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MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

May 3, 4, 5, 1993

The Advisory Committee on Civil Rules met on May 3, 4, and 5, 1993, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Sam C. Pointer, Chairman, and committee members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Chief Justice Richard W. Holmes; Mark O. Kasanin, Esq.; Dennis G. Linder, Esq.; Judge Anthony J. Scirica; and Phillip A. Wittmann, Esq. Judge William O. Bertelsman, Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Judge Robert E. Keeton, Chairman of the Standing Committee, also attended. Also present were Bryan A. Garner, Esq., and Joseph F. Spaniol, Jr., Esq., consultants to the Standing Committee; Peter McCabe, John K. Rabiej, Jeff Henemuth, and Paul Zingg of the Administrative Office; William Eldridge, John Shapard, and Elizabeth Wiggins from the Federal Judicial Center; Ted Hurt of the Dpartment of Justice; and Edward H. Cooper, Reporter. Observers included Chris Brown, Alfred W. Cortese, Jr., J. DiLorenzo, and Kenneth Scherk.

The meeting began with discussion of the Civil Rules amendments that were transmitted to Congress by the Supreme Court in April. It was noted that those who in the past have challenged various portions of these amendments have not yet decided whether to urge Congress to suspend the effective date or take other action. The flexibility that amended Rule 26 allows to depart from the disclosure provisions by local rule or order may persuade former opponents that further opposition is unnecessary.

Civil Rule 23

A draft Rule 23 revision has been studied intermittently for some time. This meeting was the first occasion for extended consideration by the Committee.

The first question discussed was the desirability of considering Rule 23 at all. It was noted that many years of experience with the 1966 revisions have provided answers to many questions, and have provided ample experience that can be used to test potential revisions. Experience has suggested several reasons for revision. Courts have encountered much difficulty in bringing tort claims into Rule 23, in part because of the Note accompanying the 1966 revisions. More specific problems have included the cost of notice to many individual members of (b)(3) classes who have small claims; potentially valid actions may be defeated by these costs. The seeming inability to opt out of (b)(1) or (b)(2) classes may create difficulties, as when individual members of a

purported employment discrimination class prefer to accept practices that are challenged by other members of the class. Rule 23 is used with increasing frequency. The greater the number of class actions, the greater the potential value of improvements in the rule. An American Bar Association task force studied class actions from 1984 to 1986 and made recommendations that have been the basis for the draft now before the Committee. The topic was brought on for study following a suggestion by the Ad Hoc Committee on Asbestos Litigation that Rule 23 might be studied by this Committee.

The next question explored was the desirability of considering changes more sweeping than those proposed by the draft. It was accepted that if revisions are proposed now, care should be taken to pursue the project in such a way that Rule 23 will not have to be revisited in the near future. There is no need for reform so pressing that more fundamental changes must be put aside in the need for prompt present action. No member of the Committee could find any reason for undertaking broader changes. Informal preliminary reactions to the present draft likewise have failed to provide any significant sense that drastic changes are appropriate.

Discussion of possible changes recognized that some changes require legislation. The American Law Institute Complex Litigation Project was noted as a model of the kinds of legislation that may prove useful in addressing multiparty, multiforum litigation. Other jurisdictional changes that might be desirable include relaxing the limits that impede use of Rule 23 for state-law claims, including complete diversity and the requirement that each member of a plaintiff class satisfy the amount-in-controversy requirement. Other possible class action changes as well may require legislation.

The specific changes made by the draft were discussed, taking note of the responses that have been received on the basis of informal circulation of the draft.

The changes made by the draft relate in many ways to the determination to collapse the present categorical separations between subdivisions (b)(1), (2), and (3) into a unified test that asks whether a class action is superior for the fair and efficient adjudication of the controversy. This change is intended to reduce wrangling about which subdivision fits a particular action. More important, the change is intended to allow a more functional approach to questions of notice and the opportunity to opt out of a class. Focus on the superiority determination will to some extent enhance district court discretion. The provision for discretionary appeal from certification or refusal to certify is intended to provide a safeguard against possible misuse of this discretion.

The relationship between the superiority criterion and the predominance of common questions over individual questions was discussed next. The predominance requirement now attaches only to (b)(3) class actions. It would be possible to incorporate predominance as a requirement for all class actions. Much thought was given to this possibility in preparing the draft. Some, particularly those representing defendant classes, have feared that elimination of the requirement that predominance be shown for what now are (b)(3) actions will encourage undue proliferation of class actions. Others express the corresponding fear that a requirement of predominance will discourage desirable class actions. On balance, predominance is better seen as one element of superiority, particularly in light of the opportunity to certify classes for specified issues. Actions that now fit into (b)(1) and (b)(2) categories may present compelling needs for class certification, even though there are many individual questions that do not affect all members of the class. Mass tort claims, moreover, present special problems. Predominance of common questions is a useful approach if the question is whether to certify a class that includes all individual issues as well as common issues. Predominance is less useful if the class is certified only for common issues. A motion passed to retain the draft approach that treats predminance as one factor in determining superiority. A motion to make predominance an independent requirement failed.

The draft requirement that a class representative be "willing" as well as able to represent the class was considered next. Many who have seen the draft fear that the willingness requirement will prove a de facto repeal of defendant class actions. The burden of defending on behalf of a class is greater than the burden of conducting an individual defense. The greater the stakes, the greater the effort that rationally should be devoted to the contest. Settlement of a class action, particularly if it is to impose burdens on nonparticipating members of a defendant class, is far more complicated than settlement of an individual action. The mere fact of assuming fiduciary responsibilities to others may weigh heavily on the representative defendants and attorneys. If a potential representative defendant can avoid these burdens by protesting a lack of willingness to represent the class, few defendant classes may survive. This risk was seen as substantial in relation to legitimate uses for defendant classes. Defendant classes have been valuable in many settings. Among those suggested to the Committee have been actions against large partnerships; actions involving multiple underwriters associated in securities offerings (including situations in which the defendant class members have several but not joint liability); and actions against large numbers of public officials who are engaged in similar activity and who cannot be bound by a judgment entered against a common superior. Other illustrations may involve problems less likely to arise in federal court, such as an action to determine

the validity of a servitude on land that runs in favor of many others, or a declaratory judgment action against a class of potential tort claimants. A willing representative in some settings, moreover, may be more dangerous than an unwilling representative. On occasion, at least, an individual defendant has been designated representative of a defendant class for determining issues of patent validity. The representative may have a stronger interest in having all defendants bound by a determination that the patent is valid than in having the patent declared invalid, if the representative is in a better position to bargain for a license or to compete without infringing.

Despite these problems, the Committee rejected a motion to delete the requirement that the representative be willing. The requirement applies to plaintiff classes as well as defendant classes, and helps protect against the risk that a defendant may seek certification of a plaintiff class in the belief that a full-scale defense may overwhelm the representatives and bind the class. Unwilling representatives, moreover, may not warrant the trust that some observers have suggested. The problem of additional litigation costs inflicted by class certification may be met in part by volurtary contributions from nonparticipating members of the class, but it is difficult to rely on this possibility in drafting a rule that does not clearly provide for forced contributions outside the opt-in setting.

The notice provisions of draft Rule 23(c) were discussed next. The purpose of the draft is to require notice of certification in all class actions, without regard to the former categories of subdivisions (b)(1), (2), and (3), but to make the nature of the requirement more flexible than the present (b)(3) requirement. The greatest change is likely to be with respect to actions involving large numbers of small claims. The cost of individual notice under present subdivision (b)(3) can defeat actions that should be brought. The revision also will focus attention on the value of providing some form of notice in other forms of class actions, a matter not now covered explicitly. It was recognized that greater discretion with respect to notice may encourage preliminary litigation on this subject, expanding to fill the gap left by reducing the occasions for litigating the nature of the class. To the extent that one motive for arguing over the choice between (b)(1), (2), and (3) is to affect notice requirements, however, it will be better to focus directly on the notice issues.

The notice provisions led to discussion of the question whether the rule should require that a motion to certify be made within a specified time. Some local rules include such requirements. It was decided not to adopt such a requirement, however, because experience shows that not all certification questions are ripe for decision at uniform intervals after the

class question is first raised. Often substantial discovery is needed, or it is desirable to dispose of preliminary motions, before addressing certification. There is little reason to force motions that may have to be deferred.

The draft provisions for opting out and opting into a class are tied to the collapse of the separate (b)(1), (2), and (3) categories. Opting out is to be available without regard to these former distinctions; opting in, not now available in Rule 23 classes, is to be made available.

In reviewing the opt-out provisions, it was noted that something closely akin to opting out can be achieved even now in (b)(1) and (2) class actions by defining the class to include only those who do not ask to be excluded.

