AGENDA XI
Washington, D.C.
June 17-19, 1993

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

May 17, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed are proposed amendments to Rules 23, 26(c), 43(a), 50(c)(2), 52(b), 59(b)-(e), 83, and 84. With the accompanying Committee Notes, these have been considered and approved by the Advisory Committee on Civil Rules for submission to the Standing Committee under rule 3c of the governing procedures. A summary of the proposals, briefly explaining the need for amendment and highlighting the more significant changes, is attached. The proposed revisions conform to the style conventions approved by the Advisory Committee in its undertaking to make the civil rules more concise, clear, and consistent; and a separate enclosure reflects how the rules with the proposed amendments would look in the new format that the Committee will be recommending.

Rules 83 and 84 were previously published and submitted to the Standing Committee, but have been reviewed for consistency with similar provisions being proposed in other federal rules. I call to your special attention proposed Rule 83(a)(2), which contains provisions not, as I understand it, being incorporated in the proposals from the other Advisory Committees. We do not assert that these provisions are merited by special circumstances unique in the Civil Rules; rather, we remain convinced that the principle contained in Rule 83(a)(2) would be generally appropriate as a limitation on enforcement of all local rules. We ask that this remaining difference in the views of the several Advisory Committees be resolved by the Standing Committee.

We request that the Standing Committee authorize publication of these proposals, affording the bench, bar, and public an opportunity to comment on the proposed amendments. Public hearings would also be needed. We suggest, however, that the Standing Committee consider postponing the time for publication, comments, and public hearings until after Congress has had time to evaluate the substantial changes in the Civil Rules adopted by the Supreme Court in April 1993. For that reason, we have not suggested any particular times or places for holding public hearings on the current proposals.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Secretary and Reporter, Standing Committee
Chairmen, other Advisory Committees
Reporter, Advisory Committee on Civil Rules

Proposed Amendments

Major controversy can be expected with respect to the proposed amendment of Rule 23, and there may be some controversy with respect to the proposed amendment in Rule 26(c). The others appear at this time to be largely non-controversial.

Where, for other reasons, changes in a rule are being proposed, the Committee has made language changes to conform to the stylistic conventions being used by the Committee in its review of all rules.

Fed. R. Civ. P. 23.

Numerous suggestions for changing Rule 23 were made following its last general revision in 1966, and ultimately the Advisory Committee declared a general moratorium on possible amendments to await further case law development.

More recently the Advisory Committee was requested by the Judicial Conference's Special Task Force on Asbestos Litigation to consider changes that might enable courts to use class action procedures in appropriate mass tort cases, at least in resolving particular issues affecting large numbers of actual and potential litigants.

Rule 23, in its 1966-form, has proved to be a useful tool in handling a wide variety of cases involving class claims, and one objective of the Advisory Committee has been to preserve the basic principles governing class actions. But the Committee also recognizes the desirability of addressing certain matters that from time to time have caused problems in cases certified for class action treatment or that have sometimes prevented class certification and in turn resulted in repeated litigation of the same issue, sometimes in hundreds of cases.

The proposed revision is drawn from a proposal submitted in the mid-80s by the Litigation Section of the American Bar Association, which in turn adopted an approach taken by the National Conference of Commissioners on Uniform State Laws. It incorporates, however, many suggestions made by others, including the special concerns when considering formation of defendant classes. The revision does not seek any changes in the jurisdictional requirements affecting class members; these matters are ones for Congressional action.

The principal changes may be summarized as follows:

(1) Elimination of the tripartite classification in current Rule 23(b), moving the requirement that a class action be superior to other available methods from Rule 23(b)(3) into Rule 23(a)(5), where it becomes a prerequisite for all class actions. The remaining provisions of Rule 23(b) become factors in deciding this essential issue of superiority.

(2) Flexibility for deciding, based on the circumstances of the case and due process, how and to whom notice should be given whenever a class is certified.

(3) Flexibility for deciding, based on the circumstances of the case and due process,

whether and under what conditions putative class members would be entitled to exclude themselves from, or join in, a class action.

(4) Highlighting the need to describe the matters certified for class resolution and the opportunity to limit class certification to specified claims, defenses, or issues while leaving others for individual resolution.

(5) Permit interlocutory review of rulings on class certification with leave of the appellate court, similar to current 28 U.S.C. § 1292(b). Particularly in view of the increased opportunity for discretion in the trial court, mandamus should not be the only option.

The Committee Note covers these changes extensively, and need not be restated here.

