ADVISORY COMMITTEE
ON
CIVIL RULES

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WASHINGTON, D.C.
MAY 3-5, 1993

Tentative Agenda
Meeting of Advisory Committee on Civil Rules
Federal Judiciary Building
Washington, DC
May 3-5, 1993

I. Welcome of new members; Orientation.

II. Report on status of pending amendments.
If Supreme Court returns any amendments for further consideration, we'll probably take these up at this point.)

III. Revisiting proposals previously considered. Ed Cooper will be sending out separately to each member his latest work on these. He has received various comments and suggestions from the groups and individuals to whom he sent drafts on an informal basis.
Rule 23
Rule 26(c) (sunshine/confidentiality)
Rule 43
Rule 68 (also possible FJC study)
Rule 83
Rule 84

IV. Style Revision. Enjoy yourself.

V. New Matters. We have received a variety of suggestions for changes. We'll need to discuss them briefly to decide which we might want to go forward with. I'm asking Ed and John Rabiej to go through their correspondence to make a list. Among the items I'm aware of: Rules 7 and 11 (signature requirement for electronic filing); Rule 45 (expansion of trial subpoena jurisdiction); Rules 52 and 59 (requirement for 10-day filing--not merely serving); Rule 53 (expansion of role of Master to discovery/pretrial areas); Rule 64 (ABA proposal--legislative action).

VI. Plans for future meetings, submissions to Standing Committee, etc.

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Members:

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Honorable Edwin J. Peterson Chief Justice, Supreme Court of Oregon Supreme Court Building 1163 State Street Salem, Oregon 97310	Area Code 503 378-6026 FAX-503-373-7536
Professor Charles Alan Wright The University of Texas at Austin School of Law 727 East 26th Street Austin, Texas 78705	Area Code 512 471-5151 FAX-512-477-8149
Professor Thomas E. Baker Texas Tech University School of Law 18th & Hartford, Box 40004 Lubbock, Texas 79409-0004	Area Code 806 742-3992 FAX-806-742-1629
William R. Wilson, Esquire Wilson, Engstrom, Corum & Dudley 809 West Third Street Little Rock, Arkansas 72201	Area Code 501 375-6453 FAX-501-375-5914
Alan W. Perry, Esquire Forman, Perry, Watkins & Krutz 188 East Capitol Street, Suite 1200 P.O. Box 22608 Jackson, Mississippi 39225-2608	Area Code 601 960-8600 FAX-601-960-8613
Alan C. Sundberg, Esquire Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. 5th Floor, First Florida Bank Bldg. P.O. Drawer 190 Tallahassee, Florida 32302	Area Code 904 224-1585 FAX-904-222-0398
Attorney General (ex officio) U.S. Dept. of Justice 10th & Constitution Ave., N.W. Washington, D.C. 20530	

Reporter:

Daniel R. Coquillette, Dean and Professor of Law Boston College Law School 885 Centre Street Newton, Massachusetts 02159	Area Code 617 552-4340 FAX-617-552-2615

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Liaison Member:

Honorable Wilfred Feinberg
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Area Code 212
791-0901

FAX-212-791-8738

Consultants:

Joseph F. Spaniol, Jr.
Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Mary P. Squiers, Asst. Prof.
Boston College Law School
885 Centre Street
Newton, Massachusetts 02159

Area Code 617
552-8851

FAX-617-552-2615

Bryan A. Garner
LawProse, Inc.
Sterling Plaza, 5949 Sherry Lane
Suite 1280, L.B. 115
Dallas, Texas 75225

Area Code 214
691-8588

FAX-214-691-9294
358-5380

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

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United States Circuit Judge
208 Federal Building
204 South Main Street
South Bend, Indiana 46601

Area Code 219
236-8744
FAX-219-236-8784

Members:

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United States Circuit Judge
James O. Eastland Courthouse Bldg.
245 E. Capitol St., Room 202
Jackson, Mississippi 39201

Area Code 601
965-4165
FAX-601-965-5436

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061

Area Code 913
782-9293
FAX-913-782-9855

Honorable Stephen F. Williams
United States Circuit Judge
United States Courthouse
3rd & Constitution Avenue, NW
Washington, DC 20001

Area Code 202
273-0638
FAX-202-273-0976

Honorable Danny J. Boggs
United States Circuit Judge
220 Gene Snyder U.S. Courthouse
6th & Broadway
Louisville, Kentucky 40202

Area Code 502
582-6492
FAX-502-582-6500

Honorable Cynthia H. Hall
United States Circuit Judge
125 South Grand Avenue
P.O. Box 91510
Pasadena, California 91109-1510

Area Code 818
405-7300
FAX-818-405-7126

Honorable Arthur A. McGiverin
Chief Justice, Supreme Court of Iowa
State Capitol
Des Moines, Iowa 50319

Area Code 515
281-5174
FAX-515-242-6164

Solicitor General (ex officio)
(Robert Kopp)
United States Department
of Justice
Washington, DC 20530

Area Code 202
514-3311
FAX-202-514-8151

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Donald F. Froeb, Esquire
Mitten, Goodwin & Raup
3636 North Central Avenue
Suite 1200
Phoenix, Arizona 85012

Area Code 602
650-2012

FAX-602-264-7033

Luther T. Munford, Esquire
Phelps Dunbar
2829 Lakeland Drive
Jackson, Mississippi 39208

Area Code 601
939-3895

FAX-601-932-6411

Reporter:

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Area Code 219
631-5866

FAX-219-631-6371

Liaison Member:

Honorable Dolores K. Sloviter
Chief Judge, U.S. Court of Appeals
18614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-1588

FAX-215-597-2371

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

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Honorable Sam C. Pointer, Jr.
Chief Judge, United States
District Court
882 United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

Area Code 205
731-1709

FAX-205-731-2243

Members:

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-0859

FAX-215-597-6913

Honorable Paul V. Niemeyer
United States Circuit Judge
101 West Lombard Street, Suite 910
Baltimore, Maryland 21201

Area Code 410
962-4210

FAX-410-962-2277

Honorable David S. Doty
United States District Judge
609 United States Courthouse
110 South 4th Street
Minneapolis, Minnesota 55401

Area Code 612
348-1929

FAX-612-348-1820

Honorable Stewart A. Newblatt
United States District Judge
140 Federal Building
600 Church Street
Flint, Michigan 48502

Area Code 313
766-5040

FAX-313-766-5027

Honorable Richard W. Holmes
Chief Justice, Supreme Court of Kansas
Kansas Judicial Center
301 West Tenth Street
Topeka, Kansas 66612

Area Code 913
296-4898

FAX-913-296-1863

Honorable Wayne D. Brazil
United States Magistrate Judge
U.S. District Court
450 Golden Gate Avenue, P.O. Box 36008
San Francisco, California 94102

Area Code 415
556-2442

FAX-415-556-6147

Attorney General (ex officio)
(Dennis G. Linder, Esquire
U.S. Dept. of Justice
Washington, DC 20530

Area Code 202
514-3314
FAX-202-616-8202

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Dean Mark A. Nordenberg University of Pittsburgh School of Law 3900 Forbes Avenue Pittsburgh, Pennsylvania 15260	Area Code 412 648-1401 FAX-412-648-2647
Carol J. Hansen Fines, Esquire Giffin, Winning, Cohen & Bodewes, P.C. One West Old State Capitol Plaza Suite 600 P.O. Box 2117 Springfield, Illinois 62705	Area Code 217 525-1571 FAX-217-525-1710
Mark O. Kasanin, Esquire McCutchen, Doyle, Brown & Enersen Three Embarcadero Center San Francisco, California 94111	Area Code 415 393-2144 FAX-415-393-2286
Francis H. Fox, Esquire Bingham, Dana & Gould 150 Federal Street Boston, Massachusetts 02110	Area Code 617 951-8000 FAX-617-951-8736
Phillip A. Wittmann, Esquire Stone, Pigman, Walther, Wittmann & Hutchinson 546 Carondelet Street New Orleans, Louisiana 70130-3588	Area Code 504 581-3200 FAX-504-581-3361

Reporter:

Edward H. Cooper Associate Dean University of Michigan Law School 312 Hutchins Hall Ann Arbor, Michigan 48109-1215	Area Code 313-764-4347 FAX-313-764-8309

Liaison Member:

Honorable William O. Bertelsman United States District Judge P.O. Box 1012 Covington, Kentucky 41012	Area Code 606 655-3800 FAX-606-431-0296

Secretary:

Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	Area Code 202 273-1820 FAX-202-273-1826

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Honorable George M. Marovich United States District Judge United States District Court 219 South Dearborn Street Chicago, Illinois 60604	Area Code 312 435-5590 FAX-312-435-7578
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Honorable B. Waugh Crigler United States Magistrate Judge United States District Court 255 West Main Street, Room 328 Charlottesville, Virginia 22901	Area Code 804 296-7779 FAX-804-296-5585
Attorney General (ex officio) Roger Pauley, Esquire Director, Office of Legislation U.S. Department of Justice Criminal Division, Room 2244 Washington, DC 20530	 Area Code 202 514-3202 FAX-202-514-4042

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Professor Stephen A. Saltzburg
George Washington University
National Law Center
720 20th Street, NW, Room 308
Washington, DC 20052

Area Code 202
994-7089
FAX-202-994-9446

John Doar, Esquire
Doar, Devorkin, & Rieck
233 Broadway, 10th Floor
The Woolworth Building
New York, New York 10279

Area Code 212
619-3730
FAX-212-962-5037

Tom Karas, Esquire
Tom Karas, Ltd.
101 North First Avenue, Suite 2470
Phoenix, Arizona 85003

Area Code 602
271-0115
FAX-602-271-0914

Rikki J. Klieman, Esquire
Klieman, Lyons, Schindler,
Gross & Pabian
21 Custom House Street
Boston, Massachusetts 02110

Area Code 617
737-4777
FAX-617-737-4778

Edward F. Marek, Esquire
Federal Public Defender
1660 West 2nd Street, Suite 750
Cleveland, Ohio 44113

Area Code 216
522-4856
FAX-216-522-4321

Reporter:

Professor David A. Schlueter
St. Mary's University of San Antonio
School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Area Code 512
436-3308
FAX-512-436-3717

Liaison Member:

William R. Wilson, Esquire
Wilson, Engstrom, Corum & Dudley
809 West Third Street
Little Rock, Arkansas 72201

Area Code 501
375-6453
FAX-501-375-5914

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820
FAX-202-273-1826

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chairman:

Honorable Edward Leavy
United States Circuit Judge
216 Pioneer Courthouse
555 S.W. Yamhill Street
Portland, Oregon 97204-1396

Area Code 503
326-5665

FAX-503-326-5718

Members:

Honorable Alice M. Batchelder
United States Circuit Judge
143 West Liberty Street
Medina, Ohio 44256

Area Code 216
722-8852

FAX-216-723-4410

Honorable Harold L. Murphy
United States District Judge
P.O. Drawer 53
Rome, Georgia 30162-0053

Area Code 706
291-5626

FAX-404-291-5688

Honorable Joseph L. McGlynn, Jr.
United States Senior District Judge
16614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-3622

FAX-215-597-2134

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Area Code 504
589-2795

FAX-504-589-4479

Honorable James J. Barta
United States Bankruptcy Judge
One Metropolitan Square
211 North Broadway, Seventh Floor
St. Louis, Missouri 63102-2734

Area Code 314
425-4222,Ext.321

FAX-314-425-4753

Honorable James W. Meyers
Chief Judge, United States
Bankruptcy Court
940 Front Street
San Diego, California 92189

Area Code 619
557-5622

FAX-619-557-5536

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
451 Hungerford Drive
Rockville, Maryland 20850

Area Code 301
443-7023

FAX-301-227-6452

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Professor Charles J. Tabb
University of Illinois
College of Law
504 East Pennsylvania Avenue
Champaign, Illinois 61820

Area Code 217
333-2877

FAX-217-244-1478

Ralph R. Mabey, Esquire
LeBouef, Lamb, Leiby and MacRae
1000 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Area Code 801
355-6900

FAX-809-359-8256

Herbert P. Minkel, Jr., Esquire
Fried, Frank, Harris, Shriver
and Jacobson
One New York Plaza, Suite 2500
New York, New York 10004-1980

Area Code 212
820-8035

FAX-212-747-1525

Henry J. Sommer
Community Legal Services, Inc.
3207 Kensington Avenue, 5th Floor
Philadelphia, Pennsylvania 19134

Area Code 215
427-4898

FAX-215-427-4895

Kenneth N. Klee, Esquire
Stutman, Treister & Glatt
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010

Area Code 213
251-5100

FAX-213-251-5288

Gerald K. Smith, Esquire
Lewis and Roca
40 North Central Avenue
Phoenix, Arizona 85004-4429

Area Code 602
262-5348

FAX-602-262-5747

Reporter:

Professor Alan N. Resnick
Hofstra University School of Law
Hempstead, New York 11550

Area Code 516
463-5930
FAX-516-481-8509

Liaison Member:

Honorable Thomas S. Ellis, III
United States District Judge
P.O. Box 21449
200 South Washington Street
Alexandria, Virginia 22320

Area Code 703
557-7817

FAX-703-557-2830

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Bankruptcy Clerk:

Richard G. Heltzel Clerk, United States Bankruptcy Court 8038 United States Courthouse 650 Capitol Mall Sacramento, California 95814	Area Code 916 551-2678 FAX-916-551-2569

Representative from Executive Office for United States Trustees:

John E. Logan, Esquire Director Executive Office for United States Trustees 901 E Street, NW, Room 700 Washington, DC 20530	Area Code 202 307-1391 FAX-202-307-0672

Secretary:

Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	Area Code 202 273-1820 FAX-202-273-1826

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Honorable Ralph K. Winter, Jr. United States Circuit Judge Audubon Court Building 55 Whitney Avenue New Haven, Connecticut 06511	Area Code 203 773-2353 FAX-203-773-2415

Members:

Honorable Jerry E. Smith United States Circuit Judge 12621 United States Courthouse 515 Rusk Avenue Houston, Texas 77002-2698	Area Code 713 250-5101 FAX-713-250-5719
Honorable Fern M. Smith United States District Judge United States District Court P.O. Box 36060 450 Golden Gate Avenue San Francisco, California 94102	Area Code 415 556-4971 FAX-415-556-9291
Honorable Milton I. Shadur United States District Judge United States District Court 219 South Dearborn Street Room 2388 Chicago, Illinois 60604	Area Code 312 435-5766 FAX-312-435-7578
Honorable James T. Turner United States Court of Federal Claims 717 Madison Place, NW Washington, DC 20005	Area Code 202 219-9574 FAX-202-219-9997
Honorable Harold G. Clarke Chief Justice Supreme Court of Georgia Room 572 244 Washington Street, SW Atlanta, Georgia 30334	Area Code 404 656-3472 FAX 404-656-2253
Professor Kenneth S. Broun University of North Carolina School of Law CB #3380, Van Hecke-Wettach Hall Chapel Hill, North Carolina 27599	Area Code 919 962-4112 (a.m.) and 968-2714 (p.m.) FAX-919-962-1277

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Gregory P. Joseph, Esquire
Fried, Frank, Harris,
Shriver & Jacobson
One New York Plaza
New York, New York 10004-1980

Area Code 212
820-8052

FAX-212-820-8584

James K. Robinson, Esquire
Honigman Miller Schwartz & Cohn
2290 First National Building
Detroit, Michigan 48226

Area Code 313
256-7534

FAX-313-962-0176

John M. Kobayashi, Esquire
Kobayashi & Associates, P.C.
1775 Sherman Street, Suite 2100
Denver, Colorado 80203

Area Code 303
861-2100

FAX-861-1944

Liaison Members:

Honorable Wayne D. Brazil
United States Magistrate Judge
United States District Court
450 Golden Gate Avenue
P.O. Box 36008
San Francisco, California 94102

Area Code 415
556-2442

FAX-415-556-3973

Professor Stephen A. Saltzburg
George Washington University
National Law Center
720 20th Street, NW, Room 308
Washington, DC 20052

Area Code 202
994-7089

FAX-202-994-9446

Reporter:

Margaret A. Berger
Associate Dean and
Professor of Law
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201

Area Code 718
780-7941

FAX-718-797-1403

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

LIAISON MEMBERS

Appellate:

Chief Judge Dolores K. Sloviter

Bankruptcy:

Judge Thomas S. Ellis, III

Civil:

Judge William O. Bertelsman

Criminal:

William R. Wilson, Esquire

Evidence:

Magistrate Judge Wayne D. Brazil

Professor Stephen A. Saltzburg

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Judith W. Krivit
Staff Assistant, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1820

FAX-202-273-1826

Anne Rustin
Secretary, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

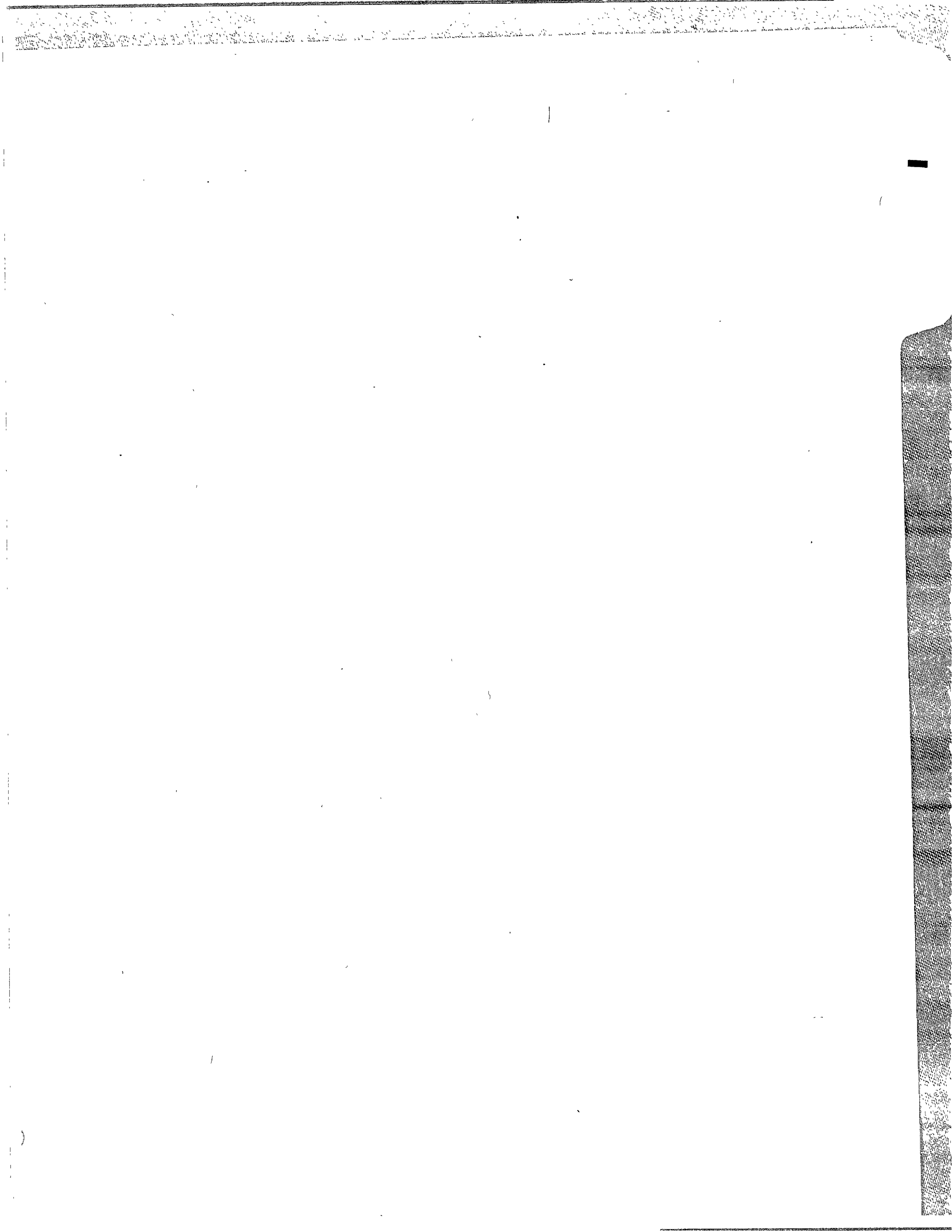
Area Code 202
273-1820

FAX-202-273-1826

Patricia S. Channon
Deputy Assistant Chief, Bankruptcy
Division
Administrative Office of the
United States Courts
Washington, DC 20544

Area Code 202
273-1900

FAX-202-273-1917

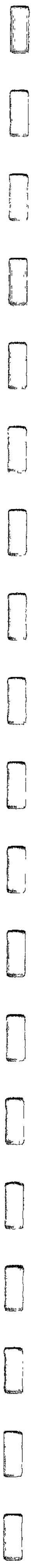


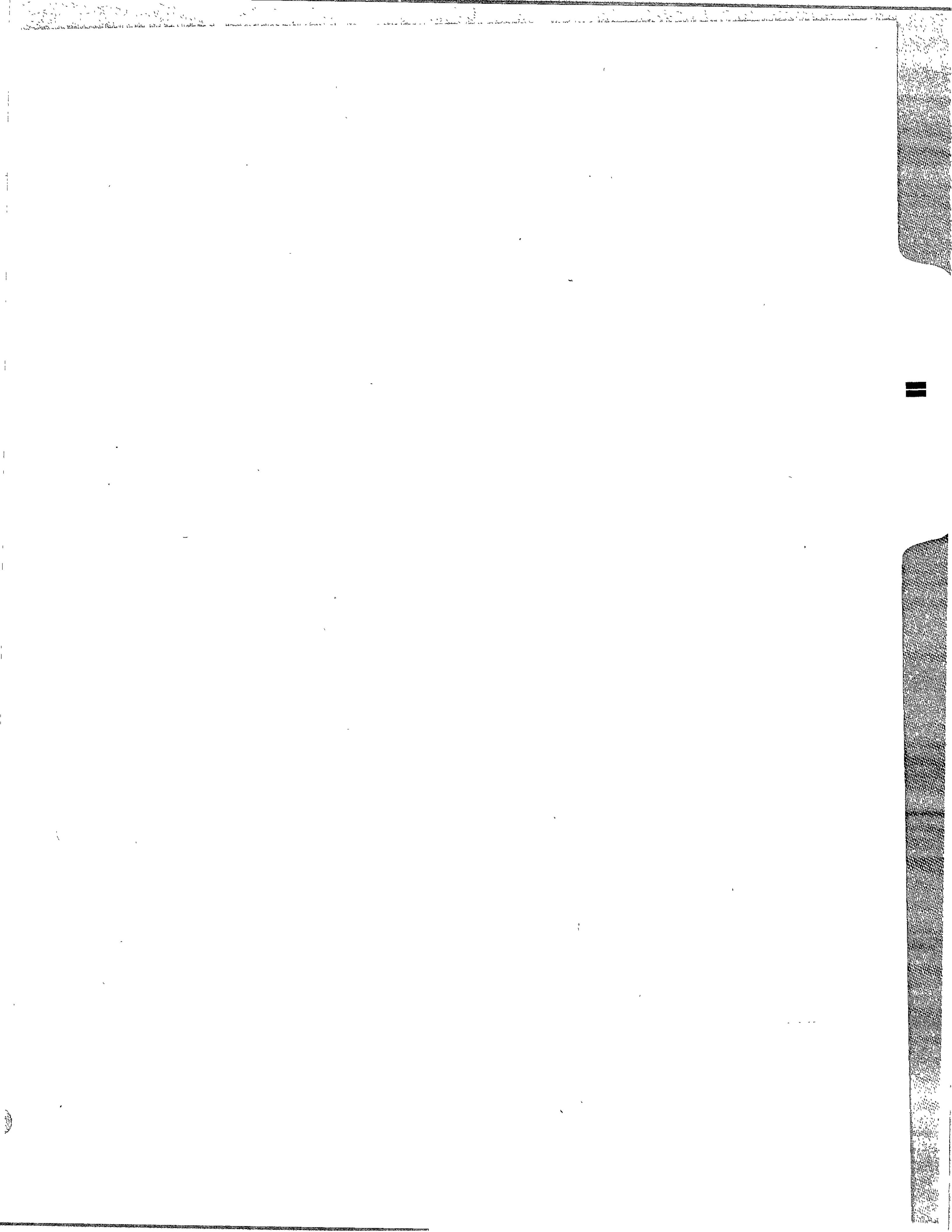
AGENDA I
Washington, DC
May 3-5, 1993

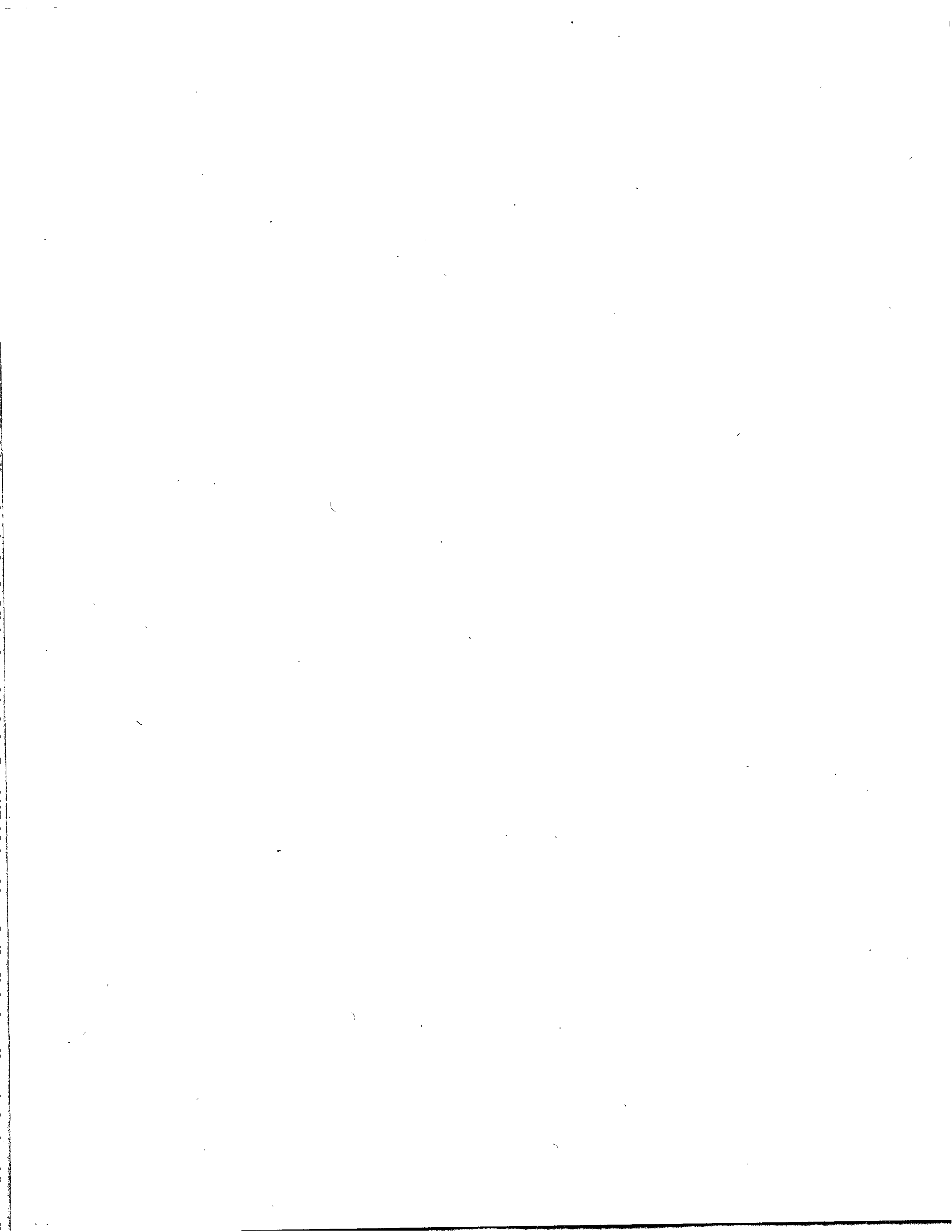
WELCOMING REMARKS

BY THE

CHAIRMAN







L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 27, 1992

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

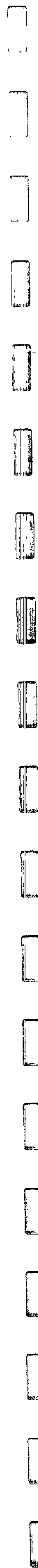
By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to the Federal Rules of Civil Procedure and proposed amendments to the Federal Rules of Evidence. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

The changes recommended by the Conference include: proposed new Civil Rule 4.1; proposed amendments to Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76; proposed new Forms 1A, 1B, and 35; proposed abrogation of Form 18-A; proposed amendments to Forms 2, 33, 34, and 34A; and proposed amendments to Evidence Rules 101, 705, and 1101.

