redundantly clear, to the pro se litigants who bring many of these actions. The motion failed by vote of 4 in favor and 9 against.

The second drafting comment pointed out a lack of parallelism between proposed Rule 12(a)(3)(A) and proposed Rule 4(i)(2)(A). Rule 12 refers to "an officer or employee" sued in an individual capacity, while Rule 4 refers only to an "officer" sued in an individual capacity. Discussion of the best choice reflected that there is no technical definition of "officer" for purposes of the Civil Rules. It is possible, although it seems awkward, that an "employee" may be sued in an official capacity; certainly many actions are filed that seem to proceed on this premise. This concern led to the decision to add "employee" to Rule 4(i)(2)(A), making it read: "(A) Service on an agency or corporation of the United States, or an officer <u>or employee</u> of the United States sued

only in an official capacity * * *." With this change in Rule 4, there is no need to change Rule 12.

Published Proposals: Admiralty Rules

Proposals to amend Admiralty Rules B, C, and E were published in August 1998. Civil Rule 14 would be amended in two places to reflect the changed terminology proposed for Rule C. The comments and testimony generally favored the proposals. Some drafting changes were suggested.

In response to the drafting suggestions, the committee unanimously determined to make two sets of changes. The first change is to Rule B(1), moving "in an in personam action" from paragraph (a) up to the introductory line of subdivision (1).

The second set of changes affects Rules B(d)(i) and (ii) and also C(3)(b)(i) and (ii). The published proposals drew from present Rule C(3), which provides that the clerk is to deliver the arrest warrant in an in rem proceeding to the marshal. The comments suggested that practice varies from district to district, but that in some districts it has proved more expeditious to have the clerk deliver the papers to the attorney, who then delivers them to the marshal. The Maritime Law Association has considered this comment, and endorses the suggestion that the rules be changed to provide that the warrant, summons, or process be delivered to the marshal or other person responsible for service; the requirement that the clerk effect delivery would be removed. The committee adopted this change for the reasons given. The committee also concluded that there is no need to republish the C(3) proposal, even though this action will effect a change in the language of the present rule that was not identified in the August, 1998 publication. These parallel provisions in Rules B and C should be expressed in parallel fashion, and the change is fully in keeping with the process that led to the Rule 4 provision that the clerk delivers the summons in a civil action to the plaintiff for service on the defendant.

The Committee unanimously rejected two other proposed drafting changes. One change would add language to Rule B(1)(a): "If a defendant is not found within the district, a verified complaint that asserts an admiralty or maritime claim may contain a prayer for process to attach the defendant's tangible or intangible personal property." This suggestion reflected concern that lawyers unsophisticated in admiralty practice might attempt to use maritime attachment or garnishment in actions not brought in the admiralty jurisdiction. Such attempted misuse might in turn reopen the questions of notice practice that have been resolved in reliance on the special needs of admiralty proceedings. Rule A, however, makes it clear that the Admiralty Rules apply only to admiralty and maritime proceedings. This particular redundancy seemed unnecessary.

The other rejected change would have revised Rule B(1)(e) to

refer to "restraint" of person, rather than "seizure" of person, for the purpose of securing satisfaction of the judgment. The published language, however, draws directly from Civil Rule 64: Rule B(1)(e) allows a plaintiff to "invoke state-law remedies under Rule 64 for seizure of person or property," the very language used in Rule 64. It seems better not to depart from the language of the rule incorporated.

The committee unanimously adopted a suggestion from the Maritime Law Association to add a new sentence to the Note on Rule B(1)(e). The note would make it clear that deletion of the superseded Rule E(8) reference to a restricted appearance under Civil Rule 4(e) does not affect reliance on similar state procedures when state prejudgment remedies are invoked through Civil Rule 64. The sentence reads: "But if state law allows a special, limited, or restricted appearance as an incident of the remedy adopted from state law, the state practice applies through Rule 64 'in the manner provided by' state law."

Published Proposals: Discovery Rules

An extensive package of discovery rules amendments was published in August, 1998. 301 numbered comments were received; more than 70 witnesses testified at three hearings; many of the witnesses supplied written statements in addition to their oral testimony. In addition to being voluminous, the public response was thoughtful and thorough. The comments generally were parallel to the arguments that were considered by the committee during the process of meetings, conferences, and subcommittee deliberations that shaped the published proposals. The comments thus in large part reinforced the initial conclusions. At the same time, the comment process brings an element of democracy into the committee's work. There are differing interests in the civil rules, often divided for rough purposes between plaintiffs and defendants. The committee must work to identify the interests, to appraise them, and ultimately to balance them. Hearing from many different points of view advances this process from well-informed speculation to clear articulation of these interests.

Judge Niemeyer introduced the discussion of the discovery rules by observing further that the committee process has been exceptionally good. It should be a model for the way that big projects are handled. The public and Congress should be made aware of the way the process works. Confidence in the product will be enhanced when the underlying work is recognized.

In response to the testimony and comments, the Discovery Subcommittee has proposed resolutions to questions that were published with requests for comment on alternative versions. It also has proposed adjustments in the wording of some rules, and additions to the Notes to address some of the uncertainties suggested. It was agreed that the best mode of deliberation would be to address first all of the issues raised by the Subcommittee report. Once the optimal version of the published package is

reached, it will be time to address any fundamental changes that may be moved by committee members.

Special Reporter Marcus led presentation of the Subcommittee package. He began by observing that there were a few policy choices that had been left open by the committee, and that the Subcommittee would present recommendations — often unanimous recommendations — as to most of them. For want of any overriding logic, the package would be presented in numerical order of the rules affected.

Rule 5(d). In its present form, Rule 5(d) provides that a court may order that designated discovery materials not be filed until used in the proceeding or an order to file is entered. This provision has been implemented by many local rules that prohibit filing in general terms that seem inconsistent with the requirement that there be a court order. This committee proposed an amended rule that designated discovery materials "need not" be filed until used in the proceeding or until filing is ordered. At the June, 1998 meeting, the Standing Committee directed that the proposal be amended to provide that the designated materials "must not" be filed until used or until filing is ordered. The materials published in August reflected this history. The Subcommittee, by divided vote, recommends that "need not" be recommended again to the Standing Committee.

It is not entirely clear whether "must not" or "need not" file would have a greater impact on present local-rule practice. It seems likely that most local rules prohibit filing before the discovery materials are used, or filing is ordered. But at least some of the local rules complicate this practice by specifically authorizing nonparty motions for access to discovery materials. Whatever the range of impact, either form of the proposed national rule will supersede local rules.

Under the "must not" version, a party who wishes to file discovery materials must create an occasion for filing. One method would be to move for an order directing filing. Another method would be to somehow "use" the materials.

There is no good way to predict whether the "need not" version would lead to voluminous filings of discovery materials in advance of any use. If the better guess seems to be that courts would not be swamped with discovery filings, there is little way to be confident that this will be the outcome.

The Public Citizen Litigation Group has urged that the "need not" formulation be adopted. It seems likely that other groups interested in public access to litigation materials also will favor that formulation.

It was suggested that the form of the rule may have an impact on the way state-law defamation privileges develop. There is reason to believe that many states will recognize a privilege for published statements that reflect materials filed in court. It is

difficult to guess whether a similar privilege would be recognized for statements that reflect discovery materials that have not been filed.

Support for the "must not" version was expressed on the ground that the Standing Committee had acted because many local rules say "must not." The Ninth Circuit Circuit Council urged that the national rule be amended to confirm the legitimacy of this practice. The local rules have worked. "Need not" is odd language, but clearly means that the decision to file is left to the unrestricted discretion of the attorneys and parties. Concerns of public access prove perplexing in many areas. But we must remember that the function of the discovery rules is not to create an expanded Freedom of Information Act that reaches private and public information outside present statutes. And it is not the function of the discovery rules to address state defamation law.

Further support for the "must not" version was expressed on the ground that the "need not" version "would create havoc." When one party wants to go public with information, it will create an excuse to "use" the information, file, and go to the press. The response will be increased protective-order motions. The "must not" version also is "certain and clear." The "need not" version, moreover, will invite local rules saying "must not" no matter how clearly inconsistent with the national rule.

In response, it was suggested that a protective order is needed to ensure confidentiality whether or not discovery materials are filed. Absent a protective order, there is nothing to restrain a party from disclosing discovery materials to anyone it wishes. Protective orders are routinely entered, commonly by agreement of the parties, in "complex" litigation, but often are not sought in more routine litigation. In many courts, employment cases have become a substantial portion of the case load. Depositions and other discovery materials in these cases often deal with intensely personal information involving both parties and nonparties. These materials should not be spread on the public record.

It was asked whether the "must not" version would inhibit the opportunity to avoid wasteful discovery duplication in parallel cases. A response was that in mass torts, there is an information network entirely outside of court filing. The first question is "give me all your other discovery." The "must not" version will not affect this practice. And there are similar networks even apart from mass torts. Discovery sharing is achieved readily now, and will be achieved under a "must not" approach to filing. A "need not" approach, on the other hand, could lead to unproductive wars of filing.

A final argument was that the "must not" version would lead to motions for orders to file, and would encourage parties to invent uses for discovery materials in order to file them. "Need not" is clearer.

Voting on the alternatives, 11 voted for "must not" and 2 voted for "need not."

It was asked whether a sentence should be added to the Committee Note to provide an express reminder that a party who wishes to file discovery materials may move for an order that directs filing. The final paragraph of the Note addresses filing on use; why not also filing on order? The conclusion was that there is no need to point out an opportunity that is clear on the face of the Rule.

As a separate question, it was asked why the package includes provisions deleting the requirement that Rule 26(a)(1) and (a)(2) disclosures be filed, but — in both Rule 5(d) and Rule 26(a)(3) — requires that pretrial disclosures under Rule 26(a)(3) be filed. It was responded that Rule 26(a)(3) requires objections to be filed before trial; it makes sense that the disclosure be filed to provide a coherent record for the objections. Rule 26(a)(3) is a form of final pretrial activity; it is important that these disclosures be readily available to the judge.

