MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

October 21, 22, 23, 1993

The Advisory Committee on Civil Rules met on October 21, 22, and 23, 1993, at the Park Hyatt Hotel, San Francisco. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Judge Anthony J. Scirica; and Phillip A. Wittmann, Esq. Judge Sam C. Pointer attended as outgoing chair. Judge Alicemarie H. Stotler and Judge Robert E. Keeton attended as chair and outgoing chair of the Standing Committee. Also present were Bryan A. Garner, Esq., consultant to the Standing Committee; Peter McCabe, John K. Rabiej, Mark Shapiro, and Judy Krivit of the Administrative Office; William Eldridge and John Shapard of the Federal Judicial Center; and Edward H. Cooper, Reporter. Observers included Robert Campbell, Esq., and Alfred W. Cortese, Jr., Esq.

Judge Higginbotham led the committee in expressions to Judge Pointer of thanks and appreciation for his devoted and enormously productive service as chair.

The minutes of the May, 1993 meeting were approved.

Discussion of legislative consideration of the pending Civil Rules amendments led to discussion of Civil Justice Reform Act plans. It will not be long – two years – before a massive effort will be needed to evaluate experience under local plans. The lessons learned from this experience may make it possible to incorporate successful experiments in national rules, restoring a greater level of uniformity in procedure across the district courts. It was noted that at the most recent count, 48 CJRA plans had been filed; 26 of them included disclosure provisions cast in a variety of forms. Early experience seems to be favorable, although in the Northern District of California there is some dissatisfaction with the suspension of discovery until the Rule 26(f) conference.

Facsimile Filing

Under the current form of Civil Rule 5(e), papers may be filed by facsimile transmission "if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." The amended version of Rule 5(e), now pending in Congress and slated to become effective on December 1, 1993, embraces

electronic filing as well: "A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States." The amended version adopts the language of Appellate Rule 25(a), which authorizes local court of appeals rules for facsimile or electronic filing.

In September, 1993, the Judicial Conference deferred action on a recommendation of the Committee on Court Administration and Case Management that courts be authorized to adopt local rules permitting facsimile filing on a routine basis. Detailed Guidelines for Filing by Facsimile were included with the recommendation. The Judicial Conference referred the recommendation to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September, 1994 Conference.

The Appellate Rules Advisory Committee met immediately after the Judicial Conference action. As reported to this Committee, the Appellate Rules Committee recommended that the Judicial Conference adopt a significantly abbreviated version of the Guidelines recommended by the Committee on Court Administration and Case Management. The Guidelines no longer would refer to "filing," but instead would govern "facsimile transmission." The Guidelines would establish technical requirements, note resource availability, and set filing fees. The provisions on original signatures, transmission records, and cover sheets would be deleted from the Guidelines and incorporated in a model local rule. This change was recommended on the view that practicing lawyers should not be required to resort to Judicial Conference Guidelines for rules governing practice and procedure. Lawyers naturally look to the national rules and local rules for guidance, and should not be at risk of innocent departures from an unfamiliar source of regulation.

Extensive discussion was devoted to the proper balance between national rules adopted through the Enabling Act process and local rules, as viewed through the special role of Civil Rule 5(e) and Appellate Rule 25(a). These questions parallel the general debate over the role of uniform national rules and local rules, but with the specific difference created by the provisions of Rules 5(e) and 25(a). It is clear that the Judicial Conference does not intend to bypass Enabling Act procedures by adopting national rules in the guise of "Guidelines." The guideline device cannot be used to replace or modify the national rules. As one rough approximation, Judicial Conference guidelines or standards should not attempt to tell lawyers how to practice. Rules 5(e) and 25(a), however, have

at least, was meant to achieve a special balance between local autonomy and national uniformity. The provision for local rules permitting filing by facsimile transmission was adopted because of the perception that there are significant variations in local conditions. Some courts have the equipment and staff necessary to handle facsimile filing. Some courts do not. Rather than attempt to force a choice on all courts, requiring that all or none permit facsimile filing, the question was left to local option. At the same time, the provision for standards established by the Judicial Conference was adopted to serve several purposes. The Conference can, at the outset, determine the appropriate time for permitting local adoption of routine facsimile filing practices. Present Conference standards limit facsimile filing to compelling circumstances or to local practices established before May 1, 1991. The Conference can authorize wider adoption of routine facsimile filing. Second, the Conference can adopt standards that ensure that local rules will not degenerate into a variety of conflicting requirements that could prove particularly troubling to practitioners who resort to facsimile transmission from distant places. Third, the Conference procedure, aided by various committees and advised by the Administrative Office staff, can respond to rapid changes of technology in ways far better than the formalized Enabling Act process. As an immediately relevant example, it may prove wise to authorize routine facsimile filing even though the time has not yet come to authorize routine filing by other electronic means.

The sense of the Committee was that the background of Civil Rule 5(e) and Appellate Rule 25(a) is important in determining the appropriate approach to facsimile filing. Local rules, authorized by 28 U.S.C. § 2071, can govern local practice but must be consistent with rules prescribed under § 2072. Local rules regulating facsimile transmission and filing are consistent with Rules 5(e) and 25(a) — rules adopted under § 2072 — only if "authorized by and consistent with standards established by the Judicial Conference of the United States." To the extent that national uniformity is desirable, Judicial Conference Standards can incorporate mandatory provisions to be included in any local rule authorized by the standards. These strictures in the Standards would not be an exercise of rulemaking power. Instead, the Standards would fulfill the purpose of Rules 5(e) and 25(a) that local rules not lead to substantial disuniformity.

The Committee believes that in fact national uniformity is very important. The attempt to limit Judicial Conference standards to bare technical provisions is unwise. Instead, the standards should establish uniform terms to be incorporated in local rules. Provisions governing signatures, transmission records, cover sheets, and time of filing are obvious examples.

The Committee was strongly of the view that whatever action the Judicial Conference takes, the product should be captioned as "Standards," the term used in Civil Rule 5(e) and Appellate Rule 25(a), not "Guidelines."

The Committee also agreed unanimously that at least the first sentence of proposed Guideline I(3) should remain in the Standards. This sentence states that papers may not be sent by facsimile transmission for filing unless authorized by local rule or by order in a particular case. If the Committee's approach is adopted, this sentence should state explicitly that the local rule must be consistent with the terms set out in the Standards. The Committee did not have any view on the second sentence of the proposal, which would prohibit facsimile transmission of bankruptcy petitions and schedules.

The Committee discussed briefly the question whether the time has come for routine facsimile filing. Possible problems were noted, and good experiences were recounted. No Committee recommendation was made.

The Committee did not have time, nor adequate advance preparation, to work on the details of the proposed Standards or the Model Local Rule 25 being drafted by the Appellate Rules Advisory Committee. Only two questions were discussed.

Signature requirements were discussed briefly. The Committee was confident that so long as a Judicial Conference Standard authorizes filing by facsimile transmission, the facsimile image of a signature satisfies the signature requirements of the Civil Rules. Rule 5(e) is adequate authority. The local rule provisions of the Standards should state that the facsimile signature satisfies a signature requirement. (The Committee did not directly address the question whether the local rule should provide that an original copy be maintained until the litigation concludes.)