Some of the provisions may be viewed as "pro-plaintiff," and others as "pro-defendant." The Advisory Committee believes that a neutral balance has been struck which will improve Rule 23. The proposal, nevertheless, is likely to generate substantial controversy. It is time, however, to consider how Rule 23 can be made more responsive to the needs of litigation for the coming years. Comments following formal publication may well indicate other approaches would be preferable, and the Committee is prepared to consider other possible revision and republication.

Fed. R. Civ. P. 26(c).

Significant concern has been expressed during the past several years--leading to the introduction in Congress of proposed legislation--that protective orders sometimes have operated to conceal matters affecting the public interest or to increase the time and expense of other litigation involving similar issues. Others have noted the benefits such orders provide during the discovery process in facilitating the prompt and economical production of sensitive information relevant to particular litigation.

After study, the Committee concluded that this matter should be addressed not by changing the standards prescribed in Rule 26(c) for granting protective orders, but by adding explicit language regarding the alteration or dissolution of such orders. The addition of Rule 26(c)(3) dispels doubts respecting a court's power to alter or dissolve such orders, and lists certain basic factors--intentionally stated in broad terms in view of the competing interests that must be balanced--to be considered when exercising this power.

Fed. R. Civ. P. 43(a).

A minor change is proposed in the existing language of Rule 43(a): eliminating the requirement that testimony be given "orally," in order to assure that persons with speech impairments are not precluded from being witnesses.

A more significant change is that contained in the sentence to be added to Rule 43(a). This provision will provide a court with the flexibility to permit--for good cause shown--the testimony of a witness to be presented through satellite video or other contemporaneous transmissions from

another location. This provision will be helpful in eliminating the need for a continuance or suspension of trial when a witness who was expected to be available has some sudden emergency preventing attendance but is able to testify from a remote location. Pretrial depositions will continue to be the standard method for obtaining testimony if the potential unavailability of a witness can be reasonably anticipated.

An earlier published draft of Rule 43(a) had contained provisions dealing with a testifying witness's adoption of prepared written statements. These provisions have been eliminated from the current proposal to amend Fed. R. Civ. P. 43(a) in the belief Rule 611(a) of the Federal Rules of Evidence provides sufficient authority for using this procedure when appropriate.

Fed. R. Civ. P. 50(c)(2), 52(b), and 59(b)-(e).

These proposals were prompted by a suggestion from the Advisory Committee on Bankruptcy Rules. The existing civil rules are inconsistent as to when certain post-judgment motions must be filed. The proposed amendments eliminate the inconsistencies in the three rules and establish a uniform requirement; namely, that the motions be both served and filed no later than 10 days after entry of judgment. By requiring filing within a prescribed time--rather than the standard under Rule 5(d) for filing within a reasonable time after service--the rules recognize the important role these motions have on the finality of judgments, a matter that is frequently of concern to non-parties as well as to the litigants and the court.

Fed. R. Civ. P. 83.

The proposed amendments--which, for the most part, mirror similar changes being proposed by other Advisory Committees--incorporate applicable statutory language and direct that local rules conform to any uniform numbering system prescribed by the Judicial Conference and not merely duplicate national rules. Particularly with the increase in local rules generated under the Civil Justice Reform Act, it is important that litigants be able to locate local requirements readily and not risk overlooking significant requirements obscured through inclusion in unnecessarily long local rules.

Proposed Rule 83(a)(2) differs from the proposals coming from the other Advisory Committees. The Advisory Committee on Civil Rules believes that a negligent failure to comply with a local rule imposing a requirement of form should not be enforced in a manner to cause a party to lose any of its rights.

Similar concerns have prompted the proposed additional language in Rule 83(b), precluding sanctions for violating a judge's standing orders unless the litigant has had actual notice of the requirement. This language mirrors that being submitted by other Advisory Committees.

Fed. R. Civ. P. 84.

The proposed amendments, with the Committee Note, are self-explanatory. We believe that the process for changing rules will be improved if the Supreme Court and Congress are relieved of the burden of reviewing proposed changes in the forms or mere technical changes in the rules.

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

SUBMITTED TO

THE STANDING COMMITTEE ON

RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

Caution: These proposals are being submitted to the Standing Committee with a request for publication and public hearings. They have not been approved by the Standing Committee.