The power to limit a class to those who opt in was viewed as a more significant alteration of Rule 23. Opting in now is limited to statutory class actions in a few areas. Something akin to opting in is regularly required in administering judgments in favor of a plaintiff class by limiting participation in the recovery to those who elect to file claims, but it is easier—and perhaps much easier—to persuade class members to file a claim at this stage than to enter at the beginning of a litigation. A class limited to those who opt in before a determination of liability may easily result in a smaller class. The 1966 revision of Rule 23 noted the danger that many potential class members, particularly those with small claims and a fear of being involved with litigation, may prefer to remain aloof. Opt-in actions put a premium on diligence, sophistication, and daring. The difference between opting out and opting in may be very substantial in such situations. An opt-out action, indeed, may be necessary to generate stakes sufficient to warrant pressing the litigation to a conclusion. Substitution of an opt-in class may reduce the utility of class actions in achieving generalized enforcement of the law. The effects of certification on statutes of limitations may be complicated, moreover, in determining the point at which the limitations period resumes running against those who do not opt in.

The opportunity to use opt-in classes may be valuable, despite these concerns. If it is difficult to accomplish effective notice, the choice may be to have no class action or to have a class limited to those who are proved to have actual notice by the act of opting in. Opt-in classes also may help resolve the choice-of-law problems encountered in diversity actions arising out of common disasters. Acceptance of litigation under specified laws may be made a condition of opting in. Opting in also may prove particularly suitable with respect to tort actions or defendant classes.

After considering the possibility of publishing the draft for comment with brackets indicating that the opt-in provision is especially open to reconsideration, the Committee concluded that the draft should be published as it stands.

Rule 23(c)(4) now provides that a class may be certified with respect to particular issues. The draft is designed to underscore the availability of this option, in part by referring to certification with respect to particular claims as well as particular issues. The focus on "claims" and "issues" extends to "defenses" as well. The advantage of referring to "claims" and "defenses" is that it may be difficult to specify the issues that should be tried on a class basis; certification of all issues arising out of designated claims, or simply of the claims, provides a more convenient and meaningful alternative. The most important concern is that the certification make clear the subject of the class certification.

The "subclass" provisions of Rule 23(c)(4) are changed in the draft to allow certification of a subclass that does not satisfy the numerosity requirement of subdivision (a). This change is important in situations in which conflicts of interest arise between the class and small numbers of class members. In employment discrimination litigation, for example, it may happen that a few class members may prefer to retain the practices claimed to give rise to liability, or may prefer remedies that differ from the remedies desired by most class members. Subclass treatment can facilitate effective handling of these problems.

The draft subdivision (d)(1) provision allowing precertification disposition of motions under Rules 12(b) and 56 reflects the result reached under the current rule by most, but not all, courts. Opposition to the draft seems based on two grounds. One group argues that there is no need to amend the rule when most courts reach the proper result. Another group seems to hope that without amendment, more courts may be encouraged to refuse precertification disposition. The Committee concluded that precertification disposition often is desirable, and that the rule should make this matter clear to avoid inconsistent approaches and to make the answer readily apparent without need for research and argument.

In preparing the draft for submission to the Standing Committee, some changes were made with the prospect that others also may be made. Draft subdivision (d)(1) would refer explicitly to the discretionary power to order notice of refusal to certify, changes in the description of a class, or decertification. The Note will indicate that the decision whether to give notice should be influenced by the extent to which class members have learned of the action and may have relied on the anticipation that their

interests would be protected. The reference to "claims" will be deleted from (b)(6), since issues may be certified. The requirement that a class action be superior will be moved into subdivision (a) as the fifth requirement; in this way all requirements will be grouped together in (a), and (b) will be confined to illustration of the factors to be considered in determining superiority.

The Committee voted unanimously to recommend the revised draft to the Standing Committee for publication at such time as the Committee next finds it appropriate to publish Civil Rules for public comment.

Rule 26(c)(3)

It was decided at the November, 1992, meeting that a draft amendment of Rule 26(c) should be prepared to study a possible provision for dissolving or modifying protective discovery orders. Bills have been introduced in Congress that would limit the power to enter protective orders in various ways. Representatives of the Judicial Conference have asked that Congress defer action so that the Advisory Committee could study the question. The draft provided power to modify or dissolve a protective order before or after judgment. Disposition of the question would consider the extent of reliance on the order, the public and private interests affected by the order, and the burden the order imposes on parties seeking information relevant to other litigation.

The need to amend Rule 26(c) was questioned. Some studies have concluded that there is ample power to modify protective orders, and that in fact protective orders have not had the adverse consequences feared by current critics. There is no systematic evidence that protective orders frequently cause wasteful duplication of discovery efforts between successive lawsuits, nor that any problems that might arise cannot be addressed under existing inherent power to modify or dissolve protective orders. There is no persuasive showing that protective orders defeat the opportunities of government agencies or public interest groups to alert the public to products or conditions that create ongoing risks to health and safety. The Federal Judicial Center plans to study the use of protective orders; more information may be available soon.

Despite uncertainty whether there is any need to add a provision for modification or dissolution, it was concluded that amendment of Rule 26(c) should be proposed. It is clear that the court that enters a protective order must have power to modify or dissolve its own order. If there is any significant doubt as to the existence of the power, the power should be made explicit in the rule. There is much concern about the possibility that

protective orders can facilitate suppression of information necessary to protect public health and safety, or can thwart efficient discovery in related litigation. The amendment of Rule 26(c) will limit the ability of the parties to narrow the court's power over its own orders. It will not extend to matters not involved with court-made protective orders. Secrecy provisions in private contracts are not reached, whether made as part of settlement, as extra-judicial discovery agreements, or otherwise. Private contract arrangements seem more matters of substance than procedure.

The dimensions of the power to modify or dissolve were discussed. It was noted that most protective orders are entered on agreement of the parties. Often they extend protection to much material that a court would not protect after a contested hearing. Modification or dissolution are most easily ordered with respect to materials that do not in fact deserve protection. Materials that deserve protection against general publication still may be released for use in similar litigation subject to continuing protection against general use.

The draft language stating that a protective order can be dissolved "before or after judgment" was discussed at length. It was first concluded that it would be better style to express this concept by providing that the court may act "at any time." Courts now are divided on the extent of power to act on a protective order after judgment. Questions may be raised as to standing to seek modification, the existence of continuing jurisdiction, First Amendment rights, private rights arising from the essentially contractual nature of settlement agreements that include provisions continuing protective orders, and the like. There is much concern that courts should not have power to undo a protective provision that was an important element of a settlement bargain. Confidentiality provisions of settlement agreements also may involve conflict-of-interest problems arising from a party's interest in winning a maximum award and the interest of counsel in retaining ready access to discovery information for use in related litigation. Settlement agreements may be fully executed before modification or dissolution is sought. Once discovery materials have been returned, for example, it may easily be argued that a person who seeks the materials for use in other litigation should pursue independent discovery in that litigation. Provisions for modification or dissolution after judgment could further complicate the ways in which protection is sought and implemented.

In face of these puzzles, some members of the Committee believed that most courts would agree that power to modify or dissolve a protective order continues after judgment. A variety of approaches are summarized in United Nuclear Corp. v. Cranford Ins. Co., 10th Cir.1990, 905 F.2d 1424; see also Poliquin v. Garden Way,

Inc., 1st Cir., 1993 U.S. App. Lexis 6014, at * 25: "[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment." Even if this prediction is correct, however, it does not resolve differences as to standing to seek, or the standards for granting, modification or dissolution. Other members of the Committee were concerned that an undefined power to grant relief after judgment would interfere with policies stated in Seattle Times Co. v. Rhinehart, 1984, 467 U.S. 20, 32-33, 34: "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. * * * Moreover, pretrial depositions and interrogatories are not public components of a civil trial." "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." Heavy burdens may be imposed on courts if they are required to balance the many interests in discovery confidentiality against the substantive policies that support settlement of disputes, First Amendment interests, problems of standing, and the like.

Middle ground might be found in the dispute over action after judgment by providing that Rule 26(c) orders are dissolved on entry of judgment unless continuation after judgment is specifically ordered. The parties would be under the burden of ensuring that continuing protection is provided. It would be possible to provide instead that the court's order terminates on entry of judgment, leaving any continuing protection to contract between the parties. This approach would serve the privacy and settlement interests of the immediate parties, but would not address concerns about expediting similar litigation or protecting against public hazards. An alternative might be to allow modification after judgment, but only within a designated period such as one year. Rather than ensure access to important information, this approach would provide less access than is available today in most courts. Yet another approach might be to amend the introductory portion of Rule 26, to provide that a protective order may be entered for good cause "to the extent permitted by law." This approach, however, would not have any impact unless it should stir Congress to address these questions.

At the conclusion of the discussion it was moved to delete the reference to action "at any time" from the draft. The motion carried over dissents by two members who would prefer to retain the reference and by one member who believes there is no need to amend Rule 26(c). It also was decided that the Note to the amended rule should not refer to the questions surrounding modification or dissolution after judgment.

Rule 43(a)

Two changes in Rule 43(a) were considered.