Time-of-filing questions also were discussed briefly. Two problems were noted. One is that transmission, particularly of lengthy documents, may take some time. It may be desirable to establish the time of filing by some precise event such as the time of receiving the first image, the time of receiving the complete document, or some mid-point average. The other is the problem of transmissions received outside regular business hours of the clerk's office. Support was expressed for the view that transmissions received outside regular business hours should be treated as filed at the time the clerk's office next opens. Some tension was noted, however, with the desire to adjust practices to the possibilities created by new technology. If it is relatively easy to treat papers as filed at the time a facsimile transmission is received, perhaps that adjustment should be made. Whatever

answer is best, a clear answer should be given.

Facsimile Service

The Committee was advised that the Appellate Rules Advisory Committee is preparing a draft rule authorizing service by facsimile transmission. The draft is scheduled for immediate publication for public comment. The Committee approved the proposal that the request for comment include an observation that similar changes may be made in other national rules. This observation may stimulate such extensive comment as to provide an adequate foundation for recommending adoption of facsimile service provisions in the Civil Rules. The Committee left for future consideration the nature and extent of possible differences between facsimile service in the course of district court litigation and facsimile service in the conduct of appeals.

Particularized Pleading

The pleading questions raised by Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 1993, 113 S.Ct. 1160, were discussed at the May, 1993 meeting and continued on the agenda for further discussion.

Discussion began with a review of the development of the Fifth Circuit pleading practices that were involved in the Leatherman decision. It was noted that in practice many courts have exacted heightened pleading requirements in specific types of litigation. Common examples are antitrust, RICO, and securities claims. Most often these heightened pleading requirements are imposed without any explicit articulation or justification.

Turning to the Leatherman decision, it was noted that the Court took pains to state that it was not dealing with pleading with respect to official immunity. There was some speculation that perhaps it remains open to require some form of allegations in the complaint that address and negate obvious issues of official immunity.

The general values of notice pleading were reviewed. One suggestion was that notice pleading should not be encouraged. District courts should be encouraged, on this view, to adopt local rules requiring more elaborate pleadings, with more fact content, for specific categories of cases. One example is provided by multiple and overlapping product liability cases that have national document depositories. A plaintiff who files a new case knows every conceivable theory; why not force disclosure of which theories are advanced in this case? Another member of the committee urged that tightened pleading requirements would promote more economical disposition of litigation. The process of course

would entail increased motion practice, but the overall savings would be significant. Another committee member observed that notice pleading often is frustrating in product liability and admiralty litigation, and that contention discovery is expensive and time-consuming. Similar views were expressed by observing that most plaintiffs and defendants agree that the federal procedural system "is broke." They spend vast amounts on discovery, first; on pleading, second; and on trial, least. More particularized pleading could help reduce expenditures at later stages of the process.

These views were reinforced by the observation that for many years, the Committee has been willing to reconsider and continually revise discovery rules. Perhaps the time has come to recognize that notice pleading is not so firmly enshrined as to be beyond reconsideration. At the same time, it was noted that discovery has become the process through which parties can get an early grasp of a case, requiring disclosure of what is involved. Functionally, it is like heightened pleading.

Doubts were expressed, however, about the prospect that much can be done with pleading requirements. Rule 12(b)(6) motions often are denied with directions to amend the complaint; how many cases really are finally dispatched at the pleading stage, or should be, is a real question. More problems may be encountered, indeed, with over-stated, over-long pleadings than with uninformative terse pleadings.

A response was offered that to the extent that more detail is needed, contention interrogatories can do it; this response was coupled with the observation that it is better to make as few Rules amendments as possible. It also was urged that local rules imposing variations in pleading requirements would be disastrous. Variations in present practice often respond to the views individual judges have of the desirability of specific forms of litigation; local rules could perpetuate these responses.

The cost of pleading motions also was emphasized. Some committee members believe that stricter pleading rules will give rise to many more pleading motions, testing not simply the entire complaint but each part of the complaint. It is not just that pleading motions can be extremely expensive. It also is that motions can be made to delay access to evidence, to delay overall progress of the litigation, and to increase expense for the adversary. Control of the evidence often is with defendants, who have these incentives to make pleading motions. If changes are made that will encourage pleading motions, care should be taken to ensure effective means of controlling the relationship to discovery so that important discovery can go forward. Summary judgment practice is a better alternative because it ensures adequate

discovery opportunities. In a variety of ways, we have been attempting to encourage "meet and confer" practices, in large part as an effort to civilize the early stages of litigation. Lawyers do prepare for pretrial conferences, and are likely to prepare for discovery plan meetings. Heightened pleading requirements would be in tension with this effort. Heightened pleading requirements also might reduce the number of cases that "self-destruct" without ever requiring an investment of judicial time; we should not be eager for that result.

The relationship between pleading and discovery also involves the observation that in taking control of the discovery process, judges regularly enforce disclosure. They require the parties to tell what the case is about, not for purposes of dismissal but for purposes of shaping discovery.

Pretrial conference practice also must be taken into account. Proposed Rule 26(f) is expressly geared to the scheduling conference. The purpose of discovery plan conferences is, in large part, to force a productive, informal, and inexpensive exchange of information about the real nature of the case. Perhaps it makes sense to wait to see whether this procedure, coupled with more active use of pretrial conference orders, can reduce the occasional costs of notice pleading. Repeated amendments to Rule 16 have been designed to encourage more active use of pretrial conference procedures. Judges who have insisted on early conferences find that lawyers cooperate and that real benefits follow. Perhaps all that is needed is some means of encouraging greater use of tools already in the Rules. Adding provisions that encourage more pleading motions may be less satisfactory.

Pleading by pro se litigants was discussed separately. It is difficult to know whether pleading rules can accomplish anything constructive in sorting through these cases. The Fifth Circuit has had good results from the practice of sending magistrate judges to the prisons, so that pro se prisoner plaintiffs can explain directly what their cases are about.

It also was observed that forgiving pleading practices may be influenced by our frequent reliance on litigation as a means of supplementing public enforcement of public policies. To the extent that we are concerned with more than immediate private interests, we may be more reluctant to dismiss litigation for inadequate pleading. At the same time, it was remembered that many of the areas that seem to involve de facto heightened pleading requirements involve such public policies – antitrust, securities, and like litigation are common illustrations.

Various possible means of incorporating heightened pleading requirements into the rules were discussed.

The possibility of increasing the Rule 9 categories of claims that must be pleaded with particularity seemed undesirable to virtually all committee members who spoke to the question. There is a real risk that imposing specific pleading requirements for specific legal theories will be seen as a substantive decision that these theories are disfavored. The number of categories that might be added is without apparent limit, and can easily change over time as experience accumulates with each individual category. Appropriate degrees of particularity may vary from one subject to another, and be difficult to specify in advance. The requirement of Rule 9(b) that fraud be pleaded with particularity may seem distinctive in this respect because of the belief that even a bare allegation of fraud can do damage outside the litigation itself.