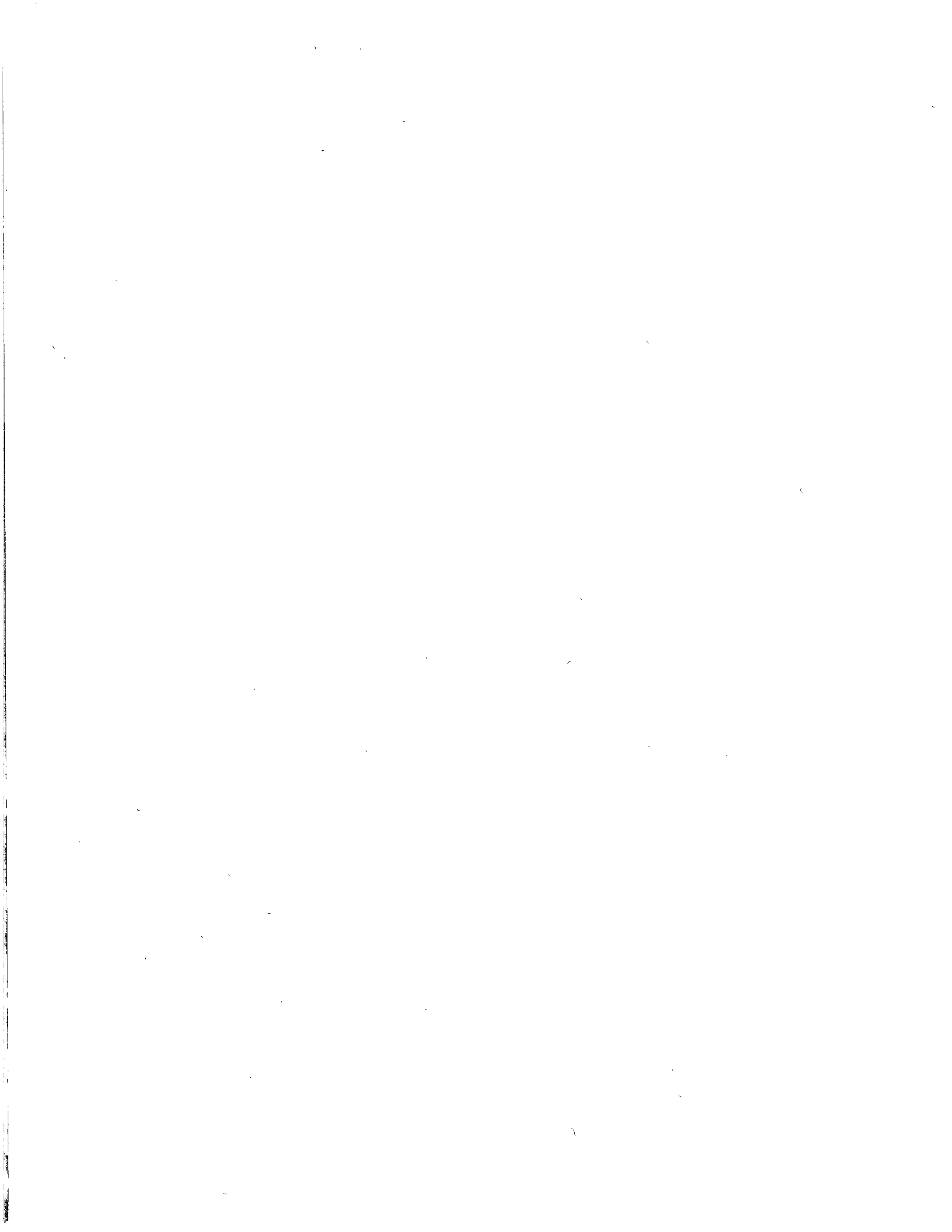
For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

L. Ralph Mecham

Enclosures



III-A



Rule 23

The proposal to revise Rule 23 has been around a long while. The attached draft reflects the form last seen by the Committee. If it is to be published for comment, it will be recast in the new styling, working from the restyled version of the current rule.

Following the November meeting, the draft was circulated to a relatively small list of people who have demonstrated interest in earlier Civil Rules proposals. A copy of the letter that accompanied the draft is attached as a preface to the draft. The draft has been shared with a good number of people not on the original circulation list. Comments, however, have been relatively sparse. As might be expected, the comments on the draft go in various directions. Many comments suggest that lower courts have worked out the bugs in the present rule and that any change will upset current practices to no real advantage. Others—mostly academics—think the proposed changes are desirable. Fewer comments have been received on the questions that go beyond the draft, although several people have indicated an interest in making comments in the future.

The questions presented by the draft changes are summarized in the letter that accompanied the circulation and the draft Note.

There are two central questions. The first is whether more dramatic changes should be proposed. It is clear that not enough work has been done to support preparation of a proposed rule for publication if that is to be done. The second is whether the present draft, restyled, should be published for comment. It does not seem likely that further delay will produce much additional information. Continued delay might nonetheless be warranted for other reasons, such as the burden of attempting to go forward simultaneously with the restyling project and with other changes that will produce much comment and debate.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

January 21, 1993

Dear Civil Procedure Buffs:

This letter about Civil Rule 23 is being sent to an array of people who have shown interest in recent proposals to revise the Federal Rules of Civil Procedure. Recipients are free to share these questions with anyone who comes to mind, so long as the tentative posture of the proposal is made clear.

The Advisory Committee on Civil Rules has had a draft revision of Civil Rule 23 slowly simmering on a back burner for some time. The most recent form of the draft is enclosed. I have not made any attempt to redraft this version. Matters of style, of substance addressed, and of substance not addressed, remain in inherited form. Robust comments can be made without fear of offending pride of authorship.

The purpose of this circulation is to invite comments on every aspect of Rule 23. The draft may provide a convenient focus for initial reactions, but I and the Committee hope for a completely uninhibited expression of experience with Rule 23 as it stands and for visions of a better Rule 23. It is important that we hear from as many different forms of experience and perspectives as may be found. Topics not addressed by the draft are more important for this purpose than the topics that are addressed. A comprehensive response now will enable the Committee to determine whether the time has come to draft a revised Rule 23 for public comment, and to draft a better revision if any is to be pursued.

Timing

Rule 23 was changed dramatically in 1966. Many of those involved in the drafting process state that they had no idea of the uses that would be made of the new rule. If the revision process is pursued now, some three decades would have run by the time any changes could take effect. That is a lot of time for appraising the effects of the 1966 amendments. Careful study of Rule 23 now does not suggest unseemly haste or petty tinkering.

The conclusion that it is appropriate to study Rule 23 does not lead inexorably to the conclusion that it is appropriate to amend Rule 23. It is possible that experience shows that the Rule is working so well than amendment is not wise. It also is possible that the Rule is not working as well as might be, but that changes are likely to make matters worse. Even if significant improvements could be made now, it might be better to wait a while longer in the

hope that much more significant changes will soon be within reach.

One question, then, is whether the time has come to revise Rule 23.

Style

Whatever else happens, Rule 23 will be rewritten in the style of the Style Subcommittee of the Standing Committee. Comments on style are welcome, particularly when they suggest ambiguities or opacities, but it should be remembered that this draft does not conform to current style conventions.

Draft

The major change made by the draft is the amalgamation of subdivisions (b)(1), (2), and (3). This amalgamation has at least three major consequences. First, it will not be necessary to decide which subdivision applies. Second, the provision for opting out of a (b)(3) class is changed to a provision that permits the court to determine whether class members may opt out -- the court may deny any opportunity to opt out of what would have been a (b)(3) class, or may allow an opportunity to opt out of what would have been a (b)(1) or (2) class. Instead, the court may certify a class that includes only those who elect to opt in. Conditions may be imposed on those who choose to opt out or in. Third, the provision for notice applies to all three in ways that may reduce the requirements for notice in former (b)(3) classes and increase the requirements in former (b)(1) and (2) classes.

There are several other significant changes. It is made clear that classes may be certified for resolution only of specific issues. This provision, and the opt-in alternative, are aimed in part at providing a framework better adapted to consolidated litigation of mass tort disputes. Subdivision (a)(4) is changed to focus directly on the ability of attorneys to represent the class, and requires that representatives be willing to fairly and adequately represent the class. The requirement that the representatives be willing is most likely to affect certification of classes defending against a claim. There is an oblique reference to fiduciary duty in (a)(4), calculated to emphasize the obligation of representatives and attorneys to put aside self-interest.

Rule 23(d) would be amended to make it clear that motions under Rules 12 or 56 can be decided before certification.

A more dramatic change is suggested by the Note to Rule 26(e). On its face, Rule 26(e) suggests that a proposal to dismiss or compromise a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisons

of Rule 53(b). The Note suggests that this provision would authorize investigation of a proposed settlement by independent counsel as a means of breaking the information monopoly of self-interested parties.

There is little need to point up the questions raised by these changes. The notice provisions may provoke dissent on the ground that there should be no room for relaxation in (b)(3) classes, or that increased burdens should not be imposed on (b)(1) or (2) class representatives. Instead, it might be argued that the draft does not go far enough in either direction.

The prospect that members of a (b)(3) class might not be allowed to opt out may seem dangerous, particularly if the forum lacks any contact with the class member. Denial of any opportunity to opt out might seem particularly dangerous with respect to members of a defendant class represented by an all-too-willing volunteer. The provisions for conditions deserve special attention. What should happen, for example, if opting out is allowed on condition the class member not bring a separate action, and a class judgment is entered that fails the tests for precluding relitigation by class members who did not opt out?

And so of other facets of the draft. A lengthy enumeration of questions that come to mind might tend to close out other questions, and perhaps more important ones. The more questions we can identify now, the better.

Detailed Questions Not Addressed

Many relatively small questions are not addressed by the draft. Some may be better left to development without guidance in the rule. Others may be unimportant in theory or in practice. A brief list of representative examples may provoke interesting reactions:

Should a party seeking class certification be required to make a motion for certification by a specified time?

Is any useful purpose served by the typicality requirement of Rule 23(a)(3)?

Is it possible to go beyond vague allusions to fiduciary duty to define the ways in which the class and all its members become clients of the attorney for the representative parties? Would more detailed principles of fiduciary duty to the class be useful? Should counsel be required, for example, to continue a course of vigorous advocacy after it has become apparent that the yield in fees is not likely to compensate the effort?

Should there be provisions regulating discovery and

counterclaims against nonrepresentative members of the class?

Would it help to adopt express provisions regulating the impact of filing, denial of certification, or decertification, on statutes of limitations?

Is it possible to include a provision allowing denial of certification on the ground that the value of a class recovery does not justify the burden of class adjudication? Can this concern be tied to provisions for "fluid" or "class" recovery? Would a provision written in neutral procedural terms invite the objection that this calculation would trespass on substantive matters?

Should anything be said about "personal jurisdiction" with respect to members of a plaintiff class or a defendant class? One possibility would be to provide jurisdiction as to any class member who has sufficient contact with the United States.

Is it desirable to provide authority for a class action court to supervise trial of individual issues in other courts after determination of common class issues? How would this be done?

Can some means of coordination be provided for situations in which potentially overlapping class actions are filed in different courts? Is transfer under present § 1407, or an amended § 1407, the only answer?

Should anything be done about the procedure for finding new representatives when mootness overtakes the original representatives?

Should the draft provision for investigation by a special master be expanded to require appointment of an independent representative for the class to evaluate any proposed dismissal or settlement?

Larger Questions

The most important questions surrounding Rule 23 probably are not suitable for present disposition. It seems likely that most reasonably detached observers would agree that some uses of Rule 23 are nefarious and some uses are highly desirable. It also seems likely that there would be wide differences among reasonably detached observers in guessing at the frequency of good and not-so-good uses. It seems even more likely that many of these judgments are bound up with deeper judgments about matters that are outside the Enabling Act process. Some may think it unwise to seek universal enforcement of substantive principles that involve uneasy and uncertain compromises between conflicting needs and policies. Others may have more direct disagreements with the substantive principles themselves. Yet others may doubt the need to encourage

entrepreneurial litigation that imposes substantial costs without producing significant benefits for anyone but the attorneys. It would be wonderful to be able to distill the wisdom from all these doubts and capture it in a procedural rule that does not trespass on substantive matters. Such wonders do not come ready to hand.

Other questions are more tractable, but clearly require legislation. Application of the amount-in-controversy requirement to each member of a class may deserve consideration, but cannot be changed by a rule of procedure. If some change were made that brought more diversity class actions, it would be necessary to consider the choice-of-law question. Again, legislation -- or perhaps a court decision -- would be needed.

Legislation also is needed, or almost surely is needed, to adopt other proposals that have been made in various forms. The theory that a class claim should be auctioned to the highest bidder, for example, would separate the owners from their claims by a procedure that deviates too far from traditional judicial procedures to permit enactment by rule. Proposals to regulate attorney fee incentives also raise grave questions of Enabling Act authority. Setting fees at a portion of the benefits gained for the class, auctioning the right to be attorneys for the class, or even tinkering with the lode star method are common examples. It may be possible to accomplish less ambitious changes by rule. Requiring disclosure and evaluation of fee arrangements as part of the determination whether the class representatives and their attorneys will fairly and adequately represent the class would be an example.

Other broad questions seem within the reach of Enabling Act processes. One question parallels the question of subclasses. Class members may have conflicting interests that are ignored in the desire to certify a broad class. Such conflicts may occur occasionally even among members of a plaintiff damages class, and easily could multiply if mass torts are brought into the class action fold. Conflicts are perhaps more likely in declaratory or injunction actions, particularly with regard to remedies. The plaintiff class in a school desegregation action, for example, may include people with widely different interests in, and views about, the remedies to be adopted. Procedures might be drafted to increase the attention given to these conflicts, as by increasing the number of representatives or creating more subclasses. Although such procedures would increase complication and expense, and likely would diminish the prospects of settlement, they might conduce to better results.

Some thought also might be devoted to the question whether there should be more than one class-action rule. It has been said, for example, that defendant class actions are important in suing large partnerships or large groups of underwriters. Mass torts

continue to be the subject of class action discussion. It may be better to draft separate rules for such cases than to attempt to fit them within a single comprehensive rule.

No doubt there are other matters, large and small, that should be considered in any effort to revise Rule 23. Let me close with the request made at the outset. Comments on the current draft proposal are welcome, and important to ensure that the draft is as good as can be if the process proceeds to the point of publishing a proposed revision for public comment. Even more important, however, will be comments on the wisdom of addressing Rule 23 at all and on the need to consider matters not addressed by the draft.

Although comments are welcome at any time, it would be helpful to have substantial reactions by Marcy 15. The Committee agenda for the May meeting is crowded, but it may prove possible to include preliminary discussion of Rule 23. Reactions from as many perspectives as possible can be most useful.

Thank-you for your help.

Sincerely,

Edward H. Cooper
Reporter, Advisory Committee
on Civil Rules

EHC/lm
encls.

Rule 23. Class Actions

1 **(a) Prerequisites to a Class Action.** One or
2 more members of a class may sue or be sued as
3 representative parties on behalf of all only if
4 (1) the class is so numerous that joinder of all
5 members is impracticable, (2) there are questions
6 of law or fact common to the class, (3) the
7 claims or defenses of the representative parties
8 are typical of the claims or defenses of the
9 class, and (4) the representative parties and
10 their attorneys are willing and able to ~~will~~
11 fairly and adequately protect the interests of
12 all persons while members of the class until
13 relieved by the court from that fiduciary duty.
14 **(b) Class Actions Maintainable.** An action
15 may be maintained as a class action if the
16 prerequisites of subdivision (a) are satisfied,
17 and in addition the court finds that a class
18 action is superior to other available methods for
19 the fair and efficient adjudication of the
20 controversy. The matters pertinent to this
21 finding include:
22 (1) the extent to which the prosecution
23 of separate actions by or against individual
24 members of the class ~~would~~ creates a risk of

25 (A) inconsistent or varying adjudications with
26 respect to ~~individual~~ members of the class
27 which would establish incompatible standards
28 of conduct for the party opposing the class,
29 or (B) adjudications with respect to
30 ~~individual~~ members of the class which would as
31 a practical matter be dispositive of the
32 interests of the other members not parties to
33 the adjudications or substantially impair or
34 impede their ability to protect their
35 interests; ~~or~~
36 (2) ~~the party opposing the class has~~
37 ~~acted or refused to act on grounds generally~~
38 ~~applicable to the class, thereby making~~
39 ~~appropriate final~~ the extent to which the
40 relief sought would take the form of
41 injunctive relief or corresponding declaratory
42 relief with respect to the class as a whole;
43 ~~or~~
44 (3) ~~the court finds that~~ the extent to
45 which questions of law or fact common to the
46 members of the class predominate over any
47 questions affecting only individual members~~,~~
48 ~~and that a class action is superior to other~~

49 ~~available methods for the fair and efficient~~
50 ~~adjudication of the controversy. The matters~~
51 ~~pertinent to the findings include:~~;
52 (~~A~~4) the interest of members of the
53 class in individually controlling the
54 prosecution or defense of separate actions;
55 (~~B~~5) the extent and nature of any
56 litigation concerning the controversy already
57 commenced by or against members of the class;
58 (~~C~~6) the desirability or
59 undesirability of concentrating the litigation
60 of the claims in the particular forum; and
61 (~~D~~7) the difficulties likely to be
62 encountered in the management of a class
63 action that will be eliminated or
64 significantly reduced if the controversy is
65 adjudicated by other available means.
66 **(c) Determination by Order Whether Class**
67 **Action to be Maintained; Notice and Membership in**
68 **Class; Judgment; Actions Conducted Partially as**
69 **Class Actions; Multiple Classes and Subclasses.**
70 (1) As soon as practicable after the
71 commencement of an action brought as a class
72 action, the court shall determine by order

73 whether and with respect to what claims or
74 issues it is to be so maintained.
75 (A) The court shall also determine
76 whether, when, how, and under what
77 conditions putative members may elect to
78 be excluded from, or included in, the
79 class. The matters pertinent to this
80 determination will ordinarily include:
81 (i) the nature of the controversy and the
82 relief sought; (ii) the extent and nature
83 of any member's injury or liability;
84 (iii) the interest of the party opposing
85 the class in securing a final resolution
86 of the matters in controversy; and (iv)
87 the inefficiency or impracticality of
88 separately maintained actions to resolve
89 the controversy. When appropriate,
90 exclusion may be conditioned upon a
91 prohibition against institution or
92 maintenance of a separate action on some
93 or all of the matters in controversy in
94 the class action or a prohibition against
95 use in a separately maintained action of
96 any judgment rendered in favor of the

97 class from which exclusion is sought, and
98 inclusion may be conditioned upon bearing
99 a fair share of the expense of litigation
100 incurred by the representative parties.
101 (B) An order under this subdivision
102 may be conditional, and may be altered or
103 amended before the decision on the
104 merits.
105 (2) ~~In any class~~ When ordering that an
106 action be maintained as a class action under
107 ~~subdivision (b)(3)~~ this rule, the court shall
108 direct that notice be given to the ~~members of~~
109 ~~the~~ class under subdivision (d)(2), concisely
110 and clearly describing the nature of the
111 action, the claims or issues with respect to
112 which the class has been certified, any
113 conditions affecting membership in the class
114 ordered under paragraph (1)(A), and the
115 potential consequences of class membership.
116 In determining how, and to whom, notice will
117 be given, the court may consider, in addition
118 to the matters affecting its decision to
119 certify a class under subdivision (b), the
120 expense and difficulties of providing actual

121 notice to all class members and the nature and
122 extent of any adverse consequences that class
123 members may suffer from a failure to receive
124 actual notice. ~~the best notice practicable~~
125 ~~under the circumstances, including individual~~
126 ~~notice to all members who can be identified~~
127 ~~through reasonable effort. The notice shall~~
128 ~~advise each member that (A) the court will~~
129 ~~exclude the member from the class if the~~
130 ~~member so requests by a specified date; (B)~~
131 ~~the judgment, whether favorable or not, will~~
132 ~~include all members who do not request~~
133 ~~exclusion; and (C) any member who does not~~
134 ~~request exclusion may, if the member desires,~~
135 ~~enter an appearance through counsel.~~
136 (3) The judgment in an action ordered
137 maintained as a class action ~~under subdivision~~
138 ~~(b)(1) or (b)(2), whether or not favorable to~~
139 ~~the class, shall include and describe those~~
140 ~~whom the court finds to be members of the~~
141 ~~class. The judgment in an action maintained as~~
142 ~~a class action under subdivision (b)(3)~~,
143 whether or not favorable to the class, shall
144 ~~include and~~ specify or describe those ~~to whom~~

145 ~~the notice provided in subdivision (c)(2) was~~
146 ~~directed, and who have not requested~~
147 ~~exclusion, and whom the court finds~~ who are
148 found to be members of the class or have as a
149 condition to exclusion agreed to restrictions
150 affecting any separately maintained actions.
151 (4) When appropriate ~~(A)~~ an action may
152 be brought or ordered maintained as a class
153 action (A) with respect to particular claims
154 or issues, or (B) by or against multiple
155 classes or subclasses. Each class or subclass
156 must separately satisfy the requirements of
157 this rule except for subdivision (a)(1). ~~a~~
158 ~~class may be divided into subclasses and each~~
159 ~~subclass treated as a class, and the~~
160 ~~provisions of this rule shall then be~~
161 ~~construed and applied accordingly.~~
162 (d) **Orders in Conduct of Actions.** In the
163 conduct of actions to which this rule applies,
164 the court may make appropriate orders: (1)
165 determining the course of proceedings or
166 prescribing measures to prevent undue repetition
167 or complication in the presentation of evidence
168 or argument, including pre-certification

169 determination of a motion made by any party
170 pursuant to Rules 12 or 56 if the court concludes
171 that such a determination will promote the fair
172 and efficient adjudication of the controversy and
173 will not cause undue delay; (2) requiring, for
174 the protection of the members of the class or
175 otherwise for the fair conduct of the action,
176 that notice be given in such manner as the court
177 may direct to some or all of the members of any
178 step in the action, or of the proposed extent of
179 the judgment, or of the opportunity of members to
180 signify whether they consider the representation
181 fair and adequate, to intervene and present
182 claims or defenses, or otherwise to come into the
183 action, or to be excluded from the class; (3)
184 imposing conditions on the representative
185 parties, class members, or ~~on~~ intervenors; (4)
186 requiring that the pleadings be amended to
187 eliminate therefrom allegations as to
188 representation of absent persons, and that the
189 action proceed accordingly; (5) dealing with
190 similar procedural matters. The orders may be
191 combined with an order under Rule 16, and may be
192 altered or amended as may be desirable from time

193 to time.

194 **(e) Dismissal or Compromise.** An ~~class~~ action
195 filed as a class action shall not, before the
196 court's ruling under subdivision (c)(1), be
197 dismissed, be amended to delete the request for
198 maintenance as a class action, or be compromised
199 without the approval of the court~~, and notice of~~
200 ~~the proposed dismissal or compromise shall be~~
201 ~~given to all members of the class in such manner~~
202 ~~as the court directs~~. An action ordered
203 maintained as a class action shall not be
204 dismissed or compromised without the approval of
205 the court, and notice of a proposed voluntary
206 dismissal or compromise shall be given to some or
207 all members of the class in such manner as the
208 court directs. A proposal to dismiss or
209 compromise an action ordered maintained as a
210 class action may be referred to a magistrate
211 judge or other special master under Rule 53
212 without regard to the provisions of subdivision
213 (b) thereof.

214 **(f) Appeals.** A Court of Appeals may permit
215 an appeal to be taken from an order of a district
216 court granting or denying a request for class

217 action certification under this rule if
218 application is made to it within ten days after
219 entry of such order. Prosecution of an appeal
220 hereunder shall not stay proceedings in the
221 district court unless the district judge or the
222 Court of Appeals, or a judge thereof, shall so
223 order.

COMMITTEE NOTES

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 and lengthy 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." This becomes the 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.

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 under subdivision (c)(4)(A), 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.

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.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made the

controlling issue; 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) become factors to be considered in making this ultimate 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 be exclusive of 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, 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 if, as a condition, the person agreed 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 when it may be impossible or impractical to give meaningful notice of the class action to all putative members of the class.

Under the revision, 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 paragraph (4), some claims or issues may be certified for resolution as a class action, while other claims or issues are not so certified. For example, in some mass tort situations it may be appropriate to certify as a class action issues relating to the defendants' culpability and general causation, while leaving issues relating to specific causation, damages, and contributory negligence for resolution through individual lawsuits brought by members of the class. Since the entirety of the class representative's claim will be before the court, there

is a "case or controversy" justifying exercise of the court's jurisdiction; and the rule is intended to eliminate the problems that might otherwise arise based on the splitting of a cause of action.

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)(2) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(2) 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.

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 potential 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. This appeal provision is authorized by 28 U.S.C. § 2072(c).

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.

III-B

Rule 26(c): Amending Protective Orders

This draft proposes a new paragraph for Rule 26(c). The paragraph would make explicit the power to dissolve or modify a discovery protective order. If the proposal goes forward, it may make sense to modify the designations of the paragraphs in Rule 26(c). The designation as Rule 26(c)(3) is, however, simply a suggestion.

The draft Note summarizes the purpose of the proposal. The attached materials explain the background. Initial discussion at the November Committee meeting supported preparation of the draft, but did not establish even tentative directions.

Elizabeth Wiggins of the Federal Judicial Center is preparing a memorandum to flesh out our information about the use of protective orders. If she is able to make her deadline of mid-April, a copy will be send out separately. She also is designing a proposal for empirical research that could be undertaken to provide new information.

(3) A protective order may be dissolved or modified on motion before or after judgment. In ruling on a motion 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

Subdivision (3) is added to the rule to dispel any doubts concerning the inherent power of the court to modify or vacate a protective order. The power should be exercised after careful consideration of 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 that 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 administered Rule 26(c) with sensitive concern

for the interests that may justify dissolution or modification of a protective order. Recent careful studies have concluded that there is no need to amend Rule 26(c) in light of actual practices. 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).

Despite the apparent wisdom of current practice, addition of express provisions for dissolution or modification serves several purposes. Most important, the text of the rule provides forceful notice that care must be taken not to rely on a protective order in disclosing particularly important information that might be shielded against any discovery. Although this reminder may reduce the usefulness of blanket protective orders as a means of avoiding discovery litigation, 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.

Assessment of the need for disclosure in support of related litigation may require joint action by two courts. The court that entered the protective order can determine most easily the circumstances that justified the order and the extent of justifiable reliance on the order. The court where related litigation is pending can determine most easily the importance of the information in that litigation, and often can determine most accurately the balance between the interest in disclosure and the interest in nondisclosure or further protection. The rule does not attempt to prescribe procedures for cooperative action.

Special questions arise from the prospect of multiple related actions brought at different times and in different courts. Great inefficiencies can be avoided by establishing means of sharing

outside the framework of consolidated proceedings. There is not yet sufficient experience to support adoption of formal rules establishing litigation support libraries and to regulate the terms of access to them. To the extent that consolidation devices may not prove equal to the task, however, these questions will deserve attention in the future.

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

Honorable William J. Hughes
Chairman, Subcommittee on Intellectual Property
and Judicial Administration
Committee on Judiciary
Cannon House Office Building, Room 207
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to advise you of the action taken by the Judicial Conference's Advisory Committee on Civil Rules on proposed changes to Rule 26(c) of the Federal Rules of Civil Procedure regarding the issuance of protective orders involving discovery materials. The Committee met on November 12-14, 1992.

The enclosed memorandum on Rule 26(c) was prepared at my request by Dean Edward Cooper, the Committee's Reporter. It identifies the general issues regarding the issuance of protective orders and addresses the specific language of the proposed amendments to Rule 26(c) contained in the "Federal Sunshine in Litigation Act" (H.R. 2017, 102nd Cong., 1st Sess. (1991)). The memorandum was circulated among the Committee members in advance of the meeting.