The first proposed change would authorize the court to permit or require that the direct examination of a witness in a nonjury trial be presented in writing. This proposal was published for comment in 1991, although members of the Advisory Committee were divided on the question. Some members believed, and continue to believe, that the power to require written presentation of testimony is established by Evidence Rule 611. Much of the public comment was hostile with respect to the provision that would allow a court to require presentation of written testimony. Many lawyers believe that it is important to present strong witnesses in the traditional setting of live question-and-answer testimony. Written testimony will be written by lawyers, and will not capture the witness's own mode of expression. When this proposal was discussed at the November, 1992 meeting of the Committee, it was concluded that it should be referred to the Evidence Rules Advisory Committee for study.

Discussion showed that concern about written testimony continues. Written testimony may aggravate the tendency of some courts to hold nonjury trials in disjointed segments.

The advantages of written testimony were noted. A judge in Oregon started this practice twenty or more years ago, and developed it extensively. That experience showed that cases could move much faster in this way. The practice has been used more selectively since then, with continuing success. The Ninth Circuit has approved the practice in bankruptcy proceedings. Essentially written testimony is used now in many circumstances to save trial time. For example, an expert witness may present a written curriculum vitae

It was suggested that the proposal might be redrawn as one to permit narration. Evidence Rule 611(a) clearly authorizes narration, however, and there was no need seen to change Rule 43(a).

It was observed that many courts now resort to written direct testimony in nonjury trials with the consent of the parties.

A motion to reject the amendment to provide for written direct testimony in nonjury trials passed. The action of the Committee will be communicated to the Evidence Rules Advisory Committee.

The second proposal is to amend Rule 43(a) to permit electronic transmission of testimony. This practice has been followed by some courts, at times by treating the testimony as a deposition conducted during trial and under supervision of the judge to ensure that only admissible matters are presented.

Telephone testimony has been used in agency proceedings. One member of the Committee observed that with suitable protective provisions covering such matters as the people who can be present with the witness, telephone testimony is as satisfactory as reliance on a deposition. If video transmission is available, it is better than a deposition.

Direct transmission of contemporaneous testimony can have many advantages. Testimony of witnesses on purely formal matters may be accomplished more easily and less expensively. Testimony of essential witnesses who cannot appear at trial may be better than reliance on earlier depositions. Reasons for not appearing at trial may range from limits on trial subpoenas to unexpected accidents. Trials that depend on witnesses scattered in many places may be managed more effectively if it is not necessary to bring them all together at one time and place, even if that is possible. Many problems are encountered in managing criminal trials when witnesses are brought to trial from distant parts of the country; transmission of testimony could reduce comparable problems in civil litigation.

The possible advantages of transmitted testimony may be offset by disadvantages. It is necessary to ensure that the witness is in fact the intended person, particularly if audio transmission is used. Controls must be imposed to protect against influence by other persons present with the witness but not included in the transmission. It may be desirable to require some advance notice by the proponent, when possible, so that other parties can arrange to depose the witness before trial. Video depositions may be particularly important if the testimony is to be transmitted by audio means alone. Protections must be built into the rule. The rule should require good cause for transmission, and should remind courts of the need to protect against possible distortions or influence. The Note should indicate that showings of unexpected unavailability are more persuasive than simple limits on subpoena power. The Note also should indicate that there is less need to rely on transmission when depositions are available. The decision whether to allow transmission, and the choice of technology, should depend on the cost of transmission in relation to the importance of the testimony, the stakes of the litigation, the means of the parties, and other factors that may seem relevant. The Note in addition should suggest that when feasible, courts should require advance notice of a request for transmission so other parties can take a deposition.

It was suggested that perhaps transmission of testimony should be authorized only for circumstances that would permit presentation of the deposition of a living witness under Rule 32. It was concluded, however, that transmission should not be confined to specifically defined circumstances. More flexibility is desirable.

The means of describing transmission technology were left open for further work. Such electronic means as facsimile transmission and direct computer communication are not contemplated, unless perhaps exceptional circumstances can be shown. It may be uncertain whether all other technologies are properly described as electronic. It should be made clear that in some circumstances it is proper to rely on audio transmission alone, while video transmission should be preferred in others.

Rules 50, 52, 59: Service and Filing

The Bankruptcy Rules Committee asked that the Civil Rules Committee consider amending Rules 50, 52, and 59 to adopt a uniform requirement that the post-judgment motions authorized by these rules be filed no later than 10 days from entry of judgment. The Bankruptcy Rules Committee believes that filing is important so that all parties have a clear and easy means of determining whether appeal time has been suspended by any of these motions. It also believes that it is desirable to maintain uniformity between the Bankruptcy Rules and the Civil Rules.

Discussion of this recommendation began with the broader questions raised by the general relationships between filing and service. Many rules apply limiting time periods by reference to service. Rule 5(d) requires filing within a reasonable time after service. Problems arise when filing is not accomplished. A defendant, for example, may serve an answer but fail to file it. A motion for default and subsequent default judgment may follow without any indication of the answer in court files. At some point, the Committee should study the many relationships in the rules between filing and service. Brief present discussion, indeed, shows uncertainty as to some matters of actual practice. It was suggested, for example, that Rule 5(d) might be amended to require filing within five days of service. In some rural areas, however, even a five-day period might effectively require personal delivery; neither mail nor private courier services can be counted upon to provide five-day delivery. It also was noted that simply putting a paper on a desk in the clerk's office may not guarantee "filing." Another observation was that even though filing requires proof of service, some lawyers try to play games by filing and then delaying service. Filing by mail was discussed, but it was noted that this alternative could create difficult problems of proof with respect to timely filing for limitations purposes, and that short filing deadlines often are set for the purpose of accomplishing actual physical receipt, not mere mailing.

Turning to the immediate question, it was concluded that Rules 50, 52, and 59 can be addressed now without waiting for a broader study of the relationship between service and filing. Rule 50(b), as amended in 1991, requires that a motion for judgment as a matter

of law be renewed by service and filing within 10 days of judgment. Rule 50(c)(2) invokes the 10-day service requirement of Rule 59. Rule 52(b) requires that a motion to amend findings of fact be "made" within 10 days. This requirement apparently is satisfied by service within 10 days, followed by later filing. Rule 59 requires that motions for a new trial or to reconsider be served within 10 days.

It was observed that both filing and service should be required when it is important that notice be accomplished. Rather than follow the suggestion that filing alone be required, it was concluded that the present requirement of service in Rules 50(c)(2), 52(b), 59(b), and 59(e) should be retained and supplemented by requiring filing no later than 10 days after entry of judgment. Filing should be accomplished with relative ease, particularly since Saturdays, Sundays, and legal holidays that fall within the 10-day period are not counted. This time period should allow adequate opportunity to prepare and file a motion. Drafts conforming to the new style guidelines will be prepared and submitted to the Standing Committee with a recommendation for publication.

Rule 68

Revision of the Rule 68 offer-of-judgment procedure was discussed at the November, 1992 meeting. A draft based on that discussion was presented for evaluation. The draft would make the offer-of-judgment procedure available to claimants as well as defendants. It also would increase the consequences of failing to accept an offer at least as favorable as the judgment. In actions seeking money damages, an award would be made for attorney fees incurred by the offeror after expiration of the offer. The amount of fees awarded would be reduced to the extent that the amount awarded by the judgment was more favorable to the offeror than the offer. The fee award also would be limited to the amount of the judgment, so that a claimant could not be forced to pay fees greater than the amount recovered and a defendant could not be forced to pay fees greater than the amount recovered.

The purpose of the revision would be to encourage early settlement. The same purpose was pursued by amendments published for comment in 1983 and 1984. Those proposals met broad and vehement opposition and were withdrawn. This proposal is meant to impose less serious consequences, with the hope that a middle ground can be found in which limited attorney fee awards can encourage early settlement without forcing unfair settlements or discouraging litigation entirely.

One question raised by the proposal is the extent of knowledge about settlement. The premise is that some cases that should

settle either settle later than should be or do not settle at all. Apart from the fact that most civil actions are resolved without trial, however, very little is known about the settlement process. One view of the proposal was that it would be "too compelling." It was feared that in many cases, any given level of dollar consequences may be more serious to the plaintiff than to the defendant. Fear of losing any recovery because of a fee award might force some plaintiffs to accept Rule 68 offers that fall below the reasonably expected judgment.

Another question raised by the proposal is the need to dispose of more cases by early settlement. It was observed that the average time from filing to disposition is going up, but that this fact may be due to shifting toward more complex cases in the overall docket. Some courts do have significant problems in processing civil cases; in extreme circumstances, civil trials may be nearly impossible to obtain. Such crises seem to result from two factors—increased loads of criminal drug prosecutions, and persisting judicial vacancies.