It also was asked whether the Committee Note should address retention of discovery materials that are not filed. This question relates to the Rule 30(f)(1) provision directing that an attorney store a deposition transcript in protective conditions. Preservation of other discovery materials is not directly addressed by the rules. Of course any prudent lawyer will retain all discovery requests and the corresponding responses. Possible Note language is suggested at pages 9 to 10 of the Subcommittee memorandum. The question is whether we need adopt the material appearing at lines 279 to 282.

It was asked how long a lawyer is supposed to retain discovery materials. Usual practice is to give the materials back to the client after the litigation is over. Is the comment intended to imply an affirmative duty? Is it a duty of unlimited duration? There is no indication in Rule 30(f)(1) as to the duration of the lawyer's duty to protect a deposition transcript.

It was suggested that the draft language referring to what a "prudent" lawyer does may seem to create a duty of care. An attempt to address preservation of discovery materials through the Committee Note may disrupt practice as it now is.

A motion was made to amend the Committee Note to describe a requirement that discovery materials be kept during the course of the litigation. It was suggested and accepted that the statement at lines 275 to 276 could be changed by substituting "during the course of the litigation" for "by prudent counsel.

It was protested that the draft Note language looks like an effort to amend Rule 30(f)(1) indirectly. The reference to "it is expected" does not say who expects this. The suggestion that the duty to preserve other discovery materials is "similar" to the Rule 30(f)(1) duty seems to imply a time limit that is not now expressed

in Rule 30(f)(1).

Another protest was that a lawyer cannot lose or destroy documents during a litigation. The Note, in attempting to address this issue in incomplete terms, will lead to mischief. There is a risk that the Note language will be read to narrow the duty that presently exists. We just do not need this language; both sides have discovery material, and all parties recognize the need and obligation to preserve it.

An alternative suggestion was that the Note could refer to the duty to preserve discovery materials indirectly by stating that the prohibition on filing does not alter the responsibility to preserve.

On the question whether to add lines 271 to 282 of the Subcommittee Memorandum to the Rule 5(d) note, it was decided unanimously not to add this material.

Rule 26(a)(1): "May use" formulation. After extensive discussion at the March, 1998 meeting, it was decided to frame the revised initial disclosure provisions of Rule 26(a)(1) to require a party to disclose witnesses and documents "supporting its claims or defenses, unless solely for impeachment." The alternative formulation called for a party to disclose information it "may use to support its claims or defenses, unless solely for impeachment." In publishing the Rule 26(a)(1) proposal, the alternative formulation was identified for comment. There was little comment.

The choice between "supporting" and "may use to support" divided the committee by a margin of 7 to 4 in 1998. The Subcommittee has reconsidered the question, and concluded to submit the issue to the committee without recommendation. Because there is no Subcommittee recommendation, the question whether to depart from the earlier vote and from the published version was opened without a motion. A motion was then made to change to the "may use" formulation.

The arguments for the competing proposals were set out at some length in summaries by the Reporter and the Special Reporter, appearing at pages 11 to 21 of the Subcommittee Memorandum. The Reporter and Special Reporter presented these arguments in condensed form. The supporting memoranda are set out as Appendix A to these Minutes.

Committee discussion began with an expression of concern about the cost of extensive disclosure. The "supporting" approach requires disclosure of information that the disclosing party has no intention to use, requires investigation to unearth supporting information that the party would not undertake for its own purposes, and may require disclosure of witnesses or documents that in any way involve supporting information even though the balance is heavily unfavorable to the disclosing party. An example was offered of an automobile design developed from 1985, first produced in 1990, and embodied in a vehicle sold in 1995 that was involved

in a 1997 accident. Information about all of these matters will be used, and is properly disclosed. Information about events in 1955 that might seem to support the continuing evolution of automobile design would not be sought out or used, and should not be subject to a disclosure requirement.

An alternative view was that the narrower version is better, but that it is not clear whether "supporting" is broader or narrower than "may use." The committee should adopt the language that is narrower, less open-ended. We should focus on material that a party actually intends, at the time of disclosure, to use at trial. It was responded that "may use" is closer to intent, and narrows the obligation in a way that "supporting" does not. The Reporter and Special Reporter agree that "may use" would create a lesser disclosure duty. The proponent of the "intent" approach urged that the Note should say that "may use" means "intends at this time to use."

It was noted that Rule 26(a)(1) already provides that disclosure is to be made "based on information then reasonably available to" a party and is not excused because the disclosing party "has not fully completed its investigation of the case." This provision is supplemented by the continuing duty to supplement created by Rule 26(e)(1). "May use" is not "will use," but speaks only to current estimates. The duty to supplement means that the disclosure obligation in effect merges with the discovery process: the more thorough the discovery process is, the less occasion there will be to disclose.

It also was suggested that in reality, most parties pay little attention to initial disclosure obligations. Most plaintiffs would rather get on directly to discovery.

Scott Atlas noted that when the ABA Litigation Section selected "supporting" over "may use," it had not particularly focused on the arguments presented to the committee. He suspected that the Section would prefer the narrower version.

When the alternative formulations were put to a vote, 11 votes preferred "may use," and 1 vote preferred "supporting."

It was urged again that the Note should say that the "may use" formulation is narrower than the published proposal to require disclosure of "supporting" information.

Rule 26(a)(1): "High-end exclusion". Proposed Rule 26(a)(1) provides that initial disclosures are to be made within 14 days after the Rule 26(f) conference unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action. This proposal reflects the view that in some circumstances it may be better to proceed directly to discovery and other pretrial management devices. Lines 784 to 795 of the Subcommittee Memorandum propose language that might be added to the Committee Note to provide examples of such circumstances. Many lawyers have advised the committee that initial disclosures

are routinely bypassed in complex litigation. The prospect of early disposition for lack of jurisdiction, or failure to state a claim, suggests other circumstances that might justify delay or disregard of initial disclosure procedure.

It was suggested that it would be better not to address this topic in the Committee Note. There is a special risk that suggesting that dispositive motions may toll disclosure will invite more motions.

The committee mustered 3 votes to include the proposed Note language, and 8 votes to omit it.

Rule 26(a)(1)(E): "Low-end exclusion". Proposed Rule 26(a)(1)(E) enumerates eight categories of proceedings that are exempted from the initial disclosure requirement. These exemptions are incorporated as well in proposed Rules 26(d) and 26(f) — in these categories of proceedings there is no Rule 26(f) conference obligation, and no Rule 26(d) discovery moratorium. When the proposals were published, the committee asked for comment on the categories chosen for exemption, and also on the ways to express the exemptions. There were not many comments.

The first exemption, (i), covers "an action for review on an administrative record." Some of the comments suggested that this description is ambiguous because administrative actions are at times "reviewed" in settings that are collateral to the main object of a proceeding. The committee approved the addition of two new sentences to the Committee Note, following the statement that the descriptions of the exemptions are generic and are to be administered flexibly: "The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an 'appeal' based solely on an administrative record. The exclusion would not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record."

The third exemption, (iii), covers "an action brought without counsel by a person in custody of the United States, a state, or a state subdivision." One suggestion was that disclosure should be required of the government when it is involved in such an action, but not of the plaintiff. Another suggestion was that the exemption should cover all pro se actions. Committee discussion noted that pro se employment cases have come to occupy a substantial portion of the docket in some courts, and that there can be problems with disclosure and the Rule 26(f) conference in such cases. But it also was observed that the practice in both the Eastern and Southern Districts of New York is that the defense discloses to a pro se plaintiff, and that this works. Another judge observed that disclosure and the Rule 26(f) conference help to move pro se cases. When the parties come to court, there has been at least an initial discussion, and the plaintiff often has a better idea of what the case is about. The committee concluded that the exemption should not be changed.

The fifth and sixth exemptions, (v) and (vi), cover "an action by the United States to recover benefit payments" and "an action by the United States to collect on a student loan guaranteed by the United States." The Department of Justice urged that these two exemptions be combined into one exemption, and extended to cover all actions by the United States to recover on a loan. Consumer groups urged that the exemptions be deleted, urging that disclosure is important because the United States frequently fails to maintain adequate records and will be forced by disclosure to present a coherent account of the amounts due. Committee discussion suggested that the consumer group concerns do not have much support. These actions are not filed without thought, and usually the information underlying the claim is narrow, straightforward, and clear. The reasons for not requiring disclosure apply at least to all loans. But it also was noted that there are many foreclosure actions, and that foreclosure actions may not be so simple. The committee concluded that these exemptions should not be changed.

A motion was made to drop the student loan exemption on the ground that disclosure and the Rule 26(f) conference will expedite the proceedings. It was further observed that once the defendant "knows the number," there are a lot of quick settlements. If there is not a settlement, disclosure and a Rule 26(f) conference may be the most efficient means to dispose of these cases. But it also was observed that there is disclosure in practice — that the collection process typically is managed by a paralegal or other staff person who calculates the amount due and delivers the calculation to the debtor. Even in cases that do not go by default, the answer typically admits the amount due. The vote was one to drop the exemption, and all others to retain the exemption.

The seventh exemption, (vii), covers "a proceeding ancillary to proceedings in other courts." This exemption was intended to reach such matters as ancillary discovery proceedings, judgment registration, an action to enforce a judgment entered by a state or foreign court, and the like. A group of bankruptcy judges, however, expressed concern that the exemption might apply to an adversary proceeding in bankruptcy. The Reporter for the Bankruptcy Rules Committee agreed that the exemption should not be read to reach adversary proceedings in bankruptcy, but suggested that the Committee Note might include an express statement on this subject. The Committee determined to add this new sentence at the end of the last full paragraph on page 51 of the published proposals: "Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules."

In addition to discussion of the exemptions included in proposed Rule 26(a)(1)(E), the comments and testimony suggested another 23 enumerated exemptions. It also was suggested that the rule should authorize further exemptions by local district rule.

The committee agreed that it is better not to propose additional exemptions for public comment. It will be time enough to consider additional exemptions after developing experience with the present proposals.