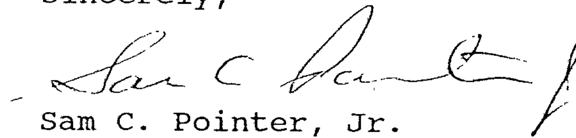
The Committee discussed at length the various issues identified in Dean Cooper's memorandum. Restricting a court's authority to issue protective orders raised serious concerns, including the potential for revealing trade secrets and other commercial practices, the sharing of discovery expenses between multiple parties and sale of discovery materials, and the increased litigation resulting from parties' objections to comply voluntarily with open-ended discovery requests. In addition, specific problems with the language of H.R. 2017 were discussed, particularly regarding the definition of "public hazard."

The Committee determined, nonetheless, that Rule 26(c) merited reconsideration and that further study was necessary. It requested the Federal Judicial Center to survey the state statutes and report on the number of states which have limited

the issuance of protective orders and the states' experiences with them.

The Committee will next meet on April 22-24, 1993, at the Federal Judicial Building in Washington, D.C. The meeting is open to the public and I invite you or your staff to attend. I will make sure that you are apprised of developments in this area.

Sincerely,



Sam C. Pointer, Jr.

Enclosure

cc: Honorable Robert E. Keeton,
Committee on Rules of Practice and Procedure
Honorable Jack Brooks
Committee on the Judiciary
Honorable Hamilton Fish, Jr.
Committee on the Judiciary
Honorable Carlos J. Moorehead
Committee on the Judiciary
Honorable David E. Skaggs

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR MICHIGAN 48109

ASSOCIATE DEAN

October 23, 1992

RECEIVED
OCT 26 1992
SAM C. POINTER, JR.
U. S. DISTRICT JUDGE

Hon. Sam C. Pointer, Jr.
Chief Judge, United States
District Court
882 United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

Re: Sunshine in Discovery--Civil Rule 26(c)

Dear Sam:

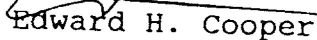
I am enclosing a memorandum on the "sunshine in discovery" questions raised by H.R. 2017 and the ways in which Civil Rule 26(c) might be amended to address these questions. There is no proposed rules language because I think drafting is premature. I also enclose a clean copy of the memorandum on this subject that Paul Carrington provided for the November, 1991 meeting of the Committee.

The memorandum is wordprocessed in WordPerfect 5.1 for DOS; I enclose a disc in the thought that this may facilitate incorporation in the agenda materials.

There are other things that could be included with the agenda materials if you wish--most notably H.R. 2017 itself, full copies of the state enactments, Judge Weis' testimony, or whatever. I can have these sent by FAX, despite the reduction in reproduction quality, if that seems desirable.

I have asked Ronald Sturtz to send a set of the ABA Civil Rule 64 materials; I will have a look at it on Monday, I expect, and will go ahead with as brief a memorandum as seems appropriate. Time is closing in, so I expect to fax that as soon as possible.

Best regards,



Edward H. Cooper

EHC/lm
encls.

SUNSHINE IN LITIGATION: RULE 26(C)

Rule 26(c) protective orders may impede or prevent access to discovery information by nonparties. It has been suggested that the Committee should consider amending Rule 26(c) to permit greater access. Contemporary discussion and reform efforts focus on two concerns: that privacy in discovery can defeat the public interest in knowledge about threats to public health and safety, and that successive litigants involved in factually related disputes should not be forced to costly efforts to discover information already gathered and provided in earlier litigation. Earlier discussion focused on a broader assertion that discovery, as part of the judicial process, is inherently a public event that should be open to the public.

The argument that Rule 26(c) amendments are necessary has been rejected by at least three recent studies: The Federal Courts Study Committee, Report pp. 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. The basic conclusions are that there is no evidence that protective orders in fact create any significant problems in concealing information about public hazards or in impeding efficient sharing of discovery information; that discovery is intended only as a means of improving litigation, not as a source of public information, and should not become a means of invading privacy for other purposes; that discovery would become more burdensome and costly if reliable protective orders could not be made; and that administration of a rule creating broader rights of public access would impose great burdens on the court system. These conclusions are summarized at greater length below.

The first question to be addressed must draw from the collective knowledge of the committee. If in fact protective orders do not often impede public knowledge of public hazards, and do not often interfere with efficient utilization of earlier discovery efforts in related litigation, there seems to be little reason to tinker with Rule 26(c). Contemporary discussion of these problems should be an effective means of encouraging careful administration of Rule 26(c) without amending the Rule.

If, on the other hand, Rule 26(c) is in fact being administered in ways that defeat significant opportunities to protect public safety or the rights of those who have been injured, or that force wasteful duplication of discovery in related litigation, it must be decided whether improvements are practicable. Much of the discussion that follows is designed to illustrate the problems that must be addressed if amendments are to be considered. It may be noted at the outset, however, that the problems are not likely to be changed by adoption of the pending proposal to amend Rule 26 to provide for disclosure as a prelude to discovery.

Background

Current interest in the problems of access to discovery materials has resulted in expanded access by statutes in Florida and Virginia and by court rule in Texas. Similar proposals have been advanced in many states. Federal legislation has been suggested.

The immediate impetus for consideration by this Committee is provided by H.R. 2017,

102d Cong., 1st Sess., the "Federal Sunshine in Litigation Act." The bill, described in detail below, would prohibit issuance of a Civil Rule protective order "that has the purpose or effect of concealing information about a public hazard." Judge Joseph F. Weis, Jr., testified on the bill on September 10, 1992. His testimony focused in part on the importance of relying on the formal rulemaking procedure for considering the questions raised by the bill. The course of the hearings makes it appropriate to consider the question now.

A somewhat similar bill, H.R. 3803, the "Federal Court Settlements Sunshine Act," would add a new § 1659 to the Judicial Code. Section 1659 would require clear and convincing evidence of a compelling public interest to justify sealing "any settlement made of a civil action to which the United States, an agency or department thereof, or an official thereof in that official's official capacity, is a real party in interest." This bill does not touch directly on the Civil Rules and will not be explored further in this memorandum.

Discovery as Public Event

Discovery under the Civil Rules has been viewed by most courts and lawyers as a means of improving litigation and decision of individual disputes. Only the need to resolve a dispute about other matters justifies a system that compels parties and nonparties to reveal information that otherwise would be private. In upholding a protective order that barred a newspaper from publishing information gained by discovery in a defamation action, the Supreme Court observed that "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, * * * and, in general, they are conducted in private as a matter of modern practice." Seattle Times Co. v. Rhinehart, 1984, 467 U.S. 20, 33, 104 S.Ct. 2199, 2107-2108. Lower courts have repeated the refrain; see U.S. v. Anderson, 11th Cir.1986, 799 F.2d 1438, 1441.

This traditional view of discovery is an essential component of protective order doctrine. Protective orders may prohibit any discovery of specified information because the interest in privacy outweighs the needs of the litigation. Quite commonly, protective orders allow discovery but seek to ensure that information is used only for the litigation needs that justify production.

The traditional view has been challenged on broad theoretical grounds. It is argued that litigation is a public event, and that the public should enjoy a right of access to discovery comparable to the right of access to a civil trial. Access is required in part because public resources are devoted to the court system and in part because government processes must be open to public scrutiny.

Adoption of a general public access perspective would require dramatic changes in protective order practices. At the logical limit, all parties would be required to produce complete copies of all discovery materials for public filing and inspection, even though the materials otherwise would not be put in reproducible form for purposes of the litigation.

For present purposes, it seems more realistic to pursue the traditional view that discovery is no more than a device for resolving a specific dispute between identified parties. This approach does not prevent use of discovery materials to give warning of public hazards or to avoid wasteful duplication by repeated discovery of the same information. This approach does, however, require development of a workable system to reconcile interests in access to information with the complicating interests in privacy, smooth working of discovery, and effective judicial management.

Privacy

Discovery casts a wide net, gathering information that often proves irrelevant even to the immediate dispute. Information is gathered from parties about their own affairs, from parties about the affairs of others, and from nonparties. Hearings on the proposed disclosure rule provided graphic testimony on the breadth of the information that may be sought from commercial entities. Discovery may reach business information that is protected as a technical trade secret, is of vital competitive importance, is "sensitive," or is simply embarrassing. Discovery also may reach personal information that is intensely private--in malignant hands, indeed, there is a risk that discovery may be conducted for the very purpose of intimidating and discouraging an adversary. Significant or even crippling damage can be done by public disclosure of the fruits of discovery.

It seems likely that effective protection against public disclosure is accomplished for most litigation by established practices. These practices may involve such informal acts as failure to arrange transcription of a deposition or failure to file discovery responses with the court. More formal devices may include court orders not to file discovery materials or protective orders. It also seems likely that much litigation in federal courts, and in state courts that have adopted federal discovery practices, involves matters that would interest others only as a matter of itching curiosity. There is little reason to doubt that for most litigation, most of the time, the present system works well. Privacy is protected without any sacrifice of worthy public interests.

Privacy is not as readily protected in all cases, nor should it be. A protective order is likely to be necessary if discovery materials are routinely being filed under Civil Rule 5(d). Materials used in support of a summary judgment motion may be treated as if trial materials. More important, there may be cogent reasons to limit protection to serve the needs of other litigation or the public.

Protective Order as Discovery Facilitating Device

Proponents of present practice urge that consent and umbrella protective orders are an essential lubricant to effective management of discovery by the parties. Relying on the opportunity to designate information as confidential, parties are said to produce voluntarily large amounts of information that would provoke discovery contests if reliable protection required item-by-item judicial consideration. In addition to adding to the judicial burdens of supervising discovery, the increased discovery contests would lead to orders refusing to compel disclosure

of some information now disclosed under shield of a protective order, would add to the pressures that encourage some parties to pursue nonpublic means of dispute resolution, and would force some parties--both plaintiffs and defendants--to abandon the litigation.

Public Hazards

These arguments for protecting privacy are met in one direction by arguing that private interests must yield to the need for public information about circumstances that pose a risk of further injury. The common illustrations involve dangerous products or toxic contamination of a natural resource. Defendants are thought to buy the right to continue injuring consumers or poisoning their neighbors by protective orders that conceal, and settlement agreements that destroy, information needed to protect the public. It hardly need be said that if such concealment actually happens, it would be desirable to find a practicable means of accomplishing disclosure.

As noted above, one response to this fear is that it is chimerical. There is no indication that the fruits of private discovery are a necessary means of accomplishing public information. The existence of the litigation and the underlying claims can be made public, and there are many alternative means of gathering information about dangers to public health and safety. If in a rare case disclosure of discovery material is the only means of accomplishing an important addition to public knowledge, Civil Rule 26(c) does not stand in the way. If this response is correct, nothing further need be done.

If Rule 26(c), as written or administered, does raise obstacles to disclosure of important public information, it is important to consider the challenges that must be met in reducing the scope of protection to an appropriate level. The spirit of the discovery rules is to delegate responsibility initially to the parties and then to confide in the broad discretion of the district court. In keeping with this spirit, amendment of Rule 26(c) would involve an open-ended admonition that in framing and considering modification of a protective order, the court should weigh the public interest in disclosure. A more pointed version would specify the public interest in avoiding injury to person or property.

More specific rule amendments may have unintended consequences, and will generate added litigation over matters of interpretation. The provisions of H.R. 2017 provide ample illustration.

The central provisions of H.R. 2017 bar protective orders that have "the purpose or effect of concealing information about a public hazard," and define public hazard to "mean[] any condition, circumstance, person, or thing whatsoever that has caused damage and is likely to do so again." This definition of public hazard is an abbreviated form of the definition in the Florida Sunshine in Litigation Act, Fla.Stat.Ann. § 69.081(2). At least three opportunities for dispute arise under this language--what counts as "damage"? Has damage been caused? Is it likely that the same thing will cause damage again? One popular illustration involves an action for professional malpractice: at what point must information be revealed about the lawyer or doctor? Has the defendant caused damage even though there was no liability for malpractice? Is

information about the client or patient information about the public hazard, because it helps to understand the nature of the risk? How does a court determine whether the same defendant is likely to cause damage again? Another popular illustration is the party, whether plaintiff or defendant, who tests HIV-positive. Others are easy to imagine--a newspaper sued for defamation or invasion of privacy (would the statute require production of the information about members and contributors of the Aquarian Foundation protected by the order in the Seattle Times case?); an employer sued for discrimination or sexual harassment (are facts involving the plaintiff again part of the information about the "public hazard"?); a large firm sued for breach of contract on allegations that its purchasing agent arbitrarily rejects conforming goods. Beyond these problems, the breadth of the definition seems to defeat any protection even for true trade secrets.

The definition problem is reduced if there is discretion whether to require disclosure of public hazard information. Alternative formulations also can reduce the problem of definition, but may create other problems. Rule 76a of the Texas Rules of Civil Procedure provides that "court records * * * are presumed to be open to the general public." Court records for this purpose include all documents filed in any civil court, and discovery materials "not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government," except for trade secrets. The Virginia statute, which provides for sharing between attorneys rather than general public access, is limited to materials "related to a personal injury action or action for wrongful death." Va. Code Ann. § 8.01-420.01. This phrase is likely to yield few problems of interpretation, but may not reach as far as should be to protect public interests.

The procedures for relief from a protective order also will require careful attention. Again, H.R. 2017 provides a useful illustration.

Standing to seek protected information is accorded by H.R. 2017 to "any person who is substantially affected by" a prohibited order. "[T]he news media" are, without more, substantially affected. "In any proceeding to enforce the prohibitions of the act, the Court shall examine the disputed information in camera." Definition of the "news media" may create some difficulties: an application by the newsletter of a trial lawyers association, for example, would likely provoke litigation of this issue. Deeper difficulties would arise from litigating the circular question whether an applicant is "affected" by an order that is "prohibited" because it relates to a "public hazard." The only way to preserve a protective order that is not in fact prohibited would be to interpret the "in camera" examination process to require a complete review of the protected material by the court. Adversary presentation would be limited to identifying the nature of the interest advanced by the applicant--a general media interest in public hazards, or a more specific private interest, and perhaps to offering surmises about the content of the protected material. The burden of substantially ex parte investigation of this sort could be staggering. If the applicant were allowed access to the protected materials under a conditional protective order, on the other hand, the effects of a proper order could be undone. The risks might be particularly acute with respect to matters of professional competence, sensitive personal information, or competive information sought by a business rival.

Finally, H.R. 2017 touches on a problem that cannot be addressed by amending Rule 26(c). It provides that copyright cannot be used to prevent disclosure or use of information about a public hazard. Apparently some lawyers have taken to copyrighting written discovery responses on the theory that any publication of the material would infringe the copyright. Whatever support copyright law may give this tactic, the question surely involves matters of substance outside the scope of the Enabling Act.

Discovery Sharing

At least two distinct questions arise from efforts to share discovery information with other lawyers. The simpler question involves the need of the lawyer who has discovered information to consult with other lawyers about the most effective way of using the information in pursuing the case at hand. In most circumstances this need should be readily accommodated by protective orders. Somewhat more complex questions involve attempts to reduce the burden of discovery in related actions by sharing the fruits of discovery.

The value of avoiding repetitive discovery of the same information in successive actions growing out of the same "conduct, transaction, or occurrence" is manifest. Many observers believe that even if discovery works well in most cases, grave problems remain in a relatively small proportion of cases. Even when all parties cooperate fully and set realistic limits, a "big" case can generate awesome volumes of discovery material. Consolidation on a local basis, and multidistrict consolidation, are undertaken in substantial part to reduce the risk of multiplicitous discovery. Similar motives underlie current proposals to expand the opportunities for consolidation. It would be foolish not to do everything possible to pursue the same ends by providing for sharing discovery between related actions that are not consolidated. The provisions of the Virginia statute noted above afford a good illustration: a protective order "shall not prohibit an attorney from voluntarily sharing [discovery] materials or information with an attorney involved in a similar or related matter, with the permission of the court, * * * provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order." Va.Code Ann. § 8.01-420.01.

The value of sharing discovery should be so apparent that protective orders do not now stand in the way, or soon will not be allowed to stand in the way. As with the public hazard issue, the first question is whether actual practice under Rule 26(c) enforces protective orders in circumstances that force parties to related litigation to develop the same information by duplicating discovery efforts, or to suffer the even worse consequence of litigating at a disadvantage because they have not the financial or legal resources to uncover the same information.

If there is evidence of a persisting problem with Rule 26(c), the solution that best fits the structure of the rules again would be open-ended. Rule 26(c) would be amended to require consideration of the interest in avoiding duplicating discovery in separate actions. A more detailed amendment might add a provision similar to the Virginia statute, allowing sharing with court approval subject to the same protective terms.

More detailed rules might address questions ancillary to discovery sharing. One question is whether to draw a distinction between protective orders entered by consent of the parties and consent orders entered after adversary dispute. If the parties consent to an order that bars sharing, should reliance on the order be protected, in part because such agreements are an important means of facilitating discovery?

Another obvious question goes to the sale of discovery information. The information has value, and has been acquired at significant cost. Cost-sharing seems reasonable. It might be asked whether part of any price charged for the information should be paid to the party who provided the information in response to discovery requests, but that question seems beyond the pale of current discourse. This perspective, however, puts a different light on the question whether any attempt should be made to regulate the price of discovery materials--the prospect that a profit can be made by selling information provided at great expense by a party facing suits by multiple plaintiffs may seem unattractive.

If there are several actions growing out of the same fact setting, discovery sharing may work most efficiently through a central "bank" or "library." The most obvious questions that might be addressed involve access: should all plaintiffs be allowed to participate? Should the terms of participation turn on the value of the incremental information each new plaintiff can contribute? Should defendants be allowed to participate? What court should regulate continuing protection of private information to ensure that it is shared and used only for litigation purposes? Should an attempt be made to regulate the process by which the library is formed, to reduce the risk that some lawyers may rush to bring the first action for the purpose of advantageous position in selling discovery information?

Even apart from the library question, is there a need to address the risk that actions will be brought primarily for the purpose of engaging in sweeping discovery-for-sale?

Settlement: Return or Destruction of Discovery

Settlement agreements may provide for the return or destruction of discovery information. This practice raises questions different from limits imposed by protective orders. The limitation arises from private agreement, and reflects the wishes of all parties. H.R. 2017 would address such agreements in part by providing that any agreement "that has the purpose or effect of concealing information about a public hazard is void and may not be enforced." If enacted, this provision would not reach settlements that do not involve a public hazard, and does not seem to have any direct effect once the materials have been returned or destroyed.

There are strong reasons for permitting settlements that include bargaining about discovery information acquired at significant cost to all parties. The purpose may include the reasonable need to ensure protection of material that is not discoverable in other litigation, or that would be discoverable only subject to effective protective orders. Disruption of the practice by rule, indeed, might be challenged as an interference with the "substantive right" to make a settlement agreement.

Agreements to return or destroy discovery information, on the other hand, also have an unpleasant aura. The purpose may be to deter other adversaries by forcing them through wasteful repetition of the full discovery process. Even worse, the purpose may be to bury information in ways that may elude future discovery.

One relatively straight-forward response by rule would be to require any party that has responded to a discovery request to retain a copy of the discovered information for a defined period. This provision could be elaborated by developing a system for requiring production of any part of the information that meets a test of likely relevance to subsequent litigation. One possibility, for example, would be to add this material to the list of matters that must be covered by the initial "disclosure."

More complicated responses also are possible, including provisions that direct the court to determine whether return or destruction of discovery information is a reasonable settlement term. The complications are apparent.

Summary

The first question is conceptual: Should all discovery be treated as a public event, akin to the admission of evidence at trial? An affirmative answer would require at least a drastic revision of Rule 26(c), and more likely a complete rethinking of the scope of discovery. It does not seem likely that this path will be followed.

If the basic current approach to discovery is retained, the next question is whether present practice frequently raises undesirable obstacles to sharing information about public hazards and parallel litigation. This question is a practical one. If recent commentary is right, there is not yet sufficient evidence of practical problems to justify revision of Rule 26(c).

If actual practice is in fact going astray, revision of Rule 26(c) could go in several directions. Choice among the directions will depend on the nature of the problems identified and judgment about the ability to address them by detailed rule provisions. There are many questions, and little reason to hazard answers now.

III-C

Rule 43

Two changes have been proposed for Rule 43(a). The first would authorize written presentation of the direct examination of a witness. The second would authorize electronic transmission of testimony of a witness located outside the state.

The proposal for written presentation of direct examination was published for comment in August, 1991. It was last discussed by this Committee in November, 1992. The conclusion was that action should be delayed until the Evidence Rules Committee could be informed of the proposal. The proposal was sent to the Evidence Rules Committee in April, 1993.

The proposal for electronic transmission of testimony was discussed at the November, 1992 meeting. It was held on the agenda for further discussion. It was noted that some courts have effectively permitted electronic presentation of testimony by conducting a deposition of the witness during trial. The witness is sworn by an officer at the place of trial, and the deposition testimony is presented at trial under the rules that permit use of depositions at trial. The judge can control the scope of the deposition to avoid presentation of inadmissible testimony.

The electronic transmission proposal raises a few obvious questions. One is whether "electronic transmission" is a suitable phrase. It might be too broad or too narrow. Present or future technology may encompass means that are not "electronic"; that possibility does not seem a real problem. Electronic transmission might include means that seem questionable, such as facsimile transmission of written responses, but the proposal does not require the court to permit electronic transmission in any form. The phrase seems useful until someone suggests an improvement.

Another question is whether the rule should turn on location of the witness outside the state. A witness outside the state may be subject to a subpoena commanding attendance at trial. As drafted, the rule would permit resort to electronic transmission instead. Substituting electronic transmission for live testimony of a witness subject to subpoena may cause some dissent. Electronic transmission nonetheless may make sense in light of the relative importance of the testimony, the burden of travelling from another state or country, the adequacy of the electronic devices available, and other factors. At the other end, Rule 45(b)(2) appears to leave open the possibility that a witness located in the state may be beyond the reach of a trial subpoena when there is no state statute

authorizing service. Even if service is possible, Rule 45(c)(3)(A)(ii) and (c)(3)(B)(iii) may cause the witness to be excused from attending trial. Perhaps this portion of Rule 43(a) should be integrated more directly with the provisions of Rule 45:

> The court may permit electronic transmission of testimony if the witness cannot be compelled to appear at trial or is excused from appearing at trial [under Rule 45].

A third question is whether the rule should specify particular modes of electronic transmission, establish qualitative standards, or invoke technical requirements to be adopted by the Judicial Conference. The present draft reflects a belief that such questions are best left to determination by the court with the assistance of the parties. Unlike such matters as filing with the clerk, the court will be immediately involved with the process. Open-ended drafting seems suitable.

Rule 43. Taking of Testimony

1 **(a) Form.** In all trials the testimony of
2 witnesses shall be taken ~~orally~~ in open court,
3 unless otherwise provided by an Act of Congress
4 or by these rules, the Federal Rules of Evidence,
5 or other rules adopted by the Supreme Court.
6 Subject to the right of cross-examination, the
7 court, in a nonjury trial, may permit or require
8 that the direct examination of a witness, or a
9 portion thereof, be presented through adoption by
10 the witness of an affidavit signed by the
11 witness, a written statement or report prepared
12 by the witness, or a deposition of the witness.
13 The contents are admissible to the same extent as
14 if the witness so testified orally. The court
15 may also permit testimony of a witness located
16 outside the state in which the trial is conducted
17 to be presented by electronic transmission.
18 * * * *

COMMITTEE NOTES

Rule 43 is revised to dispel any doubts as to the power of the court under Rule 611(a) of the Federal Rules of Evidence to permit or require in appropriate circumstances that the direct examination of a witness, or a portion thereof, be presented in the form of an affidavit signed by the witness, a written statement or report prepared by the witness, or a deposition of the witness. Presentation of direct

testimony in this manner can greatly expedite trial and may make the testimony more understandable without sacrifice to the benefits of the adversarial system, since the witness will be subject to cross-examination in the traditional manner with respect to the written statement.

This procedure is not appropriate for all cases or for all witnesses. The amendment applies only in nonjury cases, and even in such cases the primary usage will be with expert testimony or with "background" testimony from lay witnesses concerning matters not in substantial dispute.

The revision of Rule 43 is not intended to limit by implication the powers of the court under Rule 611(a) of the Federal Rules of Evidence, such as having a witness testify in a narrative fashion rather than in question-and-answer form.

The rule is also revised to authorize a court to permit examination of a witness located in another state to be conducted by teleconference or other electronic transmissions. This has sometimes been done by treating the examination as a deposition that is simulataneously being recorded and presented.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

April 9, 1993

Hon. Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511

Re: Direct Witness Examination by Writing (Civil Rule 43)

Dear Ralph:

You may recall the 1991 Civil Rules Committee proposal to amend Civil Rule 43(a) to authorize presentation of direct examination in writing. When Rule 43(a) came up on the Civil Rules Committee agenda in November, 1992, it was agreed—as the minutes put it—"that the problems are sufficiently complicated to warrant delay until the new Advisory Committee on Evidence Rules can be informed of the proposal." I enclose a copy of the proposal in the form it had assumed by the time of the November meeting. It has not been revised to reflect the style conventions followed in the project to restyle the entire set of Civil Rules.

Your recollection of the public hearings comments on proposed Rule 43(a) may well be more detailed than my own. Many lawyers believed that we should protect the interest of litigants in presenting living testimony. Some concern was expressed that a few judges might seize on written presentation of evidence as a means of expediting trials without giving adequate consideration to the advantages of oral presentation.

I know that this note reaches you at a time that may be too late for consideration at the impending meeting of the Evidence Rules Committee. Let me know if there is anything I can do to be helpful.

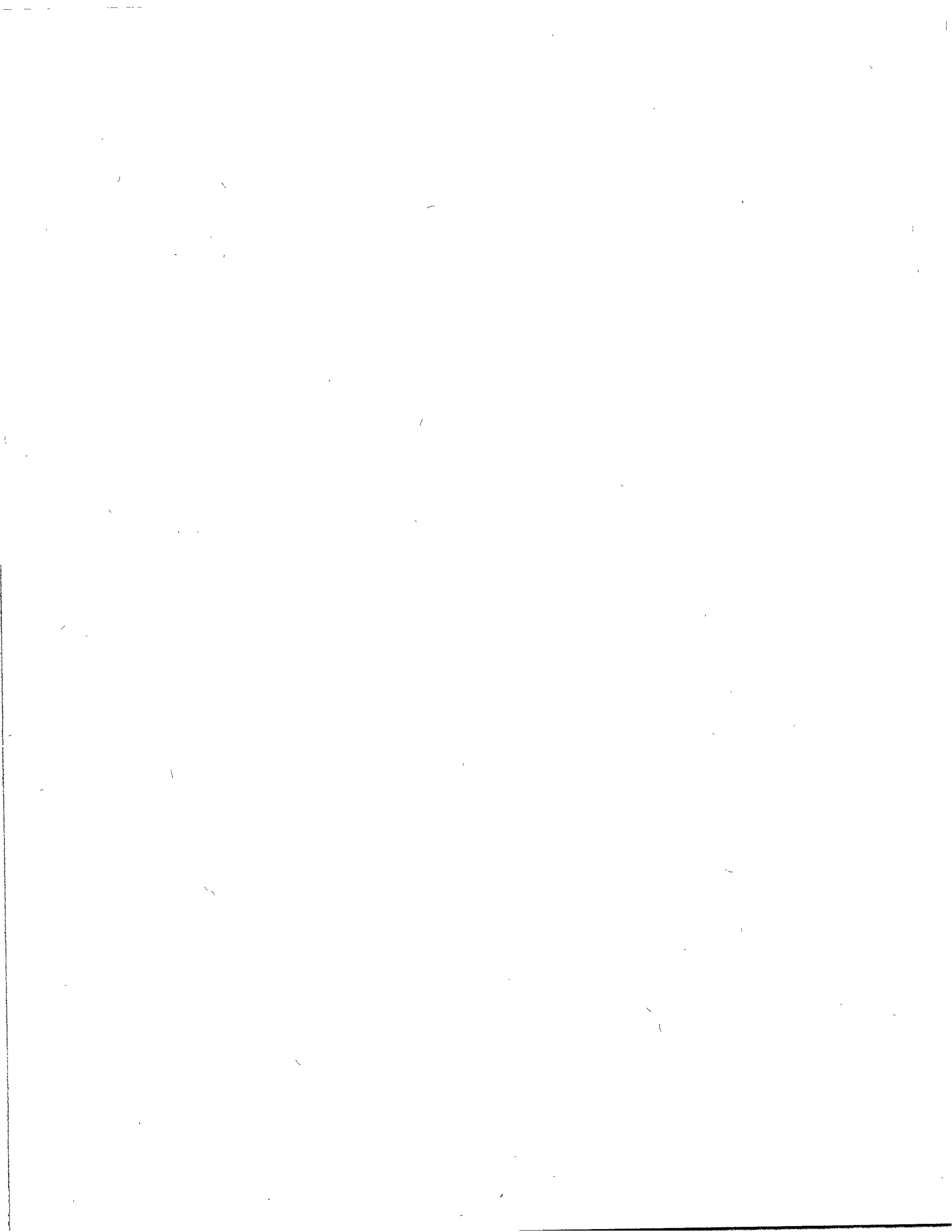
And thank-you for the reprint of your article on discovery reform and disclosure. I hope it will draw the sting from any arguments that may be addressed to Congress if the Supreme Court decides to transmit the disclosure provisions.