Rule 8 is an obvious place to lodge heightened pleading requirements. Rule 8(a)(2), requiring a short and plain statement of the claim, is an obvious starting place. One model, not directly discussed, would require pleading "in sufficient detail to show" that the pleader is entitled to relief. The cognate provisions of Rule 8(b), requiring a short and plain statement of defenses, and perhaps 8(c), also may deserve elaboration. Rule 8(e) provides another possible location. If Rule 8(e) is amended, it may be possible to refer directly to the purpose of the amendment by requiring pleading sufficient to support decision of motions under Rules 12(b), (c), (d), or (f). Changes of this sort might be designed to exact only a small incremental tightening of pleading standards, or could be more ambitious.

An alternative approach would be amendment of the Rule 12(e) provisions governing motions for more definite statement. This approach would have the advantage of permitting case-specific, court-controlled determinations whether more detailed pleading is likely to provide a suitable opportunity for pretrial disposition. The increased judicial involvement required to achieve this advantage might be well repaid, but there is an obvious risk that the investment would not be repaid.

After wondering whether present Rules 8 and 12 have much effect on the ways judges dispose of cases, the committee concluded that no present action seems warranted. The pending revisions of Rule 11 may bear on the need for action in the future. Pleading topics will remain on the agenda for continuing study.

Rule 4(m)

It has been suggested to the Committee that the 120-day period for service established by current Rule 4(j), to be renumbered as Rule 4(m) in the 1993 amendments, is too long.

Several members of the committee suggested that the 120-day

period has not presented any problems. It provides a useful docket-clearing device for a small number of cases. There may be occasions in which multiple defendants are named and it is useful to have time after serving some defendants to find out whether others should be dropped.

It was suggested that 90 days would be the minimum workable period. A reduction from 120 days to 90 days, however, seems the sort of adjustment that should be made only if there is a clear problem to be fixed.

A particular question was raised about the relationship between Rule 4(m) and Rule 12(b)(5). If a motion to dismiss for failure to make timely service under Rule 4(m) is treated as a Rule 12(b)(5) motion to dismiss for insufficiency of service of process, Rules 12(g) and (h)(1) seem to forfeit a personal jurisdiction objection that is not joined with the Rule 4(m) motion. Something may turn on the question whether the personal jurisdiction objection is "then available" if service has not been made at all by the time of the motion. The Committee concluded — without attempting to decide what the answer may be — that it is not appropriate to consider this problem now.

The Committee concluded that there is no present need to study further the 120-day period set by Rule 4(m).

Rule 23

The Committee began work on Rule 23 in response to a request from the ad hoc committee on asbestos litigation. The initial basis for consideration was provided by a model approved by the Litigation Section of the American Bar Association. (The TIPS section of the ABA opposed endorsement of this model by the ABA; the resolution was that the Litigation Section could support the model, but not as an ABA proposal.) As revised on the basis of discussions at earlier Committee meetings, a proposed amendment was taken to the Standing Committee for discussion at the June, 1993 meeting. Because the amendment is complex and likely to become controversial, the chair of this Committee suggested to the Standing Committee that the time available for consideration by the Standing Committee at that meeting was not sufficient to allow full exploration of the issues raised by the amendment. It also was noted that this Committee would have several new members in the near future, and that it might be desirable to have the benefit of their consideration before moving toward publication of a proposal for comment. No action was taken by the Standing Committee, and the amendment remains on the agenda of this committee.

Discussion began with recognition that the draft amendment may, in large part, simply describe and validate actual practice

under the current rule, permitting more express focus on what really works. At the same time, it gives the judge more power over notice, opt-out or opt-in choices, and the like. The already large power of the district court will be expanded. And class actions may become available in circumstances that do not now permit certification. Asbestos litigation may serve as an example of current developments. In one recent massive proceeding, settlements in excess of $2 billion were reached by classes of present claimants and future claimants. The parties assert a "limited fund" class; much turns on resolution in state court litigation of a dispute involving denial of insurance coverage. If the insurers prevail, the defendant "will be gone." The future claimants are those who have been exposed to asbestos but who have not filed claims. Certification of a pure "futures class" is questionable under the present rule. The amendments will make it easier to certify future classes.

The framework of present practice shows de facto aggregation by "commodification" of claims. An illustration was offered of a small 3-lawyer firm whose 3,000 class clients are nothing but names in a computer file. The longstanding pressures toward aggregation may be building to a head, with significant movement in the last few months. Class action practice is a major part of this movement, but it must be considered within the setting of potential changes in underlying substantive and remedial law. Efforts to achieve greater uniformity in awards for pain and suffering, for example, could have an obvious impact on administration of aggregated litigation.

A forerunner of the current draft has been circulated to an ad hoc list of practicing lawyers and academics, selected primarily from a list of those who appeared at a single day of the hearings on the proposals that led to the 1993 Civil Rules amendments. There has not been extensive reaction. There was no apparent sentiment favoring more dramatic changes in class action practice. Academics generally seemed to favor the basic structure of the proposal. Less enthusiasm was shown by practicing attorneys, both those commonly representing plaintiffs and those commonly representing defendants. A very common reaction is that lawyers have learned to live with the present rule, and do not need to devote ten years to educating themselves and judges in a new rule. It is common to speculate that any time saved in reducing litigation over the distinctions between (b)(1), (b)(2), and (b)(3) classes will be offset by an equal increase in litigation aimed directly at the points now reached indirectly through categorization. Notice, opt-out, and opt-in choices are very important. The increased level of district court discretion, indeed, may lead to an increase in total litigation addressed to class action procedure. There also is concern that more flexible notice provisions will be used to add increased notice costs to

actions that now are (b)(1) or (2) classes, and to provide inadequate notice in actions that now are (b)(3) classes. The provision for opt-in classes is opposed by many who fear that it will allow judges to defeat effective use of class actions to enforce disfavored substantive principles. The requirement that a class representative be willing is questioned as an almost-certain defeat of most defendant class actions.

It also was noted that opposition may come in forms that defy common stereotypes. Defendants, for example, may favor certification of classes of future claimants as a means of establishing repose. Plaintiff class attorneys, on the other hand, may oppose such classes in the belief that greater recoveries will be available after claims fully mature. The current proposal does not explicitly address future classes, but is sufficiently flexible that it seems to permit them.

One possible modification of the proposed amendment was discussed. It would be possible to add an eighth factor to proposed Rule 23(b), explicitly allowing denial of class certification on the ground that the costs of administration would outweigh the private and public benefits of enforcing the underlying claim. A point of departure for drafting could be found in the Uniform Class Action Rule promulgated by the National Conference of Commissioners on Uniform State Laws. It was concluded that this addition would not be desirable. The superiority requirement of proposed Rule 23(a)(5) provides flexibility to respond to these concerns. A more explicit provision might lead to denial of class actions in "(b)(1)" settings, and would be difficult to restrain by appellate review.