Rule 26(b)(1): Drafting Change. The Discovery Subcommittee offered no recommendations with respect to the substance of the proposal to redefine the scope of discovery in Rule 26(b)(1). It did, however, suggest a one-word change in drafting. Rule 26(b)(1), now and as it would be amended, allows discovery of "any matter" relevant to the litigation. In the present rule, it is any matter relevant to the subject matter of the pending action. In the proposed rule, it is any matter relevant to the claim or defense of any party. The proposed rule then allows the court to expand discovery back to the "subject matter" scope. As published, see line 131 on page 42, the expansion allows the court to order discovery of any "information" relevant to the subject matter. Use of "information" in this setting introduces a potential ambiguity. The intent of this "court-managed" discovery provision is to allow discovery within the full scope of the present rule; the only change is that discovery to this extent requires a showing of good cause and a court order. Unambiguous communication of this intention requires that the court-managed discovery provision be drafted in the language of the present rule. The committee unanimously agreed to change this provision to read: "For good cause shown, the court may order discovery of any ~~information~~ matter relevant to the subject matter involved in the action."

Rule 26(b)(1): "Background" information. Many of the comments on proposed Rule 26(b)(1) expressed doubt whether the change in lawyer-managed discovery from information relevant to the "subject matter" to information relevant to a claim or defense would require a court order to win discovery of various forms of information now commonly discoverable. This doubt was expressed in general terms of "background" information, but also in more focused terms. The most common examples involved impeachment information; "organizational" information identifying the people and documents or things to be subjected to further discovery; and "other incident" information involving such matters as other injuries involving similar products or the treatment of other employees for comparison with an employment-discrimination plaintiff. Additional Committee Note language was proposed to address these concerns, appearing at lines 1110 to 1123 of the agenda materials. This language is rather general. The material at lines 1112 to 1115 dealing with "other incident" information was discussed by the Discovery Subcommittee.

Discussion of the proposed Note language began with the observation that such phrases as "could be" and "might be" are troubling. They imply that the described information also might not be discoverable. The Note material, moreover, "reads like an application note to a Sentencing Guideline."

It was responded that the proposed language is excellent, making it clear that the committee never intended to close off discovery of such materials.

But it was urged that it would be better to omit the limited examples precisely because they might be seen to be limiting. It is enough to say that the boundaries of discovery should be decided on a case-by-case basis. And it was urged that to the contrary, some concreteness helps. The help is particularly important because the frequent appearance of these questions in the comments shows that lawyers will raise the same questions if the proposed rule is adopted.

A motion was made to add a sentence to the Note stating that the "claim or defense" scope of attorney-managed discovery does not exclude discovery of matter admissible under Evidence Rule 404(b). The motion failed, 4 votes in favor and 7 votes against.

It was suggested that the Note illustrations should be prefaced by "For example." Line 1115 could begin: "For example, information about organizational arrangements * * * could be discoverable." This introduction would treat the following categories also as examples.

It also was suggested that the reference to "incidents" in line 1113 is curious — it is more common to refer to "other event" or "other occurrence" information than to "other incident" information.

A motion to include lines 1110 to 1123 in the Committee Note passed with one dissent.

Rule 26(b)(1): "Relevant" information. Another change that would be made by the proposals for subdivision (b)(1) adds the word "relevant" at the beginning of the sentence allowing discovery of information not admissible at trial. Questions about this addition were raised in the comments. The committee added this reminder about relevance to ensure that the effect of the change that separates lawyer-managed discovery from court-managed discovery would not be swallowed up by misinterpretation of this sentence. The committee unanimously approved the Subcommittee proposal to add a new sentence to the Committee Note to further explain the meaning of "relevant" in this sentence: "As used here, 'relevant' means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause."

Rule 26(b)(1): Relation of cost-bearing to good-cause expansion. The committee conceived the subdivision (b)(1) scope proposal as a matter entirely independent of the cost-bearing proposal that was published as an amendment to Rule 34(b). Many of the comments, however, have assumed that there is a connection. The supposed connections have run in various directions. Some assume that showing good cause for expanding the scope of discovery

automatically means that cost-bearing is not appropriate. Others assume that a party who is willing to bear the costs is automatically entitled to expand the scope of discovery. And still others assumed that an order finding good cause to expand the scope of discovery automatically should order cost bearing. The Discovery Subcommittee discussed a possible addition to the Committee Note that is set out at page 38, note 7, lines 1199 to 1212 of the agenda materials. Different and more expanded Note language is set out at pages 39 to 40, lines 1223 to 1257; yet another and earlier alternative model is set out at page 40, note 9, lines 1261 to 1285. The Special Reporter remained dissatisfied with each of these versions, and suggested that perhaps further work should be done.

Discussion of these alternatives began with the reassurance that cost bearing is contemplated only within the principles of Rule 26(b)(2) and 26(c), whether the new provision is located in Rule 34(b) as published or is relocated to Rule 26(b)(2) as proposed for later discussion. The relation of cost bearing to expanding the scope of discovery depends, however, on the context of actual administration. A judge, for example, might find good cause for expanded discovery of three specified items; if nothing is said about cost bearing, the ordinary assumption should be that there is no need to consider cost-bearing further. A general order that opens the scope of discovery, however, need not have resolved that everything within the reach of "subject-matter" discovery is discoverable within the limits of Rule 26(b)(2) and the protective power of Rule 26(c). The scope and cost-bearing provisions are conceptually independent, and it may help to emphasize that the risk of confusion arises in actual administration when an initial focus on scope may — or may not — include consideration of (b)(2) principles. Concrete examples could illustrate the risks of confusion and clarify the conceptual independence.

The material at lines 1224 to 1257 was proposed for examination, subject to further work to integrate some of the material in footnote 9.

Lines 1223 to 1227 of the proposed Note language read: "The limitations of subdivision (b)(2) might be particularly pertinent to requests to expand discovery beyond matters relevant to the claims or defenses, and a party opposing such expansion could invoke its limitations." It was suggested that this language suggests a link between cost bearing and the scope of discovery that should not be emphasized. But it was responded that these lines work well with the first part of the paragraph, as published, which emphasizes that (b)(2) principles apply to limit discovery that otherwise is permissible under the general scope provision in (b)(1).

A different concern with the material at lines 1223 to 1227 was that it could become misleading if the cost-bearing provision is relocated to Rule 26(b)(2).

The material in footnote 7, lines 1199 to 1212 was offered as an alternative addition to the Note. It was agreed that the final sentence should be changed to make it clear that application of (b)(2) limits can justify denial of discovery as well as cost bearing: "it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be denied, or subject to a cost-bearing order."

It was moved that the material at lines 1223 to 1227 be adopted, to be followed by the material at lines 1199 to 1212 as modified. An amendment was proposed, deleting lines 1223 to 1227 and adding only line 1199 to 1212 as modified. It was repeated that lines 1223 to 1227 seem to work an inappropriate fusion of "good cause" in (b)(1) with (b)(2) principles. And it again was observed that if cost bearing is moved from Rule 34(b) to Rule 26(b)(2), these lines will create still further confusion. Ten votes were cast to delete the material at lines 1223 to 1227.

The committee then voted unanimously to add to the material at lines 1199 to 1212 this sentence from lines 1278 to 1280: "In any event, it is clear that a party cannot automatically expand the scope of discovery by agreeing to pay the reasonable expenses of responding." The location of this sentence in the text will be determined by the Special Reporter and Reporter, with any wording changes that may be required for an appropriate fit.

The new Note language, to appear at the end of the Note material on Rule 26(b)(1) on page 57 of the publication book, will read approximately thus, taking account of the later decision to move the cost-bearing provision to Rule 26(b)(2):

> Rule 26(b)(2), as amended, provides that a court may permit discovery that exceeds the limitations of subdivisions (b)(2)(i), (ii), or (iii) on payment of part or all of the reasonable expenses incurred by the responding party. Should the court expand discovery beyond matters relevant to the claims or defenses on a showing of good cause, that conclusion would normally indicate that the proposed discovery is consistent with the limitations of subdivision (b)(2). Nonetheless, as is true of discovery relevant to the claims or defenses, such broader discovery is subject to the limitations of subdivision (b)(2), and it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be denied or subject to a cost-bearing order. In any event, it is clear that a party cannot automatically expand the scope of discovery by agreeing to pay the reasonable expenses of responding.

Rule 26(b)(2): The Location of Cost Bearing. The published proposals included amendment of Rule 34(b) to provide for cost bearing in these terms: "On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall — if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii) — limit the

discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party." The letter submitting the proposals for publication, however, solicited comment on an alternative proposal to locate cost-bearing in Rule 26(b)(2) for the reasons described at pages 14 to 15 of the publication book. The choice of location was the subject of mixed comments. The Discovery Subcommittee, although not unanimously, recommended that the provision be relocated to Rule 26(b)(2). Location in Rule 26(b)(2) supports clearer drafting. The committee has believed throughout, moreover, that Rules 26(b)(2) and 26(c) already support cost-bearing orders, and recognizes that courts have in fact exercised this power. Explicit confirmation of the power in Rule 34(b) was suggested in the belief that the most frequent occasions for a cost-bearing order will arise in connection with document discovery. The published Committee Note says as much, and expressly states that courts continue to have authority to order cost bearing with respect to depositions, interrogatories, or requests for admission. The Note, however, may not be effective to defuse the possible negative implication that confirmation of the existing power in Rule 34(b) somehow defeats the same power with respect to other modes of discovery. Relocation to Rule 26(b)(2) ensures the even-handed availability of the cost-bearing power.

It was urged that the committee had it right. The problems arise with document production under Rule 34. If cost bearing is relocated to Rule 26(b)(2), "it will get lost." If this provision is relocated to Rule 26, at least Rule 34 should be amended to include an explicit reminder of the power. It also was urged that cost bearing "is very controversial. You double the controversy by putting it in Rule 26."

Relocation was supported by urging that greater controversy will arise from the Rule 34 location. The Committee Note says that this is an existing power, and that it will continue to exist across all discovery devices. The arguments summarized at page 15 of the publication book say it well. Location in Rule 34 requires unnecessarily complicated drafting, and will lead to negative implications for those who do not bother to read the Committee Note. Cost bearing is a discovery management tool, and should be located with the Rule 26(b) management provisions.

A motion to move cost bearing to Rule 26(b)(2) passed, 8 for and 3 against. The question of adopting a cross-reference in Rule 34 was postponed for later discussion of Rule 34.