Best regards,

Edward H. Cooper
Reporter, Civil Rules Committee

EHC/lm
encl.

III-D



AGENDA III-D
Washington, D.C.
May 3-5, 1993

Rule 68

The attached draft of a proposed revision of Rule 68 reflects the November Committee discussion of Judge Schwarzer's proposal. There are strong reasons for deferring publication of this draft, either in this form or as it might be improved. The Federal Judicial Center is proposing a survey of counsel in an effort to establish an empirical foundation for evaluating the proposal. John E. Shapard of the Judicial Center staff also is undertaking to review the technical "law and economics" literature that bears on fee-shifting proposals. Other economists are at work on the topic independently. The proposal will stir up controversy. It is better to be as well prepared as possible. The value of delay may be reduced, however, if it becomes necessary to act in response to legislative proposals to enact a rule without awaiting action under the Enabling Act.

In addition to the draft rule, the attached materials include a variety of items. First is the brief "civil procedure buff" letter that was sent to the same group as got the Rule 23 draft for comment. The responses are noted briefly below. Second is the Design for the Judicial Center survey. It would be helpful to have everyone read the survey carefully, as if attempting to answer it for a specific case. Careful evaluation of that kind may suggest specific improvements or may show that the survey instrument will work well in its present form. Third are letters from Judge Schwarzer and John Shapard commenting on the draft. Finally is a copy of an offer-of-judgment proposal in S. 585, 103d Cong. 1st Sess., the Civil Justice Reform Act of 1993, introduced by Senators Grassley and DeConcini.

Reactions to the civil procedure buff letter all have run in the same directions. The proposal is very complicated to those who try to read it with care; they doubt it will be readily understood by many lawyers. The prospect of transferring attorney fees, even with a reduction for the benefit of the judgment and a cap, is seen as an opportunity for institutional litigants to take advantage of poorly-financed plaintiffs. And there is a suspicion that the scheme is really designed to scare small-stakes plaintiffs out of federal courts entirely. Whatever may be the strength of these reactions on the merits, they are likely to be repeated many times over as the proposal works its way through the process.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

January 21, 1993

Dear Civil Procedure Buff:

This letter about Civil Rule 68 is being sent to an array of people who have shown interest in recent proposals to revise the Federal Rules of Civil Procedure. Recipients are free to share these questions with anyone who comes to mind, so long as the tentative posture of the proposal is made clear.

No attempt to revise Rule 68 has been made since the controversial proposals published for comment in 1983 and 1984. The 1983 and 1984 proposals rested on the belief that although more than 90% of civil actions were resolved before trial, Rule 68 could be made a more effective means of encouraging early settlements that avoided wasteful pretrial proceedings. The Civil Rules Advisory Committee once again is interested in considering the prospect that Rule 68 can be made a more effective means of encouraging early settlements.

The Committee has not gone further than the determination that the topic deserves study. The enclosed draft Rule and Note have not been seen by the Committee, but reflect an effort to resolve some of the questions that were raised in preliminary discussion. The draft reflects an effort to provide plausible answers to the questions, with the realization that in many cases the opposite answers will prove wiser. The draft will serve its purpose if it provides a focus for thought.

As stated in the Note, the central feature of the draft is a "capped-benefit-of-the-judgment" attorney fee sanction drawn from a proposal made by Judge Schwarzer. This sanction is intended to steer a compromise course between the desire for sanctions more effective than liability for costs and the understanding that unlimited attorney fee shifting could lead to the evils described by opponents of the 1983 and 1984 proposals.

The most important question to be considered is the probable effect of this limited attorney fee sanction. The first step is to ask whether in fact the sanction will be an effective means of encouraging early settlements. There is not likely to be much enthusiasm for the rule if it simply provides a means of shifting a portion of attorney fees without other consequence. The second step is to ask whether promoting early settlements by limited fee shifting is a good thing. If the preponderant effect is to coerce low value settlements from parties who have limited resources for litigation and who are risk-averse, early settlements may be more bad than good. A related step is to speculate about the probable

strategic effects of the rule. No matter what the purpose of the rule may be, adversary attorneys will seek to use it to maximum adversary advantage. The draft rule increases the occasions for strategic calculation not only by increasing the stakes but also by providing for successive offers. At the extreme, it is possible that the revised rule could encourage filing litigation before exploring settlement in order to make potential Rule 68 sanctions an explicit factor in the bargaining process.

One major question that must be faced is the effect of Rule 68 on attorney fee statutes. The draft perpetuates the ruling in *Marek v. Chesney* by providing that a party otherwise entitled to statutory attorney fees loses the right to recover fees incurred after expiration of a Rule 68 offer more favorable than the judgment. Costs incurred by the offeror after expiration of the offer are awarded as the only sanction. Quite different results may be better. At the bottom of this packet is an alternative sanction provision that would bar any sanctions against a party entitled to a statutory fee award. Yet other variations could be imagined. Perhaps the most protective version would prohibit fee sanctions against a party that would be entitled to statutory attorney fees if it prevailed, whether or not that party actually did prevail.

Other questions are obvious. The draft makes Rule 68 available to parties asserting claims as well as those resisting claims. It imposes a grace period before a plaintiff can make an offer. There is no explicit cut-off before trial, apart from the provision that court permission must be obtained before setting the time to accept an offer at less than 21 days. It includes complicated provisions for determining whether a judgment is more favorable than an offer. These and several other features are described in the Note, which should serve as a good first guide to the choices made in constructing this first draft.

Although comments are welcome at any time, it would be helpful to have substantial reactions by March 15. The Committee agenda for the May meeting is crowded, but it may prove possible to include preliminary discussion of Rule 68. Reactions from as many perspectives as possible can be greatly useful.

Sincerely,

EHC/lm

Edward H. Cooper
Reporter, Advisory Committee
on Civil Rules

Rule 68. Offer of Settlement

(a) Offers. A party may make an offer of settlement to another party.

(1) The offer must:

(A) be in writing and state that it is a Rule 68 offer;

(B) be served at least 30 days after the summons and complaint if the offer is made to a defendant;

(C) not be filed with the court;

(D) remain open for at least 21 days unless the court orders a different period; and

(E) specify the relief offered.

(2) The offer may be withdrawn by writing served on the offeree before the offer is accepted.

(b) Acceptance; Disposition.

(1) An offer [made under {subdivision} (a)] may be accepted by a written notice served [on the offeror] {within the time}{while} the offer remains open.

(2) A party may file the offer, notice of acceptance, and proof of service. The clerk or court must then enter the judgment specified in the offer. [But the court may refuse to enter judgment if it finds that the judgment is unfair to another party or contrary to the public interest.]

(c) Expiration.

(1) An offer expires if not accepted [{within the time}{while} it remains open].

(2) Evidence of an expired offer is admissible only in a proceeding to determine costs and attorney fees under Rule 54(d).

(d) Successive Offers. A party may make an offer of settlement after making or failing to accept an earlier offer. A successive offer that expires does not deprive a party of sanctions based on an earlier offer.

(e) Sanctions. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay

37 a sanction to the offeror.

38 (1) Unless the offeree is entitled to a statutory award of
39 attorney's fees, the sanction must include:
40 (A) costs incurred by the offeror after the offer
41 expired; and
42 (B) reasonable attorney's fees incurred by the offeror
43 after the offer expired, measured as follows:
44 (i) the monetary difference between the offer and
45 judgment must be subtracted from the fees; and
46 (ii) the award must not exceed the amount of the
47 judgment.

48 (2) If the offeree is entitled to a statutory award of
49 attorney's fees, the sanction must include:
50 (A) costs incurred by the offeror after the offer
51 expired; and
52 (B) denial of attorney's fees incurred by the offeree
53 after the offer expired.

54 (3)(A) The court may reduce the sanction to avoid undue
55 hardship [or because the judgment could not reasonably
56 have been expected at the time the offer expired].
57 (B) No sanction may be imposed on disposition of an
58 action by acceptance of an offer under this rule or other
59 settlement.

60 (4)(A) A judgment for a party demanding relief is more
61 favorable than an offer to it:
62 (i) if money is demanded and the amount awarded –
63 including the costs, attorney fees, and other
64 amounts awarded for the period before the offer
65 expired – exceeds the monetary award that would
66 have resulted from the offer; and
67 (ii) if nonmonetary relief is demanded and the
68 judgment includes substantially all the nonmonetary
69 relief offered and grants additional relief.
70
71 (B) A judgment is more favorable to a party opposing

72 relief than an offer to it:
73 (i) if money is demanded and the amount awarded –
74 including the costs, attorney fees, and other
75 amounts awarded for the period before the offer
76 expired – is less than the monetary award that
77 would have resulted from the offer; and
78 (ii) if nonmonetary relief is demanded and the
79 judgment does not include substantially all the
80 nonmonetary relief offered.

81 <u>(f) Nonapplicability.</u> This rule does not apply to an offer
82 made in an action certified as a class or derivative
83 action under Rule 23, 23.1, or 23.2.
84

COMMITTEE NOTE

Former Rule 68 has been properly criticized as one-sided and largely ineffectual. It was available only to parties defending against a claim, not to parties making a claim. It provided little inducement to make or accept an offer since in most cases the only penalty suffered by declining an offer was the imposition of the typically insubstantial taxable costs subsequently incurred by the offering party. Greater incentives existed after the decision in Marek v. Chesney, 473 U.S. 1 (1985), which ruled that a plaintiff who obtains a positive judgment less than a defendant's Rule 68 offer loses the right to collect post-offer attorney fees provided by a statute as "costs" to a prevailing plaintiff. The decision in the Marek case, however, was limited to cases affected by such fee-shifting statutes. It also provoked criticism on the ground that it was inconsistent with the statutory policies that favor special categories of claims with the right to recover fees.

Earlier proposals were made to make Rule 68 available to all parties and to increase its effects by authorizing attorney fee sanctions. These proposals met with vigorous criticism. Opponents stressed the policy considerations involved in the "American Rule" on attorney fees. They emphasized that the opportunity of all parties to attempt to shift fees through Rule 68 offers could produce inappropriate windfalls and would create unequal pressures and coerce unfair settlements because parties often have different levels of knowledge, risk-averseness, and resources.

The basis for many of the changes made in the amended Rule 68 is provided in an article by Judge William W. Schwarzer, Fee-Shifting Offers of Judgment -- an Approach to Reducing the Cost of Litigation, 76 Judicature 147 (1992).

The amended rule allows any party to make a Rule 68 offer. The incentives for early settlement are increased by increasing the sanctions imposed on a party who fails to win a judgment more favorable than an offer it failed to accept. A plaintiff is liable for post-offer costs even if the plaintiff takes nothing. Post-offer attorney fees are shifted, subject to two limits. The amount of post-offer attorney fees is reduced by the difference between the offer and the judgment. In addition, the attorney fee award cannot exceed the amount of the judgment. A plaintiff who wins nothing pays no attorney fees. A defendant pays no more in fees than the amount of the judgment.

A plaintiff's incentive to accept a defendant's Rule 68 offer includes the incentive that applies to all offers -- the risk that trial will produce no more, and perhaps less. It also includes the fear of Rule 68 sanctions; the defendant's post-offer attorney fees may reduce or obliterate whatever judgment is won, leaving the plaintiff with all of its own expenses and the defendant's post-offer costs. A defendant's incentive to accept a plaintiff's Rule 68 offer is similar: not only must it pay a larger judgment, but it can be held to pay post-offer costs and the plaintiff's post-offer attorney fees up to the amount of the judgment.

Attorney fee sanctions are limited to reflect the difference between the offer and the judgment. The difference is treated as a benefit accruing to the fee expenditure. If fees of $40,000 are incurred after the offer and the judgment is $15,000 more favorable than the offer, for example, the maximum fee sanction is reduced to $25,000.

Subdivision (a). Several formal requirements are imposed on the Rule 68 offer process. Offers may be made outside of Rule 68 at any time before or after an action is commenced. The requirement that the Rule 68 offer be in writing and state that it is made under Rule 68 is designed to avoid claims for sanctions based on less formal offers that may not have been recognized as paving the way for sanctions.

A Rule 68 offer is not to be filed with the court until it is accepted. The offeror should not be influenced by concern that an unaccepted offer may work to its disadvantage in later proceedings.

The requirement that an offer remain open for at least 21 days is intended to allow a reasonable period for evaluation by the recipient. Sanctions cannot fairly be imposed if inadequate time is allowed for evaluation. Sanctions run only from the time the offer expires; see subdivision (e)(1) and (2). A party who wishes to increase the prospect of acceptance may set a longer period. The court may order a different period. As one example, it may not be fair to require a defendant to act on an offer early in the proceedings, under threat of sanctions, without more time to gather information. If the court orders that the period for accepting be extended, the offer can be withdrawn under paragraph (2). The opportunity to withdraw is important for the same reasons as the power to extend — developing information may make the offer

seem less attractive to the plaintiff just as it may make the offer seem more attractive to the defendant. As another example, the 21-day period may foreclose offers close to trial; the court can grant permission to shorten the period to make an offer possible.

Paragraph (2) establishes power to withdraw the offer before acceptance. This power reflects the fact that the apparent worth of a case can change as further information is developed. It also enables a party to retain control of its own offer in face of an order extending the time for acceptance. Withdrawal nullifies the offer -- sanctions cannot be based upon a withdrawn offer.

Subdivision (b). An offer can be accepted only during the period it remains open and is not withdrawn before acceptance. Acceptance requires service on the offeror. An acceptance is effective notwithstanding an attempt to withdraw the offer if the acceptance is served on the offeror before the withdrawal is served on the offeree. If it is uncertain whether acceptance or withdrawal was served first, the doubt should be resolved by giving effect to the withdrawal, since the parties remain free to make successive Rule 68 offers or to settle outside the Rule 68 process.

Once an offer is accepted, judgment may be entered by the clerk or court according to the nature of the offer. Ordinarily the clerk should enter judgment for money or recovery of clearly identified property. Action by the court is more likely to be required for entry of an injunction or declaratory relief.

The court has the same power to refuse to enter judgment under Rule 68 as it has to refuse judgment on agreement of the parties in other settings. An injunction may be found contrary to the public interest, for example, if it requires the court to enforce terms that the court feels unable to supervise. A settled decree may affect public interests in broader terms, particularly in actions such as those to control the conduct of public institutions, protect the environment, or regulate employment practices. The parties cannot force the court to adopt and enforce a decree that defeats important interests of nonparties. A Rule 68 judgment also might be unfair to other parties in a multiparty action. An extreme illustration of unfairness would be an agreement to allocate all of a limited fund to one party, excluding others. Less extreme settings also might justify refusal to enter judgment.

Subdivision (c). An offer expires if it is not withdrawn or accepted.

An expired offer may be used only for the purpose of imposing sanctions under subdivision (e). The procedures of Rule 54(d) govern requests for costs or attorney fees as sanctions.

Subdivision (d). Successive offers may be made by any party without losing the opportunity to recover sanctions based on an earlier expired offer, and without defeating exposure to sanctions based on failure to accept an offer from another party. This system encourages the parties to make early Rule 68 offers, which may promote early settlement, without losing the opportunity to make later Rule 68 offers as developing familiarity with the case helps bring together estimates of probable value. It also encourages later Rule 68 offers following expiration of earlier offers by preserving the possibility of winning sanctions based on an earlier offer.

The operation of the successive offers provision is illustrated by Example 4 in the discussion of subdivision (e).

Subdivision (e). Sanctions are mandatory, unless reduced or excused under paragraph (3).

Final judgment. The time for determining sanctions is controlled by entry of final judgment. In most settings finality for this purpose will be determined by the tests that determine finality for purposes of appeal. Complications may emerge, however, in actions that involve several parties and claims. A final judgment may be entered under Rule 54(b) that disposes of one or more claims between the offeror and offeree but leaves open other claims between them. Such a judgment can be the occasion for invoking Rule 68 sanctions if it finally disposes of all matters involved in the Rule 68 offer. It also is possible that a Rule 54(b) judgment may support Rule 68 sanctions even though it does not dispose of all matters involved in the offer. A plaintiff's $50,000 offer to settle all claims, for example, might be followed by a $75,000 judgment for the plaintiff on two claims, leaving two other claims to be resolved. Usually it will be better to defer the determination of sanctions to a single proceeding upon completion of the entire action. If there is a special need to determine sanctions promptly, however, an interim award may be made as soon as it is inescapably clear that the final judgment will be more favorable than the offer.

<u>Costs and fees.</u> Sanctions are limited to costs and attorney fees. Other expenses are excluded for a variety of reasons. In part, the limitation reflects the policies that underlie the limits of attorney fee sanctions discussed below. In addition, the limitation reflects the great variability of other expenses and the difficulty of determining whether particular expenses are reasonable.

Costs for the present purpose include all costs routinely taxable under Rule 54(d). Attorney fees are treated separately. This provision supersedes the construction of Rule 68 adopted in Marek v. Chesney, 473 U.S. 1 (1985), under which statutory attorney fees are treated as costs for purposes of Rule 68 if, but only if, the statute treats them as costs.

Several limits are placed on sanctions based on attorney fees incurred after a Rule 68 offer expired. The fees must be reasonable. The sanction is reduced by deducting from the amount of reasonable fees the monetary difference between the offer and judgment. To the extent that the judgment is more favorable to the offeror than the offer, it is fair to attribute the difference to the fee expenditure. This reduction is limited to monetary differences. Differences in specific relief are excluded from this reduction because the policy underlying the benefit-of-the-judgment rule is not so strong as to support the difficulties frequently encountered in setting a monetary value on specific relief.

The attorney fee sanction also is limited to the amount of the judgment. A claimant's money judgment can be reduced to nothing by a fee award, but out-of-pocket liability is limited to costs. A defending party's exposure to sanctions is made symmetrical by limiting the stakes to the money amount of the judgment. If no monetary relief is awarded, attorney fee sanctions are not available to either party. This result not only avoids the difficulties of setting a monetary value on specific relief but also diminishes the risk of deterring litigation involving matters of public interest.

Several examples illustrate the working of this "capped benefit-of-the-judgment" attorney fee sanction.

<u>Example 1. (No shifting)</u> After its offer to settle for $50,000 is not accepted, the plaintiff ultimately recovers a $25,000 judgment. Rejection of this offer would not result in any sanction

on the defendant because the judgment is more favorable to the offeree than the offer. Similarly, there would be no sanctions based on an offer of $50,000 by the defendant and a $75,000 judgment for the plaintiff.

<u>Example 2. (Shifting on rejection of plaintiff's offer)</u> After the defendant rejects the plaintiff's $50,000 offer, the plaintiff wins a $75,000 judgment. (a) The plaintiff incurred $40,000 of reasonable post-offer attorney fees. The $25,000 benefit of the judgment is deducted from the fee sanction, leaving a sanction of $15,000. (b) If post-offer attorney fees were $25,000 or less, no fee sanction would be imposed. (c) If reasonable post-offer fees were $110,000, deduction of the $25,000 benefit of the judgment would leave $85,000; the cap that limits the sanction to the amount of the judgment would reduce the attorney fee sanction to $75,000.

<u>Example 3. (Shifting on rejection of defendant's offer)</u> After the plaintiff rejects the defendant's $75,000 offer, the plaintiff wins a $50,000 judgment. (a) The defendant incurred $40,000 of reasonable post-offer attorney fees. The $25,000 benefit of the judgment is deducted from the fee sanction, leaving a fee sanction of $15,000. (b) If post-offer attorney fees were $25,000 or less, no fee sanction would be imposed. (c) If reasonable post-offer fees were $110,000, deduction of the $25,000 benefit of the judgment would leave $85,000; the cap that limits the sanction to the amount of the judgment would reduce the attorney fee sanction to $50,000. The plaintiff's judgment would be completely offset by the fee sanction, and the plaintiff would remain liable for post-offer costs.

<u>Example 4. (Successive offers)</u> After a defendant's $50,000 offer lapses, the defendant makes a new $60,000 offer that also lapses. (a) A judgment of $50,000 or less requires sanctions based on the amount and time of the $50,000 offer. (b) A judgment more than $50,000 but not more than $60,000 requires sanctions based on the amount and time of the $60,000 offer. This approach preserves the incentive to make a successive offer by preserving the potential effect of the first offer.

<u>Example 5. (Counteroffers)</u> The effect of each offer is determined independently of any other offer. Counteroffers are likely to be followed by judgments that entail no sanctions or

sanctions against only one party. In some circumstances, however, counteroffers can entitle both parties to sanctions. Offers made and not accepted at different stages in the litigation may fall on both sides of the eventual judgment. Each party receives the benefit of its offer and pays the sanction for failing to accept the offer of the other party. The sanctions are offset, resulting in a net award to the party entitled to the greater sanction. As an example, a plaintiff might make an early $25,000 offer, followed by reasonable attorney fees of $40,000. The defendant might make a later $60,000 offer, followed by reasonable attorney fees of $15,000. A judgment for $50,000 would support sanctions for each party. The attorney fee sanction payable to the plaintiff would be reduced to $15,000 by subtracting the $25,000 benefit of the judgment from the $40,000 fees. The attorney fee sanction payable to the defendant would be reduced first to $5,000 by subtracting the $10,000 benefit of the judgment from the $15,000 fees. The $5,000 sanction payable to the defendant would be set off against the $15,000 sanction payable to the plaintiff, leaving a $10,000 net sanction payable to the plaintiff.

Example 6. (Counterclaims) Cases involving claims and counterclaims for money alone fall within the earlier examples. Each party controls the terms of any offer it makes. If no offer is accepted, the final judgment is compared to the terms of each offer. (a) The defendant's offer to pay $10,000 to the plaintiff to settle both claim and counterclaim is followed by a $25,000 award to the plaintiff on its claim and a $40,000 award to the defendant on its counterclaim. The result is treated as a net award of $15,000 to the defendant. This net is $25,000 more favorable to the defendant than its offer. If the defendant's reasonable post-offer attorney fees were $35,000, the attorney fee sanction payable to the defendant is $10,000. (b) If the defendant's reasonable post-offer attorney fees in example (a) had been $45,000, the attorney fee sanction payable to the defendant would be limited to the $15,000 amount of the net award on the merits. (c) The defendant's offer to accept $10,000 from the plaintiff to settle both claim and counterclaim is followed by an award of nothing to the plaintiff on its claim and a $40,000 award to the defendant on its counterclaim. The result is treated as a net award of $40,000 to the defendant, which is $30,000 more favorable to the defendant than its offer.

Contingent Fees. {Some means must be found to apportion

contingent fees between pre-offer and post-offer periods. Can we force contingent fee attorneys to keep time records? Is it relevant that failure to accept an offer changes the risks? Should sanctions be imposed on a party even for costs?}

<u>Hardship or surprise.</u> Sanctions may be reduced to avoid undue hardship or reasonable surprise. Reduction may, as a matter of discretion, extend to denial of any sanction. As an extreme illustration of hardship, a severely injured plaintiff might fail to accept a $10,000,000 offer and win a $9,500,000 judgment. Even if the defendant managed to incur reasonable fees of $1,500,000 after expiration of the offer, a $1,000,000 sanction might seem untoward. Surprise is most likely to be found when the law has changed between the time an offer expired and the time of judgment. Later discovery of vitally important factual information also may establish that the judgment could not reasonably have been expected at the time the offer expired.

<u>Statutory Fee Entitlement.</u> Sanctions against a party entitled to statutory attorney fees have been governed by the decision in *Marek v. Chesney*, 473 U.S. 1 (1985). Revised Rule 68 continues to provide that a statutory award is not to be made for fees incurred after expiration of an offer more favorable than the judgment. The only additional sanction against a party entitled to statutory fees is costs incurred by the offeror after the offer expired. The fee sanction provided by subdivision (e)(1)(B) for other cases is not available. These rules establish a balance between the policies underlying Rule 68 and statutory attorney fee provisions. It is desirable to encourage early settlement in cases governed by statutory attorney fee provisions just as in other cases. Effective sanctions remain important. The award of an attorney fee sanction against a party entitled to recover statutory fees, however, could interfere with the legislative determination that the underlying claim deserves special protection. The balance struck by Rule 68 does not address the question whether failure to win a judgment more favorable than an expired offer should be taken into account in determining whether any particular statute supports an award for fees incurred before expiration of the offer.

<u>Settlement.</u> All sanctions are denied upon acceptance of a successive Rule 68 offer or other settlement. This rule makes it easier to reach a final settlement, free of uncertainty as to the prospect of Rule 68 sanctions. The prospect of Rule 68 sanctions

remains, however, as one of the elements to be considered by the parties in determining the terms of settlement.

Judgment more favorable. Many complications surround the determination whether a judgment is more favorable than an offer, even in a case that involves only monetary relief. The difficulties are illustrated by the provisions governing offers to a party demanding relief. The comparison should begin with the exclusion of costs, attorney fees, and other items incurred after expiration of the offer. The purpose of the offer process is to avoid such costs. Costs, attorney fees, and other items that would be awarded by a judgment entered at the expiration of the offer, on the other hand, should be included. An offer that matches only the award of damages is not as favorable as a judgment that includes additional money awards. Beyond that point, comparison of a money judgment with a money offer depends on the details of the offer, which are controlled by the offeror. An offer may specify separate amounts for compensation, costs, attorney fees, and other items. The total amount of the offer is controlling in the determination of sanctions. There is little point in denying sanctions because the offer was greater than the final award in one dimension and smaller — although to a lesser extent — in another dimension. If the offer does not specify separate amounts to each element of the final judgment and award, the same comparison is made by matching any specified amounts and treating the unspecified portion of the offer as covering all other amounts. For example, a defendant's lump-sum offer of $50,000 might be followed by a $45,000 judgment for the plaintiff. The judgment is more favorable to the plaintiff than the offer if costs, attorney fees, and other items awarded for the period before the offer expired total more than $5,000.

Nonmonetary relief further complicates the comparison between offer and judgment. A judgment can be more favorable to the offeree even though it fails to include every item of nonmonetary relief specified in the offer. In an action to enforce a covenant not to compete, for example, the defendant might offer to submit to a judgment enjoining sale of 30 specified items in a two-state area for 15 months. A judgment enjoining sale of 29 of the 30 specified items in a five-state area for 24 months is more favorable to the plaintiff if the omitted item has little importance to the plaintiff. Any attempt to undertake a careful evaluation of significant differences between offer and judgment, on the other

hand, would impose substantial burdens and often would prove fruitless. The standard of comparison adopted by subdivision (e)(4)(A)(ii) reduces these difficulties by requiring that the judgment include substantially all the nonmonetary relief in the offer and additional relief as well. The determination whether a judgment awards substantially all the offered nonmonetary relief is a matter of trial court discretion entitled to substantial deference on appeal.

The tests comparing money offers with money judgments and comparing nonmonetary offers with nonmonetary judgments both must be satisfied to support sanctions in actions for both monetary and nonmonetary relief. Gains in one dimension cannot be compared to losses in another direction.

The same process is involved, in converse fashion, to determine whether a judgment is more favorable to a party opposing relief.

There is no separate provision for offers for structured judgments that spread monetary relief over a period of time, perhaps including conditions subsequent that discharge further liability. The task of comparing a lump-sum judgment with a structured offer is not justified by the purposes of Rule 68, even when a reasonable actuarial value can be attached to the offer. If applicable law permits a structured judgment after adjudication, however, it may be possible to compare the judgment with the offer. It seems likely that ordinarily the comparison should be made under the principles that apply to nonmonetary relief, since the elements of the structure are not likely to coincide directly.