The best means of pursuing further deliberation were discussed. The proposal has been with the Committee for some time. It seems carefully balanced to many Committee members. It is anticipated that although the proposal seems balanced and reasonably conservative to many Committee members, there will be more explicit and hostile reaction when it is formally published for comment. It was agreed that the formal publication and public comment process should not be initiated by recommendation to the Standing Committee until the Advisory Committee is confident that the proposal is desirable. The formal process should not be used to launch trial balloons. It is possible to begin with a formal request for public comment on the need to revise Rule 23, as was done before preparing the proposed 1993 amendment of Rule 11. As an alternative, it is possible to undertake a widespread informal circulation. Or the proposal could be published with a request for comment on suggested alternative draft provisions.

The possibility of widespread informal circulation was thought dangerous by some members because of the risk that it may cause

positions to crystalize without thought, entrenching opposition that would be mollified by a more open deliberative process. It was noted that many lawyers have commented in the past that only a small fraction of the practicing bar have any generalized experience with class actions. Most lawyers who have handled class actions have experience in only one or two substantive fields. The problems encountered in class actions, however, seem to be distinctively different across different substantive fields. It may be better to focus on processes that will provide open and simultaneous expressions from a cross-section of experienced lawyers.

This discussion led to discussion of the extent to which changes can be made following publication and public comment without need for repeating the publication and public comment process. One argument advanced by opponents of the disclosure provisions proposed in the 1993 amendments to Rule 26(a)(1) was that the final proposal was different from the published proposal, and had not been republished for additional comment. The principle urged in responding to this argument was that the final proposal was merely a reduced version of the original proposal, that the original contained all of the duties included in the final proposal and more in addition. That principle seems right to the Committee, but account must be taken of the potential need for republication in determining whether a proposal is ready for publication.

The discussion of Rule 23 closed with the conclusion that, in part because there are several new Committee members, the proposed amendment should be retained on the agenda for further discussion at the next Committee meeting. It was recognized that the draft changes the nature of the certification process. The process is made more open-ended and discretionary by elevation of the superiority requirement to subdivision (a)(5), transformation of the subdivision (b) categories into factors that inform the superiority decision, reduction of the predominance of common questions test from a prequisite in (b)(3) class actions to a factor that simply bears on superiority, increased flexibility as to opting out and opting in, increased flexibility as to notice requirements, and other changes. These changes will generate uncertainty during a significant period of learning the new rule. They will reduce the opportunities for appellate control of discretionary district court decisions. They may generate more complexity even in the long run than the certification process should have to bear.

Additional materials will be supplied to the Committee to assist preparation for renewed discussion of Rule 23 at the next meeting.

Rule 53

Discussion of Rule 53 began with a relatively lengthy introductory description of the questions that might be faced.

Rule 53 governs the appointment of special masters in terms that seem to focus primarily on trial. For many years now courts have made increasing use of masters before and after trial. Before trial, discovery tasks seem to be those most often assigned to masters, but it is not uncommon to assign broader responsibilities for supervising pretrial case management or for facilitating settlement. After trial, masters are used to supervise enforcement of complex decrees, particularly in "institutional reform" litigation. Enforcement tasks at times seem to require extensive, expert, and detailed familiarity with the institution and the problems that may require reformulation of a decree as implementation is attempted. The responsibilities imposed on the master may call for nonlegal expertness as much as — or more than — legal skills. The means used to gather information may go beyond those familiar to ordinary adversary litigation.

These pretrial and post-trial uses of masters raise a number of questions that are not addressed by Rule 53. The central questions go to authority to rely on masters, the extent to which judicial power can be delegated and the terms of review by the judge that must be observed, the distinctions that may be appropriate between delegation to masters and delegation to magistrate judges, the propriety of ex parte communications between master and judge, the occasions that justify appointment of masters, the persons who qualify to be appointed and grounds for disqualification, the extent to which rules of judicial ethics apply to masters, the ability of masters to demand evidence from the parties or even to seek out evidence independently, and the terms of compensation and liability for paying compensation.

The best means of addressing these questions are uncertain. There are distinct advantages in amending Rule 53, not only because Rule 53 is familiar as the rule regulating masters but also because there are great efficiencies in maintaining a single rule that addresses all of the common issues that affect use of masters for any purpose. If Rule 53 amendments are pursued, it will be important to catch all of the cross-references to Rule 53(b) in other rules. There are equally apparent advantages in establishing independent rules governing pretrial and decree-enforcement masters. Pretrial masters might be governed by provisions in the discovery rules, but Rule 16 may be a more suitable location because pretrial master responsibilities may extend beyond discovery. Perhaps a new Rule 16.1 would be most appropriate. Decree-enforcement masters might be dealt with by provisions in the "judgments" section of the rules, perhaps as a new Rule 66.1

following Rule 66 on receivers. If separate rules are adopted for pretrial and decree-enforcement masters, it still may be possible to establish a single set of provisions governing common issues for incorporation into the separate rules.

Thought also must be given to coordinating special master practice with appointment of expert witnesses under Evidence Rule 706. There are some indications that court-appointed experts have been used for purposes of advising courts in ways that go beyond testimony presented in open court. If such practices are emerging, much remains to be learned about them before it can be determined whether explicit rule provisions are needed. In like vein, there are indications of occasional practices in appointing experts as judicial assistants by means outside Evidence Rule 706. The economist-law clerk is one example. Again, much more must be learned before the rulemaking process can be undertaken.

Some recent appellate decisions appear to be constricting use of special masters, particularly in the pretrial setting. These decisions afford the immediate occasion for addressing the question through the rulemaking process.

General discussion followed this introduction.

The first and recurring question was the extent of actual reliance on special masters for pretrial and decree-enforcement proceedings. Most of the discussion focused on pretrial matters. Some members of the committee reported that they had no experience with pretrial masters; in the districts in which they practice, judicial duties are delegated only to magistrate judges, not special masters. Others reported extensive use, reflecting inability of the magistrate judge corps to handle all of the pretrial work that needs to be done. The Northern District of California makes extensive use of masters, perhaps because the docket is studded with complicated intellectual property cases. Masters are used to supervise discovery, to handle other pretrial management tasks, and to facilitate settlement. As a very special illustration, one committee member who is supervising consolidated pretrial proceedings has appointed a special master to handle communications and coordination with courts in 48 states dealing with related litigation. Masters also are used to supervise disposition of class action judgments. One concern may be that adopting formal rules may invite increased use of masters by making the practice seem easier and more ordinary. Rule amendments should be framed to ensure that reliance on masters remains exceptional.

To the extent that masters are appointed because of limits on available magistrate judge time as well as district judge time, one possibility may be to expand the number of magistrate judges. If there is only occasional need, it might be possible to establish a

roving corps of magistrate judges available for assignment to specific tasks without regard to ordinary district lines. The problem in large part is one of the limits of judicial time in relation to the demand. Magistrate judge positions were created to respond to burdens on judicial time, and have become essential. Regularization of special master practices may in turn encourage the system to rely on ad hoc appointment of nonjudicial officers in a way that soon becomes another indispensable part of the system. This prospect argues for caution in approaching rules that may expand reliance on masters.