MAY 1993

TABLE OF CONTENTS

Page

Proposed Amendments to the
Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) **~~Prerequisites to a Class Action.~~** One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if — with respect to the claims, defenses, or issues certified for class action treatment —

(1) the ~~class is~~ members are so numerous that joinder of all ~~members~~ is impracticable,

(2) ~~there are questions of law or fact~~ legal or factual questions are common to the class,

(3) ~~the claims or defenses of~~ the representative parties' positions typify those ~~are typical of the claims or defenses~~ of the class, ~~and~~

(4) the representative parties and their attorneys are willing and able to ~~will~~ fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty; and.

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) **~~When~~ Whether a Class Actions ~~Maintainable~~ Is Superior.** ~~An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition~~ The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which ~~the prosecution of~~ separate actions by or against individual members ~~of the class would create a risk of~~ might result in

(A) inconsistent or varying adjudications ~~with respect to individual members of the class which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications ~~with respect to individual members of the class which would~~ that, as a practical matter ~~be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede~~, would dispose of the nonparty members' interests or reduce their ability to protect their interests; ~~or~~

~~(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief~~ the extent to which the relief may take the form of an injunction or ~~corresponding~~ declaratory ~~relief with respect to~~ judgment respecting the class as a whole; ~~or~~

(3) ~~the court finds that~~ the extent to which the common questions of law or fact ~~common to the members of the class~~ predominate over any questions affecting only individual members~~, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:~~;

(~~A~~4) the class members' interests ~~of members of the class~~ in individually controlling the prosecution or defense of separate actions;

(~~B~~5) the extent and nature of any related litigation ~~concerning the controversy~~ already ~~commenced~~ begun by or against members of the class;

(~~C~~6) the desirability or undesirability of concentrating the litigation ~~of the claims~~ in the particular forum; and

(~~D~~7) the likely difficulties ~~likely to be encountered~~ in ~~the management of~~ managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) **Determination by Order Whether Class Action to Be ~~Maintained~~ Certified;**

Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) As soon as practicable after ~~the commencement of an action brought as a class action~~ persons sue or are sued as representatives of a class, the court ~~shall~~ must determine by order whether and with respect to what claims, defenses, or issues ~~it is to be so maintained~~ the action should be certified for maintenance as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

(i) the nature of the controversy and the relief sought;

(ii) the extent and nature of the members' injuries or liability;

(iii) potential conflicts of interest among members;

(iv) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, exclusion may be conditioned upon a prohibition against maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separate action of any judgment rendered in favor of the class from which exclusion is sought, and inclusion may be conditioned upon bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before ~~the~~ a decision on the merits.

(2) ~~In any class~~ When ordering that an action be ~~maintained~~ certified as a class action under ~~subdivision (b)(3)~~ this rule, the court ~~shall~~ must direct that appropriate notice be given to the ~~members of the~~ class under subdivision (d)(1)(B). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider, in addition to the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(3) The judgment in an action certified ~~maintained~~ as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3)~~, whether or not favorable to the class, ~~shall include and~~ must specify or describe those ~~to whom the~~

~~notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ who are ~~to be~~ members of the class or have, as a condition to exclusion, agreed to restrictions affecting any separate actions.

(4) When appropriate ~~(A)~~ an action may be ~~brought or maintained~~ certified as a class action with respect to particular claims, defenses, or issues~~, or (B)~~ by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1). ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

(d) Orders in Conduct of Class Actions.

(1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:

(~~1~~A) ~~determining~~ determine the course of proceedings or ~~prescribing~~ prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument, including pre-certification decision on a motion under Rule 12 or 56 if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(~~2~~B) ~~requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that~~ require notice ~~be given in such manner as the court may direct~~ to some or all of the members or putative members of:

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class ~~or of~~;

(ii) the proposed extent of the judgment,; or ~~of~~

(iii) the members' opportunity ~~of members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3C) ~~imposing~~ impose conditions on the representative parties, class members, or ~~on~~ intervenors;

(4D) ~~requiring~~ require ~~that~~ the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly; or

(5E) deal~~ing~~ with similar procedural matters.

(2) ~~The orders~~ An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended ~~as may be desirable from time to time~~.

(e) **Dismissal or Compromise.** An ~~class~~ action filed as a class action must ~~shall~~ not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for maintenance as a class action, or be compromised without the approval of the court~~, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs~~. An action certified as a class action must not be dismissed or compromised without the approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or

denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on the practicality of the case proceeding as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which is added to subdivision (a) as a prerequisite for any class action. The issue of superiority of class action resolution is made a critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions--and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

The revision emphasizes the need for the court, parties, and counsel to focus on the particular claims, defenses, or issues that are appropriate for adjudication in a class action. Too often, classes have been certified without recognition that separate controversies may exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion. Also, the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries--at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not however a unqualified license for certification of a class whenever there are

numerous injuries arising from a common or similar nucleus of facts, nor does the rule attempt to establish a system for "fluid recovery" or "class recovery" of damages. Such questions are ones for further case law development. Nor does the revision attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions will be so certified under this rule, and most that were not so certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility respecting notice and membership in the class.