Multiparty offers. No separate provision is made for offers that require acceptance by more than one party. Rule 68 can be applied in straight-forward fashion if there is a true joint right or joint liability. Sanctions should be imposed on all joint offerees without excusing any who urged the others to accept the offer; this result is justified by the complications entailed by a different approach and by the relationships that establish the joint right or liability. Rule 68 should not apply in other cases in which an offer requires acceptance by more than one party. The only situation that would support easy administration would involve failure of any offeree to accept, and a judgment no more favorable to any offeree. Even in that setting, a rule permitting sanctions could

easily complicate beyond reason the already complex strategic calculations of Rule 68. Offers would be made in the expectation that unanimous acceptance would prove impossible. Acceptances would be tendered in the same expectation. Apportioning sanctions among the offerees also could entail complications beyond any probable benefits.

Subdivision (f). Rule 68 does not apply to actions certified as class or derivative actions under Rules 23, 23.1, or 23.2. This exclusion reflects several concerns. Rule 68 sanctions do not seem appropriate if the offeree accepts the offer but the court refuses to approve settlement on that basis. It may be unfair to impose sanctions on representative parties, and even more unfair to seek to reach nonparticipating class members. The risk of sanctions, moreover, may create a conflict of interest that chills efforts to represent the interests of others.

The subdivision (f) exclusions apply even to offers made by class representatives or derivative plaintiffs. Although the risk of conflicting interests may disappear in this setting, the need to secure judicial approval of a settlement remains. In addition, there is no reason to perpetuate a situation in which Rule 68 offers can be made by one adversary camp but not by the other.

Alternate Fee Sanction Provision

(e) Sanctions. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a sanction to the offeror.

(1) The sanction must include:

(A) costs incurred by the offeror after the offer expired; and

(B) reasonable attorney fees incurred by the offeror after the offer expired, measured as follows:

(i) the monetary difference between the offer and judgment must be subtracted from the fees; and

(ii) the award must not exceed the amount of the judgment.

(2)(A) The court may reduce the sanction to avoid undue hardship [or because the judgment could not reasonably have been expected at the time the offer expired].

(B) No sanction may be imposed:

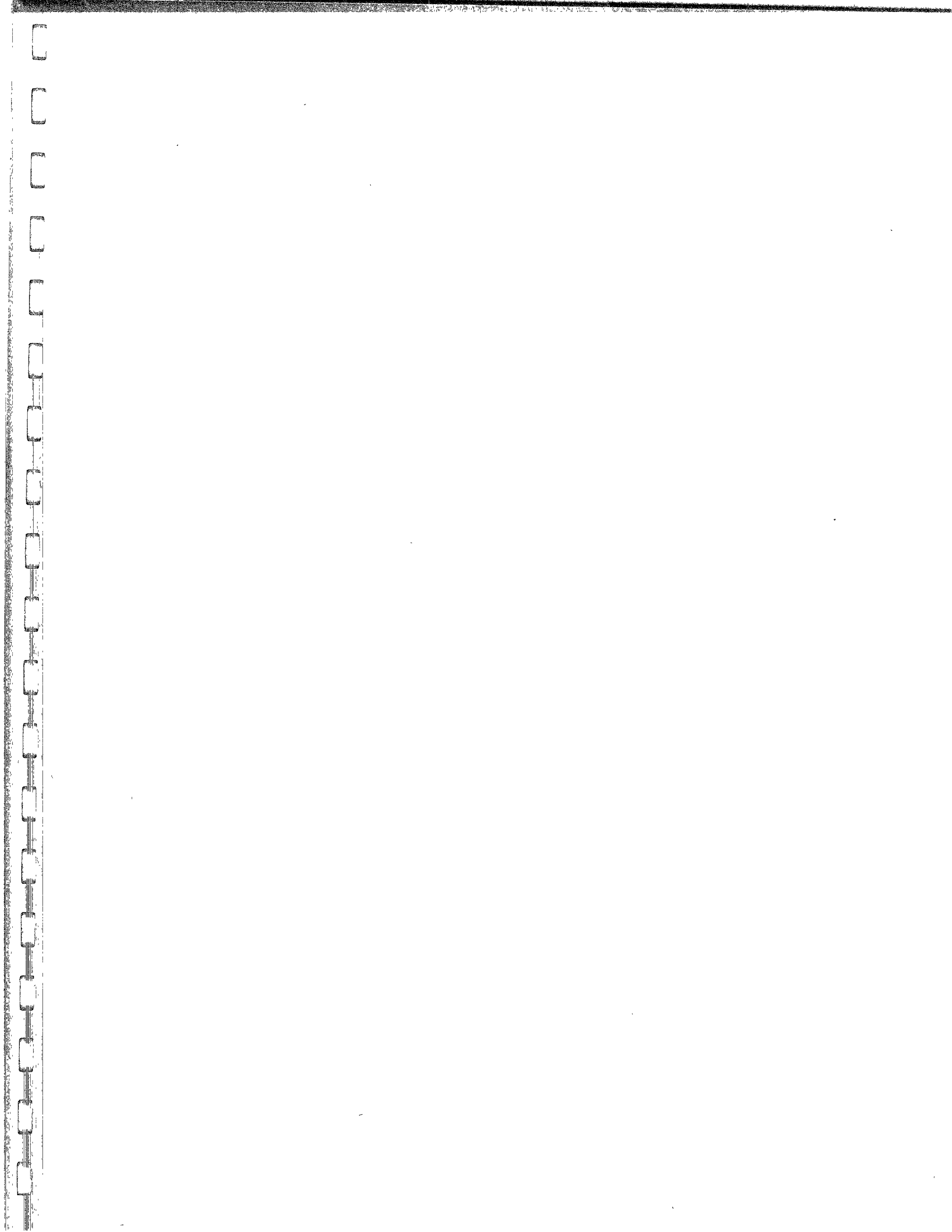
(i) against a party that otherwise is entitled to a statutory award of attorney fees; or

(ii) on disposition of an action by acceptance of an offer under this rule or other settlement.

Note

All sanctions are denied against a party who is entitled to a statutory award of attorney fees. This rule supersedes the decision in *Marek v. Chesney*, 473 U.S. 1 (1985). In a system in which each party ordinarily is responsible for its own attorney fees, statutes that shift attorney fees represent a legislative determination that the underlying claims deserve special protection. This protection would be defeated by denying recovery of statutory fees or imposing fee sanctions on a party entitled to recover statutory fees. A plaintiff, for example, might reject a defendant's $100,000 offer and win a $90,000 judgment. If an applicable fee statute would be interpreted to make the plaintiff a prevailing party, entitled to recover fees, an expired Rule 68 offer should not change this result. Even cost sanctions may be inconsistent with the policy of protecting the party entitled to a statutory fee award. Rule 68 sanctions are withheld accordingly. Interpretation of each attorney fee statute is required to

determine whether failure to accept a Rule 68 offer should be taken into account in determining the right to recover statutory fees.



THE FEDERAL JUDICIAL CENTER
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, D.C. 20002

RESEARCH DIVISION

Writer's Direct Dial Number:
(202) 273-4070 Ext. 357

March 31, 1993

Honorable Sam C. Pointer, Jr.
Chief Judge, U.S. District Court for the Northern District of Alabama
882 United States Courthouse
1729 Fifth Ave. North
Birmingham, AL 35203

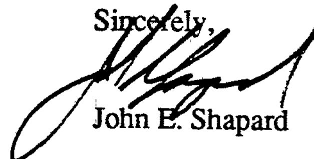
Dear Judge Pointer,

As I explained in my December 18, 1992, letter to Professor Cooper, the Center is preparing to provide the Advisory Committee with an analysis of the "technical" literature concerning the effects of fee-shifting rules, and to conduct a survey of counsel concerning possible amendments to Rule 68. Work on the technical analysis suggests that the survey of counsel can provide two distinct benefits: (1) empirical information about a sample of cases should improve the technical analysis, and (2) counsels' views of the proposed rule should provide the Committee some early indications of the nature and strength of support or resistance among the legal community.

I enclose a document that explains our plan for the survey, including a draft questionnaire and cover letter. I provide the enclosures to solicit suggestions from the Advisory Committee about any additional points that might be covered to enhance the survey's usefulness to the Committee. The plan as described in the enclosures is subject to revision based on further review within the Center and on the results of preliminary tests of the questionnaire. The questionnaire is more demanding than many we have used in other surveys, but we have obtained good response from attorneys with good questions on important subjects. Accordingly, we will particularly appreciate suggestions to improve the questionnaire on that score.

My December letter to Professor Cooper set September 1 as our target date for completion of both the questionnaire survey and the literature analysis. At that time I conceived the survey as an "opinion poll" of counsel, and did not appreciate that the theoretical debate could be greatly informed by objective information acquired in the survey. Hence the proposed survey is a more demanding task and the literature analysis will depend in significant part on the survey results, so September 1 will be a difficult deadline to meet. I would be very grateful if your Committee's agenda could accommodate a somewhat later date for receipt of our report. September 1 is not impossible, but November or December would be a good deal more comfortable. Please tell me what the deadline should be. We are prepared to proceed as soon as we have the committee's suggestions.

Sincerely,



John E. Shapard

encl.
cc: Professor Cooper

DESIGN FOR SURVEY OF COUNSEL

The planned survey of counsel concerning proposed amendments to Rule 68 is one part of a two-part effort by the Federal Judicial Center to help inform the debate about possible amendments to Rule 68. The other part of the effort is an analysis of technical literature concerning the theoretical effects of fee-shifting rules. The survey of counsel has two general objectives: (1) to ascertain counsel's views about the likely effects of a proposed amendment, and (2) to obtain information about cases and litigation practices that can enhance the theoretical analysis--both "technical" and non-technical--of the likely effects of such an amendment.

Explanation of the Objectives of the Survey

The draft questionnaire included with this statement is in some respects a detailed statement of the objectives. Those questions that elicit counsel's general views about the pros and cons of a Rule 68 amendment have a self-evident purpose. Many of the other questions have purposes that relate to the literature analysis. The questionnaire itself includes some brief explanatory notes, but it may help to understand that there are several issues upon which the literature analysis hinges:

1. Do cases now reach trial when they could have settled, or do cases now settle later than they might have? If all cases that can settle do in fact settle, and settlements occur about as early as possible, then the possible effects of an amended rule 68 are limited. If instead many cases that are now tried could have settled or many cases that now settle could settle earlier at less expense, an amended rule could have significant effects. Whether cases that now reach trial could have settled may depend both on (a) whether counsel thought the case could have settled, and (b) independently, on whether settlement was "objectively" possible because there existed a settlement figure that both sides would have been willing to accept, but the case did not settle because the parties did not know that the possibility existed.
2. It is frequently suggested that "risk-aversion" (basically an inability to risk a loss or to risk forgoing a gain) places less-affluent litigants at a disadvantage compared to the more-affluent. Fee-shifting rules can exacerbate (or possibly mitigate) this disparity. The questionnaire includes several questions concerning counsel's views about this issue.
3. The technical literature provides no satisfactory theory to suggest how cases that can settle actually proceed to settlement. Whether an amended Rule 68 might assist in or detract from reaching settlement depends on the approach counsel take in deciding what amount to offer or accept .
4. Fee-shifting rules may affect fee expenditures, encouraging expenditures by a party who expects fees to be compensated by opponent, and inhibiting the imposition of expenses on opponent (e.g. by marginal discovery requests) due to the risk of having to compensate opponent for those expenses. The net effect of these contrasting incentives depends on the nature of parties' expenses--how much is incurred "voluntarily" and how much is imposed on a party by actions of the opponent.
5. It is generally assumed that plaintiff's estimates of the odds of a verdict for plaintiff and of the damages to be recovered are both higher than defendant's estimates of those same figures. Many of the conclusions of the technical analysis are valid only if that assumption is correct, and the logic would in some instances lead to the opposite conclusion if the assumption is incorrect. The survey will permit us to determine the proportion of cases in which the assumption is correct.

Specifics of Sampling Plan

The questionnaire will be sent to counsel whose names and addresses are obtained from the docket sheets of a sample of cases recently terminated in the district courts. Several considerations dictate how that sample should be drawn.

First, we are concerned primarily with cases that might have been affected had an amended Rule 68 been in effect. The questionnnaire begins with an explanation of a specific draft rule, but for purposes of defining the relevant cases, we need only observe that the presumed purpose of the rule is to encourage settlement instead of trial and encourage earlier settlement with less litigation expense rather than later settlement with more expense. There are some cases for which it is highly unlikely that an amended Rule 68 would yield either potential benefits or possible adverse consequences. In general, we cannot expect the rule to have any influence in cases that are disposed of far short of the point when settlement might be feasible (e.g. by default judgment or dismissal for failure to state a claim). Moreover, there are certain classes of civil cases for which "settlement" as we usually think of it is simply inapplicable (e.g. habeas corpus actions, appeals from denials of social security benefits, deportation cases). The plan is to exclude the following categories of cases.

1. Cases terminated by default judgment or dismissal (other than dismissal based on a settlement).
2. Cases whose "termination" is not a disposition: those terminated by remand, inter-district transfer, or MDL transfer.
3. Cases in which settlement is inapposite or exceedingly rare: social security, habeas corpus, deportation, mortgage foreclosure, and actions to vacate sentence.
4. Cases to which the proposed rule would not apply by virtue of a statutory provision for recovery of attorney fees.

These exclusions eliminate about half of all civil cases. Those remaining divide readily into three broad groups, each of which accounts for about a third of the total: contract, tort, and all other. Overall, about 8% of these cases reach trial, 73% settle, and the remaining 19% are disposed of in other ways that may be equivalent to settlement or may have been averted by settlement. But the percentages vary among categories, so that tort cases account for over 60% of the trials, with contracts accounting for 25% and the "other" category for 15%.

To assure that the number of tried cases in the sample is large enough to afford a basis for generalization, we need to draw separate samples of tried cases and non-tried cases. To assure as well that the sample of tried cases is not dominated by tort actions (which could preclude our ability to infer how the rule might affect trial in other types of cases), we propose to sample separately from the three subject matter groups. The proposed sample would total 600 cases, 100 each drawn at random from each of 6 categories of cases, as follows:

	Tried Cases	Non-Tried Cases	Total
Torts	100	100	200
Contracts	100	100	200
All Other	100	100	200
Total	300	300	600

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

Research Division
Telephone: (202) 273-4070

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Judge William W Schwarzer, Director

March 25, 1993

Mr. John J. Smith
123 Fourth St.
Ourtown, OS 98765

[Questionnaire Cover Letter]

RE: Able v Baker, Docket # 92-1234 U.S.D.C., M. Dist. of North Carolina

Dear Mr. Smith,

The Advisory Committee on Civil Rules of the Judicial Conference of the U.S. has before it proposals to amend Rule 68, concerning offers of judgment. The Federal Judicial Center has undertaken a study to assist the committee in determining how such an amendment might affect federal civil litigation. The Advisory Committee is the body responsible for initiating proposed amendments to the Rules of Civil Procedure, and the Judicial Center is the research arm of the federal courts.

I write to you because I understand that you were counsel in the above-referenced case, which is one of a randomly selected sample of cases chosen for the Judicial Center's study. I have enclosed a questionnaire that I ask you to complete and return at your earliest convenience.

As you will see from the questionnaire, assessing the proposed amendment requires reflection. The questionnaire asks more from you than a few simple facts or quick conclusions. It asks some hard questions. I recognize that questionnaires are rarely welcome, but your response will make a valuable contribution to improving the administration of justice in the federal courts.

Although the Advisory Committee always requests and receives public comment on formally proposed amendments, it ordinarily hears only from a limited audience, including legal scholars and organizations representing particular segments of the bar or particular interests. Response to the enclosed questionnaire will provide the committee with the views of a truly representative sample of federal civil litigators, including some from whom the committee rarely hears.

Your responses will be kept confidential. The questionnaire is marked with an identifying code that will allow us to relate your responses to information about the above-referenced case, but no one outside of the five-member research project team will be able to associate you or your case to the answers you provide. Your responses will be released only as part of aggregate statistics.

The Judicial Center and the Advisory Committee will be very grateful for your cooperation in completing the questionnaire. You may check the box at the end of the questionnaire if you wish to receive a copy of the report of our study and updates on the status of the proposal.

Sincerely,

John E. Shapard

Established by 28 U.S.C. § 620, the Federal Judicial Center conducts research to further the development and adoption of improved judicial administration in the courts of the United States.

Questionnaire Concerning Proposed Amendment to Rule 68, FRCP

Explanation of the draft rule. No proposed amendment has yet been published for comment or otherwise formally entertained by the Advisory Committee on Civil Rules. The essence of the proposal that has been made to the committee is summarized below.

1. **Applicability.** The rule would not apply in class actions or in cases where existing law provides for recovery of attorney fees by one party from an opposing party (e.g., civil rights cases covered by 42 USC §1988). Moreover, it would apply only to cases in which at least some monetary relief is sought.
2. **Offer of Settlement, Expiration, Withdrawal.** The rule would allow any party, at least 30 days after service of the summons and complaint, to serve on an opposing party an offer to settle the case on the terms stated in the offer. An offer would expire 21 days after service, although the court could shorten or lengthen that period for cause. An offer could be withdrawn at any time prior to its acceptance.
3. **Acceptance.** An offer not previously withdrawn could be accepted by the offeree by serving and filing the offer and notice of acceptance, whereupon the court would enter judgment on the terms of the offer.
4. **Consequence of Failure to Accept an Offer.** If the case proceeds to a judgment that is not more favorable to the offeree than were the terms of an expired offer, the offeree would be required to pay compensation to the offeror for the costs--ordinary statutory costs--and reasonable attorney fees incurred by the offeror after expiration of the offer. A judgment awarding any non-monetary relief could not be deemed less favorable than an offer unless the terms of the offer included substantially all such non-monetary relief.
5. **Limitations on Compensation for Attorney Fees.** Compensation for reasonable attorneys fees incurred after the offer expired would be:
   a. reduced by the difference in monetary compensation provided by the offer and that provided by the judgment (i.e., offeror's attorney fees are recoverable only to the extent that they are not already "recovered" by virtue of the difference between offer and judgment); and
   b. further limited to the amount of the judgment (i.e., plaintiff can lose no more than the amount of the judgment, and defendant's liability cannot exceed twice the amount of the judgment).

Examples A few brief examples will illustrate the operation of the rule.
1. Suppose plaintiff offers to settle the case for $50,000, the offer is not accepted, plaintiff thereafter incurs reasonable attorney fees of $20,000 and judgment after trial is for $60,000. Defendant would compensate plaintiff for $10,000 of the $20,000 in fees, leaving plaintiff with the same net outcome as it would have obtained had the offer been accepted: $50,000.
2. Same facts as 1, except that judgment is for $45,000. The offer was not more favorable to the defendant than was the judgment, so no compensation is recoverable by plaintiff-offeror.
3. Defendant offers to settle for $50,000, plaintiff does not accept, defendant thereafter incurs $20,000 in reasonable fees, and plaintiff obtains judgment for $25,000. Defendant's $20,000 in reasonable fees is fully compensated by the difference between the offer and the judgment–$25,000–so plaintiff pays no compensation.

General Instructions

This questionnaire has two types of questions. Some are labeled "**Case-specific**" and others are labeled "**General.**" Case-specific questions pertain specifically to the case referenced in the cover letter. Before answering the questionnaire, you may find it helpful to retrieve your files on the referenced case in order to refresh you memory concerning its litigation and the associated expenses. General questions concern your general views about the likely effects and pros and cons of the draft rule, or about you and your practice. In almost every instance where we ask your views about how the draft rule might have affected the specific case, we also ask a similar but general question. Please be careful to distinguish between the two types of questions.

Interspersed with the questions are explanatory passages, set off in a different type face (like the next paragraph). These passages explain why the questions are relevant to assessing the potential effects of the draft rule. Much of the questionnaire was drafted in light of a body of literature written by legal scholars and economists that debates the theoretical effects of various fee-shifting rules on the frequency and fairness of settlements. The explanations sometimes include reference to the theoretical debate. You need **not** read these passages in order to answer the questions, but we hope that if you choose to read them, you will find them thought-provoking.

The draft rule can be expected to influence settlement decisions only in cases where settlement would otherwise be possible, and, for cases that would settle in any event, only insofar as the rule might result in settlement that occurs earlier or later, at less or greater expense to the litigants, or on terms that are more or less favorable. In addition, limitations on the amount of compensation for an offeror's reasonable attorney fees make it unlikely that the rule would have much influence on cases where there is a substantial chance that plaintiff will not prevail on the issue of liability or fail to obtain judgment on a major component of its monetary claims.

1. Case-specific. How was this case resolved? (please check only **one** answer)

- ☐ a. It has not been resolved. (Please indicate "NA" next to those questions that you are unable to answer because the case has not been concluded).
- ☐ b. By verdict after a jury trial
- ☐ c. By verdict after a bench trial
- ☐ d. By summary judgment
- ☐ e. By dismissal with prejudice
- ☐ f. By voluntary dismissal that did not involve a settlement
- ☐ g. By a compromise settlement or consent judgment entered into before the case was disposed of in the district court, and in which the net result for both plaintiff and defendant was better than the worst result they might have obtained without settlement.
- ☐ h. By a settlement entered into after verdict or other final judgment (e.g., pending appeal).
- ☐ i. By a stipulated disposition that amounted to capitulation by plaintiff or defendant.
- ☐ j. Other. Please explain: ______________________________

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2. **Case-specific.** If this case was not settled, why not? Please check only one answer. (If the case did settle, skip this question.)

- ☐ a. The issues at stake in the case extended beyond the relief sought in this particular case (e.g., one or both parties sought to establish legal precedent, one or both parties were concerned that a settlement in this case would encourage or discourage litigation of similar or related cases).
- ☐ b. Although concerned mainly about the instant case and not about other possible litigation, one or both parties were more concerned about the principles at stake or were too emotionally invested in the case to accept a compromise resolution.
- ☐ c. The stakes in the case were so great that the costs of litigation through trial (and appeal, if necessary) were rather insignificant, so that there was no incentive for settlement on the part of at least one party.
- ☐ d. The outcome of the case was so highly unpredictable that there really was no way to find a satisfactory compromise.
- ☐ e. The parties (and/or counsel) were simply too far apart in their assessment of the likely outcome of the case. Had one or both sides been more reasonable or realistic, settlement might have occurred.
- ☐ f. This was a multi-party case in which the multiple interests involved made it very difficult, if not impossible, to fashion a satisfactory settlement.
- ☐ g. No serious settlement offers were made. I can't say why.
- ☐ h. Serious settlement negotiations occurred, but failed. I can't say why they failed.
- ☐ i. Other. Please explain: ______________________________

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Parts of the following questions address concern that a party of relatively limited financial means is at a disadvantage in settlement negotiations as compared to a wealthier opponent, because the wealthier party can more easily afford either to accept the worst possible outcome or forgo the best possible outcome. Debate exists about whether a fee-shifting rule might exacerbate that perceived disadvantage .

3. **Case-specific.** Please check each of the following statements that is applicable to the settlement of this case. (If the case did not settle, skip this question.)

- ☐ a. This case settled as soon as the parties had adequate information to evaluate the case. It could not reasonably have settled earlier than it did.
- ☐ b. This case could have settled earlier than it did, although not at significant savings in litigation expenses.*
- ☐ c. This case could have settled earlier than it did, with significant savings in litigation expenses.*
- ☐ d. The settlement in this case provided my client with a less favorable outcome than he (or she or it) would have accepted had he been financially able to accept the risks of going to trial, and hence able to insist on better settlement terms.

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* Litigation expenses: For work not compensated on an hourly basis at standard rates, the "expense" should be the amount that would have been charged if compensation had been on an hourly basis at standard rates.

4. **General.** For the types of cases you litigate, please check each statement that you agree with concerning how a party's financial means affects the fairness of results in these cases.

- ☐ a. Financially weaker parties are generally at no disadvantage compared to wealthier parties
- ☐ b. A party is at a disadvantage compared to a wealthier party when the worst possible outcome would be financially ruinous to the "poorer" party.
- ☐ c. A party is at a disadvantage compared to a wealthier party when a settlement offer that is unfair to that party is nonetheless a large increase in wealth for the "poorer" party.
- ☐ d. Financially weaker parties are generally at a disadvantage compared to wealthier parties, regardless of the range of possible outcomes in the case.
- ☐ e. Financially weaker parties generally have an advantage, or at least an offset to other disadvantages, by virtue of the fact that juries are inclined to render generous verdicts against wealthier parties and/or inadequate verdicts against poorer parties.

5. **Case-specific.** Please check <u>each</u> of the following statements that is applicable to this case (whether or not it settled).

Had the draft rule been applicable in this case, it probably would have:

- ☐ a. made no difference
- ☐ b. made settlement more likely or led to an earlier settlement, and thus probably resulted in significant savings in litigation expenses*
- ☐ c. delayed settlement, and probably led to greater litigation expenses.*
- ☐ d. made settlement less likely
- ☐ e. resulted in a less favorable result for my client
- ☐ f. resulted in a more favorable result for my client
- ☐ g. caused my client never to have brought or defended the case, or led me to refuse to accept the case

6. **General.** Please check <u>each</u> of the following statements with which you agree concerning the likely effects of the draft rule.

If the draft rule were adopted, it probably would have these effects:

- ☐ a. make no difference
- ☐ b. lead more cases to reach settlement
- ☐ c. lead cases to settle earlier than they would in the absence of the rule
- ☐ d. make settlement less likely
- ☐ e. delay settlement
- ☐ f. lead to case outcomes (<u>net</u> outcome from settlement or trial) that are more fair
- ☐ g. lead to case outcomes that are unduly generous to plaintiffs
- ☐ h. lead to case outcomes that are unduly generous to defendants
- ☐ i. lead to case outcomes that are unduly generous to wealthier litigants
- ☐ j. lead to case outcomes that are unduly generous to poorer litigants
- ☐ k. increase the expenses of litigation
- ☐ l. decrease the expenses of litigation

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* Litigation expenses: For work not compensated on an hourly basis at standard rates, the "expense" should be the amount that would have been charged if compensation had been on an hourly basis at standard rates.

7. **Case-specific.** What remedy or remedies were sought in this case? (please check only one)

- ☐ a. monetary relief only
- ☐ b. non-monetary relief only
- ☐ c. both monetary and non-monetary relief, with the monetary relief much more significant than the non-monetary relief
- ☐ d. both monetary and non-monetary relief, with the non-monetary relief much more significant than the monetary relief
- ☐ e. both monetary and non-monetary relief, with both being of considerable significance (i.e., not c or d)

8. **Case-specific.** If non-monetary relief was sought in this case, was it: (please check only one)

- ☐ a. impossible, nearly impossible, or simply inappropriate to equate to a monetary amount in terms of its importance to my client
- ☐ b. difficult but not impossible to equate to a monetary amount in terms of its importance to my client
- ☐ c. readily or easily equated to a significant sum of money in terms of its importance to my client
- ☐ d. of little or no importance to my client, and so worth nothing or very little in monetary terms

9. **Case-specific.** Litigation expenses for your client. "Litigation expenses" refers to attorney fees, statutory costs, and other actual expenses incurred in representing your client in this case, by all counsel who took part in that representation. If your client was not charged on an hourly basis (e.g. because the arraignment was a contingent fee, flat fee, or you are in-house counsel), please estimate what the attorney fees would have been had you charged on an hourly basis at rates that are standard in your locality for counsel of your level of experience and reputation.

a. What was the approximate total of litigation expenses for your client in this case?

$_______________

b. About what percentage of the total litigation expenses were attributable to attorney fees?

____________%

c. If this case settled, about how much additional litigation expense would have been required to take the case through trial or other final disposition (e.g., if the case might well have been decided by summary judgment or have been appealed).

$_______________

d. (Skip to question 10 if this case could not reasonably have settled). If this case could have settled (or did settle), about what percentage of the total litigation expenses were incurred after the earliest point when the case might have settled? (If the case settle at the earliest possible point, your answer should be 0%; otherwise, the answer should be more than 0%).

____________%

The following question is the most demanding one we ask. Its answer will permit us to estimate the "expected value" of all possible outcomes in this case. Expected value is a concept of statistics that is key to much of the theoretical analysis contained in the relevant literature. You may think it a silly or sound way to look at a case. In either event, please bear with us by reading the instructions carefully and providing an answer as informative as is feasible.