The view was expressed that pretrial use of special masters is essentially unregulated by the Civil Rules. The history of Rule 53 shows explicit consideration of this possibility and equally explicit rejection. As the rules now stand, it is necessary to rely on theories of inherent power. Rule 53 provides at most an analogy to regulate some of the questions that arise. And there are many important questions.

Cost is one of the broad questions posed by resort to special masters. In the competition for scarce judicial resources and attention, litigants who can afford to pay may be nudged toward use of special masters. This phenomenon may be seen as a desirable movement toward "user pays" methods of defraying the costs of adjudication. One incidental benefit is that a greater share of public judicial capacity is freed for use by others. It may seem instead to give an unfair advantage to wealthy parties who can afford to bypass the queue for judicial disposition. Even worse, it may seem to impose disadvantages on litigants who cannot really afford the cost of masters inflicted by court order. The experience in federal equity practice before the use of masters was severely curtailed by the 1912 rules was offered as a warning. There are real risks in routine delegation to masters who manage to spend inordinate amounts of time, generating inordinate fees and providing inexpert service.

The question of compensation rates was noted. Experience in the committee reflected rates as high as $300 an hour, and as low as $50 to $75 an hour for monitors selected to review decree enforcment problems. In one case fees were set lower than the parties agreed upon in anticipation that the master's fees might be argued as support for increased statutory fees. One judge observed that masters are commonly selected from "retired judges companies" who provide private judicial services, with expenses prepaid by the parties on an equal sharing basis but eventually taxed as costs.

It was observed that the nexus between Evidence Rule 706 and masters may run in two directions. Not only may a master become in effect a witness; an expert witness may be appointed and asked to assume the duties of a master. If these questions are addressed,

it should be in coordination with the Evidence Rules Advisory Committee. Some judges use experts in Evidence Rule 104(a) hearings to help decide whether to consider evidence from another expert; there may be some risk of a continual regression. There may be a more direct interdependence if a special master is appointed for discovery or other pretrial chores with an eye to paving the way toward Rule 104(a) hearings.

There may be significant distinctions between appointment of a master with consent of all the parties and appointment over the objection of one or more parties. When all parties consent, the practice may seem similar to arbitration. Indeed, some private contracts provide for court appointment of arbitrators upon failure of the parties to agree; these relationships do not involve special masters. Nonetheless, there may remain issues that should be addressed. Apart from the questions of qualification, compensation, scope of reference, communication with the trial judge, applicability of the principles of judicial ethics, and the like, one specific illustration was the question of immunity from liability. Might there be a distinction between consensual masters and others with respect to the availability of judicial immunity? Could the result turn on the decision whether to embody the consent in a formal appointment order? And of course consent of the parties is not alone enough; the court must consent and appoint a master if the master is to participate in administering the court's power. And at the outer limits of likely practice, Article III imposes limits on delegation that cannot be overcome by consent. Even consensual masters, moreover, may become caught up in conflicts. The master may appear before the same judge as advocate in another case, or may become involved in another case as counsel opposing one of the parties or attorneys in the master case.

The need for rules amendments may depend in part on the extent of inherent power to appoint masters. Reliance on inherent power, however, does not provide any ready means of regularizing practice. Inherent power, moreover, is an elusive concept. To the extent that inherent power depends on some measure of necessity, it may not carry very far in justifying appointment of masters, particularly if a party objects.

Finally, discussion turned to the form of possible rules. A highly detailed model governing many aspects of pretrial master appointments was considered as a model. The view was expressed that it is better to rely on more cryptic and general rules, with comments on some matters of detail in the Note. It also was suggested that amendments to any rule should make it clear that reliance on masters should remain exceptional in all settings.

The location of rule amendments was left open. Rule 16 offers one obvious choice; as renumbered by the 1993 amendments, Rule

16(c)(8) could be amended to include specific authorization for appointment of pretrial special masters. Another possibility would be to work within the discovery rules; this possibility is particularly attractive if it is concluded that most other pretrial chores should be discharged by a magistrate judge or district judge. Rule 53, although a trial rule, might be amended at least to establish general provisions that govern masters appointed under any rule.

The prospect of addressing Evidence Rule 706 as well, in coordination with the Evidence Rules Committee, was found too complex to be addressed immediately.

The conclusion of the discussion was that models of possible rule amendments should be prepared, perhaps with alternative versions responding to the possible choices between Rule 16, the discovery rules, and Rule 53. Decree-enforcement questions are to be postponed unless the process of drafting amendments for discussion leads inexorably to such problems. The basic approach is to use simple and general terms in the rules, leaving questions of detail for the Notes.

Rule 68

A proposal to revise Rule 68 advanced by Judge Schwarzer, Director of the Federal Judicial Center, has been reviewed at the November, 1992, and May, 1993, meetings of the Committee. In addition, the Court Administration and Case Management Committee has endorsed the provision of the Civil Justice Reform Act of 1993, S. 585, that would enact this proposal as legislation. The Court Administration Committee has urged that the Committee on Rules of Practice and Procedure report to the March, 1994 session of the Judicial Conference on the appropriateness of considering this matter through the Rules Enabling Act process.

Discussion of this proposal began with the observation that Rule 68 has received much attention over time. There also has been much discussion of more direct fee-shifting proposals. Initial support for moving toward a "British" fee-shifting system seems to be waning. One reason for concern is the heavy reliance we place on private litigation to accomplish public ends; this "private attorney general" approach would be impaired by putting plaintiffs at risk of paying defense attorney fees. As economists have studied fee shifting in greater detail, moreover, they have identified realistic settings in which fee shifting can deter settlement.

The difficulties that inhere in the present proposal arise in part from the fact that it strikes out in a new direction. This proposal would be a creative and predictive exercise of the

rulemaking power, not an adoption, validation, and refinement of practices that have emerged in the courts. It may be that economists – who have begun to study offer-of-judgment sanctions seriously – can help by identifying party incentives and motivations that are not intuitively obvious. Common-sense evaluation of economic diagnoses remains important, however. The more refined reaches of game theory, for example, may be more sophisticated than the motives that actually drive behavior.

Following this introduction, the Reporter reviewed the purposes and character of the current proposal. The central feature of the proposal is adoption of a sanction that provides for limited attorney fee shifting. The assumption is that something can be done to increase the number of cases that settle, and to accelerate the time of settlement in cases that now settle. There also seems to be a belief that fairness requires compensation to a party for expenses incurred after making an unsuccessful offer to settle on terms more favorable to its adversary than the judgment. The mechanism designed to serve these purposes would shift reasonable post-offer fees, but subtract the benefit that results from the difference between offer and judgment and limit the maximum award to the amount of the judgment. A simple set of figures was used to illustrate both the "benefit-of-the-judgment" and "cap" features:

Defendant Offer	$50,000	$50,000
Post-offer def fees	15,000	55,000
Judgment	40,000	40,000

The award in the left column is $5,000: The actual reasonable $15,000 fee is reduced by the $10,000 difference between offer and judgment. The award in the right column is $40,000: The actual reasonable $55,000 fee is first reduced by the $10,000 difference between offer and judgment, leaving a $45,000 figure; and then "capped" at $40,000 as the amount of the judgment. The plaintiff nets $35,000 in the first setting, and the defendant is in the same position as if the $50,000 offer had been accepted. The plaintiff gets nothing in the second setting, but is not out-of-pocket, and the defendant is $5,000 worse off than had the offer been accepted.