Various non-substantive stylistic changes are made to conform to style conventions adopted by the Committee to simplify the present rules.

Subdivision (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities owed to the class.

Paragraph (5)--the superiority requirement--is taken from subdivision (b)(3) and becomes a critical element for all class actions.

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words "claims, defenses, or issues" are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

Subdivision (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made a controlling issue for all class actions and moved to subdivision (a)(5); namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) then become factors to be considered in making this determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to exclude other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7)--the consideration of the difficulties likely to be encountered in the management of a class action--is revised by adding a clause to emphasize that such difficulties should be

assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs"--or, in some cases, even require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class action remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion--the fact pattern described in subdivision (b)(1)(A)--a person might nevertheless be allowed to be excluded from the class upon the condition of agreeing to be bound by the outcome of the class action. The opportunity for imposition of appropriate conditions on the privilege of exclusion enables the court to avoid the unfairness that resulted when a putative class member elected to exclude itself from the class action in order to take advantage of collateral estoppel if the class action was resolved favorably to the class while not being bound by an unfavorable result.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give meaningful notice of the class action to all putative members of the class.

Under the revision, some notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations it might be appropriate, incident to the case or controversy involving the

named plaintiffs, to certify some issues relating to the defendants' culpability and general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision when this will promote the fair and efficient adjudication of the controversy.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Revised subdivision (d)(1)(B) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(1)(B) contemplates that some form of notice to class members should be given in virtually all class actions. The particular form of notice, however, in a given case is committed to the sound discretion of the court, keeping in mind the requirements of due process. The language of (d)(1)(B)(i) calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of these proposals conducted by independent counsel can be of great benefit to the court. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. If denied, the plaintiff, in order to secure appellate review, may have to incur expenses wholly disproportionate to any individual recovery. If the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potentially ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. As authorized by 28 U.S.C. § 2072(c), the rule has the effect of permitting the appellate court to treat as final for purposes of 28 U.S.C. § 1291 an otherwise conditional and interlocutory order.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * *

(c) Protective Orders.

(1) ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending — and ~~or alternatively~~, on matters relating to a deposition, also the court ~~in the district~~ where the deposition ~~is to~~ will be taken — may, for good cause shown, make any order ~~which~~ that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(~~1~~A) ~~that~~ precluding the disclosure or discovery ~~not be had~~;

(~~2~~B) ~~that~~ specifying conditions, including time and place, for the disclosure or discovery ~~may be had only on specified terms and conditions, including a designation of the time or place~~;

(~~3~~C) ~~that the discovery may be had only by~~ prescribing a discovery method ~~of discovery~~ other than that selected by the party seeking discovery;

(~~4~~D) ~~that~~ excluding certain matters ~~not be inquired into~~, or ~~that the scope of the disclosure or discovery be limited~~ limiting the scope to certain matters;

(~~5~~E) ~~that discovery be conducted with no one~~ designating the persons who may be present while the discovery is conducted ~~except persons designated by the court~~;

(6F) directing that a sealed deposition, ~~after being sealed,~~ be opened only ~~by~~ upon court order ~~of the court~~;

(7G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened ~~as directed~~ the court directs by the court.

(2) If the motion for a protective order is wholly or partly denied ~~in whole or in part~~, the court may, on ~~such~~ just terms ~~and conditions as are just~~, order that any party or ~~other~~ person provide or permit discovery. ~~The provisions of~~ Rule 37(a)(4) ~~apply~~ applies to the award of expenses incurred in relation to the motion.

(3) On motion, the court may dissolve or modify a protective order. In ruling, the court must consider, among other matters, the following:

(A) the extent of reliance on the order;

(B) the public and private interests affected by the order; and

(C) the burden that the order imposes on parties seeking information relevant to other litigation.