Rule 26(b)(2): Differentiated Case Management; Party Agreements. Proposed Rule 26(b)(2) repeals the authority conferred by the present rule to adopt local rules that alter the national rule limits on the number of interrogatories or the number or length of depositions. Some district judges have expressed concern that this change jeopardizes local rules that establish differentiated case-management plans. Examination of the rules in these districts

shows that although the plans describe a number of different discovery "tracks" that include limits on discovery events, assignment to a discovery track is accomplished by specific order in a particular case. These plans are consistent with proposed Rule 26(b)(2), which continues to authorize orders that alter the discovery limits prescribed by the national rules. In order to allay the fears expressed by these districts, additional language is proposed for the Committee Note, as set out at page 46, lines 1463 to 1479 of the Subcommittee memorandum. Discussion of the proposal suggested that the Committee Notes are becoming too long. It was agreed that only lines 1463 to 1465 would be added to the Note: "This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 processes."

A concern similar to the differentiated case-management concern was expressed by a group that feared parties would lose sight of the power to modify discovery limits by agreement. The Subcommittee Memorandum suggested language for the Committee Note that would refer to the powers of the parties under Rules 26(f) and 29, and the powers of the court under Rule 16, see page 47, lines 1503 to 1507. No one moved adoption of this language.

Rule 26(d): Early Discovery. Some of the comments urged consideration of the need for early discovery in some circumstances, such as motions for preliminary relief under Rule 65 or challenges to subject-matter jurisdiction. The discovery moratorium established by Rule 26(d) will be made applicable in all courts by deletion of the power to opt out by local rule. It might help win acceptance of the new national scheme to recognize the need for early discovery in the Committee Note; suggested language is set out at page 48, lines 1536 to 1538. It was observed that the published note already says all that need be said: "The parties may agree to disregard the moratorium where it applies, and the court may so order in a case." The motion to add the new language to the Note failed.

Rule 26(f): Expedited Case Management. The proposed amendments to Rule 26(f) set the discovery conference at 21 days before a scheduling conference is held or a scheduling order is due. Judges from the Eastern District of Virginia have been concerned that this time period will interfere with their expedited case management system. The Discovery Subcommittee believes that Rule 26(f) should not interfere with such expedited case-management systems, and has proposed a new sentence for Rule 26(f) to address this problem, set out at page 50, lines 1573 to 1585 of the memorandum. This addition rests on recognition that changes to Rule 16, beginning in 1983, have been designed to prompt speedier pretrial movement of cases. There has not been any expressed desire to slow down pretrial management.

Further expanding on the new provision, the Discovery Subcommittee chair noted that he and the Special Reporter had

devoted a lot of time talking to judges in the Eastern District of Virginia. It is important to accommodate their case-management model in the national rule.

It was suggested that the Virginia system serves the spirit of Rule 1 that there be speedy disposition of litigation. A court that has developed a system that accomplishes prompt dispositions should not be thwarted by rules designed to set outer time limits, not to encourage expansion to those outer limits. Even if there is legitimate doubt whether faster disposition always makes for better disposition, it would be untoward to upset a system carefully developed by a court that is proud of the results.

This discussion led to discussion of the published proposal to set the discovery conference at 21 days before the scheduling conference or order, and to require the report to the court within 14 days after the discovery conference. These periods were selected because the former periods of 14 days and 10 days could lead to delivery of the discovery conference report to the court too late to be of use at the scheduling conference, particularly given the method of calculating periods of less than 11 days. It was asked whether the problem could be cured by changing the time for the discovery conference back to 14 days before the scheduling conference and requiring the discovery conference report within 7 days. This approach would not address the needs of the Eastern District of Virginia, where a Rule 16 scheduling conference may be set much sooner after the answer is filed.

It was suggested that the draft Committee Note to accompany the new Rule provision was too long, and that the paraphrasing of the new rule language at lines 1610 to 1626 on page 51 should be deleted. A motion to delete this language passed by unanimous vote. Styling changes were made. The committee then voted unanimously to adopt this new language after the last sentence of proposed Rule 26(f):

> A court may by local rule or order require that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties under this subdivision occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed less than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

The committee also voted unanimously to add to the Committee Note the provisions appearing at lines 1598 to 1610 and 1626 to 1629 of the Subcommittee Memorandum.

It was noted that this language was not part of the rule published for comment, and agreed that the lack of publication should be pointed out to the Standing Committee. The committee concluded, however, that this is the kind of change in response to public comment that can properly be made without further publication. It would be undesirable to carve this accommodation of a specific need out from the general package of amendments for a separate process of comment and tardy adoption.

Rule 30(d): Deponent Veto. The published proposal to adopt a presumptive 7-hour limit for depositions included a provision to extend the time by stipulation "by the parties and the deponent." Great concern was expressed about the "deponent veto" in the testimony and comments. The Discovery Subcommittee recommended deletion of the deponent veto. The recommendation was unanimously adopted by the committee. The corresponding portion of the Committee Note will be deleted, as indicated at lines 1697 to 1700 of the Subcommittee Memorandum.

Rule 30(d): Calculation of 7-Hour Limit. The public comments and testimony expressed many concerns about the method of calculating the 7-hour presumptive time limit for depositions. Specific concern was addressed to application of the limit to Rule 30(b)(6) depositions of an organization when the organization designates more than one person to testify on its behalf. The Subcommittee proposed two new sentences for the Committee Note. The first, appearing at page 54, lines 1690 to 1693, recognizes that "breaks" do not count as part of the 7 hours, and that the only time to be counted is that occupied by the actual deposition. The Subcommittee made a deliberate decision not to speak more precisely to the "stopwatch" mentality that many comments feared will arise. The second, appearing at lines 1693 to 1696, states that the deposition of each person designated under Rule 30(b)(6) counts as a separate deposition for purposes of the 7-hour limit.

It was asked whether even the discussion of reasonable breaks for lunch and other needs departs too far from the appropriate spirit of "one day without a stopwatch." The new language only shadows the problems feared to arise from disputes over allocation of the 7 hours among multiple parties, cross-examination, objections, and the like. It also seems to approach micromanagement. But it was answered that a surprising number of comments expressed uncertainty over so basic a question as whether a lunch break would count toward the 7 hours. A motion to delete proposed lines 1690 to 1693 failed, 2 for and 10 against.

Turning to the organization deponent, it was noted that for purposes of the Rule 30(a)(2)(A) 10-deposition limit, a deposition of an organization counts as only one deposition no matter how many people are designated to testify on behalf of the organization. The opposite answer is proper for the Rule 30(d)(2) time limit — it would be absurd to limit depositions to an average of 42 minutes if an organization designated 10 people to testify.

Lines 1690-1695 were adopted unanimously.

Rule 30(d)(2): Extending the 7-hour limit . Many, many comments urged changes in the proposed one-day, 7-hour deposition limit. A change to 2 days was often urged. Even more often, it was argued that depositions of expert witnesses should be exempted. A variety of other exemptions and changes were suggested. The Subcommittee did not think it useful to attempt to capture in the Rule any formula to guide decisions whether to extend the limit. But it thought it might help to list examples of circumstances that may justify expansion. Proposed new Committee Note language is set out at pages 55 to 56 of the Subcommittee Memorandum, lines 1737 to 1778. The initial emphasis is on circumstances the parties may consider in agreeing to extend the time, as a means of underscoring the primacy of party agreement over resort to court order. The draft also notes that it is desirable to deliver documents to be used at the deposition to the deponent before the deposition, and suggests that the deponent's failure to consult the documents in advance is a likely ground for an extended limit.

There was initial debate over the desirability of providing examples. It was suggested that it is a mistake to give examples. But it was urged that examples are helpful, so long as it is made clear that these are only examples. The list should be introduced by "for example."

The first example, at lines 1739 to 1742, suggests that additional time may be warranted if it is expected that the deposition will be presented at trial in lieu of testimony by the deponent as a trial witness. It was argued that this is a bad example — a "trial" deposition should be made shorter, not longer, in order to reduce the burden of editing the transcript for effective trial presentation. The lawyers are not likely to agree to lengthen the time, and a court is not likely to order it. A motion to strike lines 1739 to 1742 passed unanimously.

It was agreed that "For example" would be added on line 1742 before the first illustration: "For example, if the witness needs an interpreter * * *."

Lines 1774 to 1778 refer to the desirability of exploring deposition time questions at the Rule 26(f) conference or a Rule 16(b) scheduling conference. A motion to strike these two sentences as unnecessary was adopted with one dissent.

Lines 1770 to 1774 suggest that additional time may be appropriate for deposition of an expert witness when a challenge to admissibility is expected. It was noted that the need for extra time for expert witness depositions is explored at lines 1766 to 1770, and urged that this additional reference to *Daubert* hearings is unnecessary. A motion to delete lines 1770 to 1774 passed unanimously.

Proposed lines 1764 to 1766 read: "Similarly, should the lawyer for the witness want to examine the witness, that ought

rdinarily to be accommodated." Doubts were expressed as to the meaning of "accommodated": does it mean that extra time should be given? Or that the parties have a duty to ensure that part of the original 7 hours is allocated for this purpose? Is the "witness" described in the example only a nonparty witness, or also a party witness? Ordinarily the parties are expected to allocate the time between themselves, whether the witness is a party or is not a party. The problem for the lawyer for the witness, whether the witness is a party or not, is that neither lawyer nor witness knows at the beginning of the deposition what will come up. The thought behind this sentence is that necessary questioning should be permitted even when it goes beyond the 7-hour limit. The "lawyer for the witness" was meant to refer to the lawyer who did not notice the deposition. But the same problem may be encountered by a lawyer for a party who wants to examine another party witness or a nonparty witness. And a "de bene esse" deposition commonly takes on the character of two separate depositions, with examination first by the party who noticed the deposition and then separately by cross-examination; the dynamic is different from the ordinary discovery deposition. It was suggested that these problems could be fixed by deleting the introductory phrase on line 1760, so that the material on lines 1760 to 1764 would not be limited to multi-party cases, and by deleting lines 1764 to 1766 as unnecessary. But it was argued that it is important to note the distinct time needs of multiparty cases — many comments were addressed to this point. In the end, these problems were resolved by taking "accommodated" out from line 1766, so that the sentence from 1764 to 1766 reads: "Similarly, should the lawyer for the witness want to examine the witness, that may require additional time."