Another premise underlying the proposal is that Rule 68 does not now have any significant effect on settlement. The same premise was followed in advancing the 1983 and 1984 proposals. Committee members continue to believe that the rule has little effect in most cases, in part because offers are made only after most costs have been incurred, weakening the incentive effect of liability for post-offer costs. It was suggested, however, that Rule 68 does have an effect in cases that include a statutory attorney fee. Failure to accept an offer more favorable than the judgment cuts off the right to post-offer attorney fees even though the offeree is a prevailing party. The prospect of losing part of the fee recovery does encourage settlement. At the same time, the offer may create a conflict of interest between attorney and client, particularly if a fee award is important to ensure actual payment. Even apart from the conflict of interest, the effect on settlement may be seen as undesirable coercion rather than desirable encouragement.

It was noted that California has an offer-of-judgment statute that provides for shifting expert witness fees, and that this procedure seems to have a desirable effect in encouraging settlement.

It was suggested that it is inappropriate to refer to Rule 68 consequences as a sanction. The rule is not based on inappropriate behavior. The test is not one of subjective bad faith, nor even of objective unreasonableness. Neither a party nor, by reflection, counsel, should be stigmatized as if it were.

Discussion of the sanction terminology led to discussion of

authority to affect attorney fee awards under the Rules Enabling Act. The "sanction" terminology seems appropriate for enforcing a procedural duty. The Enabling Act should authorize Rule 68 if the rule creates a procedural duty to guess right about the eventual judgment. Imposition of consequences then falls within the power to create the duty. Attorney fee awards are commonly authorized for violation of other procedural duties; Rule 37 is a good example. Some members of the Committee were uncertain, however, whether this analogy is persuasive. There is power to create a discovery procedure. It is not so clear that there is power to create a duty to settle substantive claims. Shifting responsibility for attorney fees is a departure from the prevailing "American Rule," and may seem substantive when used as an incentive to settle rather than as a means of enforcing more obviously procedural duties. This fear is not allayed by the fact that the proposal is designed to put the offeror — at best — in a position no better than would have resulted from acceptance of the offer. Other sanctions, such as double costs, might seem more appropriate.

Alternative sanctions were discussed further. One possibility might be simply to award a flat proportion of the difference between offer and judgment. Another might be to allow the offeror a choice between entering judgment on the offer and entering judgment on some basis calculated from the actual judgment and a procedural sanction. Yet another might be to design a simple system in which post-offer fee awards are capped at the amount of difference between offer and judgment: if judgment is $100,000 more favorable to the offeror, the maximum fee award would be $100,000. This system is simpler to administer, but could put the offeror in a better position that would have followed from acceptance of the offer.

Other approaches to amending Rule 68 were discussed. One was simple abrogation of Rule 68. Other pretrial devices, such as neutral evaluation, may prove better means of encouraging early settlement. Another alternative would be to make Rule 68 available to claimants, but without adopting any attorney-fee sanctions.

At the end of the discussion it was unanimously concluded that further consideration of Rule 68 should await development of further information about actual operation of the present rule and the factors that affect settlement. Study of the possible effects of the proposed revision also will be desirable if it can be accomplished in persuasive form. The Federal Judicial Center is developing such a study under the direction of John Shapard. Committee members Doty, Kasanin, and Scirica agreed to work with Shapard on the design of the study.

Rules 83 and 84 have been before the Committee for some time. The proposals that were sent to the Standing Committee for its December, 1992 meeting were returned for further consideration of uniform language proposed for similar provisions in all the various sets of court rules.

Discussion of Rule 83 focused on the proposal that rights should not be defeated for neligent failure to adhere to a requirement of form set out in a local rule or directive. The other sets of rules do not have similar provisions. No reason was found that would make this provision more suitable to the civil rules than the other rules. It was concluded, however, that this provision is desirable for all of the different sets of rules. The Committee voted to recommend this provision to the Standing Committee.

Discussion of proposed Rule 84 focused on the recommendation of the Bankruptcy Rules Committee that the proposed Rule 84(b) and cognate rules not be adopted. In the alternative, the Bankruptcy Rules Committee has urged that the amendment not include Judicial Conference power to make any changes more significant than changing spelling, cross-references, or typography. The Committee voted unanimously to adhere to the uniform language proposed by the Reporter of the Standing Committee.

Rules 83 and 84 will be sent to the Standing Committee with a recommendation that they be published for public comment.

New Matters

Rule 4

It has been suggested to the Committee that Rule 4(j), renumbered as Rule 4(m) in the proposals transmitted to Congress by the Supreme Court on April 22, 1993, should set a shorter period than 120 days for serving process after filing. Committee discussion noted that there was much debate about Rule 4 in the revision process, but perhaps not much attention to this specific point. One member noted that often it is useful to delay service after filing so that settlement discussions can be pursued. It was concluded that the Reporter should study the question and report back to the Committee.

Rules 7, 11 Signature Requirement

The signature requirements of Rules 7 and 11 have raised questions in the process of generating rules to govern filing by facsimile transmission and in studying filing by computer. Draft Judicial Conference guidelines for facsimile filing would authorize alternative means of satisfying the signature requirement.

Facsimile transmission can reproduce a signature, so the problem is not acute. Computer transmission can reproduce a signature only with expensive capacities that are not available in all clerk's offices nor in all law offices. The Committee concluded that these questions should be studied to determine what accommodations should be made to ease the task of adjusting to modern technology. The initial studies of the problem, however, should remain with the committees specially charged with working through the problems of facsimile and computer filing.

Rule 9(b)

The *Leatherman* decision of the Supreme Court in February ruled that particularized pleading requirements can be imposed only when authorized by Rule 9(b). Heightened requirements could not be imposed in a civil rights action claiming vicarious responsibility of a municipal entity for wrongs committed by law enforcement officers. At the same time, the Court suggested that the question might profitably be studied by the Advisory Committee.

Several approaches to pleading were suggested, looking to Rules 8, 9(b), or 12(e). It was noted that some local rules impose detailed pleading requirements for specified categories of cases, such as those brought under the Racketeer Influenced and Corrupt Organizations Act. It also was suggested that any action in this area should be carefully integrated with the proposed disclosure rules now pending in Congress. Rules 26(a)(1) and (2) create duties of disclosure with respect to facts alleged with particularity. One of the purposes of that proposal was to encourage more informative pleading practices. The disclosure duty also is integrated with the Rule 26(f) conference. Direct imposition of more demanding standards at the initial pleading stage might shift the burden of specific contention to a point in the litigation that is too early to be useful.

Several members of the Committee thought it would be a mistake to attempt to draft rules setting heightened standards of specific pleading for particular categories of cases. One possible approach would be to allow lower courts to continue the longstanding process of tailoring pleading standards to the perceived needs of different types of litigation. This process has developed over a period of many years, and may not be much checked by the Leatherman decision.

Another suggestion was that a motion for more particular statement be created in Rule 8, or that Rule 12(e) be amended. The new rule would allow a court to require more detailed pleading on a case-by-case basis. The purpose of this provision would be to continue and legitimize the process that often imposes detailed pleading requirements through a motion to dismiss, commonly followed by amendment. Many courts have often gone beyond simple

notice pleading. This experience may suggest that it is desirable to rely on pleading practice for preliminary screening in a wide variety of lawsuits. At the cost of appearing to relive history, a return to some practice akin to the bill of particulars may have real value.

The Committee concluded that the topic of pleading particularity should remain on the agenda for further study. The conclusion may be that the time has not yet come for any action. Each of the approaches named in the discussion should be explored, however, as the basis for a further report.

Rule 45

It has been proposed that the Committee should explore amendment of Rule 45 to provide nationwide subpoenas for witnesses in civil trials. Discussion of the proposal began with the observation that this question reappears continually. It was noted that the proposal to amend Rule 43(a) to permit transmission of testimony from places outside the courtroom will a partial answer to this question. Several members of the committee stated that there are no real problems created by the present limits in Rule 45. Others suggested that expanding the reach of trial subpoenas would encourage some lawyers to engage in slipshod preparation, forgoing careful pretrial preparation in anticipation of dragging distant witnesses to trial. It was agreed unanimously that there is no present reason to study the question further.

Rule 53

Several suggestions have been made over the years that Rule 53 should be studied. The Rule does not clearly authorize many present practices. More and more courts are appointing special masters to manage discovery, encourage settlement, investigate and supervise enforcement of decrees, and to undertake other tasks. Inherent authority may support these practices, but the reach of inherent authority is not clear.

It was suggested that one approach might be to build special master provisions into specific parts of the rules governing pretrial conferences, discovery, and the like. A general revision of Rule 53 may provide a more effective approach. It was recognized that care still must be taken in using masters.

It was agreed that Rule 53 should remain on the docket for further study and possible action.

Rule 64

The American Bar Association proposal recommending legislation

and amendment of Rule 64 to provide federal prejudgment security devices was carried over from the November, 1992 agenda. Brief discussion suggested that the topic is very complicated, and fraught with substantive issues beyond the reach of the rulemaking process. Committee member Phillip Wittmann agreed to discuss these questions further with representatives of the ABA.