* * * *

COMMITTEE NOTE

The existing provisions of subdivision (c) are divided into numbered paragraphs, and paragraph (3) is added to dispel any doubt that a court has the power to modify or vacate a protective order. This power should be exercised after carefully considering the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to

facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests which also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

Courts have generally administered Rule 26(c) with sensitive concern for the interests that may justify dissolution or modification of a protective order. Recent studies have concluded that, in the light of actual practices, there is no need to amend the provisions of Rule 26(c) relating to entry of protective orders. See Report of the Federal Courts Study Committee, 102-103 (1990); Marcus, The Discovery Confidentiality Controversy, 1991 U.Ill.L.Rev. 457; and Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv.L.Rev. 427 (1991). Some dispute may be found, however, as to the approach that should be taken to requests for dissolution or modification. Some of the decisions are explored in *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990).

The addition of express provisions for dissolution or modification serves several purposes. Most important, the text of the rule provides forceful notice that, when faced with a discovery request for particularly sensitive information, parties should not rely on a protective order as an absolute shield against any further disclosure. Although this reminder may reduce the usefulness of blanket protective orders as a means of avoiding controversies during discovery, it is better to give notice than to risk exploitation of inadvertent reliance. The express provisions also serve to remind parties and courts of the major factors that must be considered. The public and private interests in disclosure must be weighed against the private interests that may defeat any discovery or sharply limit the use of discovery materials. These factors are not expressed in more precise terms because of the need to balance infinite degrees of the interests that weigh for or against discovery. Public and private interests in disclosure may be great or small, as may be the interests in preventing disclosure.

Rule 43. Taking of Testimony

(a) **Form.** In ~~all~~ every trials, the testimony of witnesses ~~shall~~ must be taken ~~orally~~ in open court, unless ~~otherwise provided by an Act of Congress or by~~ a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown and under appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

* * * *

COMMITTEE NOTE

The only substantive changes intended by this revision are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is unable to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted on showing good cause. Good cause can be shown for a variety of reasons. A particularly strong showing often can be made when a key witness, who had been expected to attend the trial, is unable to be present for unanticipated reasons, such as accident or illness, but remains able to testify from a different place. Expenses may be reduced by allowing remote transmission of testimony as to relatively formal or unimportant matters that cannot be covered by stipulation.

Good cause is not established simply by showing that a witness is beyond the subpoena power of the trial court. Depositions remain the primary means to obtain such testimony.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement, such as facsimile or other computer transmission of printed words, ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties

of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Rule 50. Judgment as a Matter of Law in ~~Actions Tried by~~ Jury Trials; Alternative Motion for New Trial; Conditional Rulings

* * * *

(c) ~~Same: Conditional Rulings on Grant of~~ Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

* * * *

(2) ~~The~~ Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law ~~has been~~ is rendered ~~may~~ must be served and filed ~~a motion for a new trial pursuant to Rule 59~~ not later than 10 days after entry of the judgment.

* * * *

COMMITTEE NOTE

The only substantive change intended by this revision is to require that, when judgment as a matter of law is granted under this rule, any motion for a new trial must be filed, as well as served, no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. The Committee believes that, given the importance--often to third persons in addition to the parties and the court--these motions can have on the finality of a judgment, each of these rules should be modified to require both service and filing before end of the 10-day period. The phrase "no later than" is used--rather than "within"--to avoid problems when a post-judgment motion is filed before actual entry by the clerk of the judgment. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period.

Rule 52. Findings by the Court; Judgment on Partial Findings

* * * *

(b) Amendment. ~~Upon~~ On a party's motion ~~of a party made~~ served and filed not later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may ~~be made with~~ accompany a motion for a new trial ~~pursuant to~~ under Rule 59. When findings of fact are made in actions tried ~~by the court~~ without a jury, the ~~question of the~~ sufficiency of the evidence ~~to support~~ supporting the findings may ~~thereafter~~ be later questioned ~~raised~~ whether or not in the district court the party raising the question ~~has made in the district court an objection to such~~ objected to the findings, moved ~~or has made a motion~~ to amend them ~~or a motion for judgment~~, or moved for partial findings.

* * * *

COMMITTEE NOTE

The only substantive change intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed, as well as served, no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. The Committee believes that, given the importance--often to third persons in addition to the parties and the court--these motions can have on the finality of a judgment, each of these rules should be modified to require both service and filing before end of the 10-day period. The phrase "no later than" is used--rather than "within"--to avoid problems when a post-judgment motion is filed before actual entry by the clerk of the judgment. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period.