With these changes, the added Note material on pages 55 to 56 was adopted with one dissent.

Rule 30(d)(1): Instructions to Witness. Rule 30(d)(1) now regulates instructions by a party to a deponent not to answer a question. The proposed amendment changes "party" to "person," so as to regulate attempts by nonparties to instruct a deponent not to answer. The magistrate judges' association has expressed the fear that this change may create new implied powers for nonparties. Additional Committee Note language to defeat this possible implication is proposed on page 58, lines 1811 to 1820 of the Subcommittee Memorandum. The Committee first voted unanimously to adopt the opening sentence at lines 1811 to 1814. Then it voted unanimously to delete the sentence at lines 1814 to 1817. The final vote was to adopt this new Note language:

> The amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Rule 30(f): Conformity to Proposed Rule 5(d). By oversight, the published proposals did not include a necessary change to Rule 30(f)(1) to bring it into conformity with the proposed changes in Rule 5(d). Rule 30(f)(1) directs the officer who takes a deposition to file the deposition in the court or to send it to the attorney who arranged for the transcript or recording. Proposed Rule 5(d) prohibits filing until the court orders filing or the deposition is used in the proceeding. The necessary conforming amendment would strike from Rule 30(f) these words: "file it with the court in which the action is pending or." The Committee voted unanimously to recommend this conforming change for adoption without publication. The Committee also voted unanimously to adopt the Committee Note proposed on page 60, lines 1865 to 1873, with a change in line 1869 to conform to the language of the Rule: "directing that the lawyer who arranged for the transcrip ~~tion~~ or recording preserve the deposition."

Rule 34(b): Adjust for Relocating Cost Bearing in Rule 26(b)(2). The discussion of the decision to relocate cost bearing from proposed Rule 34(b) to Rule 26(b)(2) included the suggestion that there should be a reference in Rule 34 to remind users that a cost-bearing order is one option in responding to a dispute about an unnecessarily burdensome Rule 34 request to produce. The Subcommittee Memorandum discussed this question at pages 63 to 66. The Subcommittee observed that it might be sufficient to provide this reminder in a Committee Note, but further observed that the committee has never acted to adopt Committee Note material when a Rule is not being changed. There was no discussion of the "Note-only" approach.

The Subcommittee Memorandum proposed a new amendment that would add a sentence at the end of the second paragraph of present Rule 34(b), with a single drafting choice indicated by brackets: "Such an order, or an order under Rule 26(c), [is subject to][shall implement] the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)." In response to questions, the Special Reporter explained that the reference to a Rule 26(c) order was included because these questions often arise by motion for a protective order. The reference to the specific items (i), (ii), and (iii) in Rule 26(b)(2) was used because Rule 26(b)(2) includes provisions that do not relate to these discovery principles.

A preference for the "is subject to" drafting was expressed. This preference was supported by observing that a finding of the court is required to support application of the Rule 26(b)(2) principles. The committee unanimously adopted the "is subject to" alternative.

It was argued that the principles embodied in Rule 26(b)(2) items (i), (ii), and (iii) are principles, not "limitations" on discovery. This distinction could be implemented by simply stating in Rule 34(b) that an order to produce "is subject to Rule 26(b)(2)(i), (ii), and (iii). This suggestion was not adopted.

The draft Committee Note, set out at pages 64 to 65, lines 1988 to 2008, explains the desire to call attention to the new Rule 26(b)(2) cost-bearing provision in the language of Rule 34(b) by describing the history of the 1998 proposal and the decision to relocate the provision in Rule 26(b)(2). It was suggested that the sentence at lines 1996 to 1999 is an unnecessary emphasis on anecdotal information about the burden imposed by requests to produce. A motion to delete this sentence passed by voice vote, with one dissent. The balance of the proposed Note was retained on the view that there is a lot of history underlying the cost-bearing proposal that should be explained.

The Committee acted unanimously to adopt the proposed Rule 34(b) language and Committee Note as framed by the Committee votes.

Rule 37(c)(1). The Discovery Subcommittee proposed, at page 67 of its memorandum, to correct a drafting oversight in the published proposal to amend Rule 37(c)(1). The proposal was intended to bring within Rule 37(c)(1) a failure to supplement discovery responses. As published, however, the proposal refers only to a failure to "disclose" information required by Rule 26(e)(2). Rule 26(e)(2) is the correct reference to the duty to supplement discovery requests, but is not properly preceded by a reference to failure to disclose. The cure adds words to properly describe the Rule 26(e)(2) duty: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), shall not, unless * * *."

This amendment was adopted unanimously, with the observation that the Rule 37(c)(1) proposal seemed to be the most popular proposal in the discovery package.

The Discovery Subcommittee proposals were followed in the agenda materials by several pages that set out "niggling changes" made by the Reporters in the published Committee Notes. No member of the committee moved to discuss any of these changes.

With these actions, the committee finished action on the complete discovery package as published, with the changes adopted by committee vote. Attention turned to motions to amend the package offered by individual committee members.

Motion: Rule 26(b)(1): Professor Rowe made a motion to abandon the "scope of discovery" amendments proposed for Rule 26(b)(1). The motion would delete all of the changes shown on pages 41 to 42, lines 122 to 132 of the publication book. The other changes to Rule 26(b)(1), shown at lines 132 to 138, would not be affected. The motion was presented to the committee before the meeting in written form. Professor Rowe asked that the written motion be incorporated in the minutes, so that he could summarize it briefly for discussion purposes. The written motion is attached as Appendix B.

Professor Rowe observed that if the scope of discovery is to

be changed, the present proposal adopts the proper approach. It is better to divide the present scope of discovery as a matter of right between attorney-managed discovery and court-managed discovery. Restriction to "claim-or-defense" discovery without affording the opportunity for expansion to "subject-matter" discovery on showing good cause would be a mistake.

The proposal, however, is unclear. It will spawn satellite litigation. And it will encourage resistance to discovery.

Although there may be a connection between the scope of discovery and the new standard for initial disclosure, as will be argued, it may be better to recognize the dilution of disclosure by maintaining the present scope of discovery unchanged.

The problems with the Rule 26(b)(1) proposal summarized in the motion memorandum have been pointed out by many bar organizations. Several of these organizations are not identified either with plaintiffs or with defendants.

The central effect of the Rule 26(b)(1) scope change will be to narrow private enforcement of our regulatory laws. This effect was described by Judge Patrick Higginbotham at the Boston College discovery conference.

The first response to the motion was an observation that at the beginning it seemed a matter of real concern that some defendants see the reduced scope of discovery as a way to cut off discovery now had. Common examples are product cases, excessive force cases, and employment discrimination cases. But on reflection, the reduction is a common sense approach to a problem of misinterpretation. "Subject matter" in present Rule 26(b)(1) should be interpreted to mean the same thing as "claim or defense." But interpretation has expanded the meaning of "subject matter" beyond its intended meaning. The proposed change will cut back on excesses in practice, but will not cut plaintiffs off from evidence they traditionally have got through discovery. The fear that lawyers will react to the change by "overpleading" their cases, advancing tenuous claims to increase the scope of discovery, is misplaced — most lawyers already overplead to the limits permitted by Rule 11. Although there is "stonewalling" resistance to legitimate discovery demands now, the proposed change will help to reduce it.

The motion was supported "on behalf of the Department of Justice as a whole." Throughout the process of formulating the present proposals, the Department of Justice has participated and has offered support. But there is a strong division of views within the Department, and the official position supports Professor Rowe's motion. The "enforcement branches" do not believe that there is any problem that will be solved by the (b)(1) proposal. The present rules provide all tools necessary to control discovery excesses. The purpose of the proposal is to bring the district judge or magistrate judge into discovery disputes. The involvement

of the court, however, will increase the cost of litigation when, for example, the Department seeks to explore related incidents connected to the event in litigation but not part of the particular gravamen that led to the decision to initiate litigation. The Civil Rights and Environmental divisions have been enabled by discovery to expand their initial complaints. These divisions understand that the proposed rule is intended to enable them to get such information still, but are concerned that some judges will not understand just what the new rule means. The uncertainty will lead to greater litigation costs, and these divisions are skeptical that judges will devote the time required to understand all discovery disputes. Absent a sufficient investment of judicial time, the result will, by default, be no discovery. The present default result is that discovery is allowed, and that is better.

Francis Fox spoke on behalf of the American College of Trial Lawyers. The College Rules Committee has studied this proposal intensely. The Advisory Committee also has worked intensely. The effort has focused on the scope of discovery as never before. The effort is enormously impressive, and has supported an intense learning process. After the Boston College conference, many participants concluded that there indeed is a problem with the scope of discovery. Even though there are no problems in a majority of cases, there are problems in some cases. The standard is a problem in 10% to 15% of all cases filed in federal court. The costs of discovery can get out of hand. The Discovery Subcommittee recommendations were greeted with enthusiasm by the Advisory Committee, but were vigorously reviewed. The Rule 26(b)(1) scope proposal was carefully discussed. The compromise with the initial "claim-or-defense" proposal was to add back the "subject-matter" scope of discovery on showing good cause. It may be argued that the silence of the case law exploring the limits of "subject-matter" discovery shows that there are no problems. But the silence is the silence of resignation, not satisfaction. No one bothers to fight this one any longer. But the hearings and conferences have shown that there are problems. The fear that discovery of similar conduct or incidents will be cut off will be addressed by the judges under Evidence Rule 404(b). If there is a difference, it will be better discovery that focuses on the issues in the case. The fear that waves of satellite litigation will arise from the change will prove as groundless as the fear that the 1993 advent of initial disclosure would lead to frequent satellite litigation. The published proposal is a careful, deliberate compromise. The committee should stand fast by it.

Judge Scheindlin also spoke in support of Professor Rowe's motion. She began by noting that she had carefully read the Boston College conference materials and the statistical studies that came out of it. These extensive materials show that there is no real clamor of lawyers for a scope change. The 301 written comments break down precisely — defendants champion the scope change, and plaintiffs excoriate it. The change is polarizing. The professors and most of the neutral bar associations also oppose the proposal.