Restyling

The afternoon of May 4 and the morning of May 5 were devoted to considering the restyled version of the Civil Rules proposed by the Style Subcommittee of the Rules Committee. The process of preparing the working draft was described. The Style Subcommittee draft was distributed to Advisory Committee members in December. The chairman prepared revised versions of the rules proposals then pending in the Supreme Court and sent them out to Advisory Committee members; the Style Subcommittee did not see these drafts. Members of the Advisory Committee, working in three subcommittees, commented on these drafts. The subcommittee versions were consolidated with some changes by the chairman and made the basis of the working draft considered at this meeting. A revision of the Supplemental Rules for Admiralty prepared by Bryan Garner and reviewed by the Style Subcommittee also has been circulated. Bryan Garner has made comments on the working draft that were considered as each item was studied.

Rules 1 through 5 were studied in depth. Rules 26(c), 43(a), 50(c), 52(b), and 59 were studied to enable use of the new styling in the proposals for amendment described above.

During the discussion of Rule 4(j)(1) it was noted that the Style Subcommittee hopes to eliminate use of "pursuant to." This term is confusing, particularly to nonlawyers. Even lawyers use the term in many ways. Substitute terms should be found.

Rule 59 was used as one of the rules that illustrates the value of "no later than" as a replacement for "within." If an action is required "within" ten days from entry of judgment, it may be inferred that action taken before entry of judgment is ineffective. Use of "no later than" makes it clear that action taken before entry of judgment is effective.

Next Meeting

The next meeting of the Advisory Committee was set for October 21 through 23 in San Francisco, California.

Respectfully submitted,

Edward H. Cooper, Reporter

Civil Rule 23

A draft Rule 23 revision has been studied intermittently for some time. This meeting was the first occasion for extended consideration by the Committee.

The first question discussed was the desirability of considering Rule 23 at all. It was noted that many years of experience with the 1966 revisions have provided answers to many questions, and have provided ample experience that can be used to test potential revisions. Experience has suggested several reasons for revision. Courts have encountered much difficulty in bringing tort claims into Rule 23, in part because of the Note accompanying the 1966 revisions. More specific problems have included the cost of notice to many individual members of (b)(3) classes who have small claims; potentially valid actions may be defeated by these costs. The seeming inability to opt out of (b)(1) or (b)(2) classes may create difficulties, as when individual members of a purported employment discrimination class prefer to accept practices that are challenged by other members of the class. Rule 23 is used with increasing frequency. The greater the number of class actions, the greater the potential value of improvements in the rule. An American Bar Association task force studied class actions from 1984 to 1986 and made recommendations that have been the basis for the draft now before the Committee. The topic was brought on for study following a suggestion by the Ad Hoc Committee on Asbestos Litigation that Rule 23 might be studied by this Committee.

The next question explored was the desirability of considering changes more sweeping than those proposed by the draft. It was accepted that if revisions are proposed now, care should be taken to pursue the project in such a way that Rule 23 will not have to be revisited in the near future. There is no need for reform so pressing that more fundamental changes must be put aside in the need for prompt present action. No member of the Committee could find any reason for undertaking broader changes. Informal preliminary reactions to the present draft likewise have failed to provide any significant sense that drastic changes are appropriate.

Discussion of possible changes recognized that some changes require legislation. The American Law Institute Complex Litigation Project was noted as a model of the kinds of legislation that may prove useful in addressing multiparty, multiforum litigation. Other jurisdictional changes that might be desirable include relaxing the limits that impede use of Rule 23 for state-law claims, including complete diversity and the requirement that each

member of a plaintiff class satisfy the amount-in-controversy requirement. Other possible class action changes as well may require legislation.

The specific changes made by the draft were discussed, taking note of the responses that have been received on the basis of informal circulation of the draft.

The changes made by the draft relate in many ways to the determination to collapse the present categorical separations between subdivisions (b)(1), (2), and (3) into a unified test that asks whether a class action is superior for the fair and efficient adjudication of the controversy. This change is intended to reduce wrangling about which subdivision fits a particular action. More important, the change is intended to allow a more functional approach to questions of notice and the opportunity to opt out of a class. Focus on the superiority determination will to some extent enhance district court discretion. The provision for discretionary appeal from certification or refusal to certify is intended to provide a safeguard against possible misuse of this discretion.

The relationship between the superiority criterion and the predominance of common questions over individual questions was discussed next. The predominance requirement now attaches only to (b)(3) class actions. It would be possible to incorporate predominance as a requirement for all class actions. Much thought was given to this possibility in preparing the draft. Some, particularly those representing defendant classes, have feared that elimination of the requirement that predominance be shown for what now are (b)(3) actions will encourage undue proliferation of class actions. Others express the corresponding fear that a requirement of predominance will discourage desirable class actions. On balance, predominance is better seen as one element of superiority, particularly in light of the opportunity to certify classes for specified issues. Actions that now fit into (b)(1) and (b)(2) categories may present compelling needs for class certification, even though there are many individual questions that do not affect all members of the class. Mass tort claims, moreover, present special problems. Predominance of common questions is a useful approach if the question is whether to certify a class that includes all individual issues as well as common issues. Predominance is less useful if the class is certified only for common issues. A motion passed to retain the draft approach that treats predminance as one factor in determining superiority. A motion to make predominance an independent requirement failed.

The draft requirement that a class representative be "willing" as well as able to represent the class was considered next. Many who have seen the draft fear that the willingness requirement will

prove a de facto repeal of defendant class actions. The burden of defending on behalf of a class is greater than the burden of conducting an individual defense. The greater the stakes, the greater the effort that rationally should be devoted to the contest. Settlement of a class action, particularly if it is to impose burdens on nonparticipating members of a defendant class, is far more complicated than settlement of an individual action. The mere fact of assuming fiduciary responsibilities to others may weigh heavily on the representative defendants and attorneys. If a potential representative defendant can avoid these burdens by protesting a lack of willingness to represent the class, few defendant classes may survive. This risk was seen as substantial in relation to legitimate uses for defendant classes. Defendant classes have been valuable in many settings. Among those suggested to the Committee have been actions against large partnerships; actions involving multiple underwriters associated in securities offerings (including situations in which the defendant class members have several but not joint liability); and actions against large numbers of public officials who are engaged in similar activity and who cannot be bound by a judgment entered against a common superior. Other illustrations may involve problems less likely to arise in federal court, such as an action to determine the validity of a servitude on land that runs in favor of many others, or a declaratory judgment action against a class of potential tort claimants. A willing representative in some settings, moreover, may be more dangerous than an unwilling representative. On occasion, at least, an individual defendant has been designated representative of a defendant class for determining issues of patent validity. The representative may have a stronger interest in having all defendants bound by a determination that the patent is valid than in having the patent declared invalid, if the representative is in a better position to bargain for a license or to compete without infringing.

Despite these problems, the Committee rejected a motion to delete the requirement that the representative be willing. The requirement applies to plaintiff classes as well as defendant classes, and helps protect against the risk that a defendant may seek certification of a plaintiff class in the belief that a full-scale defense may overwhelm the representatives and bind the class. Unwilling representatives, moreover, may not warrant the trust that some observers have suggested. The problem of additional litigation costs inflicted by class certification may be met in part by voluntary contributions from nonparticipating members of the class, but it is difficult to rely on this possibility in drafting a rule that does not clearly provide for forced contributions outside the opt-in setting.

The notice provisions of draft Rule 23(c) were discussed next. The purpose of the draft is to require notice of certification in

all class actions, without regard to the former categories of subdivisions (b)(1), (2), and (3), but to make the nature of the requirement more flexible than the present (b)(3) requirement. The greatest change is likely to be with respect to actions involving large numbers of small claims. The cost of individual notice under present subdivision (b)(3) can defeat actions that should be brought. The revision also will focus attention on the value of providing some form of notice in other forms of class actions, a matter not now covered explicitly. It was recognized that greater discretion with respect to notice may encourage preliminary litigation on this subject, expanding to fill the gap left by reducing the occasions for litigating the nature of the class. To the extent that one motive for arguing over the choice between (b)(1), (2), and (3) is to affect notice requirements, however, it will be better to focus directly on the notice issues.

The notice provisions led to discussion of the question whether the rule should require that a motion to certify be made within a specified time. Some local rules include such requirements. It was decided not to adopt such a requirement, however, because experience shows that not all certification questions are ripe for decision at uniform intervals after the class question is first raised. Often substantial discovery is needed, or it is desirable to dispose of preliminary motions, before addressing certification. There is little reason to force motions that may have to be deferred.

The draft provisions for opting out and opting into a class are tied to the collapse of the separate (b)(1), (2), and (3) categories. Opting out is to be available without regard to these former distinctions; opting in, not now available in Rule 23 classes, is to be made available.

In reviewing the opt-out provisions, it was noted that something closely akin to opting out can be achieved even now in (b)(1) and (2) class actions by defining the class to include only those who do not ask to be excluded.