Economic theory can identify situations in which this system would encourage settlement, and other situations in which it would deter settlement. Theory has not yet reached a point at which the distribution of actual impacts can be predicted.

Strategic use of this system is often predicted, and difficult to control. Since multiple offers are allowed, and indeed encouraged, many lawyers who have reviewed the proposal predict that early offers will be made for the purpose of affecting bargaining positions in later negotiations, not for the purpose of

prompting settlement.

The predicted impact of the system may depend on the character of the underlying litigation. "Big" cases for high stakes may be relatively immune from this form of settlement incentive; other incentives will overwhelm offer-of-judgment sanctions. In small-stakes cases, plaintiffs who have relatively few resources and who are risk-averse may feel compelled to settle on terms that do not reflect the fair settlement value of their claims.

It also is possible to question the value of early settlement. If the proposal encourages parties to settle without undertaking the discovery and other information-gathering efforts that otherwise would be made, early settlements may reflect ignorance rather than fair appraisal of the dispute.

The intrinsic value of settlement also can be questioned. Some litigants may seek judgment, not the present money equivalent of probability-adjusted possible outcomes. The theory that we should increase incentives to settle may not take sufficient account of this question.

With this introduction, discussion began with speculation about the characteristics of cases that settle. It was noted that although more than 90% of all filed cases disappear without trial, many of them disappear for reasons other than settlement. Settlement is most likely in cases that are approached by the parties from a cost/benefit analysis. Most of these cases likely settle now. Those that survive may involve stakes beyond money judgments. With large and uncertain damages, and uncertainty as to liability, settlement may be difficult to predict. The risk of losing everything may make it attractive to settle on terms that do not correspond to a dispassionately calculated predicted value. And cases involving multiple parties may be more difficult to settle, at least as to all defendants. The rules of setoff, contribution, and like incidents of joint, joint and several, or several liability are important. The multi-defendant antitrust action is an illustration of a pattern in which it is common to settle with all but one or two deep-pocket defendants as a means of financing a big-scale trial. Settlements among most parties do not avoid the need for trial.

But there may be cases in which settlement remains possible. A very small sample considered by the Federal Judicial Center found trials in cases in which the defendant expected to pay more than the plaintiff expected to win, so that settlement should have been possible. Cases involving a single defendant and relatively clear damages at a reasonably low level may be particularly suitable for settlement. Personal injury cases in which the dispute centers on damages also may be cases likely to be influenced by Rule 68

revisions.

It was urged that we should pursue this topic to see whether it is possible to encourage early settlement. Some regular litigants are frustrated by the difficulty of achieving early settlement. Incentives can help. California practice relies on shifting payment of expert witness fees as incentives in the offer-of-judgment rule. This incentive has helped induce settlements. Offers are routinely made, and the consequences are regularly considered in evaluating the offers. Offers are made even in cases involving relatively poor parties who may not be able to satisfy a judgment for sanctions, since the judgment can be traded off in the process of settling an appeal.

The offsetting concerns about the fairness of settlement also were explored. Fear was expressed that exposure to potentially substantial Rule 68 consequences could distort settlement calculations. An individual plaintiff with a legitimate claim, anxious for full discovery to evaluate and assert the claim, may feel undue pressure to settle on terms that do not seem intrinsically attractive. This fear was expressed on the basis of experience both in representing plaintiffs and in representing defendants. The relatively great economic power of many defendants in relation to many plaintiffs may lead to unfair results. This observation led to the suggestion that perhaps sanctions should be imposed for making an offer that is less favorable than the judgment.

The most direct view about the value of settlement was that it is a mistake to view trial as a pathological event, resulting from settlement miscalculations by the parties. The system is designed to provide trials. Systems designed to deter parties from going to trial are unwise; what is to be feared is not an ineffective rule, but a rule that is too effective in coercing settlements.

Related doubts were expressed in the observation that protracted experience with attempts to encourage settlement suggests that rule-driven approaches are not likely to work. The current rule has little effect outside of statutory fee-shifting cases, because costs are not likely to be significant in relation to stakes. Economists grossly exaggerate the rationality of the settlement process. In many personal injury cases the damages are not capable of calculation. It is not fair to attach consequences to failure to guess right in response to a Rule 68 offer when there is no sound basis for predicting probable judgments.

These views led many to believe that the proposed amendments may involve matters of substance. To the extent that they seem to move part-way toward adoption of the "British Rule" that the loser pays the winner's attorney fees, there may be more direct and

better ways of making the move.

It also was suggested that offer-of-judgment provisions work effectively only in cases in which rejection can defeat the right to recover statutory attorney fees. In such cases it can create a conflict of interest between attorney and client if statutory fees are an important guarantee of fee payment. On the other hand, it also can help reduce conflicts of interest in cases in which settlement is thwarted by the attorney's desire to pursue greater fees through litigation.

Fee-shifting sanctions may have a perverse consequence if a party who rejects a formal offer seeks to reduce the danger of fee liability by increasing expenses in an effort to win a more favorable judgment.

John Shapard of the Federal Judicial Center described the questionnaire they plan to use in an effort to gain more information about the settlement process. He began by noting that it is easier to understand the proposed Rule 68 amendments as creating a choice for the offeror. The offeror can choose to stand on the judgment, without any attorney fee award, or can choose the offer with an adjustment for attorney fees. Thus if the defendant offers $50,000 and judgment is $40,000, the defendant will choose to pay the judgment if post-offer fees are $10,000 or less, and will choose to pay the $50,000 offer less post-offer fees if the fees exceed $10,000. This rationale would support rule language that avoids the need to determine reasonable post-offer fees whenever the offeror elects to accept the judgment. This rationale, on the other hand, may lend support to arguments that the Rule affects substantive rights.

Mr. Shapard also noted that plausible offers under a fee-shifting statute may restrain incentives to run up expenses by imposing responsibilities on an adversary. A party who may have to compensate such expenses may hesitate to inflict them.

The proposed questionnaire, which has been reviewed with a subcommittee of this Committee, is intended in part to find out how many cases that do not now settle might have settled. It also hopes to find out whether cases that do settle might be settled earlier. It has been opened out from earlier versions so as to solicit reactions to other possible revisions of Rule 68. Although the broader inquiry may help gather lawyer reactions to an array of possible sanctions, drafting the questionnaire in this form is more difficult. The survey population will seek to reach all lawyers who participated in 600 cases selected at random. There will be 100 tort cases that went to trial and 100 that settled; 100 contract cases that tried and 100 that settled; and 100 "other" cases that tried and 100 that settled. A separate questionnaire

will be designed for statutory-fee shifting cases.