There is no widespread support. The "good cause" requirement will lead to ten or twenty years of satellite litigation while its meaning is worked out; the good cause requirement was abandoned from Rule 34 in 1970, and should not now be resurrected. If it be said, as it often is, that there is no change in the scope of discovery, why are we doing this? No plaintiff will accepts less than present discovery. They will make good-cause motions in case after case. The proposal will increase cost and delay. In New York a discovery motion costs from $25,000 to $50,000. The change, further, will lead to overpleading. Careful plaintiffs will plead as broadly as possible. But the judge cannot know the case as well as the lawyers do; in ruling on good cause, the judge "can only make a stab at it." "Claim-or-defense" discovery in fact makes a change. It is narrower than subject-matter discovery. That is why the proposal is being made.

Judge Scheindlin further suggested that the scope of discovery relates to the initial disclosure provisions of Rule 26(a)(1). The committee has adopted the "may use to support" formulation for initial disclosure. No one is left, however, to support initial disclosure in this watered-down form. "May use" disclosure is useless. Initial disclosure, with the discovery moratorium and Rule 26(f) conference, will only cause delay. Plaintiffs do not want it; they would prefer to go directly to discovery. And the judges are upset — they hate automatic disclosure. The watered-down initial disclosure proposal will not buy the judges' support for sacrifice of the opportunity to opt out of disclosure by local rule. Initial disclosure is an experiment that has failed. The failure, however, is the responsibility of the Advisory Committee, which has chosen to abandon disclosure before it has had an opportunity to develop. If we give up meaningful automatic disclosure, we have to have a "give back" to level the playing field. Initially the limitation on the numbers of depositions and interrogatories was part of the package, supported by the theory that initial disclosure would provide information that otherwise would require sacrifice of part of the limited numbers of discovery requests. At least we should delete the numerical limits. It would be better to abandon the scope limitation. Responding to a question, Judge Scheindlin stated that if initial disclosure were dropped from Rule 26(a), there would be no federal rule on disclosure and individual districts would be free to adopt disclosure practices by local rule.

Judge Levi, as chair of the Discovery Subcommittee, supported the scope proposal. Reasonable minds can differ on the value of the proposal. It is a close issue. But the committee should not be misled by a bare count of the comments. When a controversial rule proposal is advanced, the opponents come out in far larger proportion than the supporters. The opposition to the scope proposal is not as strong as the opposition encountered by several of the recent class-action proposals. And support is provided by such neutral bodies as the ABA Litigation Section, the American College of Trial Lawyers, and the Magistrate Judges Association.

There has been an attack, especially by academics, asking for a definition of the terms. There will be a lot of debate. But "subject matter" in the present rule is not well defined. Although judges have commented extensively on other proposals in the discovery package, they have not shown any concern that the scope proposal will not work. The proposal will nudge us toward earlier identification of the issues, and will focus discovery. And although there is a tie to initial disclosure, it is a good one — plaintiffs, knowing that they must disclose the witnesses and documents they may use to support their claims, will be discouraged from overpleading. Although the Department of Justice has expressed skepticism at the prospect that district judges and magistrate judges will universally take the time required to determine good cause to allow subject-matter discovery, the Department has such vast non-discovery means of gathering information that they are not likely to be hurt.

Judge Levi noted that, coming from a district that has opted out of more parts of Rule 26(a) disclosure than it has authority to opt out from, he has been surprised by the support expressed for initial disclosure. Lawyers who use disclosure favor it. The (a)(1) proposal is a modest cut-back that leaves initial disclosure as a useful "jump-start" on discovery. The Rule 26(f) conference is very valuable; the discovery moratorium is a necessary adjunct. We have learned that disclosure is practiced more widely than we had thought. Judges in opt-out districts use it. Disclosure happens in more than 50% of federal cases. Uniformity, moreover, is important. There must be a uniform national procedure to enforce national substantive law. To abandon a national rule and allow local experiment would be untoward. We have heard opposition from many judges, but they have not had the information we have had. This committee cannot lurch back and forth between its proposals. It would be extraordinary to go back to the bar now and abandon disclosure.

Where empirical work can be done, we have had it done. And we have relied on a Discovery Subcommittee to ensure that the details are executed properly. The discovery package is a good one that deserves adoption.

Judge Scheindlin responded that the proposed "low-end" exemptions from initial disclosure in Rule 26(a)(1)(E) will remove disclosure from perhaps 30% of federal cases. And the provision allowing objections to disclosure will encourage many lawyers to object to initial disclosure in all cases, further reducing the number of cases with any disclosure and aggravating the consequences of the discovery moratorium. Returning to the scope proposal, she noted that it is not the number of 301 comments that is impressive, but the stark split between plaintiffs and defendants. It is impressive that the scope proposal is supported by the ABA Litigation Section and the American College of Trial Lawyers, but many major bar associations oppose it, including many that have outstanding reputations for very careful and well-

reasoned work.

General discussion of Professor Rowe's motion followed. It was suggested that the scope proposal will not lead to overpleading; everything is overpleaded now. Fraud is pleaded in every product-liability case. The claims available from the transaction or occurrence in suit will all be pleaded from the beginning. The same experience must hold in other areas of litigation as well.

The concern with motion practice will be short-term. To be sure, there will be motions testing the scope of discovery in the beginning. But the bar will quickly adjust to a new reality and carry on. Often, when there is staged discovery, it is possible to begin by producing all the documents the producing party thinks the requesting party needs, offering to supply more if the requesting party asks. Almost always the requesting party is satisfied with the initial production — parties seeking discovery are no more anxious to engage in unnecessary work than are parties making discovery.

In product cases, it is good to force a plaintiff to show that other products are so similar to the product involved in the litigation as to justify discovery as to the other products.

The scope change will make a difference in big, complex cases. The difference will be for the better. And any risk that desirable discovery will be defeated can be met by showing good cause for an expansion.

Frank Hunger, speaking as a former committee member, stated that significant parts of the Department of Justice support the committee scope proposal. They always have found judges willing to hear the arguments for discovery, and have been treated fairly. There is little reason to be skeptical about the willingness of judges to become involved. And one part of the Department, the FBI, has gone on record supporting the scope proposal.

Professor Rowe's motion was supported by observing that the (b)(1) scope proposal is a philosophical shift that will narrow discovery. The Boston College conference materials provide very little data to support the change of philosophy. A system that works 85% to 90% of the time is a great success. The American College arguments advancing the proposal themselves show that there are no data, case law, or groundswell of public sentiment supporting the proposal. All that is offered is opinion. And the support of the ABA Litigation Section must be contrasted with the opposition of the lawyer who is chair-elect of the Section. Support comes only from a very small constituency of clients and lawyers involved in a very small range of cases. The good-cause provision is not a panacea; it is very expensive to go to court, and small parties cannot afford it. The big defendants tell us how much discovery costs — and then tell us that the scope change will make no difference: plaintiffs can get what they need if only they

push hard enough. These positions are inconsistent. There are no data at all to tell us how much the change will save any defendant. That is not surprising, since no one can tell us what the change will mean. This is a philosophical shift that has little support. It will prove very divisive. And it will promote discovery motions and impede the efficient resolution of disputes.

The scope proposal was defended by arguing that it will reduce cost and delay. The fact that 85% of cases have no discovery problems now does not argue against the proposal. The proposal is carefully nuanced. It does not cut off discovery at claim or defense; good cause showings allow more. And most of the 85% will continue, as before, with no discovery problems. But in those cases that generate legitimate disputes about the scope of legitimate and needed discovery, the proposal presents a way to get a judge involved when — and only when — a judge is needed. There is skepticism about judges' ability and availability to become involved promptly. This skepticism goes to case management, not the scope of discovery. Many judges are able to do this. This is the very role that district judges and magistrate judges do best; it is not the role of providing "adult supervision" to squabbling juveniles, but the role of setting legitimate bounds of relevance for a specific case. There should not be a problem with satellite litigation.

Further support for the changes in the scope of discovery was voiced on the ground that the proposed language preserves what is in the rule now. The problem with the present rule is that the language is too general to point out what is properly involved. The proposal focuses attention, moving directly to what is the issue. The 85% of cases that present no discovery problems now will work without any definition of the scope of discovery at all. The problem is the case with antagonistic attorneys, the case with an "unreal claim or defense," the case with some problematic precedent. There are abuse problems in a limited number of cases. The committee should do something. The scope proposal is a fair way of dealing with the subject.

The discussion was concluded with observations about the committee's institutional processes. The committee has worked very well on the discovery proposals. There is a synergy among committee members as competing views fuse into a package that is generally acceptable to most. The discovery project has had a long lead time, and has endured — as most major projects do — through several changes in committee membership. The committee must be careful to follow processes that enable it to develop a "continuing will." Dozens of discovery proposals have been considered, and winnowed down to a very modest and balanced package. Every member must always vote conscientiously, but conscientious voting can include some deference to the long-term view of former committee members who have worked carefully but are no longer present for the final vote.

Professor Rowe's motion failed, with 4 votes in support and 9 votes against.

Professor Rowe expressed satisfaction with the high quality of the debate and the value of the information expressed. Judge Niemeyer responded that the motion was well done, and will be transmitted as part of the record.

Motion: Rule 26(b)(2): Myles Lynk moved that the cost-bearing provision published as an addition to Rule 34(b) and relocated by committee vote to Rule 26(b)(2) be deleted. The relocation to Rule 26(b)(2) compounds the problem created by this measure. There is no need to add an express provision to the rules — the proponents agree that judges already have this authority. Cost-bearing under this proposal will be available only as to discovery that otherwise would be prohibited under items (i), (ii), or (iii) of Rule 26(b)(2), but courts should not be encouraged to permit such discovery on condition that part or all of the costs be paid. Instead, the discovery request should be granted because it is not inconsistent with these principles, or — if it is inconsistent with these principles — it should be denied. Orders granting discovery will be encouraged by emphasizing the alternative to order discovery on condition that part or all of the costs be paid. The consequences are made worse by applying this provision to all forms of discovery by adding it to Rule 26. This measure will not promote better or less expensive discovery. Judges routinely impose cost conditions now in allowing discovery, relying on inherent power. But we encourage use of this power by putting it in the Rule. There is no need to send this signal. Payment, moreover, will be only for some identifiable costs. It is difficult to calculate the real costs to the client in time and disruption, and such costs will seldom be compensated. The result, moreover, will be differential justice: the party who cannot afford to pay will not get the discovery, while the one who can pay — who may be eager to pay — gets the discovery.