The power to limit a class to those who opt in was viewed as a more significant alteration of Rule 23. Opting in now is limited to statutory class actions in a few areas. Something akin to opting in is regularly required in administering judgments in favor of a plaintiff class by limiting participation in the recovery to those who elect to file claims, but it is easier—and perhaps much easier—to persuade class members to file a claim at this stage than to enter at the beginning of a litigation. A class limited to those who opt in before a determination of liability may easily result in a smaller class. The 1966 revision of Rule 23 noted the danger that many potential class members, particularly those with small claims and a fear of being involved with litigation, may

prefer to remain aloof. Opt-in actions put a premium on diligence, sophistication, and daring. The difference between opting out and opting in may be very substantial in such situations. An opt-out action, indeed, may be necessary to generate stakes sufficient to warrant pressing the litigation to a conclusion. Substitution of an opt-in class may reduce the utility of class actions in achieving generalized enforcement of the law. The effects of certification on statutes of limitations may be complicated, moreover, in determining the point at which the limitations period resumes running against those who do not opt in.

The opportunity to use opt-in classes may be valuable, despite these concerns. If it is difficult to accomplish effective notice, the choice may be to have no class action or to have a class limited to those who are proved to have actual notice by the act of opting in. Opt-in classes also may help resolve the choice-of-law problems encountered in diversity actions arising out of common disasters. Acceptance of litigation under specified laws may be made a condition of opting in. Opting in also may prove particularly suitable with respect to tort actions or defendant classes.

After considering the possibility of publishing the draft for comment with brackets indicating that the opt-in provision is especially open to reconsideration, the Committee concluded that the draft should be published as it stands.

Rule 23(c)(4) now provides that a class may be certified with respect to particular issues. The draft is designed to underscore the availability of this option, in part by referring to certification with respect to particular claims as well as particular issues. The focus on "claims" and "issues" extends to "defenses" as well. The advantage of referring to "claims" and "defenses" is that it may be difficult to specify the issues that should be tried on a class basis; certification of all issues arising out of designated claims, or simply of the claims, provides a more convenient and meaningful alternative. The most important concern is that the certification make clear the subject of the class certification.

The "subclass" provisions of Rule 23(c)(4) are changed in the draft to allow certification of a subclass that does not satisfy the numerosity requirement of subdivision (a). This change is important in situations in which conflicts of interest arise between the class and small numbers of class members. In employment discrimination litigation, for example, it may happen that a few class members may prefer to retain the practices claimed to give rise to liability, or may prefer remedies that differ from the remedies desired by most class members. Subclass treatment can facilitate effective handling of these problems.

The draft subdivision (d)(1) provision allowing precertification disposition of motions under Rules 12(b) and 56 reflects the result reached under the current rule by most, but not all, courts. Opposition to the draft seems based on two grounds. One group argues that there is no need to amend the rule when most courts reach the proper result. Another group seems to hope that without amendment, more courts may be encouraged to refuse precertification disposition. The Committee concluded that precertification disposition often is desirable, and that the rule should make this matter clear to avoid inconsistent approaches and to make the answer readily apparent without need for research and argument.

In preparing the draft for submission to the Standing Committee, some changes were made with the prospect that others also may be made. Draft subdivision (d)(1) would refer explicitly to the discretionary power to order notice of refusal to certify, changes in the description of a class, or decertification. The Note will indicate that the decision whether to give notice should be influenced by the extent to which class members have learned of the action and may have relied on the anticipation that their interests would be protected. The reference to "claims" will be deleted from (b)(6), since issues may be certified. The requirement that a class action be superior will be moved into subdivision (a) as the fifth requirement; in this way all requirements will be grouped together in (a), and (b) will be confined to illustration of the factors to be considered in determining superiority.

The Committee voted unanimously to recommend the revised draft to the Standing Committee for publication at such time as the Committee next finds it appropriate to publish Civil Rules for public comment.

Rule 26(c)(3)

It was decided at the November, 1992, meeting that a draft amendment of Rule 26(c) should be prepared to study a possible provision for dissolving or modifying protective discovery orders. Bills have been introduced in Congress that would limit the power to enter protective orders in various ways. Representatives of the Judicial Conference have asked that Congress defer action so that the Advisory Committee could study the question. The draft provided power to modify or dissolve a protective order before or after judgment. Disposition of the question would consider the extent of reliance on the order, the public and private interests affected by the order, and the burden the order imposes on parties seeking information relevant to other litigation.

The need to amend Rule 26(c) was questioned. Some studies have concluded that there is ample power to modify protective orders, and that in fact protective orders have not had the adverse consequences feared by current critics. There is no systematic evidence that protective orders frequently cause wasteful duplication of discovery efforts between successive lawsuits, nor that any problems that might arise cannot be addressed under existing inherent power to modify or dissolve protective orders. There is no persuasive showing that protective orders defeat the opportunities of government agencies or public interest groups to alert the public to products or conditions that create ongoing risks to health and safety. The Federal Judicial Center plans to study the use of protective orders; more information may be available soon.

Despite uncertainty whether there is any need to add a provision for modification or dissolution, it was concluded that amendment of Rule 26(c) should be proposed. It is clear that the court that enters a protective order must have power to modify or dissolve its own order. If there is any significant doubt as to the existence of the power, the power should be made explicit in the rule. There is much concern about the possibility that protective orders can facilitate suppression of information necessary to protect public health and safety, or can thwart efficient discovery in related litigation. The amendment of Rule 26(c) will limit the ability of the parties to narrow the court's power over its own orders. It will not extend to matters not involved with court-made protective orders. Secrecy provisions in private contracts are not reached, whether made as part of settlement, as extra-judicial discovery agreements, or otherwise. Private contract arrangements seem more matters of substance than procedure.

The dimensions of the power to modify or dissolve were discussed. It was noted that most protective orders are entered on agreement of the parties. Often they extend protection to much material that a court would not protect after a contested hearing. Modification or dissolution are most easily ordered with respect to materials that do not in fact deserve protection. Materials that deserve protection against general publication still may be released for use in similar litigation subject to continuing protection against general use.

The draft language stating that a protective order can be dissolved "before or after judgment" was discussed at length. It was first concluded that it would be better style to express this concept by providing that the court may act "at any time." Courts now are divided on the extent of power to act on a protective order after judgment. Questions may be raised as to standing to seek modification, the existence of continuing jurisdiction, First Amendment rights, private rights arising from the essentially contractual nature of settlement agreements that include provisions continuing protective orders, and the like. There is much concern that courts should not have power to undo a protective provision that was an important element of a settlement bargain. Confidentiality provisions of settlement agreements also may involve conflict-of-interest problems arising from a party's interest in winning a maximum award and the interest of counsel in retaining ready access to discovery information for use in related litigation. Settlement agreements may be fully executed before modification or dissolution is sought. Once discovery materials have been returned, for example, it may easily be argued that a person who seeks the materials for use in other litigation should pursue independent discovery in that litigation. Provisions for modification or dissolution after judgment could further complicate the ways in which protection is sought and implemented.

In face of these puzzles, some members of the Committee believed that most courts would agree that power to modify or dissolve a protective order continues after judgment. A variety of approaches are summarized in United Nuclear Corp. v. Cranford Ins. Co., 10th Cir.1990, 905 F.2d 1424; see also Poliquin v. Garden Way, Inc., 1st Cir., 1993 U.S. App. Lexis 6014, at * 25: "[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment." Even if this prediction is correct, however, it does not resolve differences as to standing to seek, or the standards for granting, modification or dissolution. Other members of the Committee were concerned that an undefined power to grant relief after judgment would interfere with policies stated in Seattle Times Co. v. Rhinehart, 1984, 467 U.S. 20, 32-33, 34: "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. * * * Moreover,

pretrial depositions and interrogatories are not public components of a civil trial." "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." Heavy burdens may be imposed on courts if they are required to balance the many interests in discovery confidentiality against the substantive policies that support settlement of disputes, First Amendment interests, problems of standing, and the like.

Middle ground might be found in the dispute over action after judgment by providing that Rule 26(c) orders are dissolved on entry of judgment unless continuation after judgment is specifically ordered. The parties would be under the burden of ensuring that continuing protection is provided. It would be possible to provide instead that the court's order terminates on entry of judgment, leaving any continuing protection to contract between the parties. This approach would serve the privacy and settlement interests of the immediate parties, but would not address concerns about expediting similar litigation or protecting against public hazards. An alternative might be to allow modification after judgment, but only within a designated period such as one year. Rather than ensure access to important information, this approach would provide less access than is available today in most courts. Yet another approach might be to amend the introductory portion of Rule 26, to provide that a protective order may be entered for good cause "to the extent permitted by law." This approach, however, would not have any impact unless it should stir Congress to address these questions.

At the conclusion of the discussion it was moved to delete the reference to action "at any time" from the draft. The motion carried over dissents by two members who would prefer to retain the reference and by one member who believes there is no need to amend Rule 26(c). It also was decided that the Note to the amended rule should not refer to the questions surrounding modification or dissolution after judgment.

Rule 43(a)

Two changes in Rule 43(a) were considered.