It was asked whether the survey is something that should inform consideration of Rule 68 amendments, or whether the first questions should be addressed as a matter of philosophy rather than probable impact. It was pointed out that one of the motives for undertaking the survey is that legislation has been introduced to enact the capped-benefit-of-the-judgment proposal; the survey has meaning outside of possible use by this Committee.

A motion was made and seconded that this Committee not ask the Federal Judicial Center to undertake the proposed survey. Discussion of this motion included the observation that the Court Administration and Case Management Committee has already approved the principle embodied in the proposed Rule 68 amendments, and has asked for a report on the wisdom of addressing the matter through the Rules Enabling Act process. The proposed statute does not fit well with the Rules; it would overlap Rule 68, and does not attempt to adjust the overlap. We should know more about the possible impact of Rule 68 before seeking to cut off the Rulemaking process.

Further discussion resulted in a suggestion that most members of the Committee would, if put to the question, agree to several points. First, the Committee is not now prepared to go ahead with the proposed revision of Rule 68. Second, that to whatever extent the Judicial Conference has approved the basic elements of this proposal on recommendation of the Court Administration and Case Management Committee, it should reconsider. In addition, it should note the need to adapt any legislation that may be adopted to the incidents of Rule 68 as it stands now, including its impact on attorney fee-shifting statutes. Third, the question of allocating responsibility between legislation and the Rules Enabling Act process is difficult. There may be substantive elements to attorney fee shifting in this setting that counsel action by Congress. At the same time, the proposal bears directly on a procedure that has been adopted through the Enabling Act process, and there are great benefits to consideration through this deliberate and multi-stage process. This summary was approved on motion, as described below.

On vote, the motion that the Committee not recommend to the Federal Judicial Center that it undertake the proposed survey failed, seven votes against and two votes for.

A motion was then made to recommend that the Federal Judicial Center undertake two surveys, including one focusing on the use of Rule 68 in statutory fee-shifting cases. The motion included approval of the three points summarized in the next-to-preceding paragraph. The motion carried, nine votes for and no votes against.

Two final suggestions were made. One was that the actions of the Committee leave it open to consider abrogating Rule 68. The second was that any Rule 68 revision should address the possible issue preclusion effects of a Rule 68 judgment.

Liaison to Evidence Rules Committee

Judge Brazil reported as liaison member from this Committee on the New Orleans meeting of the Evidence Rules Committee.

The Evidence Rules Committee plans to review all the Evidence Rules. Proposed revisions to Rule 412 are going forward now.

The Evidence Rules Committee began with proposals that it consider the topic of "trial management." It considered the possibility of providing guidance and perhaps encouragement for management of litigation at the trial stage. The possibilities of proceeding by way of formal rules, guidelines, or educational efforts were considered and found difficult to evaluate. It was concluded that the Civil Rules Committee is the more appropriate body to initiate study of these matters, but that it will be desirable for the Evidence Rules Committee to participate in the process. Joint projects, or initiatives by the Civil Rules Committee, will be welcome.

The Evidence Rules Committee also considered the relationship between Civil Rule 53 masters and Evidence Rule 706 court-appointed expert witnesses. The Evidence Rules Committee will study the 700 series rules, but believes that the initiative with respect to masters and experts should come from the Civil Rules Committee with respect to all questions other than experts appointed to testify at trial.

Many issues will be studied involving Evidence Rule 408 on the admissibility of statements and offers in settlement. Among the issues will be identification of communications that count as made for the purpose of settlement; admissibility in one case of communications made in another case; and what exceptions might be made based on finding different purposes for the communications. Sealed settlements also will be studied, recognizing that these questions may involve the Civil Rules Committee.

Regulation of juror questions at trial will be studied. Again, this topic may overlap with the Civil Rules Committee.

Finally, there was substantial debate over Evidence Rule 404(b) dealing with other crimes, wrongs, or acts. The questions included whether there should be an Evidence Rule 104(a) hearing requirement before bad acts can be used for any purpose; whether findings should be required as to the relative probative value and

effects of the evidence; and whether a criminal defendant can concede an issue to avoid admission of such evidence.

Finally, it was noted by a member of this Committee that pending legislation would adopt a limit on the number of expert witnesses that can be used at trial. It was moved and seconded that this Committee oppose adopting such limits by legislation rather than the Rules Enabling Act process. The motion passed unanimously.

Sealing Records

Judge J. Rich Leonard wrote on behalf of the joint committee on Court Records established by the Administrative Office and the Federal Judicial Center. He noted that the records schedule adopted in 1982 by the Judicial Conference requires that designated court case files be preserved, but that there is an impasse between orders that seal records without any time limit and the refusal of the National Archives to accept records that cannot be made available by a specific date. He recommended that the various rules committees consider rules amendments setting 25 years as the presumed expiration date of sealing orders. Civil Rule 43 could be amended, for example, by adopting a new subdivision: "**(g) Expiration of sealing orders.** An order sealing court records expires 25 years after final judgment unless the order or a later order sets a different expiration date."

The Committee decided that the time has not come to worry about the National Archives problem. Legislation may be a suitable mans of addressing the record storage problem. It was noted that a provision setting a presumed expiration period would simply prompt careful lawyers to ask for perpetual sealing, or sealing for periods so long as to be perpetual for any practical purpose. And it was suggested that most judges probably assume now that sealing orders are perpetual.

The questions raised by this proposal, however, involve much deeper issues of access to court records. Members of the committee noted that different courts around the country follow quite different policies in directing that records be sealed. A wide variety of records may be sealed, including pleadings, summary judgment materials, transcripts, and settlement papers. Sealing orders at times are used to protect privilege materials. The topic has been enormously controversial in state courts. Special problems arise in litigation consolidating actions governed by different state laws; one member of the committee reported that in consolidated litigation involving the laws of 48 different states he had adopted the expedient of requiring disclosure according to the law of the least protective state – once an item is disclosed under that law, it is available as a practical matter in all other

cases.

The Committee has recently considered legislation dealing with public access to settlement agreements in litigation with the United States or United States agencies, and concluded that legislation is the proper means of addressing that problem.

Sealing orders in more general terms, however, seem a suitable topic for Civil Rules action. The topic is important. The Committee concluded that these questions should remain on the agenda for further study, instructing the Reporter to provide information for discussion at the next meeting.

Proposed Amendments To Be Published

It was reported that earlier Rules amendment proposals will be published for public comment. Rules 26(c)(3), 43, 50, 52, 59, 83, and 84 are in the package. The versions of Rules 83 and 84 initially proposed by this Committee have been revised by the Reporter of the Standing Committee, working with the Reporters for the various advisory committees, to achieve uniformity. Public hearings have been set for Dallas, Texas, at 2:00 p.m. on April 6, 1994.