The cost-bearing provision, he continued, is different from the major, fundamental change made in the scope-of-discovery provisions in Rule 26(b)(1). That change can be made only by recommendation of this committee and approval throughout the remaining steps of the Enabling Act process. But with cost bearing, we are not really making a change; we are only, and unnecessarily, encouraging greater use of an existing power. This measure will not contribute to reduce expense and delay. There should be no express amendment either to Rule 34(b), as published, or to Rule 26(b)(2), as now recommended by the committee.

It was stated that the Department of Justice is concerned that judges may tend to "split the difference" by allowing discovery on condition of payment. The statements in the proposed Committee Note do about as much as can be done to address this concern. Still there is a risk that in a significant number of cases, a party who can pay will get discovery. And the United States may

find that courts are willing to make it pay to get discovery that other litigants would be allowed to get without paying.

In response, it was observed that "everything in litigation is dollars and cents." Most judges do not think about the power they now have to condition an order to make marginal discovery on payment of the response costs. The willingness of a requesting party to pay is a good measure of the need for discovery. This is a good tool. At times, it may lead to some discovery that now would not be permitted.

It also was noted that there were not many comments addressed to this proposal. It does not seem to have created any special concern with the bar. To the extent that opponents fear differential justice, they must recognize that we have differential justice now. The Department of Justice is wrong to fear that some judges will make the Department pay for discovery that other litigants will get without paying. This proposal is likely to be most relevant in the emerging areas of electronic discovery. A plaintiff, for example, may want to "map" a defendant's email system, a measure that might cost $250,000; the question of responsibility for paying for such discovery is an important one, and it should be made clear that judges have authority to consider the question directly.

Mr. Lynk suggested that lawyers are prepared now to argue about paying the costs of electronic discovery; this explicit rule provision is not needed for that reason.

Another comment observed that the concern about differential justice is real. The Committee Note points out that the court can take account of the parties' resources. Cost-bearing is most likely to be used in big discovery cases between parties of equal, and substantial, means.

Mr. Lynk repeated the question whether it is wise to emphasize cost bearing in the text of the rules in a way that may encourage a judge who should bar discovery by Rule 26(b)(2) principles to order the discovery only because a party is willing to pay for it. There is no need to make every discovery detail explicit in the rules, and no need to add this particular detail to the package of fundamental discovery changes that the committee has approved.

In response it was urged that everyone agrees that the judge has this power. It is better to make it explicit in the rule, so that judges need not continually investigate or reinvent the principle.

Another response was that Rule 26(b)(2) calls for a very speculative judgment about the costs and benefits of discovery requests, a judgment that must be made without knowing what information the discovery will actually yield. The ability to condition an order granting discovery on cost bearing is a "buffered intermediate" solution that helps. The demanding party can make the judgment whether the discovery is worth the cost.

A final argument in support of the motion was that there are litigants who really want the discovery and who really are unable to pay for it. Employment and civil rights litigation is occupying an ever growing share of the federal docket, and these plaintiffs often cannot pay for discovery that in fact is important to them.

The motion to delete the cost-bearing provision failed by 5 votes in favor and 8 votes against.

Final approval. The committee voted unanimously to recommend approval of the complete discovery package as published, with the changes approved at this meeting.

Future discovery issues. Judge Niemeyer noted that electronic data discovery will be on the committee's agenda, and is likely to present issues more difficult than those presented by the package of changes now recommended to the Standing Committee for approval. Electronic means of storing information are likely to expand the amount of information available for discovery, and the expansion may be great. As significant as the present proposals are, the committee cannot count itself freed from discovery issues.

Agenda Subcommittee

Justice Durham presented the report of the Agenda Subcommittee. The Subcommittee has developed a set of categories to describe agenda items. These categories will be used to summarize recommendations to the committee for regulating the flow of docket items. The categories, in short-hand description, are these:

(1) Matters that should be accumulated for routine revision and periodic updates. Some rules seem to occasion rather frequent suggestions for change, and often it seems desirable to consider these proposals in groups at reasonably separated intervals.

(2) Matters that should be held to determine whether future developments in practice or the emergence of additional information will provide a better basis for action.

(3) Matters that need study. For these items, the Subcommittee will recommend a schedule for undertaking study. When there is a relevant subcommittee, the Agenda Subcommittee may recommend referral for study by that subcommittee.

(4) Matters that are ready for action.

(5) Matters that are not appropriate for consideration by this committee, or that seem ready for rejection without further work.

(6) Matters that are awaiting review.

(7) Matters that are best handled by joint consideration with one or more of the other advisory committees.

Application of these categories was illustrated by two documents appended to the Subcommittee report. The first is a

table of all pending agenda items, listed in numerical rule order, with terse statements of the recommended disposition. The second is a memorandum that briefly describes the nature and purpose of each proposal on the agenda, and suggests the reasons for the Subcommittee recommendation.

The Subcommittee is prepared to recommend that the committee remove many of the items that have accumulated on the agenda. It believes that a "consent calendar" approach should be adopted for items that do not seem to warrant discussion at a committee meeting. The consent calendar should be circulated to the full committee before the full agenda book is circulated, to provide an opportunity for any committee member to request that an item be marked for discussion. Advance designation of consent-calendar items for committee discussion will often make it possible to add expanded materials to the committee agenda book. The procedure should remain fluid, however, so that committee members may request that an item be brought up for discussion even as late as the meeting itself. Items not removed from the consent calendar will be acted on by the committee in a single vote. It was agreed that the consent-calendar approach would be implemented for the fall meeting this year.

The agenda subcommittee will follow matters that are not put on the consent calendar. These items will be brought on for committee discussion as the committee chair, reporter, and subcommittee deem appropriate. An report from the subcommittee will be a regular feature of the agenda book for each meeting.

Forms

The Agenda Subcommittee report prompted discussion of one of the several agenda items. Form 17 is a model complaint for copyright infringement. It has not been revised since 1946. The publication this summer of the proposals to abrogate the Copyright Rules of Practice might afford an obvious opportunity for seeking comment on the need to revise Form 17 to conform to the Copyright Act of 1976, and on the need to have any form complaint for copyright actions. But the question seems broader than Form 17 alone. There are several other form complaints for specific federal statutory claims. These forms do have the virtue of suggesting that the complaint asserting a federal statutory claim can indeed be "short and plain." But the examples chosen for the forms may seem an eccentric selection from the vast array of federal statutes. There is little obvious reason for retaining these particular illustrations. Retaining forms of this sort, moreover, imposes on the committee an obligation to remain current in substantive developments in each relevant field of law. Even if the forms are kept current, moreover, it is important that they rely only on substantive principles that are established with indisputable clarity; it will not do to express, even ignorantly, implied judgments about disputable substantive issues.

Rather than act now on Form 17, it was concluded that these

issues deserve further study. The chair may appoint an ad hoc subcommittee for this purpose.

Corporate Disclosure Statements

The question whether the committee should propose a new rule to deal with corporate disclosure statements came late to the agenda for the November, 1998 meeting. The Standing Committee has assumed a coordinating role, supervising the efforts of each advisory committee to consider these questions. The Appellate Rules Committee has recently considered corporate disclosure statements, and its revised rule has become the model for revision of the Supreme Court rule. This committee's recommendation that the Standing Committee's ad hoc committee on Federal Rules of Attorney Conduct might undertake the task of coordination has not proved feasible, however, in light of the complexity of the attorney-conduct questions.

It was suggested that these are urgent questions that should be advanced for discussion at the fall meeting. There is a real attraction to adopting the Appellate Rule as a model for a new Civil Rule.

The Standing Committee has asked the Federal Judicial Center to undertake a study of the approaches to disclosure being taken around the country. The Center hopes to have preliminary information available for consideration by the advisory committees at the fall meetings, but its final goal is to complete work in time for consideration at the spring, 2000 advisory committee meetings. The Standing Committee hopes to act on these questions at its June, 2000 meeting.

In light of this schedule for consideration, it was agreed that consideration of corporate disclosure statements would be on the agenda for the fall meeting of this committee.

Rule 53: Special Masters

Judge Vinson reported that the Rule 53 Subcommittee had met, and had conferred with Thomas Willging about a Federal Judicial Center study of current practices in using special masters. The Center has agreed to undertake a study, and hopes to have the first phase proceed on a schedule that will allow the subcommittee to develop some sense of current practices by the time of the fall Advisory Committee meeting. This first phase will involve a docket study to identify a sample of cases in which special masters or similar judicial adjuncts were used. The second phase, which will involve interviews with judges, will take longer. But it is hoped that by the time of the spring, 2000 meeting the subcommittee will be in a good position to make a recommendation whether further work should be done on the draft Rule 53 amendments that last were considered in 1994.

Discussion noted that there seem to be many contemporary uses of special masters that are not clearly contemplated or governed by

Rule 53. The questions posed by these practices are potentially complex. There is neither any strong pressure on the committee to explore these issues, nor any apparent resistance to the project. The most important issues to be resolved are whether indeed there are problems, and whether a solid foundation can be built for addressing any problems that may be found.

Electronic Service: Rules 5(b), 6(e), 77(d)

Judge Carroll reported for the Technology Subcommittee. He noted that electronic case filing is being done in some courts in conjunction with a new case-management system. Electronic case filing allows lawyers to file papers electronically. The Administrative Office intends to expand electronic case filing beyond the present prototype courts to a larger number of pilot courts. Software development is proceeding apace; it remains to be seen whether present projections for completion are optimistic. The Standing Committee's Technology Subcommittee met with representatives from the prototype electronic courts in February. After that meeting, the Subcommittee discussed the issues that had been raised with respect to electronic service, and asked that the Civil Rules Committee take the lead in preparing a draft electronic service rule that might become a model for adoption by other advisory committees, working under the coordinating supervision of the Standing Committee. The draft Rule 5(b) presented for discussion has been reviewed by our Technology Subcommittee and approved as a recommendation for committee discussion.