The first proposed change would authorize the court to permit or require that the direct examination of a witness in a nonjury trial be presented in writing. This proposal was published for comment in 1991, although members of the Advisory Committee were divided on the question. Some members believed, and continue to believe, that the power to require written presentation of testimony is established by Evidence Rule 611. Much of the public comment was hostile with respect to the provision that would allow a court to require presentation of written testimony. Many lawyers believe that it is important to present strong witnesses in the traditional setting of live question-and-answer testimony. Written testimony will be written by lawyers, and will not capture the witness's own mode of expression. When this proposal was discussed at the November, 1992 meeting of the Committee, it was concluded that it should be referred to the Evidence Rules Advisory Committee for study.

Discussion showed that concern about written testimony continues. Written testimony may aggravate the tendency of some courts to hold nonjury trials in disjointed segments.

The advantages of written testimony were noted. A judge in Oregon started this practice twenty or more years ago, and developed it extensively. That experience showed that cases could move much faster in this way. The practice has been used more selectively since then, with continuing success. The Ninth Circuit has approved the practice in bankruptcy proceedings. Essentially written testimony is used now in many circumstances to save trial time. For example, an expert witness may present a written curriculum vitae.

It was suggested that the proposal might be redrawn as one to permit narration. Evidence Rule 611(a) clearly authorizes narration, however, and there was no need seen to change Rule 43(a).

It was observed that many courts now resort to written direct testimony in nonjury trials with the consent of the parties.

A motion to reject the amendment to provide for written direct testimony in nonjury trials passed. The action of the Committee will be communicated to the Evidence Rules Advisory Committee.

The second proposal is to amend Rule 43(a) to permit

electronic transmission of testimony. This practice has been followed by some courts, at times by treating the testimony as a deposition conducted during trial and under supervision of the judge to ensure that only admissible matters are presented. Telephone testimony has been used in agency proceedings. One member of the Committee observed that with suitable protective provisions covering such matters as the people who can be present with the witness, telephone testimony is as satisfactory as reliance on a deposition. If video transmission is available, it is better than a deposition.

Direct transmission of contemporaneous testimony can have many advantages. Testimony of witnesses on purely formal matters may be accomplished more easily and less expensively. Testimony of essential witnesses who cannot appear at trial may be better than reliance on earlier depositions. Reasons for not appearing at trial may range from limits on trial subpoenas to unexpected accidents. Trials that depend on witnesses scattered in many places may be managed more effectively if it is not necessary to bring them all together at one time and place, even if that is possible. Many problems are encountered in managing criminal trials when witnesses are brought to trial from distant parts of the country; transmission of testimony could reduce comparable problems in civil litigation.

The possible advantages of transmitted testimony may be offset by disadvantages. It is necessary to ensure that the witness is in fact the intended person, particularly if audio transmission is used. Controls must be imposed to protect against influence by other persons present with the witness but not included in the transmission. It may be desirable to require some advance notice by the proponent, when possible, so that other parties can arrange to depose the witness before trial. Video depositions may be particularly important if the testimony is to be transmitted by audio means alone. Protections must be built into the rule. The rule should require good cause for transmission, and should remind courts of the need to protect against possible distortions or influence. The Note should indicate that showings of unexpected unavailability are more persuasive than simple limits on subpoena power. The Note also should indicate that there is less need to rely on transmission when depositions are available. The decision whether to allow transmission, and the choice of technology, should depend on the cost of transmission in relation to the importance of the testimony, the stakes of the litigation, the means of the parties, and other factors that may seem relevant. The Note in addition should suggest that when feasible, courts should require advance notice of a request for transmission so other parties can take a deposition.

It was suggested that perhaps transmission of testimony should

be authorized only for circumstances that would permit presentation of the deposition of a living witness under Rule 32. It was concluded, however, that transmission should not be confined to specifically defined circumstances. More flexibility is desirable.

The means of describing transmission technology were left open for further work. Such electronic means as facsimile transmission and direct computer communication are not contemplated, unless perhaps exceptional circumstances can be shown. It may be uncertain whether all other technologies are properly described as electronic. It should be made clear that in some circumstances it is proper to rely on audio transmission alone, while video transmission should be preferred in others.

Rules 50, 52, 59: Service and Filing

The Bankruptcy Rules Committee asked that the Civil Rules Committee consider amending Rules 50, 52, and 59 to adopt a uniform requirement that the post-judgment motions authorized by these rules be filed no later than 10 days from entry of judgment. The Bankruptcy Rules Committee believes that filing is important so that all parties have a clear and easy means of determining whether appeal time has been suspended by any of these motions. It also believes that it is desirable to maintain uniformity between the Bankruptcy Rules and the Civil Rules.

Discussion of this recommendation began with the broader questions raised by the general relationships between filing and service. Many rules apply limiting time periods by reference to service. Rule 5(d) requires filing within a reasonable time after service. Problems arise when filing is not accomplished. A defendant, for example, may serve an answer but fail to file it. A motion for default and subsequent default judgment may follow without any indication of the answer in court files. At some point, the Committee should study the many relationships in the rules between filing and service. Brief present discussion, indeed, shows uncertainty as to some matters of actual practice. It was suggested, for example, that Rule 5(d) might be amended to require filing within five days of service. In some rural areas, however, even a five-day period might effectively require personal delivery; neither mail nor private courier services can be counted upon to provide five-day delivery. It also was noted that simply putting a paper on a desk in the clerk's office may not guarantee "filing." Another observation was that even though filing requires proof of service, some lawyers try to play games by filing and then delaying service. Filing by mail was discussed, but it was noted that this alternative could create difficult problems of proof with respect to timely filing for limitations purposes, and that short filing deadlines often are set for the purpose of accomplishing actual physical receipt, not mere mailing.

Turning to the immediate question, it was concluded that Rules 50, 52, and 59 can be addressed now without waiting for a broader study of the relationship between service and filing. Rule 50(b), as amended in 1991, requires that a motion for judgment as a matter of law be renewed by service and filing within 10 days of judgment. Rule 50(c)(2) invokes the 10-day service requirement of Rule 59. Rule 52(b) requires that a motion to amend findings of fact be "made" within 10 days. This requirement apparently is satisfied by service within 10 days, followed by later filing. Rule 59 requires that motions for a new trial or to reconsider be served within 10 days.

It was observed that both filing and service should be required when it is important that notice be accomplished. Rather than follow the suggestion that filing alone be required, it was concluded that the present requirement of service in Rules 50(c)(2), 52(b), 59(b), and 59(e) should be retained and supplemented by requiring filing no later than 10 days after entry of judgment. Filing should be accomplished with relative ease, particularly since Saturdays, Sundays, and legal holidays that fall within the 10-day period are not counted. This time period should allow adequate opportunity to prepare and file a motion. Drafts conforming to the new style guidelines will be prepared and submitted to the Standing Committee with a recommendation for publication.

Rule 68

Revision of the Rule 68 offer-of-judgment procedure was discussed at the November, 1992 meeting. A draft based on that discussion was presented for evaluation. The draft would make the offer-of-judgment procedure available to claimants as well as defendants. It also would increase the consequences of failing to accept an offer at least as favorable as the judgment. In actions seeking money damages, an award would be made for attorney fees incurred by the offeror after expiration of the offer. The amount of fees awarded would be reduced to the extent that the amount awarded by the judgment was more favorable to the offeror than the offer. The fee award also would be limited to the amount of the judgment, so that a claimant could not be forced to pay fees greater than the amount recovered and a defendant could not be forced to pay fees greater than the amount recovered.

The purpose of the revision would be to encourage early settlement. The same purpose was pursued by amendments published for comment in 1983 and 1984. Those proposals met broad and vehement opposition and were withdrawn. This proposal is meant to impose less serious consequences, with the hope that a middle ground can be found in which limited attorney fee awards can encourage early settlement without forcing unfair settlements or discouraging litigation entirely.

One question raised by the proposal is the extent of knowledge about settlement. The premise is that some cases that should settle either settle later than should be or do not settle at all. Apart from the fact that most civil actions are resolved without trial, however, very little is known about the settlement process. One view of the proposal was that it would be "too compelling." It was feared that in many cases, any given level of dollar consequences may be more serious to the plaintiff than to the defendant. Fear of losing any recovery because of a fee award might force some plaintiffs to accept Rule 68 offers that fall below the reasonably expected judgment.

Another question raised by the proposal is the need to dispose of more cases by early settlement. It was observed that the average time from filing to disposition is going up, but that this fact may be due to shifting toward more complex cases in the overall docket. Some courts do have significant problems in processing civil cases; in extreme circumstances, civil trials may be nearly impossible to obtain. Such crises seem to result from two factors—increased loads of criminal drug prosecutions, and persisting judicial vacancies.