10. **Case-specific.** The "value" of a case for purposes of settlement can be broken down into a combination of the possible judgments (sometimes expressed as a range of possible values), together with the likelihood of each possible judgment (or range). A personal injury case, for instance, might present a 30% possibility that defendant will prevail, and a 70% possibility that plaintiff will obtain a judgment between $40,000 and $100,000. Or the possible positive verdicts might be more complex, with 40% odds of a verdict in the $40,000 to $60,000 range, 20% odds of a $60,000-$80,000 verdict, and a 10% chance of a verdict between $80,000 and $100,000. A case where damages are not at issue may require just two figures ($0 and the clear damages), together with the two percentage figures.
This question asks you to provide such a breakdown for the monetary relief sought in this case (including, where possible, the monetary value of any non-monetary relief), as you might have evaluated the case <u>before</u> it settled or reached judgment. Starting with the worst possible outcome for you client, please list the possible outcomes and their associated percentage odds. Put outcomes in parentheses to indicate liability to another party, and use numbers without parentheses to indicate liability of another party to your client. Use a $0 amount to indicate a judgment of no liability. The percentages should add to 100%. Do not take into account your party's attorney fees or other expenses, only the monetary value of possible judgments standing alone. You may use K as the abbreviation for thousands and M for millions. The example mentioned above would be listed by defendant as follows: (80K-100K) - 10%, (60K-80K) - 20%, (40K-60K) - 40%, $0 - 30%.

Possible verdicts (or other judgments).	Likelihood of the possible verdict, stated as a percentage. The percentages should sum to 100%.
______________________	______________________%
______________________	______________________%
______________________	______________________%
______________________	______________________%
______________________	______________________%
______________________	______________________%
______________________	______________________%

The literature suggests that fee-shifting rules may influence litigation expenses. The chance the opponent will have to pay some of a party's attorney fees may encourage greater expenditures. On the other hand, the chance that a party may have to pay opponent's fee's may inhibit activity that could increase the opponent's fees.

11. **Case-specific.** Please estimate what percentage of the total litigation expenses* in this case were attributable to the following categories of expenses. (The percentages should sum to 100%.)

_________% Expenses incurred in necessary response to actions of an opponent that were probably taken primarily for the purpose of increasing my client's expenses, and/or delaying or complicating the litigation.

_________% Expenses incurred in necessary response to actions of an opponent that were unreasonable or ill-considered, although probably not intended to increase my client's expenses or to delay or complicate the litigation.

_________% Expenses incurred in necessary response to actions of an opponent that were reasonable and necessary in light of the circumstances of the case.

_________% Expenses incurred at the initiative of me or my client, and which did not necessarily require that opponent incur expense in response.

_________% Expenses incurred at the initiative of me or my client, and which probably or clearly required that opponent incur expense in response.

12. **General**. Please check each of the following statements with which you agree:
If the draft rule were adopted, it would:

- ☐ a. Inhibit actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation, and this is currently a substantial problem.
- ☐ b. Inhibit actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation, but this is currently a minor problem.
- ☐ c. Increase the frequency of actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation.
- ☐ d. Inhibit taking reasonable and/or necessary steps in litigation, out of fear that the party may have to compensate opponent for the expense of responding to those actions.
- ☐ e. Encourage taking reasonable and/or necessary steps in litigation, owing to the possibility that those expenses will be compensated by opponent.
- ☐ f. Have none of the effects stated above.

13. **Case-specific.** What was the nature of the fee arrangement with your client in this case?

- ☐ a. Hourly fee (exclusively or primarily)
- ☐ b. Contingent fee
- ☐ c. In-house counsel or other compensation unrelated to time spent or result achieved
- ☐ d. Flat fee
- ☐ e. Other. Please explain: ____

____

____

---

* Litigation expenses: For work not compensated on an hourly basis at standard rates, the "expense" should be the amount that would have been charged if compensation had been on an hourly basis at standard rates.

14. **Case-specific.** What type of party was your client in this case?

- ☐ a. Plaintiff or claimant only
- ☐ b. Defendant (party against whom a claim is asserted)
- ☐ c. Both claimant and party defending against a claim (e.g. a counterclaim was at issue)
- ☐ d. Other real party in interest (e.g. third party defendant)
- ☐ e. A nominal party (not a real party in interest)
- ☐ f. Other. Please explain: ____

The theoretical literature addresses how fee-shifting rules may affect the possibility of settlement—whether a particular rule would make it more or less likely in a given case that there will be some settlement figure that both sides would find preferable to the result they expect from taking the case to trial (taking into account both verdict and expenses of trial). Very little theory has been advanced to suggest whether and how a case that can settle will in fact settle. Whether and how that happens depends on the strategies the parties employ in settlement negotiation.

15. **Case-specific.** Approximately what was the final, "bottom line" settlement offer you would have recommended that your client make or accept in this case--the offer most favorable to opponent that you thought an acceptable alternative to trial or other court disposition of the case. Please provide a monetary figure. Answer "NA" if the settlement terms cannot be equated to a monetary amount or if your client would have been unwilling to settle.

$____________

16. **General.** Which of the following statements best describes how you would generally arrive at a final, bottom line settlement offer that you would recommend your client make or accept (as described in the previous question). Please check only one answer.

- ☐ a. I estimate the average or most likely verdict (or other case outcome), and subtract the litigation expenses likely required of my client for further litigation.
- ☐ b. I ignore litigation expenses, and consider only the average or most likely expected judgment.
- ☐ c. I try to determine how the opponent assesses the case, and thus estimate the offer most advantageous to my client that the opponent might be willing to make or accept.
- ☐ d. I simply explain to the client what I see as the likely or possible outcomes, and let the client decide whether to make or accept an offer. I usually do not make any specific recommendation.
- ☐ e. Other. Please explain: ____

17. **General.** As a general matter, do you think that the draft rule is a good idea or a bad idea?

- ❑ a. A good idea
- ❑ b. A bad idea
- ❑ c. Neither a nor b.
- ❑ d. I'm not sure.

18. **General.** Whether you generally approve of the draft rule or not, which of the following changes do you think would improve the draft rule.

- ❑ a. Do not limit recoverable fees to the amount of the judgment (i.e., allow recovery of fees against a losing plaintiff or in excess of the judgment for a losing defendant).
- ❑ b. Do not reduce recoverable fees by the monetary difference between the offer and the judgment.
- ❑ c. Limit the amount of recoverable fees to a greater extent than they are limited by the draft rule.
- ❑ d. Permit an offer to be accepted at any time (unless previously withdrawn), but with late acceptance requiring compensation for offeror's reasonable post-offer fees.
- ❑ e. Permit offers to be made only by defendants.
- ❑ f. Permit offers to be made only by plaintiffs.
- ❑ g. Require a retrospective court determination that the offer was reasonable before fee compensation may be awarded.
- ❑ h. Require a court determination that the offer is reasonable before an offeror must decide whether to accept the offer.

19. **General.** Approximately how many civil cases have you handled or worked on in the past ten years in which you played a major role in advising on decisions to make, accept, or reject offers of settlement?

- ❑ a. none
- ❑ b. between 1 and 5
- ❑ c. between 5 and 15
- ❑ d. more than 15

20. **General.** Approximately what percentage of the civil cases you handle or work on are cases in federal district court.

____________%

❑ Please check here if you wish to receive a copy of the report of this study, and information concerning the Advisory Committee's decision regarding amendment to Rule 68. If your address is not shown correctly on the cover letter, please indicate the correct address here: ____

____

____

____

Thank you for your cooperation and assistance. Please return the questionnaire in the enclosed envelope (or addressed to: Research Division, The Federal Judicial Center, One Columbus Circle, N.E., Washington D.C. 20002, Attn.: Rule 68). If you have questions concerning the survey, please contact John Shapard at (202) 273-4070, Ext. 357.

THE FEDERAL JUDICIAL CENTER
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
WASHINGTON, D.C. 20002

WILLIAM W SCHWARZER
DIRECTOR

Telephone:
FTS/202 273 4160

March 13, 1993

Professor Edward H. Cooper
Reporter, Advisory Committee
on Civil Rules
University of Michigan
Hutchins Hall
Ann Arbor, Michigan 48109

Dear Ed:

This letter responds to your invitation to comment on the committee drafts of Rules 23 and 68. Time does not permit more than a brief comment since your letter came to hand only a few days ago and by accident; evidently neither the Center nor I qualify as "civil procedure buffs" and hence were not included in the mailing. Perhaps we will be included in the future.

Rule 23. I think that the amendment is on the right track. My principal concern is over continuing to permit defendant class actions. For obvious reasons, it is a mistake to regard defendant class actions as merely the other side of the coin of plaintiff class actions. Why should a plaintiff, by unilaterally and arbitrarily selecting one defendant, subject numerous others not named or served to the risk of an adverse judgment, making their fortunes ride on the plaintiff-selected class representative's action or inaction. And since the named defendant can presumably decline, as a practical matter defendant class actions are reserved to cases in which the named defendant volunteers which does not give me much confidence in the degree of protection the members of the defendant class can expect. In fact, I have never been able to reconcile defendant class actions with fundamental notions of procedural due process, or for that matter, with restrictions on personal jurisdiction and venue which defendant class action proceedings can circumvent. If the numbers are small enough to permit joinder, joinder ought to be required. If they are not, there is a serious question about protecting the rights of individual defendants. It is true that class members can opt out but that assumes they have received actual notice; there is no assurance that the court will require it or, if it does, that it will in fact be equivalent to service (as it should be). Perhaps defendant class actions, if they survive at all, should be limited to opt-in classes, giving defendants the benefits of an efficient and economical unitary adjudication, if desired, without sacrifice of procedural rights.

A final question: do we really need defendant class actions? My impression is that they are rarely used. Perhaps a survey on this point might be useful.

I question whether subsection (a) is still needed in light of the revision of subsection (b). Clauses (1), (2) and (3) are fairly included within the factors to be considered under the new subsection (b), such as predominance of common questions, superiority, commonality and manageability. As for (4), adequate representation, I would add it as a factor under (b). The reasons for this suggestion are to shorten and simplify the rule and to eliminate provisions that judges have used to exercise essentially unguided discretion resulting in extremely disparate application of Rule 23.

Rule 68. I greatly regret the manner in which this proposal is now being presented. For example, characterizing it as another provision for sanctions is likely to be its death-knell; Judith Resnik's reaction (shrugging it off as having "all of the obvious problems") is emblematic of what can be expected. Many states require attorneys to report sanctions imposed on them in excess of a specified amount; exposing them to a professional taint because they declined to settle a case will surely guarantee defeat for this proposal. The general connotation of sanctions is that they are a consequence of unreasonable or unprofessional conduct. They have no place where the question concerns legitimate judgments about risk vs. benefit, particularly where the final say is usually the client's.

Another way the present draft ensures its defeat is by enshrining the anti-civil rights litigation rule of Marek v. Chesney. This will of course catalyze the opposition of the civil rights bar. The proposed rule can do much good without reaching claims under fee-shifting statutes.

The tone of the covering letter, moreover, seems to me to reflect substantial bias against the proposal, focusing entirely on what it sees as negative features. It ignores the fact that the proposal will provide carefully calibrated incentives to initiate settlement negotiations early in the litigation and engage in risk-benefit analyses. That more than 90% of all cases terminate before trial, as noted, does not address the fact that only about half or fewer are disposed of by settlement and often only after lengthy and costly pretrial proceedings. Even without precise statistics, experience tells us that many parties would welcome a procedure that creates greater incentives (and thus opportunities) to extricate themselves from litigation before they are overwhelmed by its cost, and this applies just as much to defendants as to plaintiffs. The capping provisions of the proposed rule will go far toward compensating for inequality of resources; litigants confront the problem of unequal resources now and will be no worse off--and probably better--under a procedure providing incentives for early settlement.

There is of course an articulate and prolific academic school of thought that bemoans the decline of adjudication and is skeptical about--if not biased against--what it regards as too many settlements, and early settlements in particular. Those sentiments are not shared by most litigants, attorneys and judges burdened by the exigencies of litigation in an over-extended justice system and a high-cost environment.

Nor do I find it persuasive to worry that adversary attorneys will seek to use the rule to maximum adversary advantage. So long as we have the adversary system, the same can be said of every rule. It proves nothing about its value or utility. Certainly it can be

said of the discovery process. The answer is to structure the rule so as to minimize the risk of unfair (as opposed to adversarial) results. I have not seen a demonstration that the proposal is likely to generate more unfair or undesirable results than fair and desirable ones.

A few specific comments:

(b)(2): the bracketed language allowing the court to refuse to enter judgment is problematic since it suggests that settlements may be subject to review for reasonableness (exactly what the proposal seeks to avoid). It should be sufficient to deal with the point in the Committee Note as now written (last para. p. 3).

(e)(2): for reasons discussed elsewhere, I would exclude claims, not actions, with respect to which a party is entitled to a statutory award of attorney fees (but including under the rule joined claims not subject to such awards).

Committee Note pp. 8-9: I see no problem with contingent fees. An attorney planning to invoke the benefits of the rule by making an offer has the option to keep time records that will afford a basis for determining reasonable post-offer fees. This is no different than contingent fee attorneys seeking fee awards under fee-shifting statutes or in class actions where lodestar calculations apply.

Committee Note p. 9: I do not agree that many complications surround the determination whether a monetary judgment is more favorable than an offer. In the overwhelming majority of cases, this will be a straightforward matter. The present text is unduly discouraging and intimidating.

Committee Note p. 10: there is no need for a separate provision for structured settlements (judgments). If a party wishes to invoke Rule 68, it needs only to make an offer that reflects a lump sum (to afford a basis for comparison with the final judgment), coupled with the option to transform it into a structured settlement. This creates no problem since the choice is that of the party that might make a claim for fees.

Finally, notwithstanding all my criticisms, I commend you on the text of the Committee Note. Except for some superfluous editorial comment, I think it does a fine job in explaining the operation of the proposed rule and should be quite helpful to the reader.

Sincerely,

cc. Honorable Sam C Pointer, Jr.
Peter G. McCabe

THE FEDERAL JUDICIAL CENTER
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, D.C. 20002

RESEARCH DIVISION

Writer's Direct Dial Number:
(202) 273-4070 Ext. 357

March 17, 1993

Professor Edward H. Cooper
Reporter, Advisory Committee on Civil Rules
University of Michigan Law School
University of Michigan
Hutchins Hall
Ann Arbor, MI 48109

Dear Professor Cooper,

I received from Judge Schwarzer a copy of your January 21, 1993, "Dear Civil Procedure Buff" letter concerning Rule 68. I agree with Judge Schwarzer's observations in his letter to you of March 13. I wanted to add a few points about the issues raised in your cover letter, the draft rule and Committee Note:

1. I agree wholeheartedly that "sanction" is an inapposite term for a party's recovery of post-offer expenses. I think you could fairly easily cure the defect by substituting "compensation" as the operative term.

2. I see no point in your observation in the cover letter that the revised rule might encourage filing a lawsuit before exploring litigation. So what? Filing and serving a complaint is not by itself an evil we should guard against, and the existence of a revised rule 68 will likely be relevant to settlement negotiations both before and after commencement of suit. I take it that under current rules plaintiff's counsel often file suit merely to "get the other side's attention," so that they will take settlement possibilities seriously, or simply to get the opposing party to retain counsel and so obtain sensible advice. If the revised Rule 68 has meritorious effects, I don't see why we should worry that it might encourage filing of cases in order to take advantage of those effects.

3. Under "Hardship or surprise" on page 8 of the Committee Note, I think your discussion of "surprise" is excellent, but I disagree with the "hardship" example, which is appealing only by virtue of a logical fallacy. We tend to think that the party who fails to accept a $10,000,000 offer and then wins a $9,500,000 judgment has erred only by a rather small margin, so it is arguably unjust to "penalize" the error. As stated, however, the example gives no clue to how large an error the claimant made. Suppose that plaintiff had rejected the $10,000,000 offer and made a counteroffer to settle for $20,000,000. In that case, the

$9.5 million judgment would make clear that plaintiff erred by a rather large margin.[1] If instead plaintiff had counteroffered $10,500,000, we could see that the error was not so great. At the same time, I see no reason why the rule should offer a prospect of lenience to either party in a case where the parties are unable to reach settlement after having put on the table offers of $10 million and $10.5 million. Parties who choose to proceed to trial in the face of a potential $1,000,000 bill for the opponent's attorney fees should be entitled to do so, but the party who "wins" should be entitled to compensation. True "hardship" lies at the other end of the spectrum, where parties who have made and rejected offers and counteroffers in the $10 million range are presented with a verdict of $5 or $15 million, but the "benefit of the bargain" feature of the rule provides automatic relief for this type of hardship.

As a general matter, it seems to me that the only appropriate basis for discretionary reduction or elimination of compensation is where the offeree was unable to determine that the offer was reasonable at the time it was made (or was still open). Your examples of "surprise" cover such situations, as does subsection (a)(1)(D), which allows the court to extend the time for acceptance of the offer, and the discussion of that subsection at Committee Note page 2, which suggests that a need for more time to gather information could be a proper basis for an extension of time.

3. Example 5 at pp 6-7 of the Committee Note fails adequately to explain how the rule must operate in the context of overlapping offers (where plaintiff's expired offer demands less than defendant's expired offer). The rule itself covers the situation, albeit very tersely, in subsections (e)(4)(A)(i) and (e)(4)(B)(i), and your example is not necessarily incorrect, it just fails to illuminate the tricky case.

Suppose we change your example as follows. Plaintiff makes a $50,000 offer, followed by reasonable attorney fees of $20,000. Then defendant makes an offer for $60,000. Both parties thereafter incur reasonable fees of $15,000, and judgment is entered for $55,000. Plaintiff's offer entitles it to $30,000 compensation ($35,000 total reasonable fees less $5,000 deduction for the difference between offer and judgment). We must now assess defendant's offer in light of the fact that plaintiff's offer was "good." Subsection (e)(4)(A)(i) says that the judgment for plaintiff is more favorable than defendant's offer if "... the amount awarded - including the costs, attorney fees, and other amounts awarded for the period before the offer expired - exceeds the monetary award that would have resulted from the offer, ..." The "amount awarded" to plaintiff for purposes of the subsection is $70,000: $55,000 judgment, plus $20,000 fees incurred before the offer expired, less the $5,000 difference between judgment and offer. Hence defendant's $60,000 offer has no effect, even though it exceeded the $55,000 judgment.

The foregoing example serves to illustrate the complexity. It might be best for the rule to state explicitly (rather than by way of an example in the Committee Note), that the

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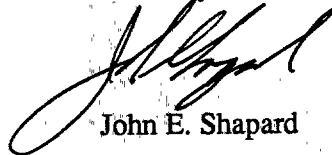
[1] There is a context when the fact that the offer "misses by a penny" is rightly seen as imposing harsh consequences: provisions that require both (a) that an offer be made , and (b) that the *offeror* pay litigation expenses if the judgment is more favorable to the *offeree* than was the offer. Such a provision places the onus entirely on the offeror and is thus very one-sided and rightly seen to produce "hardship" results.

phrase "costs, attorney fees, and other amounts awarded for the period before the offer expired" must include all such amounts, including those awardable by virtue of this Rule.

The general rule should be that offers are evaluated in the order in which they were made, with costs and fees compensable by virtue of prior offers being taken into account in evaluating each subsequent offer. I might observe that these complexities can be avoided by (a) prohibiting a counteroffer that "overlaps" a prior offer and instead (b) allowing an offer not withdrawn to be accepted after its "expiration" on condition that the offeror then be awarded costs and reasonable attorney fees incurred after the offer expired (but limited to the amount of the offer). I might also observe that I am the only person I know who is not aghast at the idea of (a) not having an absolute deadline for acceptance of an offer, and (b) requiring judicial determinations of attorney fee awards in cases that settle. My idea might best be filed away as a measure to be considered if Rule 68 is amended and significant problems arise due to overlapping offers and counteroffers.

Finally, I thought to mention that I am at work on the design for a survey of counsel concerning possible Rule 68 revision, as I mentioned in my letter to you of December 18, 1992. I expect to have the proposal and a draft questionnaire available prior to the Committee's May meeting.

Sincerely,



John E. Shapard

cc: Honorable Sam C. Pointer, Jr.
Honorable William W Schwarzer
Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure

(B) recommendations regarding whether the requirements should be continued or applied with respect to additional actions.

(c) REPEAL.—No later than 5 years after the date of enactment of this Act, this section and the amendment made by this section shall be repealed.

SEC. 3. OFFER OF JUDGMENT.

(a) IN GENERAL.—Part V of title 28, United States Code, is amended by inserting after chapter 113 the following new chapter:

"CHAPTER 114—PRETRIAL PROVISIONS

S. 585

"Sec.
"1721. Offer of judgment.

"§ 1721. Offer of judgment

"(a)(1) In any civil action filed in a district court, any party may serve upon any adverse party a written offer to allow judgment to be entered for the money or property specified in the offer.

"(2) If within 14 days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may file the offer and notice of acceptance and the clerk shall enter judgment.

"(3) An offer not accepted within such 14-day period shall be deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine reasonable attorney fees.

"(4) If the final judgment obtained by the offeree is not more favorable than the offer made under paragraph (1) which was not accepted by the offeree, the offeree shall pay the offeror's reasonable attorney fees incurred after the expiration of the time for accepting the offer, to the extent necessary to make the offeror whole.

"(5) In no case shall an award of attorney fees under this section exceed the amount of the judgment obtained. The court may reduce the award of costs and attorney fees to avoid the imposition of undue hardship on a party.

"(6) The fact that an offer is made under this section shall not preclude a subsequent offer.

"(7)(A) Subject to the provisions of subparagraph (B), when the liability of 1 party has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial.

"(B) The court may shorten the period of time an offeree may have to accept an offer under subparagraph (A), but in no case shall such period be less than 7 days.

"(b) A party making an offer shall not be deprived of the benefits of an offer it makes by an adverse party's subsequent offer, unless the subsequent offer is more favorable than the judgment obtained.

S. 585

"(c) If the judgment obtained includes nonmonetary relief, a determination that it is more favorable to the offeree than was the offer shall be made only when the terms of the offer included all such nonmonetary relief.

"(d) This section shall not apply to class or derivative actions under rules 23, 23.1 and 23.2 of the Federal Rules of Civil Procedure.

"(e)(1) Except as provided under paragraph (2), the provisions of this section shall not be construed to prohibit an award or reduce the amount of an award a party may receive under a statute which provides for the payment of attorney's fees by another party.

"(2) The amount a party may receive under this section may be set off against the amount of an award made under a statute described in paragraph (1).".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part IV of title 28, United States Code, is amended by inserting after the item relating to chapter 113 the following:

"114. Pretrial provisions .... 1721".

SEC. 4. PRIOR NOTICE AS A PREREQUISITE OF FILING A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT.

(a) IN GENERAL.—Chapter 23 of title 28, United States Code, is amended by adding at the end the following:

1 **"§ 483. Prior notice of civil action**
2 "(a)(1) No less than 30 days before filing a ci
3 tion in a court of the United States the claimant int
4 to file such action shall transmit written notice to a
5 tended defendant of the specific claims involved, inc
6 the amount of actual damages and expenses incurr
7 expected to be incurred. The claimant shall transmi
8 notice to any intended defendant at an address reas
9 expected to provide actual notice.
10 "(2) For purposes of this section, the term 'tra
11 means to mail by first class-mail, postage prepaid, o
12 tract for delivery by any company which physically d
13 correspondence as a commercial service to the pul
14 its regular course of business.
15 "(3) The claimant shall at the time of filing
16 action, file in the court a certificate of service evid
17 compliance with this subsection.
18 "(b) If the applicable statute of limitations fo
19 action would expire during the period of notice re
20 by subsection (a), the statute of limitations shall
21 on the thirtieth day after the date on which written
22 is transmitted to the intended defendant or defen
23 under subsection (a). The parties may by written
24 ment extend that 30-day period for an additional
25 of not to exceed 90 days.

III-E

Rules 83, 84

Rules 83 and 84 have been caught up in the process of seeking uniformity among different sets of rules dealing with the same topic. The reporters for the advisory committees and the Standing Committee met at lunch during the December meeting of the Standing Committee and agreed upon a uniform version that is to be submitted to each of the advisory committees. We are to report back to the Standing Committee. A copy of the uniform version is attached. Presumably the purpose of sending the uniform version back to the advisory committees is to garner suggestions for improving the uniform version. Also attached is a revised version incorporating changes suggested by Judge Pointer after the Standing Committee meeting. It seems appropriate to consider these changes with a view to reporting on them to the Standing Committee.

P.S. The Advisory Committee on Bankruptcy Rules reviewed the same proposals at its February 18-19, 1993 meeting. The committee approved language similar to the proposed amendments to Civil Rule 83 with modifications.

In addition, the committee recommended that the proposed language on the enforcement of local rules (Civil Rule analog Rule 83(c)) be revised by: (1) deleting the word "with" before "local rules", (2) deleting the word "statutes" after "federal" and inserting in lieu thereof the word "laws", and (3) deleting "local rules of the district" and inserting in lieu thereof the words "local rules".

The committee rejected language authorizing the Judicial Conference to promulgate technical rules changes (Civil Rule analog Rule 84).

The committee rejected the "Rule 84" proposal primarily because it believed that: (1) it was unnecessary, and (2) it would create a slippery slope that would lead to the issuance of substantive rules changes under the guise of technical changes. If the Standing Rules Committee determines that the proposal should go forward, however, the committee recommended in the alternative that all the language after the word "typography" be deleted. (John Rabiej)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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

(a) **Local Rules.** 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 comment, make and amend rules governing its practice. A local rule must be ~~not in~~consistent with -- but not duplicative of -- Acts of Congress and ~~these~~ rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule ~~so adopted shall~~ takes effect ~~up~~on 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.

(b) **Judge's Directives.** ~~In all cases not provided for by rule, the district judges and magistrates~~ By order or other written directive, a judge may regulate ~~their~~ practice in any manner ~~not in~~consistent with Acts of Congress, with ~~these~~ rules ~~or~~ adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules ~~those~~ of the district ~~in which they act~~.

(c) **Enforcement.** A local rule or judge's directive imposing a requirement of form must not be enforced in a manner that causes a party to lose rights

21 because of a negligent failure to comply with the requirement. A sanction for
22 violating a requirement prescribed by a judge under (b) may be imposed only if
23 the party or its attorney has actual notice of the requirement.

COMMITTEE NOTE

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider carefully the possibility of conflict between their local rules and practices and the nationally-promulgated rules. At various places within these rules (*e.g.*, Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar explicit authorization in other rules should not be viewed as precluding by implication the adoption of other local rules subject to the constraints of this Rule 83.

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 Federal Rules of Bankruptcy Procedure 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 statutes and national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor variations in the wording of 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.

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 directives should not conflict with the Federal Rules of Bankruptcy Procedure adopted under 28 U.S.C. § 2075. The rule continues to authorize--although not encourage--individual judges to establish standard procedures in cases assigned to them if the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important that these requirements be in writing--as by a standing order--and that litigants be informed about any such requirements or expectations; subdivision (c) contains provisions that protect parties and attorneys from penalties for violating a judge's special directives unless they have notice of the requirement.

Subdivision (c). These provisions are new. One objective is to protect against loss of rights in the enforcement of local rules (or directives by a judge) 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 subdivision assures that negligence in conforming to a local requirement relating to a matter of form will not deprive the party of some right; it does not, however, preclude the court from appropriately sanctioning the attorney for such inattention, as by requiring attendance at a seminar covering the local rules of court.

This proscription is narrowly drawn--covering only violations attributable to negligence and only those involving local rules or a judge's directive regarding 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 the subdivision affect the court's power to enforce local requirements that involve more than mere matters of form--for example, a local rule precluding evidence from a witness not identified in a pretrial listing of witnesses.

The second sentence applies to enforcement of a judge's directives adopted under subdivision (b). There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has notice of those requirements. Furnishing litigants in a case with a copy outlining the judge's practices--or attaching instructions to a notice setting a case for conference or trial--would suffice to give notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

Although, as indicated above, subdivision (c) is quite limited in its scope, it reflects a broader concern; namely, that, particularly with the proliferation of local rules and standing orders, litigants can be unfairly prejudiced by rigorous enforcement of diverse local requirements not addressed by the national rules. Excesses in promulgating and enforcing local requirements can result in attorneys, otherwise qualified, being unwilling to appear in the particular federal forum, and in parties being forced into extra expenditures because of a fear of proceeding without local counsel familiar with the intricacies of local practice. Revised Rule 83(c) should, therefore, be viewed, notwithstanding its narrow explicit reach, as expressing a more general concern that local requirements be enforced in a manner that appreciates the potential for error when counsel practice in a number of courts with different, sometimes inconsistent, local rules.