Style amendments

The Committee resolved itself into Committee of the Whole to work on style revisions of the Civil Rules developed by the Style Subcommittee of the Standing Committee, working with Bryan A. Garner. The history of the process was noted. The initial draft of the Style Subcommittee did not include the 1993 Civil Rules amendments that were then in process of adoption. Judge Pointer, as chair of this Committee, revised all of the 1993 amendments to conform to the style of the draft. This Committee was divided into three subcommittees that each studied one portion of the draft. Suggestions from these subcommittees were incorporated in the draft. The product of this process went back to the Style Subcommittee; working with Bryan Garner, the Style Subcommittee developed the draft now before this Committee.

The nature and purpose of the style project were discussed throughout the deliberations of the Committee of the Whole. It was concluded that it is worthwhile to pursue restyling through to the point of establishing a well-polished document that restyles all of the Civil Rules. The purpose of the project is to make the rules more accessible to the lawyers, judges, and even pro se litigants who must work with them. The Rules have many ambiguities and failures of clarity that can be corrected. The Civil Rules have been chosen as the demonstration project. The Style Subcommittee has grown increasingly enthusiastic as the project has developed,

finding the drafts much easier to use and understand than the current rules. The purpose throughout has been simply to improve clarity, recognizing that resolution of identified ambiguities may effect changes in meaning but seeking as far as possible to resolve each ambiguity in favor of the most likely intended meaning. Once a uniform style has been attained, all future revisions will follow this style.

The use to be made of the final document, however, remains uncertain. The most ambitious program would be to publish the document for public comment with an eye to adoption of the complete revision all at once. This possibility has been contemplated by the Standing Committee from the beginning. This Committee would report the final restyled draft to the Standing Committee with a recommendation for adoption as with any other Civil Rules changes. Upon approval by the Standing Committee, with such changes as it might find desirable, the draft would be published for comment. If this course were followed, the period for public comment should be longer than the ordinary period to ensure as full comment as possible on the ways in which changes made for the purpose of clarification might effect unintended changes in meaning. Even then, there are risks of confusion, and a certainty that changes in language will generate litigation over arguments that meanings have been changed. It also may be unwise to attempt to seek public comment on any rules amendments designed to change rules meaning during the period for comment on the style proposal. Public comment on the style proposal could easily absorb all the available time and energy of this Committee.

It was noted that inadvertent substantive changes may be made. The drafts represent an intent to identify each recognized ambiguity and to state the reasons for its resolution. It was suggested, however, that if any such changes have any substantive effect, the project will generate great resistance. Each time this Committee has studied portions of a draft, significant numbers of possible substantive changes have been found. This experience has demonstrated the difficulty of avoiding unintentional changes in meaning, and has sharpened the sense that a cautious approach may be desirable in determining the use to be made of the final product.

The effort to revise all the rules at one time responds to the belief that it is better to use style conventions that are constant across the full set of rules.

Consideration also must be given to other foreseeable work in deciding the use to be made of the final style draft. In relatively short order, the results of local civil justice delay and expense reduction plans will be available for study. This Committee must be deeply engaged in the process of sorting through

the successful innovations and separating the unsuccessful ones, with an eye to incorporation of the successful practices in the Civil Rules. Much time and energy will be required for this work.

The Committee concluded that it is important to produce as clean a style draft as possible. A motion that the Committee not attempt to finish work on the style draft at this meeting passed unanimously. It was agreed that a separate meeting should be held for the sole purpose of working on the style draft. The potential impact of the style draft is enormous; great care must be taken to ensure that no changes of meaning are effected. The work cannot be rushed. Judge Pointer agreed to incorporate into a single draft the suggestions that have been made by members of the Style Subcommittee and marked on the current working draft. This new draft will provide the basis for discussion at the style meeting.

Further discussion of the steps to be taken after finishing a style draft concluded without resolution. It may prove desirable to circulate the draft for informal comment, but the form and scope of the circulation cannot be determined without deciding on the purpose of the circulation. If it is decided to pursue submission to the Standing Committee with a recommendation for publication through the regular Rules Enabling Act process, it may be better to follow that path without extensive prior circulation. If it is decided to hold the draft as a model to be incorporated in individual rules as amendments are made for other purposes, wider informal circulation may be desirable.

Specific drafting rules were noted. One problem that has not been fully resolved is the "hanging indent," in which an unnumbered flush block of text follows numbered and inset portions. It would be better not to come back to the margin after inset items. This problem arises in part from the attempt to preserve well-known Rule numbers. Rule 12(b)(6), for example, is to remain numbered as Rule 12(b)(6). This problem arises perhaps 20 times in the current draft. Recognizing that hanging indents can create ambiguity, efforts should be made to eliminate them.

A number of specific style issues were discussed.

In Rule 1, the draft changes the provision that the Rules "shall be construed" to "should be" construed. It was suggested that the revision should adopt "must be" construed to create rights. The response was that "should" is appropriate because the language is hortatory. A motion to retain "should" passed by seven votes for, one vote against.

In various rules, the draft refers to the place where a court "sits." It was concluded that "is located" is the appropriate term.

It has been agreed that "party" is a neutral term; a party can be referred to by "that," "who," and other flexible words.

In draft Rule 4(d)(4), a change from requests addressed to a defendant "outside any judicial district of the United States" to "not within any judicial district of the United States" was accepted. Parallel changes are appropriate in other places.

Draft Rule 5(c)(1)(C) carries forward an ambiguity of the current rule. The provision that filing and service on the plaintiff constitutes due notice to the parties seems, as observed in the footnote, awkward if answers to cross-claims and replies to defendants' pleadings are served only on the plaintiff. The style draft does not attempt to resolve this question.

Discussion of Rules 12(g) and (h) led to the conclusion that they mean two things: If a Rule 12(b) motion is made, it must include or waive all defenses then available under paragraphs (2), (3), (4), or (5). If no Rule 12(b) motion is made, these defenses must be included in the answer or waived. The style draft should reflect this meaning.

Rule 13(i), on first examination, seems to have no independent meaning. If it serves as no more than a cross-reference to Rules 42(b) and 54(b), perhaps it should be deleted. The Reporter is to study the question and report.

Discussion of Rule 14 renewed an earlier discussion of the need to preserve antique provisions that have served purposes now vanished. Rule 7(c), for example, abolishes demurrers, pleas, and exceptions for insufficient pleading. This provision was useful when the rules were first adopted. It is no longer necessary to emphasize the absence of Rules providing for demurrers, pleas, and exceptions for insufficient pleading. For the moment, the approach to these provisions will be to note them with the question whether they continue to serve any purpose.

Future Meetings

Future meetings of the Committee were set. A meeting will be held February 21, 22, and 23, 1994, in Sea Island, Georgia, to discuss the style revision draft. The next meeting for regular business will be held April 28, 29, and 30, 1994, in Washington, D.C. The following regular meeting was tentatively set for October 20, 21, and 22, 1994, in New Orleans, Louisiana. As noted above, a hearing on published Rules amendments is scheduled for April 6, 1994, in Dallas, Texas.

Respectfully submitted,

Edward H. Cooper, Reporter