Another premise underlying the proposal is that Rule 68 does not now have any significant effect on settlement. The same premise was followed in advancing the 1983 and 1984 proposals. Committee members continue to believe that the rule has little effect in most cases, in part because offers are made only after most costs have been incurred, weakening the incentive effect of liability for post-offer costs. It was suggested, however, that Rule 68 does have an effect in cases that include a statutory attorney fee. Failure to accept an offer more favorable than the judgment cuts off the right to post-offer attorney fees even though the offeree is a prevailing party. The prospect of losing part of the fee recovery does encourage settlement. At the same time, the offer may create a conflict of interest between attorney and client, particularly if a fee award is important to ensure actual payment. Even apart from the conflict of interest, the effect on settlement may be seen as undesirable coercion rather than desirable encouragement.

It was noted that California has an offer-of-judgment statute that provides for shifting expert witness fees, and that this procedure seems to have a desirable effect in encouraging settlement.

It was suggested that it is inappropriate to refer to Rule 68 consequences as a sanction. The rule is not based on inappropriate behavior. The test is not one of subjective bad faith, nor even of objective unreasonableness. Neither a party nor, by reflection, counsel, should be stigmatized as if it were.

Discussion of the sanction terminology led to discussion of authority to affect attorney fee awards under the Rules Enabling Act. The "sanction" terminology seems appropriate for enforcing a procedural duty. The Enabling Act should authorize Rule 68 if the rule creates a procedural duty to guess right about the eventual judgment. Imposition of consequences then falls within the power to create the duty. Attorney fee awards are commonly authorized for violation of other procedural duties; Rule 37 is a good example. Some members of the Committee were uncertain, however, whether this analogy is persuasive. There is power to create a discovery procedure. It is not so clear that there is power to create a duty to settle substantive claims. Shifting responsibility for attorney fees is a departure from the prevailing "American Rule," and may seem substantive when used as an incentive to settle rather than as a means of enforcing more obviously procedural duties. This fear is not allayed by the fact that the proposal is designed to put the offeror – at best – in a position no better than would have resulted from acceptance of the offer. Other sanctions, such as double costs, might seem more appropriate.

Alternative sanctions were discussed further. One possibility might be simply to award a flat proportion of the difference between offer and judgment. Another might be to allow the offeror a choice between entering judgment on the offer and entering judgment on some basis calculated from the actual judgment and a procedural sanction. Yet another might be to design a simple system in which post-offer fee awards are capped at the amount of difference between offer and judgment: if judgment is $100,000 more favorable to the offeror, the maximum fee award would be $100,000. This system is simpler to administer, but could put the offeror in a better position that would have followed from acceptance of the offer.

Other approaches to amending Rule 68 were discussed. One was simple abrogation of Rule 68. Other pretrial devices, such as neutral evaluation, may prove better means of encouraging early settlement. Another alternative would be to make Rule 68 available to claimants, but without adopting any attorney-fee sanctions.

At the end of the discussion it was unanimously concluded that further consideration of Rule 68 should await development of further information about actual operation of the present rule and the factors that affect settlement. Study of the possible effects of the proposed revision also will be desirable if it can be accomplished in persuasive form. The Federal Judicial Center is developing such a study under the direction of John Shapard. Committee members Doty, Kasanin, and Scirica agreed to work with Shapard on the design of the study.

Rules 83, 84

Rules 83 and 84 have been before the Committee for some time. The proposals that were sent to the Standing Committee for its December, 1992 meeting were returned for further consideration of uniform language proposed for similar provisions in all the various sets of court rules.

Discussion of Rule 83 focused on the proposal that rights should not be defeated for neligent failure to adhere to a requirement of form set out in a local rule or directive. The other sets of rules do not have similar provisions. No reason was found that would make this provision more suitable to the civil rules than the other rules. It was concluded, however, that this provision is desirable for all of the different sets of rules. The Committee voted to recommend this provision to the Standing Committee.

Discussion of proposed Rule 84 focused on the recommendation of the Bankruptcy Rules Committee that the proposed Rule 84(b) and cognate rules not be adopted. In the alternative, the Bankruptcy Rules Committee has urged that the amendment not include Judicial Conference power to make any changes more significant than changing spelling, cross-references, or typography. The Committee voted unanimously to adhere to the uniform language proposed by the Reporter of the Standing Committee.

Rules 83 and 84 will be sent to the Standing Committee with a recommendation that they be published for public comment.

New Matters

Rule 4

It has been suggested to the Committee that Rule 4(j), renumbered as Rule 4(m) in the proposals transmitted to Congress by the Supreme Court on April 22, 1993, should set a shorter period than 120 days for serving process after filing. Committee discussion noted that there was much debate about Rule 4 in the revision process, but perhaps not much attention to this specific point. One member noted that often it is useful to delay service after filing so that settlement discussions can be pursued. It was concluded that the Reporter should study the question and report back to the Committee.

Rules 7, 11 Signature Requirement

The signature requirements of Rules 7 and 11 have raised questions in the process of generating rules to govern filing by facsimile transmission and in studying filing by computer. Draft Judicial Conference guidelines for facsimile filing would authorize alternative means of satisfying the signature requirement. Facsimile transmission can reproduce a signature, so the problem is not acute. Computer transmission can reproduce a signature only with expensive capacities that are not available in all clerk's offices nor in all law offices. The Committee concluded that these questions should be studied to determine what accommodations should be made to ease the task of adjusting to modern technology. The initial studies of the problem, however, should remain with the committees specially charged with working through the problems of facsimile and computer filing.

Rule 9(b)

The *Leatherman* decision of the Supreme Court in February ruled that particularized pleading requirements can be imposed only when authorized by Rule 9(b). Heightened requirements could not be imposed in a civil rights action claiming vicarious responsibility of a municipal entity for wrongs committed by law enforcement officers. At the same time, the Court suggested that the question might profitably be studied by the Advisory Committee.

Several approaches to pleading were suggested, looking to Rules 8, 9(b), or 12(e). It was noted that some local rules impose detailed pleading requirements for specified categories of cases, such as those brought under the Racketeer Influenced and Corrupt Organizations Act. It also was suggested that any action in this area should be carefully integrated with the proposed disclosure rules now pending in Congress. Rules 26(a)(1) and (2) create duties of disclosure with respect to facts alleged with particularity. One of the purposes of that proposal was to encourage more informative pleading practices. The disclosure duty also is integrated with the Rule 26(f) conference. Direct imposition of more demanding standards at the initial pleading stage might shift the burden of specific contention to a point in the litigation that is too early to be useful.

Several members of the Committee thought it would be a mistake to attempt to draft rules setting heightened standards of specific pleading for particular categories of cases. One possible approach would be to allow lower courts to continue the longstanding process of tailoring pleading standards to the perceived needs of different types of litigation. This process has developed over a period of many years, and may not be much checked by the Leatherman decision.

Another suggestion was that a motion for more particular statement be created in Rule 8, or that Rule 12(e) be amended. The new rule would allow a court to require more detailed pleading on a case-by-case basis. The purpose of this provision would be to continue and legitimize the process that often imposes detailed pleading requirements through a motion to dismiss, commonly followed by amendment. Many courts have often gone beyond simple notice pleading. This experience may suggest that it is desirable to rely on pleading practice for preliminary screening in a wide variety of lawsuits. At the cost of appearing to relive history, a return to some practice akin to the bill of particulars may have real value.

The Committee concluded that the topic of pleading particularity should remain on the agenda for further study. The

conclusion may be that the time has not yet come for any action. Each of the approaches named in the discussion should be explored, however, as the basis for a further report.

Rule 45

It has been proposed that the Committee should explore amendment of Rule 45 to provide nationwide subpoenas for witnesses in civil trials. Discussion of the proposal began with the observation that this question reappears continually. It was noted that the proposal to amend Rule 43(a) to permit transmission of testimony from places outside the courtroom will a partial answer to this question. Several members of the committee stated that there are no real problems created by the present limits in Rule 45. Others suggested that expanding the reach of trial subpoenas would encourage some lawyers to engage in slipshod preparation, forgoing careful pretrial preparation in anticipation of dragging distant witnesses to trial. It was agreed unanimously that there is no present reason to study the question further.

Rule 53

Several suggestions have been made over the years that Rule 53 should be studied. The Rule does not clearly authorize many present practices. More and more courts are appointing special masters to manage discovery, encourage settlement, investigate and supervise enforcement of decrees, and to undertake other tasks. Inherent authority may support these practices, but the reach of inherent authority is not clear.

It was suggested that one approach might be to build special master provisions into specific parts of the rules governing pretrial conferences, discovery, and the like. A general revision of Rule 53 may provide a more effective approach. It was recognized that care still must be taken in using masters.

It was agreed that Rule 53 should remain on the docket for further study and possible action.

Rule 64

The American Bar Association proposal recommending legislation and amendment of Rule 64 to provide federal prejudgment security devices was carried over from the November, 1992 agenda. Brief discussion suggested that the topic is very complicated, and fraught with substantive issues beyond the reach of the rulemaking process. Committee member Phillip Wittmann agreed to discuss these questions further with representatives of the ABA.