Rule 84. Forms; Technical Amendments

1 (a) **Forms.** The forms ~~contained~~ in the Appendix ~~of Forms are sufficient~~

2 suffice under the rules and ~~are intended to indicate~~ illustrate the simplicity and

3 brevity ~~of statement which~~ that the rules contemplate. The Judicial Conference of

4 the United States may authorize additional forms and may revise or delete forms.

5 **(b) Technical Amendments.** The Judicial Conference of the United States

6 may amend these rules to correct errors in spelling, cross-references, or

7 typography, or to make technical changes essential to conforming these rules with

8 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 and Congressional approval in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other.

The revision contained in 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 limited delegation of authority will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on noncontroversial nonsubstantive 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 current proposals in recognition of the new title of "Magistrate Judge" pursuant to a statutory change. Any general rewriting of the rules to improve language, style, and format would have to be submitted to the Supreme Court and Congress.

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

Memorandum

TO: Chairmen and Reporters of the Advisory Committees

FROM: Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

RE: Federal Rules Amendments Concerning Local Rules and Technical Amendments, Including Committee Notes

DATE: February 5, 1993

At our lunch meeting in Asheville, North Carolina, last month, the Chairmen and Reporters of the Advisory Committees agreed on precise language for rule amendments concerning local rules and technical amendments. The need for uniform committee notes on these rules was also discussed. We have set out the language for the proposed rules below. We have also set out committee notes that we believe accurately reflect the views of those present at the lunch meeting.

It is our understanding that each of the Advisory Committees will consider these rules and notes at their respective winter or spring 1993 meetings.

If you have any questions or comments about this material, please feel free to contact either one of us (Dan: (617) 552-4340; Mary: (617) 552-8851).

Technical and Conforming Amendments

<u>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.</u>

Committee Note

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

Uniform Numbering of Local Rules

Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

Committee Note

This rule requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Procedure When There is No Controlling Law

A judge may regulate practice in any manner consistent with federal statutes, rules, [official forms],* and with local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal statutes, rules, [official forms],* or the local district rules unless the alleged violator has actual notice of the requirement.

* Bankruptcy Rules only

Committee Note

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with Acts of Congress, with rules adopted under [insert appropriate enabling legislation], [in bankruptcy cases: with Official Forms,] and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, this Rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violation has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices--or attaching instructions to a notice setting a case for conference or trial--would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

IV

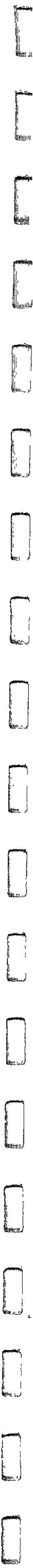
AGENDA IV
Washington, DC
May 3-5, 1993

COPY OF STYLE REVISION

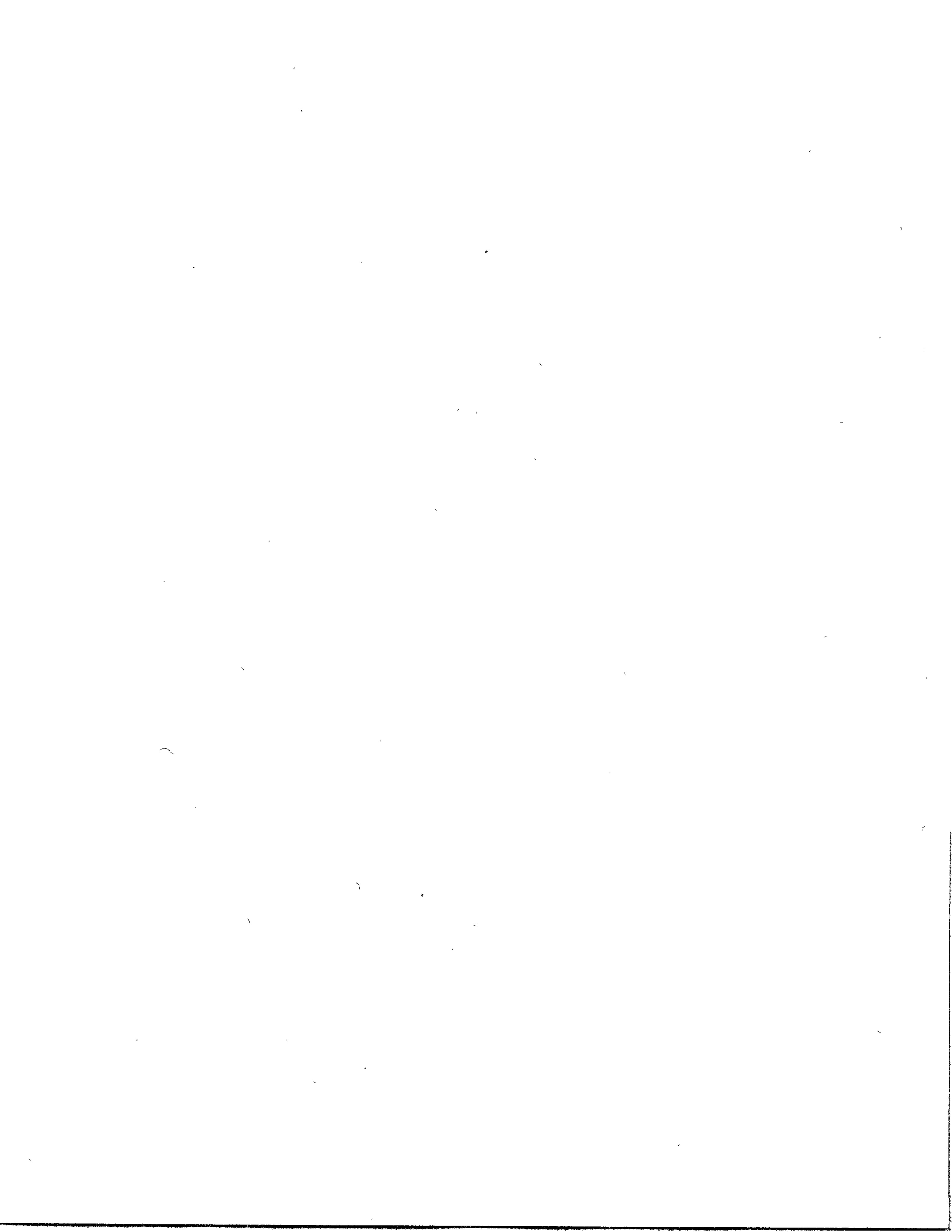
OF

OF CIVIL RULES

(SENT UNDER SEPARATE COVER)



V-A



Rule 59

The Advisory Committee on Bankruptcy Rules has recommended amendments that would require that motions under Civil Rules 52 and 59 be "filed" within 10 days of judgment. Rule 52(b) now requires that a motion be "made" within 10 days. Rules 59(b) and (e) now require that a motion be "served" within 10 days. A copy of an explanatory letter from Alan N. Resnick, Reporter for the Bankruptcy Rules Committee, is attached. The best response may be to amend these rules to require that the motions be "filed and served" within 10 days. Conforming changes would be desirable in Rule 50(c)(2) and Appellate Rule 4(a)(4)(F).

The recommendation of the Bankruptcy Rules Committee reflects special needs of bankruptcy practice and the desire to maintain integration between the Bankruptcy Rules and the Civil Rules. As in civil actions, post-trial motions suspend the time for appeal in bankruptcy. Because bankruptcy orders frequently affect transactions that must be effected promptly, it is important that everyone involved be able to determine with certainty whether a post-judgment motion has been made. Service on a party does not satisfy this need. A filing requirement would provide a clear and easily known means of information.

Appellate Rule 4(a)(4) governs the effect of post-trial motions on appeal time. The provisions pending approval suspend appeal time if any party "makes a timely motion" under Civil Rules 50(b), 52(b), 59(e), or 59(a). Appeal time is suspended if a timely motion for attorney fees is made under Rule 54 and the district court extends the time under Rule 58. A motion for relief under Rule 60 also suspends appeal time if it is "served" within 10 days after judgment.

As noted below, there is considerable variation in the language of different Civil Rules dealing with different post-trial motions. It seems likely that these variations are the result of accident, not a deliberate decision that different requirements are better suited to different motions. Before adopting a uniform requirement, however, it is important to inquire whether there are good reasons for requiring that a Rule 59 motion be "served" within 10 days, a Rule 50(b) motion be served and filed within 10 days, and so on. No likely reason appears on casual contemplation, but collective consideration may generate reasons that demand attention.

If a uniform approach is to be taken, any of three requirements could be adopted: service; filing; or filing and service. (1) Filing establishes a clear means of information for anyone who wishes to inquire. Timely filing also should be reasonably easy to accomplish in all cases; timely service may be

more difficult in some cases. (2) Service provides clear notice to the party served, without the burden of inquiry, but does not provide notice to others. (3) Filing and service imposes a dual requirement, but it adds little significant burden in comparison to a requirement of service. The real choice should be between relaxing present requirements of service to require only timely filing, delaying the time of actual notice, and requiring both filing and service. The more recently amended Rules, 50(b) and 54(d)(2), require both filing and service. Unless that requirement was adopted absent-mindedly, it seems the better choice for all rules.

Several rules would be affected by a "filed and served" requirement.

The rules that most obviously must be considered include all those that, under Appellate Rule 4(a)(4), suspend the time for appeal. Rule 50(b) provides that a motion for judgment as a matter of law "may be renewed by service and filing not later than 10 days after entry of judgment." This dual requirement of service and filing is the most recent formulation used by the Committee, having been adopted by the 1991 amendment; Rule 50(b) had earlier provided that a party "may move" for judgment n.o.v. or notwithstanding the failure of the jury to agree. Rule 50(c)(2), amended at the same time, continues to provide that a party against whom judgment as a matter of law has been entered may "serve" a motion for new trial within 10 days pursuant to Rule 59. This drafting seems to reflect the service requirement of Rule 59, not an independent determination that different functional considerations apply.

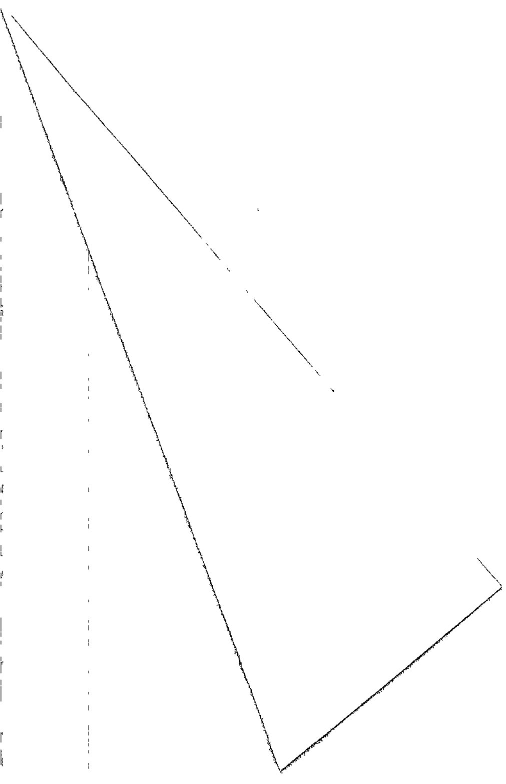
Rule 52(b) provides that a court may amend its findings on motion "made" not later than 10 days after judgment. This language appears to have the same effect as the Rule 59 requirement that a motion be served. It has been said that Rule 52(b) "is satisfied if the motion is served on the other parties in the ten-day period even though it is not filed until after that period has run." 9 Wright & Miller, Federal Practice & Procedure: Civil § 2582, pp. 723-724. This conclusion seems to be supported by the interplay of Rules 7 and 5. Rule 7(b)(1) requires that a motion be in writing unless made during a hearing or trial. Rule 5(a) requires that every written motion be served on all parties. Rule 5(d) requires that all papers required to be served on a party be filed, with a certificate of service, within a reasonable time after service. It is not entirely clear, however, whether a Rule 52(b) motion filed but not served within 10 days would count as a motion "made," even though a certificate of service could not be filed.

The pending proposal to amend Civil Rule 54(d)(2) would require that a motion for attorney fees be "filed and served" no later than 14 days after

judgment, but allows the court to provide a different time. Proposed Rule 58 would permit a district court to order that a timely motion suspends appeal time if the order is made before a notice of appeal is filed. The "filed and served" language tracks Rule 50(b).

Rules 59(b) and (e) require that motions be "served" not later than 10 days after judgment.

Rule 60(a) allows correction of clerical mistakes and errors "at any time." 60(b) requires that motions to vacate judgment be "made" within a reasonable time, and that motions advancing many grounds be made no more than one year after judgment. Proposed Appellate Rule 4(a)(4) would suspend the time for appeal if a Rule 60 motion is "served" within 10 days of judgment. This provision does not directly affect the time governing Rule 60 motions. There is no pressing need to amend Rule 60(b), but uniform style would be served by requiring motions for relief under 60(b)(1), (2), or (3) to be filed and served no later than one year after judgment. It also would be desirable to revise Appellate Rule 4(a)(4)(F) to incorporate whatever phrase is used in the Civil Rules: "This provision applies to a timely motion under the Rederal Rules of Civil Procedure: * * * (F) for relief under Rule 60 if the motion is <u>filed and</u> served within 10 days after the entry of judgment."



THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

March 3, 1993

Hon. Sam C. Pointer, Jr.
Chief Judge, United States
District Court
882 United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

Dear Sam:

I am enclosing a letter from Alan Resnick reporting the recommendation of the Bankruptcy Rules Advisory Committee that Civil Rules 52 and 59 be amended to require that motions be filed, not merely served, within 10 days.

I also enclose the relevant portion of my December 20 letter reporting to you on events at the meeting of the Standing Committee. It may be that the suggested change can be considered as part of the style revision, even though it clearly could not be treated as a matter of style.

Apart from that, and a scheduled trip to talk with the federal practice committee of ABCNY, I'm waiting for style revision material. Waiting apprehensively, but waiting.

Best regards,

Edward H. Cooper

EHC/lm
encl.
c: Alan N. Resnick

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

February 24, 1993

Associate Dean Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, Michigan 48109-1215

Dear Ed:

At the meeting of the Advisory Committee on Bankruptcy Rules held on February 18-19, 1993, the Committee discussed the fact that the Civil Rules are not consistent regarding the 10-day time periods for filing postjudgment motions. As we discussed at the Standing Committee meeting in December, a motion under Rule 50(b) must be made "by service and filing not later than 10 days after entry of judgment." A motion under Rule 52(b) must be "made not later than 10 days after entry of judgment." A motion under Rule 59 must be "served not later than 10 days after entry of the judgment."

Several rules regarding postjudgment motions are made applicable to bankruptcy proceedings by specific Bankruptcy Rules. Most importantly, Bankruptcy Rule 7052 makes Civil Rule 52 applicable to bankruptcy proceedings, and Bankruptcy Rule 9023 makes Civil Rule 59 applicable in bankruptcy proceedings.

The Advisory Committee on Bankruptcy Rules, by a unanimous vote, has instructed me to inform you of its recommendation that Civil Rules 52 and 59 be amended to provide that motions under these rules must be "filed" not later than 10 days after entry of the judgment. This change will provide for greater certainty regarding whether such a motion has been made. This certainty is especially important in bankruptcy cases, where these postjudgment motions have the effect of extending the 10-day period for filing an appeal and parties often rely on the finality of orders and judgments before closing transactions.

Please communicate this recommendation to the members of the Advisory Committee on Civil Rules before your next meeting.

If I can be of any further assistance to you in this matter, please do not hesitate to call on me. Best personal regards.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

cc: Honorable Edward Leavy
Honorable Sam C. Pointer, Jr.

> (b) Orders. A judge may regulate practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules of the district. A judge may impose a sanction or other disadvantage for violation of a requirement of practice adopted under this paragaph only on a party or lawyer who has actual notice of the requirement.

The group agreed with my suggestion that "a judge" does duty for "a district judge or magistrate judge." They also agreed that it is sufficient to refer to "local rules of the district," deleting "in which the judge acts." The "Orders" caption perhaps should be changed -- neither the Civil Rules Committee draft nor this version refers to orders.

I think that the text of proposed Rule 83(c) need not be amended to reflect this version of Rule 83(b). The Note, however, should be revised. Either of us can do that.

Rule 84(b) was changed in ways intended to narrow the Judicial Conference power to correct mistakes in the rules. The group version is this:

> 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 essential to conforming these rules with statutory amendments.

The theory was that "technical changes" is narrower than changes "in form and style." This view clearly was influenced by the lessons learned in the project to restyle all the rules. I think we should change "conforming" to "conform." There was strong resistance to allowing changes in explanatory notes, on the ground that legislative history cannot be changed. New explanatory notes can be adopted when technical changes are made, or footnote cross-references can be added to the original notes.

RULES 50(b), 52(b), 59

The Bankruptcy Rules Committee plans to address the inconsistent serving and filing requirements of Civil Rules 50(b), 52(b), and 59. Alan Resnick says that he will recommend at their February meeting that the Bankruptcy Rules should continue to incorporate these rules, but with the proviso that a motion under any of them must be filed within 10 days. I told him that this question might be one that we could address in the styling process; I should be in a position to let him know soon whether we expect to be able to do this.

Rule 50(b) in its new form provides that a motion for judgment as a matter of law "may be renewed by service and filing not later

than 10 days after entry of judgment." Rule 50(c)(2) provides that after judgment as a matter of law is entered, the losing party "may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after" judgment. Rule 52(b) provides for amendment of findings "upon motion * * * made not later than 10 days after entry of judgment." Rule 59(c) provides that "a motion for new trial shall be served not later than 10 days after" judgment. Rule 59(e) provides that "a motion to alter or amend the judgment shall be served not later than 10 days" after judgment.

The Bankruptcy Rules Committee believes that in the context of bankruptcy proceedings it is very important to have a clear means of determining whether any of these motions has been timely made. Thus their view that each should be filed within 10 days.

There was some discussion of this question in the Standing Committee. It was observed that 10 days is effectively longer than it once was, since Rule 6(a) now excludes Saturdays, Sundays, and legal holidays. The virtues of express delivery services were touted. Facsimile transmission doubtless will be added to the discussion. It also was noted that there are many local rules setting various time periods for filing after service. Alan Perry, on the other hand, noted that he automatically becomes nervous whenever serious consequences are attached to a filing requirement.

Rule 60(b) requires that a motion to vacate be "made" within a reasonable time. I believe that Appellate Rule 4(a) is being amended to incorporate the common view that any "10-day" motion to revise the judgment should suspend an appeal -- I do not have a copy of the pending revision. If so, Rule 60(b) should be added to the list for our attention.

My first inclination is that it might make sense to establish a uniform 10-day "served and filed" requirement for all the "appeal-defeating" post-trial motions. It is difficult to understand why different procedures should apply to these different rules. Although I do not suppose that there is a great need for certain knowledge on the eleventh day outside of bankruptcy, clarity and uniformity with bankruptcy practice are worth something. Perhaps there is a practical reason for relying on service alone in Rule 59, and on "making" a motion -- I suppose by service and subsequent filing -- in Rule 52. I do not know what that reason may be.

Rather than read one of my junk mysteries on the plane back, I skimmed through the full set of Rules to see how service and filing are treated. As might be expected, there are many variations.

The most important model comes from the rules governing magistrate judges. Rules 72(a) and (b) provide a 10-day period to

"serve and file" objections to rulings. Rule 74(a), governing cases in which the parties have agreed to appeal to the district court from judgment in a case tried before a magistrate, provides that appeal time is suspended "by the timely filing" with the magistrate judge of Rule 50(b), 52(b), and 59 motions. Rule 75(c), governing proceedings on such appeals, requires that each party "serve and file" briefs within prescribed periods. These rules, along with the new version of Rule 50(b), suggest that "serve and file" may be the approach preferred by recent Advisory Committees.

The discovery rules commonly provide that responses or objections be "served," much as pleading rules do. Rule 27 provides that a verified petition is first filed, with notice served thereafter, but this model is akin to commencing an action and then effecting service. Rule 41(a)(1) provides that a notice of dismissal must be filed before the right to dismiss is cut off. Rule 55(e)(2) requires that objections to a master's findings be served within 10 days. Perhaps we could review the serving and filing variations in all of the rules as part of the style study, although I suspect many of the variations are accounted for by a general view that pleadings are filed before serving, and most other things are served before filing.

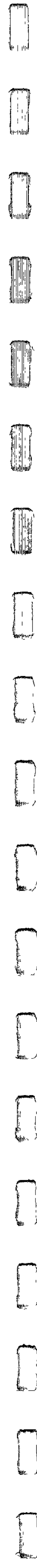
Let me know whether I can tell Alan Resnick that we are sympathetically considering the Bankrupty Rules Committee's interest.

LONG-RANGE PLANNING

I am enclosing a first draft of a letter about long-range planning. Judge Keeton wants to receive a letter from each of the Advisory Committees by January 4, describing long-range planning interests. During the discussion Saturday morning it seemed to be agreed that the letter should include issues currently on the Committee Agenda, including matters pending in the Supreme Court. Longer-term projects or interests also are desirable. We can properly include a note on the limits imposed by the Enabling Act. The letter is not to be long. I have taken much of the draft from the discussion at our November meeting.

RULEMAKING PROCESS AND PHILOSOPHY

Not very many people remained by 10:35 Saturday morning, the time for discussing Judge Stotler's interest in the history and philosophy of the rulemaking committees and process. Joe Spaniol provided a brief history. The discussion focused mostly on the value of returning to these questions when there are more committee members and advisory committee chairs present. Time will be made on the June agenda. Each Advisory Committee is invited and encouraged to send letters to Judge Keeton and Dan Coquillette on these topics. The discussion closed with a vague suggestion that



V-B

Miscellaneous Rules Proposals

A variety of other rules proposals have placed on the agenda. Some involve matters that have been considered in the past and postponed on indefinite terms. Others come through the mailbag. They are listed below in numerical sequence, using the lowest rule number for proposals that involve more than one rule. Matters not connected to any obvious rule are set out at the end. It may be possible to remove some of these proposals from the agenda. For others, the most important action is likely to be a determination whether to press forward actively.

Rule 4(jm): Time for Service

At the November meeting the Committee considered a recommendation from the Eastern District of Pennsylvania that the 120-day period presumptively allowed for service of process should be shortened. The question was put over with the suggestion that a revision might be drafted for consideration at the May meeting. It was noted that any revision should take account of pending Rule 4(d), which encourages plaintiffs to request defendants to waive service. The request to waive must allow a defendant a reasonable time to return the waiver, allowing at least 30 days from the date on which the request is sent, or 60 days if the defendant is outside any judicial district of the United States. It was pointed out that the Northern District of California has a local rule that presumes that service should be made within 40 days of filing.

The only significant question seems to be selection of a period for effecting service. If 120 days seems too long, a shorter period can be set readily. The easy approach would be to set a period that allows time both to request waiver and to make service after waiver is refused. The period almost certainly would have to be different for defendants outside the United States, both because of the 60-day period set for return of the waiver and because effecting service is likely to be more difficult. One possibility would be to set the Rule 4(m) period at 80 days for defendants in the United States, and leave it at 120 days for defendants not in the United States.

Rule 4: Service on Insured Depository Institutions

S. 201, 103d Congress, 1st Session, would amend Bankruptcy Rule 7004 to require that service of process in bankruptcy proceedings be made on an insured depository institution by personal service on an officer of the institution. The Bankruptcy Rules Committee is studying the question. Judge Keeton has written to Senator Helms to request support for withdrawing or deferring the bill so that the underlying questions can be considered "in the Rules Committees in accordance with the Rules Enabling Act procedures." The question may come to involve Civil Rule 4. For the time being, however, it seems wise to rely on the Bankruptcy Rules Committee for initial consideration.

Rules 7(b)(3), 11: Electronic Filing Signatures

It has been suggested that the signature requirement be deleted from Rule 11 to ease the way for electronic filing. Although the suggestion is not as drastic as it may sound, there does not seem to be any pressing need for immediate action.

Rule 5(e) authorizes filing by facsimile transmission if permitted by local rule. The local rule must be authorized by and consistent with standards established by the Judicial Conference. The Judicial Conference has authorized limited use of facsimile transmission. In March, 1993, the Committee on Court Administration and Case Management and the Committee on Automation and Technology recommended that the Conference authorize local rules permitting general use of facsimile filing according to prescribed technical guidelines. That recommendation has been held in abeyance, but will be pursued. Its signature provisions are noted below.

John M. Graecen, Clerk of the United States Bankruptcy Court, District of New Mexico, has written the Committee to propose that Rules 7(b)(3) and 11 be amended to delete the requirement that an attorney or party sign papers filed with the court. He proposes that "submit" be substituted for "sign," and "submission" for "signature." He advances the proposal as a result of his work as a member of Judge Harold Baker's management committee for Court Integrated Information Management Systems. That group is considering the need to provide not only for facsimile transmission but also for direct electronic filing that bypasses facsimile transmission. A signature can be duplicated by facsimile. Computer duplication of a signature, however, requires graphics capabilities that many computer systems lack. Electronic signatures by password can be substituted for graphic signatures with no loss in assurance of authenticity.

This proposal is simpler than the provisions of the Guidelines drafted by the Committee on Court Administration and Case Management. Part V of the Guidelines provides that Civil Rule 11 and Bankruptcy Rule 9011 signature requirements can be met by local facsimile filing rules in either of two ways: (1) a signed original must be received by the clerk within three days of the facsimile filing; or (2) the image of the original manual signature will constitute an original signature—the original is <u>not</u> to be substituted in the court file.

The signature requirement can help authenticate filings and also may serve a symbolic purpose. The question on the merits is whether either purpose justifies

creation of elaborate systems to preserve signatures or signature substitutes as electronic filing comes of age. The value of a signature as authentication must be appraised and set against the effectiveness of substitute means. It seems likely that few forgeries are filed under current practice; whether credit can be assigned to the signature requirement is less certain. The effectiveness of substitutes, whether by password for direct electronic communication or by facsimile transmission of an authentic signature, is less clear. There is room to wonder, however, whether bogus filings would become a problem.

The symbolic value of a signature is even more elusive than the practical value. It is possible that some attorneys or unrepresented parties shrink from fixing a signature to unfounded papers that would be filed under a more impersonal system.

The function of identifying the attorney or party by address and telephone number can be separated from the signature requirement. The pending proposed amendment of Rule 11 accomplishes this separation.

The pending Rule 11 amendments also begin the task of separating the signature from the functional requirements imposed by Rule 11. Pending Rule 11(b) applies Rule 11 requirements to a party or attorney who presents a pleading, motion, or other paper "to the court (whether by signing, filing, submitting, or later advocating)." The balance of the drafting task is easily accomplished.

In short, it does not seem likely that much would be lost by deleting the signature requirement from Rule 11 and the parallel provision in Rule 7(b)(3). Present action might make life easier for committees working on electronic filing. On the other hand, those committees are peculiarly able to determine the difficulties of providing for electronic signatures, the reliability of substitutes, and the burden of substitutes. If anything were to be done to Rule 11 now, the safe course would be to require a signature or a substitute authorized by local rule that complies with standards approved by the Judicial Conference. Such an amendment might be premature, and in any event can be accomplished readily whenever a clear need arises.

Rule 9(b)

Chief Judge Harry Lee Hudspeth of the Western District of Texas has written to suggest that Rule 9(b) should be amended to supersede the decision in Leatherman v. Tarrant County Narcotics Intelligence Unit, 1993, 61 L.W. 4205. The suggestion opens a range of questions that might better be deferred.

The Leatherman decision reversed dismissal of an action asserting that a municipal employer was liable for failing to train law enforcement officers so that they would avoid violations of the Fourth Amendment while searching the plaintiffs' homes. The lower courts had employed a "heightened pleading" requirement adopted by the Fifth Circuit for § 1983 cases. The core of the Court's opinion is "that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." A plaintiff is not required to set out in detail the facts underlying the claim. "Rule 9(b) does impose a particularity requirement * * *." "Expressio unius est exclusio alterius." The Court went on to suggest that § 1983 claims against municipalities were unknown when the Rules were drafted in 1938. "Perhaps if they were rewritten today, such claims would be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, not by judicial interpretation."

Judge Hudspeth observes that an order for a more definite statement has been a valuable tool in determining whether pro se complaints are supported by any ground for litigation. He urges that Rule 9(b) should be amended.

The problem of pleading standards is not limited to municipal liability. The Court's opinion in the Leatherman case includes a caveat that seems at odds with the rationale. At the outset, the Court noted that municipalities do not enjoy immunity from suit. "We thus do not have occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officers." Rule 9(b) says nothing of heightened pleading in such cases.