Discussion began with the observation that the Rule 5(b) draft had been reviewed by the Bankruptcy Rules and Appellate Rules Committees, and would be on the agenda of the Criminal Rules Committee in a few days. Suggestions made by the Bankruptcy Rules Committee had been incorporated in the draft. The Appellate Rules Committee concluded that it would not recommend publication of an Appellate Rule on electronic service this summer, and offered several suggestions and questions that were received during the course of this meeting.

It also was noted that the only comments from the Standing Committee Style Committee were based on the earlier drafts of a restyled set of the Civil Rules. It was thought premature to attempt to work through all of these style revisions in the time available to bring a possible rule to the Standing Committee this spring. As with all of the Civil Rules that have been studied so far, careful study is required to determine whether style changes in fact change meaning. As one example, Rule 5(b) provides at one point for leaving papers with a person "residing" in a house or usual place of abode. The style draft changes this to "living." It is not clear whether "living" means something different from the more traditional "residing," nor whether any difference would be an improvement in the rule. These questions should not be faced in the project to bring a provision for electronic service into Rule 5.

The central question put to the committee then was whether it would prove possible to complete action on a draft that the committee would be prepared to recommend for publication in August if the Standing Committee should find it desirable to proceed at this pace.

The first important characteristic of the Rule 5(b) proposal is that it is clearly limited to service of papers covered by Rule 5(a) and Rule 77(d). It does not reach service of the initial summons under Rule 4, service of other process under Rule 4.1, service of subpoenas under Rule 45(b), or service in condemnation actions under Rule 71A(c)(3). It was agreed at the February meeting that the time has not yet come for electronic service under these rules.

The second important feature of the proposal is that electronic service is authorized only with the consent of the person served. Although those who have practiced electronic filing appear to be enthusiastic about the gains in efficiency and speed, the basis of experience remains limited. Nor has the time come when it is fair to insist that all parties, or even to insist that all lawyers, have equipment suitable to receive electronic service and be responsible to maintain and monitor the equipment. This feature also was agreed upon at the February meeting.

The consent requirement triggered discussion of the decision to expand the draft to provide for service by "other means" in addition to electronic means. Appellate Rule 25(c) authorizes personal service, and also service "by mail, or by third-party commercial carrier for delivery within 3 calendar days." Draft Rule 5(b) requires consent of the party to service by electronic means or by "other means" beyond mail or personal service. The Appellate Rules Committee asked why consent should be required for service by commercial carrier. It was urged that for the Civil Rules, it is important to rely on consent for "other means." In practice today, parties often consent to service by commercial carrier or facsimile transmission. Not all "commercial carriers" are as reliable as the best-known services. Even the largest express services, moreover, may make it awkward to effect delivery to a home address — the recipient may be obliged to commit to be at home for a specified time, or may be required to travel to the office of the express service to pick up the "delivery." We do not require consent to mail service because "everyone gets mail service." It was concluded that consent should be required for anything but mail or personal service.

The consent requirement also triggered a minor drafting discussion. The Standing Committee's Technology Committee was anxious that the text of the rule refer expressly to "electronic" service — even though it would be sufficient to refer to "other means," pointing out in the Committee Note that electronic means are included, it is better to make the electronic alternative express on the face of the Rule. Given a choice between delivery

"by electronic or any other means consented to" and delivery by "any other means, including electronic means, consented to," the committee chose the "any other means, including electronic means" formulation by 9 votes over 2 votes for the "electronic or any means" formulation. This was the choice of other advisory committees as well.

A third important aspect of the proposal is that it makes service by electronic means complete on "transmission." The choice between "transmission" and "receipt" was discussed extensively at the February meeting. The actual word chosen, "transmission," was selected with advice from the automation support staff in the Administrative Office. There would be advantages to making service complete on receipt. Actual receipt of notice is the object. Complete transmission does not ensure actual receipt, either in the sense that the message arrives in the recipient's equipment or in the sense that the recipient actually reads the message. Transmissions do go astray, and senders to not always have notice of the failure. But there also are difficulties in making service complete only on receipt. It would be necessary to define receipt — to decide whether it means registering in the recipient's equipment, actual awareness of the message, or something else. There are no reliable means to ensure that a "return receipt" confirming delivery can be sent across different electronic communications systems. The premise that consent is required was found to be sufficient to put the risk of nondelivery on the person who consents to be served by electronic means.

Some distrust of transmission emerged from the discussion. It is clear that electronic transmission does not always work as intended, whether it be by facsimile transmission or electronic mail. In the district court setting, the result of failed transmission is most likely to be complications in scheduling hearings. The court will, as a practical matter, be at the mercy of the party willing to say "I did not receive it." But it was urged in response that parties will not consent to service by unreliable means. They will consent only when confident in their own sophistication and when willing to monitor their equipment for receipt of the transmissions.

The Appellate Rules Committee raised a more pointed question. Rule 5(b) now says that service by mail is "complete upon mailing." What happens if the mail is returned to the sender as undeliverable? If the sender can treat it as "complete" service, we should not extend this unfortunate result to service by electronic means that may be less reliable than the Postal Service. This committee agreed that a lawyer who receives actual notice that intended delivery was not accomplished has a professional obligation to correct the failure. It would be appropriate to add a statement to the Committee Note that actual knowledge of nondelivery defeats the presumption of receipt raised by the provision making service complete on transmission.

The committee adopted transmission as the time of completing service by 9 votes for, 2 votes against. It was recognized, however, that it will be appropriate to solicit public comment addressed to this issue if the proposed rule is published for comment.

The final sentence of draft Rule 5(b)(2)(D) read: "If authorized by local rule, the court may make service on behalf of a party under this subparagraph (D)." It was asked what happens if the court undertakes service and gets notice of nondelivery — is it the responsibility of the court, not the party, to correct the failure? How far does service "on behalf of a party" mean that the court takes on the party's obligations? It also was observed that if the process is one by which the court's equipment automatically relays a party's filing to all other parties, it is awkward to conceive of the process as service by the court on behalf of the party. It is better to conceive of the process as service by the party through the court's facilities. The committee agreed unanimously to rephrase the sentence to read: "If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities."

Several suggestions to expand the Committee Note have been made by other advisory committees and others. The suggestions generally involved illustrations of ways in which local district rules might address specific electronic service questions. The Appellate Rules Advisory Committee, indeed, suggested that the text of the rule should expressly mention "the ability of courts to use local rules to regulate electronic service." The draft Note already suggests that local rules could describe the means of consent, including provisions that would enable a law firm or frequent litigant to file a standing consent for service by specified means in future actions. Other suggestions were to deal with electronic requests for consent, consent by failure to object, and proceedings in which some parties give consent while others do not. In a different direction, it was suggested that the Note and local rules might deal with such issues as allowing service to consist simply of a notice of filing, coupled with a "hyperlink" directly to the filed paper. Committee discussion led to the conclusion that it is too early to attempt to deal with such issues in a Note. The committee voted to strike from the draft rule language praising the virtues of electronic service and suggesting that local rules might deal with some consent issues.

Rule 6(e) now provides that when a paper or notice is served by mail, 3 days are added to the period prescribed for acting in response. This provision might be extended to allow an additional 3 days following service by electronic or other means apart from personal service. Four alternative approaches were set out in the materials. The initial draft was essentially the same as the third alternative — each would allow an additional 3 days if, in the language of the third alternative, service is by mail "or by a means permitted only with the consent of the party served." This

phrasing would make it easier for the Bankruptcy Rules Advisory Committee to draft a Bankruptcy Rule incorporating the Civil Rule. This drafting approach was preferred by the subcommittee if this is the approach to be taken. The first alternative was to leave Rule 6(e) as it stands, so that the extra 3 days are available only following mail service. This alternative was favored by the Appellate Rules Committee. The second alternative was to eliminate Rule 6(e), so that no additional time is allowed even for mail service.

The first question asked went to the relationship between Rule 6(e) and service made by a commercial carrier or other agency under the present rule. A party who wishes to make personal service by delivering a copy to the person served may employ any of a number of means of delivery, including commercial carrier. Under present Rule 5, the risk of nondelivery is on the person utilizing these means; service is accomplished only by actual delivery. Because service remains service by actual delivery, Rule 6(e) does not extend the time to respond.

Discussion turned to the question of additional time to respond following service by electronic or other means. The reasons for allowing extra time, by analogy to service by mail, were straight-forward. Actual delivery does not coincide with delivery to a commercial carrier, and even with electronic mail may take a day or more. A party asked to consent to these modes of service will be concerned with reducing the time practically available to respond, and may be encouraged to give consent if the time to respond is extended. The Appellate Rules Committee, on the other hand, expressed concern that a party intending to make service might be discouraged from asking for consent if the result was to concede additional response time. Members of the committee who are practicing lawyers said that there is little need to worry about the effect on consent. They consent to service by commercial carrier or electronic means now. They condition consent on use of a method that is reliable and fast. Under the proposed rule, consent will be given only for service by means that are reliable and fast. There is no need to provide the additional 3 days that Rule 6(e) now provides for service by mail.

An alternative suggestion was that electronic service ordinarily is faster than service by mail or other means, and that the rule might be drafted to distinguish electronic means from other means. This approach would make it more likely that parties would consent to service by other means — otherwise, consent to electronic service ordinarily would mean receipt on the same day, while consent to other means ordinarily would mean receipt a day later and a corresponding reduction of the time to respond.

This discussion led to the suggestion that a different distinction could be made by returning to draft Rule 5(b)(2)(D). Electronic service could be made complete on transmission, as in the draft, while service by other means could be made complete on

delivery to the person served.

On putting the alternatives to a vote, 4 votes were cast for Alternative 3, while 6 votes were cast for Alternative 1. The committee accordingly recommends that Rule 6(e) not be changed. But if additional time is to be allowed, it should be when "the notice of paper is served upon the party by mail or by a means permitted only with the consent of the party served * * *."

The sense of the committee was that if the Standing Committee determines to publish one or more electronic service rules for comment in August 1999, this package is sufficiently developed to be published as the Civil Rules proposals.

Fall Meeting

The dates for the fall meeting were tentatively set for October 14 and 15, at a place to be determined.

Respectfully submitted,

Edward H. Cooper
Reporter