Rule 59. New Trials; Amendment of Judgments

* * * *

(b) Time for Motion. Any motion for a new trial ~~shall~~ must be served and filed not later than 10 days after ~~the~~ entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based ~~upon~~ affidavits, they ~~shall~~ must be served and filed with the motion. The opposing party has 10 days after ~~such~~ service ~~within which~~ to serve and file opposing affidavits, ~~which~~ but that period may be extended for ~~an additional period not exceeding~~ up to 20 days, either by the court for good cause ~~shown~~ or by the parties' ~~by~~ written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative ~~of Court~~; Notice; Specifying Grounds. ~~Not later than~~ Within 10 days after entry of judgment the court, on ~~of~~ its own, ~~initiative~~ may order a new trial for any reason ~~for which it might have granted a new trial on~~ that would justify granting one on a pary's motion ~~of a party~~. After giving the parties notice and an opportunity to be heard ~~on the matter~~, the court may grant a timely motion for a new trial, ~~timely served,~~ — even for a reason not stated in the motion. In either ~~case~~ event, the court ~~shall~~ must specify ~~in the order~~ the grounds in its order ~~therefor~~.

(e) Motion to Alter or Amend ~~a~~ Judgment. Any motion to alter or amend ~~the~~ a judgment ~~shall~~ must be served and filed not later than 10 days after entry of the judgment.

COMMITTEE NOTE

The only substantive changes intended by this revision are to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed as well as served during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. The Committee believes that, given the importance--often to third persons in addition to the parties and the court--these motions can have on the

finality of a judgment, each of these rules should be modified to require both service and filing before end of the 10-day period. The phrase "no later than" is used--rather than "within"--to avoid problems when a post-judgment motion is filed before actual entry by the clerk of the judgment. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period.

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) Each district court ~~by action of~~, acting by a majority of ~~the~~ its judges ~~thereof~~, may ~~from time to time~~, after giving appropriate public notice and an opportunity ~~to~~ for comment, make and amend rules governing its practice. A local rule must be ~~not in~~consistent with Acts of Congress, consistent with -- but not duplicative of -- ~~these~~ rules adopted under 28 U.S.C. §§ 2072 and 2075, and conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule ~~so adopted shall~~ takes effect ~~upon~~ the date specified by the district court and ~~shall~~ remains in effect unless amended by the ~~district~~ court or abrogated by the judicial council of the circuit ~~in which the district is located~~. Copies of rules and amendments ~~so made by any district court shall~~ must, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be ~~made~~ available to the public.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement.

(b) Judge's Directives. ~~In all cases not provided for by rule, the~~ A ~~district~~ judges ~~and magistrates~~ may regulate ~~their~~ practice in any manner ~~not in~~consistent with ~~these~~ federal laws, rules adopted under 28 U.S.C. §§ 2072 and 2075, ~~or~~ and local rules ~~these of the district in which they act~~. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal laws, federal rules, or local rules unless the alleged violator has had actual notice of the requirement.

COMMITTEE NOTE

SUBDIVISION (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules on such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of--or forgetting--a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of the paragraph (2) is narrowly drawn--covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form--for example, a local rule requiring parties to identify evidentiary matters relied upon to support or oppose motions for summary judgment.

SUBDIVISION (b). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to authorize--although not encourage--district and magistrate judges to enter orders that establish standard procedures in cases assigned to them (*e.g.*, through a "standing order") if the procedures are consistent with these rules and with any local rules. Subdivision (b) is, however, revised to provide that parties not be penalized for failing to adhere to some special procedure that is not contained in the local rules but is established by an individual judge unless they have received some notification of that procedure.

Rule 84. Forms; Technical Amendments

(a) Forms. The forms ~~contained~~ in the Appendix ~~of Forms are sufficient~~ suffice under these rules and ~~are intended to indicate~~ illustrate the simplicity and brevity ~~of statement which~~ that these rules contemplate. The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.

(b) Technical Amendments. The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to these changes, which would eliminate the requirement of Supreme Court approval and Congressional review in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other, and from other proposed amendments to the rules.

The revision of subdivision (a) is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by the terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

Similarly, the addition of subdivision (b) will enable the Judicial Conference, acting through its established procedures and after consideration by the appropriate Committees, to make technical amendments to these rules without having to burden the Supreme Court and Congress with such changes. This delegation of authority, not unlike that given to Code Commissions with respect to legislation, will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on non-controversial non-substantive matters, at the risk of diverting attention from items meriting more detailed study and consideration. As examples of situations where this authority would have been useful, one might cite section 11(a) of P.L. 102-198 (correcting a cross-reference contained in the 1991 revision of Rule 15) and the various changes contained in the 1993 amendments in recognition of the new title of "Magistrate Judge" pursuant to a statutory change.