Beyond the immediate setting of the Leatherman case, it seems clear that the required level of pleading specificity varies widely among different types of litigation. An exhaustive demonstration of this proposition was provided by Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 1986, 86 Colum. L. Rev. 433. A survey of more recent decisions by Judge Keeton led to the same conclusion: "[S]pecificity requirements are not

limited to cases decided under Rule 9(b) or under Admiralty Rules C(2) and E(2)(a). Rather, the 'degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context.'" Boston & Maine Corp. v. Town of Hampton, 1st Cir., 1993 U.S.App. LEXIS 4159 at *36.

There is room to dispute the desirability of this contextual specificity phenomenon. It may seem a wilful defiance of notice pleading philosophy. It also may seem a desirable reinstatement of the easily ignored requirement of Rule 8(a)(2) that the short and plain statement of the claim "show[] that the pleader is entitled to relief." Much as Judge Hudspeth suggests for § 1983 actions, judicial experience with various theories of litigation may show that a variable pleading standard is useful as a preliminary screen. The screen is raised higher with respect to categories of litigation that frequently generate ill-founded claims or that threaten to impose exhausting pretrial burdens before it is possible to go beyond the pleadings.

Against this background, pleading reform should not be limited to a question as specific as municipal liability under § 1983. If the topic is to be approached at all, it should be approached in a way that will not lead to repeated revision upon successive consideration of each possible subject. The Leatherman case standing alone does not seem to provide sufficient provocation for comprehensive revision. One major reason for this conclusion is the suspicion that courts will be able to adjust actual pleading standards to meet the needs of § 1983 cases even without a formal "heightened pleading" standard. Better answers are likely to be provided in this way than through an ever-amending process that seeks to adjust pleading standards to a myriad of different claims.

This conclusion may be bolstered by recent history. A few years back, the Committee considered the possibility of abolishing motions to dismiss for failure to state a claim. Apparently the conclusion was that the motion to dismiss does continue to perform a useful function. An attempt to specify pleading standards for a wide variety of claims, however, might confuse practice to a point jeopardizing pleading-based dismissals.

Even more recently, the Rule 9(b) particularity test was adopted in drafting the disclosure requirements of pending Rule 26(a)(1), in part with the hope that limiting the disclosure requirement to "facts alleged with particularity" would encourage more detailed pleading. Hearings on the disclosure proposal provided much testimony, mostly from product liability defense attorneys, reflecting the belief that notice pleading often provides little guidance for an adversary attempting to discern the purport of a pleading. If the disclosure requirement takes effect, it may encourage pleading practices that will reduce any pressure to

adopt more detailed rules.

Rule 45: Nationwide Trial Subpoenas

Two Rule 45 questions were deferred indefinitely at the November meeting. The more modest question was raised by the suggestion that the limits for compelling witnesses to respond to subpoenas should not be defined in the antique terms of service. More functional limits should be imposed, perhaps modeled on the Rule 45(c)(3)(A)(ii) references to distance from residence, place of employment, or place of regularly transacting business in person. The more sweeping question was raised by the suggestion that trial subpoenas should be given nationwide scope. A simple model could be based on Criminal Rule 17(e)(1): "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States." A more complex model, perhaps better tailored to the circumstances of civil litigation, would be that used in the ALI Complex Litigation Project: "[A] subpoena for attendance at a hearing or trial, if authorized by the * * * court upon motion for good cause shown and upon such terms and conditions as the court may impose, may be served at any place within the jurisdiction of the United States, or anywhere outside the United States if not otherwise prohibited by law." Proposed Final Draft, 1993, p. 549.

The immediate impetus for consideration was provided by a letter from the authors of a brief article on the subject. See Sloan & Gotfryd, Eliminating the 100 Mile Limit for Civil Trial Witnesses, 1992, 140 F.R.D. 33-47. The article actually combines two quite different concerns. Much of the focus is on the parallel suggestion that nonparty discovery should be curtailed drastically. Expansion of the power to compel attendance at trial would make it possible to eliminate the need to rely on discovery to put nonparty testimony into admissible form. The use of discovery for the sake of uncovering information could be curtailed so as to force litigants to prepare better on their own, to limit the number of nonparty witnesses that are involved at any stage, and perhaps to improve trial. "The courts may find that the original idea of a Complaint, Answer and expedited trial proceedings with very limited deposition discovery was not a bad idea in the first place." 140 F.R.D. at 47.

The basic argument that the reach of a subpoena should not be measured by traditional geographic limits on service seems compelling. The only real advantage of relying on district or state boundaries is that they avoid the need to devise a rational alternative. One alternative would be to pick a necessarily arbitrary distance from the place of trial as the maximum reach of a subpoena. Distance does not correspond perfectly to cost, time, or difficulty, but it is a good proxy. Another alternative would be to allow nationwide power subject to control

by the court. Both approaches could be combined: reach beyond a defined distance requires court approval. Once an approach is settled, it should not be difficult to work it out in relation to the rules governing discovery subpoenas and the use of discovery at trial.

There is an apparent tension between a proposal to widen the reach of trial subpoenas and other proposals to allow greater use of written testimony and to provide for electronic transmission of testimony. The seeming tension may not be real. All proposals can make sense together, as a means of increasing the ability to deal flexibly with the different needs of different situations.

If there is to be a significant expansion of trial subpoena power, it will be necessary to face a number of related questions. Those noted at the November meeting included the period of advance notice to be given the witness; setting travel allowances; establishing a power to excuse attendance in light of the burdens involved and the probable importance of the testimony; avoiding repetitive subpoenas for trials that are repeatedly adjourned; and preventing undue waiting periods while a trial is being conducted. Criminal Rule 17(e)(1) does not explicitly address any of these questions, although the problems of fees are addressed by rule and statutory provisions for witnesses subpoenaed by the United States and for those subpoenaed on behalf of indigent defendants. The ALI formulation leaves such matters in the discretion of the trial court; that approach is more attractive for the unusual event of consolidated multidistrict litigation than for run-of-the-mill civil litigation. These practical questions are the most important matters to be resolved when the question is moved to the agenda for further action.

Rule 53

Advisory groups for at least two Civil Justice Expense and Delay Reduction plans have suggested changes in Rule 53 to encourage use of special masters. The District of New Jersey believes that the Rule 53(b) provision that references are to be the exception, not the rule, unduly limits innovative use of masters to resolve complicated and protracted discovery disputes. Use of masters should be encouraged so that judges and magistrate judges can tend to other matters. The Northern District of Georgia wants to encourage use of masters to try cases, to clarify the power of the court to initiate appointment of a master in complex cases, and to establish a pilot program under which the master would be paid out of government funds if the parties agreed to select a master from a court-approved list.

There seems to be widespread concern that Rule 53 has not been reconsidered in many years, and revision could prove a fruitful source of additional judicial resources. The tradition that fees of a master are paid by the parties might be relied upon as a step toward the belief of some that the costs of providing judicial services should be imposed on the parties in some kinds of litigation. Apart from some discussion in connection with the pending proposal to revise Rule 23, however, the Committee has not devoted enough attention to these questions to provide even a sketch of the issues that should be explored.

Rule 64

In 1986 the House of Delegates of the American Bar Association adopted a resolution supporting enactment of a federal statute governing prejudgment security in federal courts and suggesting corresponding revisions of Civil Rule 64. The proposed statute would allow nationwide enforcement of a prejudgment security order made by a federal court. It also would establish standards for prejudgment security independent of state law. Attempts are made to integrate the operation of the federal scheme with state law. These complex proposals were considered briefly at the November meeting. It was concluded that the matter should be held on the agenda for further study.

Only preliminary discussions have been held with the ABA proponents of this recommendation. It is clear that they are prepared to introduce legislation, and believe that they can find substantial support in Congress. It also is clear that they would prefer to work through the problems with this Committee, so as to anticipate and adjust for difficulties that may arise upon serious study of Civil Rules amendments.

The questions are complex at several levels. A decision must be made as to the proper means of integrating the processes of legislating and rulemaking. Integration is required if, as seems certain, many aspects of the ABA proposal would strain and break the limits of the Rules Enabling Act. Drafting a rule to implement proposed legislation involves obvious risks. Attempting to assist the legislative process in other ways also courts a variety of dangers. The Committee must think carefully about the role it might want to assume, if any, in a cooperative endeavor.

Apart from participating in an integrated legislative and rulemaking process, consideration might be given to the prospect of amending Rule 64 in ways that do not depend on new legislation. One example would be creation of a "no notice" procedure for cases presenting the risk that notice of attachment proceedings will cause disappearance of the assets to be attached. It is difficult to think of other examples so long as Rule 64 continues to depend primarily on state law security devices.

A decision also must be made as to the place of this topic in allocating the time of this Committee. The underlying questions involve many matters that are not peculiarly procedural. Detailed knowledge of state property law, and especially commercial law and transactions, is vitally important.

A major allocation of Committee time and resources will be required to pursue this topic in a coherent way. If that investment seems appropriate, the next step will be to initiate a closer working relationship with the ABA proponents of change.

FAX FILING GUIDELINES

Rule 5(e) provides that local rules may authorize filing by facsimile transmission if the rules are authorized by and consistent with standards established by the Judicial Conference of the United States. The signature provisions of the most recent draft Guidelines are discussed above in connection with Rules 7 and 11.

Other provisions of the draft Guidelines may create some problems under other Rules. If Rule 5(e) is given full preemptive value, local rules consistent with the Guidelines would supersede any inconsistent provisions of the Rules. Even on that interpretation of Rule 5(e), practical problems may remain. A copy of the draft Guidelines is attached.

Guideline II states that electronic transmission does not constitute filing; "filing is complete when the document is filed by the clerk." This provision does not refer to the possibility that a judge may accept a paper for filing under the general provisions of Rule 5(e). More important, it seems to leave a gap between the time of receipt by the clerk and the time when other unspecified acts are completed to establish "filing." A similar question is raised by Guideline VII(1), which states that a document handled by a fax filing agency "shall be deemed to be filed when it is submitted by the fax filing agency, received in the clerk's office, and filed by the clerk." Whatever may be the reason for establishing an uncertain filing date when documents are transmitted directly to the clerk, it is difficult to guess why a document presented by a fax filing agency should not be treated as "filed" when the physical document is presented to the clerk's office.

A curious question is posed by Guideline VIII(1)(d), which requires the cover sheet to include case number identification. The Guidelines clearly contemplate that local rules may authorize filing a complaint by fax. Some means must be found for determining a case number for complaints.

Guideline X(1) requires courts to ensure that filing fees are paid. Paragraph (c) provides a three-day grace period for receipt of direct payments. "Non-receipt of payments will [must?] result in suspension of facsimile privileges, the striking of pleadings for which fees were not tendered, and any other penalties deemed appropriate * * *." Mandatory striking of pleadings seems a drastic sanction. At least it should be made clear whether striking a complaint entails dismissal of the action, or whether a period must be allowed for reinstatement.

Guideline XI(1) directs that a rule permitting filing after normal business

hours "shall provide guidelines to determine time and date of filing." This provision does not seem to create any special difficulty—even if the local rule provides that the filing occurs on the first following day that is not a Saturday, Sunday, or legal holiday, the opportunity to file after normal business hours does not impose any new limit on access to the court. If the local rule provides that the filing occurs on the day of transmission, on the other hand, the result could be a significant extension of the time of notice to other parties under any rule that requires filing but not service by a set day.

Finally, Guideline XI(8) directs that local rules should address the question whether an incomplete transmission is sufficient to fix the filing date. This Guideline presents an awkward drafting juxtaposition with the Guideline II dictate that electronic transmission does not constitute filing. The intent, however, seems to be that a local rule may authorize the clerk to file a partially transmitted paper. Whatever terms are adopted, a measure of discretion seems inevitable. Serious consequences may turn on the exercise of discretion. An incomplete motion for new trial received on the 10th day after judgment is an easy illustration.

Study of the Guidelines by Committee members may reveal other potential problems.

LENGTH OF BRIEFS

Chief Judge Rodney S. Webb of the District of North Dakota has suggested that the Civil Rules should include a provision limiting the length of briefs. Appellate Rule 28(g) sets out page limits that have been revised periodically in an ongoing attempt to keep pace with changing technology. Bankruptcy Rule 8010(c) establishes page limits for briefs on appeal to a district court or bankruptcy appellate panel.

The question for the Civil Rules may be different from the other rules. The first issue is whether there is a problem. Do lawyers in fact regularly waste client money and court time by excessive district court briefing in civil actions? If so, can a rule be drafted that will work as well for civil trials as for appeals in bankruptcy and other cases?

It may be that legitimate briefing demands vary so widely across the full range of district court jurisdiction that no one provision can reasonably accommodate all types of actions. If that is so, either a compromise must be struck or an attempt must be made to tailor different rules to different types of litigation. It also may be that practices vary so widely across the country that a uniform national rule, simple or complex, is inappropriate. It may be that the question is in fact addressed by satisfactory local rules in most districts.

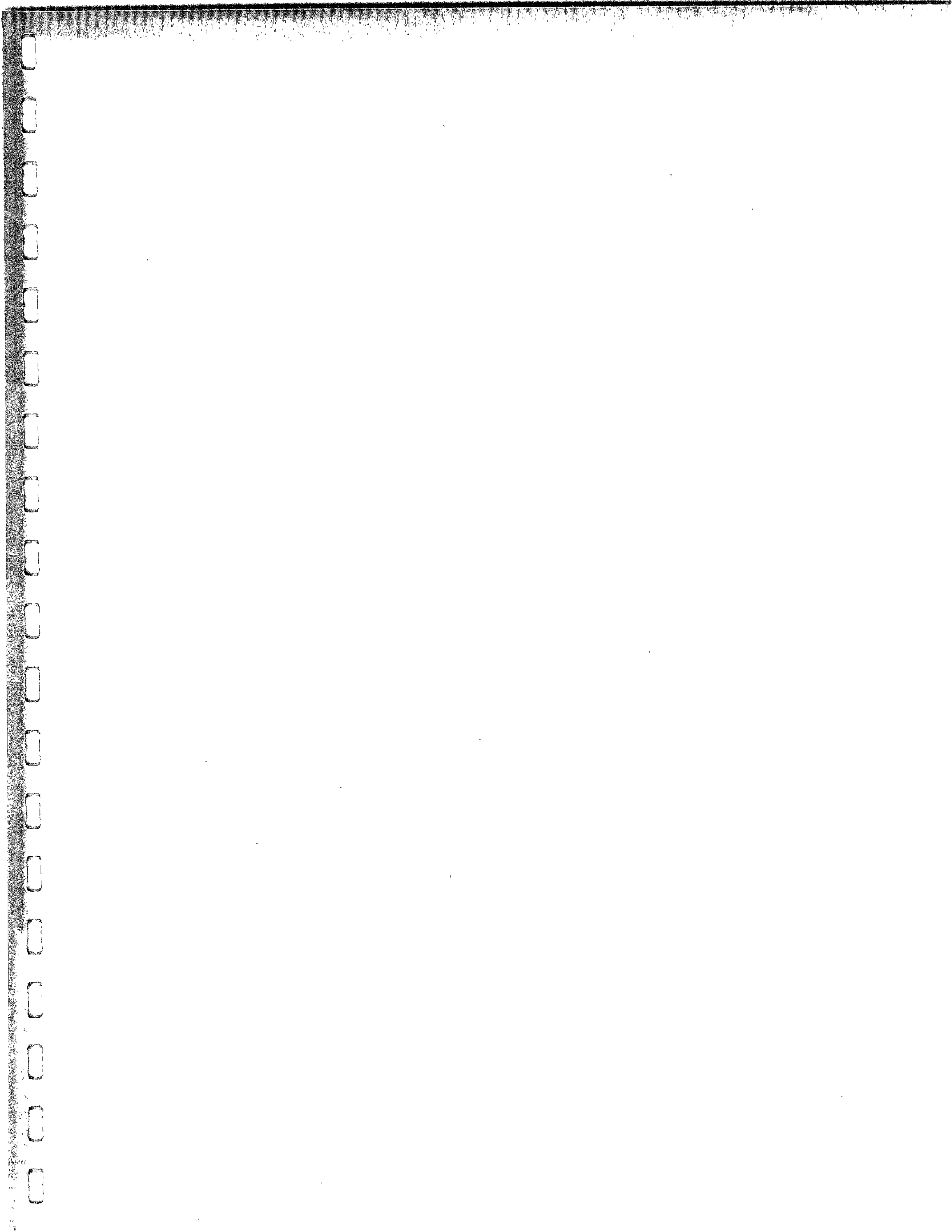
The question of briefing limits must be answered as a matter of practical experience, not grand theory. If there is a problem, discussion of its practical dimensions should provide the foundation for drafting a rule.

LOCAL COURT MEMBERSHIP: DEPARTMENT OF JUSTICE ATTORNEYS

Last December the attached letter from Attorney General Barr was referred to the Civil and Criminal Rules Committees. The letter protests application to "attorneys representing the interests of the United States under the direction of the Attorney General" of circuit and district court rules that require membership in the court's bar, and often payment of a fee. It is asserted that such requirements conflict with statutes authorizing representation of the United States by the Attorney General and lawyers directed by the Attorney General. The specific request for relief is that the Judicial Conference modify the circuit rules that apply to attorneys representing the United States.

Section 2071(c)(2) of the Judicial Code provides the Judicial Conference with authority to modify or abrogate a rule adopted by a circuit court of appeals under § 2071(a). Section 2071(c)(1) provides that district court rules remain in effect unless modified or abrogated by the judicial conference of the relevant circuit. Attorney General Barr's letter recognizes this distinction, and asks the Judicial Conference to act only on the circuit rules. The hope is expressed that once the Judicial Conference has acted, the example will be followed by district courts or, if need be, circuit judicial councils.

Since Judicial Conference assistance is invoked only with respect to circuit rules, it seems better to refer this question to the Appellate Rules Committee.



Agenda F-7 (Appendix C)
Court Administration/Case Mngt.
March 1993

GUIDELINES FOR FILING BY FACSIMILE

I. *Definitions:*

(1) "Facsimile transmission" means the transmission of a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(2) "Facsimile filing" or "filing by fax" means the facsimile transmission of a document to a court or fax filing agency [1] for filing with the court.

(3) "Fax" is an abbreviation for "facsimile" and refers, as indicated by the context, to a facsimile transmission or to a document so transmitted.

(4) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time, and an indication of errors in transmission.

II. *Transmission does not constitute filing*: Electronic transmission of a document via facsimile machine or other electronic means does not constitute filing; filing is complete when the document is filed by the clerk.

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[1] A "fax filing agency" is a private entity (business, law firm, etc.) that receives facsimile transmissions of documents to be filed with the court. The fax filing agency acts similar to a messenger service, filing a hard copy facsimile transmission as if it were the original with the court. The court does not have to maintain facsimile machines, establish mechanisms to accept filing fees via fax, or make copies of filed documents. [See Section VII.]

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. [2]

(1) Facsimile Standards for Courts: "Facsimile machine" means a machine that can send a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution. "Facsimile machine" also means a receiving unit meeting the standards specified in this subdivision that is connected to and prints through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3 [3]

(ii) Modem Speed - 9600-2400 bps (bits per second) with automatic stepdown

(iii) Image Resolution - Standard 203 x 98

(b) A facsimile machine used to send documents to a court shall be able to produce a transmission record, as proof of transmission at the time transmission is completed.

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[2] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[3] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

IV. *Resource Availability:* No additional personnel (FTEs) or funds for equipment will be made available due to a court's adoption of a fax filing policy. Courts should be aware of the potential burdens on the clerk's office and should examine thoroughly the potential impact on the court before adopting a fax policy.

V. *Original Signature:* The court shall make provisions to meet the requirements under the Federal Rules for court documents to bear an original signature [4] in one of the following ways:

(1) The date the clerk files the fax copy will be the date of filing, subject to receipt by the court of a signed original within three days; or

(2) The image of the original manual signature on the fax copy will constitute an original signature for all court purposes. The original signed document shall not be substituted, except by court order. The original signed document shall be maintained by the attorney of record or the party originating the document, for a period no less than the maximum allowable time to complete the appellate process.

VI. *Transmission record:* The sending party is required to maintain a transmission record in the event fax filing later becomes an issue.

VII. *Fax filing agency as intermediary:* A fax filing agency may file pleadings on behalf of the parties or their counsel. The court should set standards to be met by any fax filing agency seeking to act in this capacity. The fax filing agency must also meet the requirements of all applicable statutes and regulations. In addition, the following requirements shall apply:

(1) The fax filing agency acts as the agent of the filing party and not as agent of the court. A document shall be deemed to be filed when it is submitted by the fax filing agency, received in the clerk's office, and filed by the clerk. Mere transmission or receipt by the fax filing agency will not be construed as filing.

(2) The fax filing agency must meet all technical requirements under "Part III" of these guidelines.

(3) Duties of the fax filing agency: The fax filing agency will:

(a) ensure that additional copies necessary for filing shall be reproduced;

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[4] Rule 11, Federal Rules of Civil Procedure; Rule 9011, Federal Rules of Bankruptcy Procedure.

(b) take the document(s) to the court and file the document(s) with the court;

(c) on behalf of the client, attorney or litigant, pay any applicable filing fee; and

(d) ensure that all documents to be filed with the court shall be on size 8 1/2 x 11 inch bond.

VIII. *Cover sheet:*

(1) Each document transmitted to the court shall be accompanied by a cover sheet, which shall include the following:

(a) court in which the pleading is to be filed;

(b) type of action, e.g., civil, criminal, bankruptcy, or adversary proceeding

(c) case title information

(d) case number identification

(e) title of document(s)

(f) sender's name, address, telephone number, and fax number

(g) number of pages transmitted including cover sheet

(h) billing or charge information for court fees

(i) date and time of transmission

(2) The cover sheet shall be the first page transmitted. The cover sheet shall not be filed in the case, nor shall it be counted toward any page limit established by the court.

(3) The facsimile cover sheet is not intended to replace any cover sheet which the court may require. It is for use by the clerk's office in identifying the document and identifying any applicable fees.

IX. *Prohibited documents:* The court is free to accept for filing any documents subject to the local rules, except that bankruptcy courts are prohibited from accepting petitions or schedules by facsimile transmission.

X. *Fees:*

Payment of filing fees and any additional charges prescribed by the Judicial Conference for the use of the facsimile filing option shall be paid in a manner determined by the court.

(1) Filing Fee:

Courts which accept the filing of papers by facsimile on a routine basis must ensure that filing fees are paid.

Courts may decide not to allow the filing of complaints by facsimile [see Section XII(6)], thus alleviating the issue of collecting a filing fee. If a court does allow the filing of complaints by fax, the fee may be paid in person, by mail, by credit card, [5] or through use of an escrow account or advance deposit method, as follows:

(a) The filing fee, accompanied by a copy of the facsimile filing cover sheet, shall be deposited with the court not later than three days after the filing by fax.

(b) If the filing fee is not received by the court within three days after the filing by fax, the court shall proceed in the same manner as required for returned checks, except that no further notice need be given any party. The bad check fee shall not be assessed.

(c) A three day grace period will be allowed for receipt of direct (non-credit card or escrow account) payments. Non-receipt of payments will result in suspension of facsimile privileges, the striking of pleadings for which fees were not tendered, and any other penalties deemed appropriate within the discretion of the court.

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[5] Use of credit card payment for this purpose is allowed only if otherwise authorized.

(2) Fees for Filing by Fax [6]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet . . . . $ 5.00

For each additional page . . . . $ .75

Any necessary copies to be reproduced by the court [see Section XII(5)], for each page [7] . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States.

XI. *The following are among the issues to be addressed by the courts in local rules:*

(1) After hours filings: The court may make arrangements for acceptance of papers filed by fax after business hours, or the court may limit the acceptance of papers filed by fax to normal business hours. If the court accepts filings after normal business hours, then the court shall provide guidelines to determine time and date of filing.

(2) Page limits: The court may limit the number of pages that will be accepted by fax transmission. The court may consider increasing permitted document length after normal business hours.

(3) Exhibits: Certain exhibits may not lend themselves to fax filing, and the court should establish guidelines to handle such situations.

(4) Whether the sender will be notified of receipt or error in transmission: The court shall provide guidance as to whether it is the responsibility of the sender to confirm complete and legible transmission, or whether the court will notify sender of errors.

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[6] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[7] See Miscellaneous Fee Schedules.

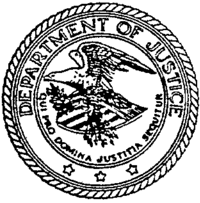
(5) Number of copies to be filed: Whether the party must provide required number of copies or whether the court will reproduce required number of copies and charge a fee for reproduction. [See Section XI(2)(a).]

(6) Types of document: The court may limit the types of document that will be accepted for filing by fax. [See Sections X, XI(1).]

(7) Legibility: The court may decide how to address the problems associated with illegibility due to faulty transmission.

(8) Whether there are any circumstances under which an incomplete transmission would be sufficient to fix the filing date.

ATTACHMENT 2



Office of the Attorney General
Washington, D. C. 20530

November 24, 1992

Refer to Ptlr

The Honorable William H. Rehnquist
Chief Justice
Supreme Court of the United States
1 First St., N.E.
Washington, D.C. 20543

Dear Chief Justice Rehnquist:

I am writing to you in your capacity as the presiding officer of the Judicial Conference of the United States. I would like to call to your attention a problem caused by the local rules of a number of federal courts for attorneys representing the interests of the United States under the direction of the Attorney General. These rules are promulgated under the authority of 28 U.S.C. 2071(a). By statute, the Judicial Conference of the United States has the power to modify or abrogate rules of the federal courts of appeals if they are inconsistent with federal law. See 28 U.S.C. 331 and 2071(c)(2). Thus, the Judicial Conference is well-positioned to resolve our problem.

A number of federal courts require attorneys who practice before them to join their local bars, and many of these courts require the payment of admission fees. See, for example, D.C. Circuit Rule 6, Second Circuit Rule 46, Ninth Circuit Rule 46.1, and Tenth Circuit Rule 46.2. These rules do not, as far as we are aware, include any exception for government attorneys. Certain other circuits, however, exempt government attorneys from the requirement of paying the admission fee or joining the bar of the court. See First Circuit Rule 46.1, and Federal Circuit Rule 46(d).

We believe that those court rules that require attorneys appearing at the direction of the Attorney General solely in order to represent the interests of the United States to join federal court bars and to pay a fee to do so are not consistent with federal law. Several sections of Title 28 set out the authority of the Attorney General to assign attorneys to appear in court to represent the interests of the United States. Section 515(a) provides that "[t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when

specifically directed by the Attorney General, conduct any kind of legal proceeding * * * which United States attorneys are authorized by law to conduct * * *." (The powers of United States Attorneys are then broadly set out in 28 U.S.C. 547.) Further, Section 517 states that any officer of the Department of Justice "may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States * * *." Finally, Section 518(b) provides that "[w]hen the Attorney General considers it in the interests of the United States" he may "direct the Solicitor General or any officer of the Department of Justice" to "conduct and argue any case in a court of the United States in which the United States is interested * * *."

Thus, federal law clearly states that the Attorney General may direct any Department of Justice attorney to appear in federal court on behalf of the United States. The circuit rules mentioned above appear to conflict with these statutory provisions insofar as they actually require court bar membership and payment of fees by attorneys acting under the direction of the Attorney General.

Although district court rules on this point vary widely, a number of district courts also require payment of bar admission fees. I recognize that the Judicial Conference does not have direct supervision over district court rules (see 28 U.S.C. 331). However, these rules also must be in conformance with Acts of Congress (see 28 U.S.C. 2071(a)), and the judicial council in each circuit may modify or abrogate them if appropriate (see 28 U.S.C. 2071(c)(1)). Consequently, if the Judicial Conference requires the circuit rules to conform to federal law, I am confident that the district courts will either voluntarily make the necessary modifications, or that various circuit judicial councils will do so.

In sum, I respectfully request that the Judicial Conference of the United States consider our view that imposition of local bar admission fees on attorneys representing the United States is inconsistent with federal law, and modify any of the various circuit rules so that attorneys assigned by the Attorney General (or his legal designee) to represent the interests of the United States are not required to pay bar admission fees imposed by those rules.

Thank you for your attention to this matter. If you or members of the Judicial Conference would like to discuss it with me or my staff, please contact me.

Sincerely,

WILLIAM P. BARR
Attorney General