ADVISORY COMMITTEE ON CIVIL RULES

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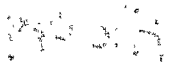
San Francisco, California

October 21-23, 1993



Advisory Committee on Civil Rules
San Francisco, California
October 21-23, 1993

I. Opening remarks of the chairman.

II. Approval of minutes of May 1993 meeting.

III. Status of amendments to the civil rules.

A. Legislative update on amendments approved by the Supreme Court.

B. Report on amendments approved, with some revisions, by the Standing Committee for publication.

IV. Rule 23 - reconsideration of proposed amendments.

V. Rule 53 and its current utility: is it adequate?

VI. Rule 9(b) and the Leatherman decision.

VII. Rule 4(j) (renumbered Rule 4(m), effective 12/1/93): reduction of 120-day period for service of process.

VIII. Rule 68.

A. Reconsideration of proposed amendments.

B. Request from the Committee on Court Administration and Case Management for views on pending legislation regarding Rule 68.

IX. Miscellaneous rule proposals.

X. Stylized draft of revised rules.

XI. Future agenda - identification of civil rules for future consideration.

XII. Next meeting.

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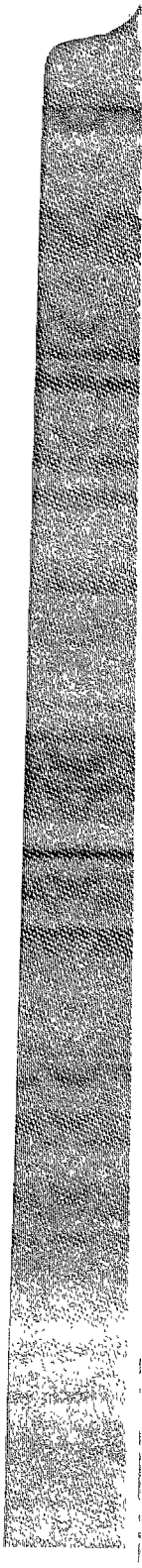

OPENING REMARKS

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 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.

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

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 24, 1993

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: Agenda Item III-A

The following materials are attached and contain information regarding the status of amendments to the Federal Rules of Civil Procedure approved by the Supreme Court and transmitted to Congress:

1. Report to Judge Sam Pointer on mark-up of H.R. 2814. The bill would delete the proposed amendments to Civil Rule 26(a)(1) and 30(b)(2).

2. Copies of H.R. 2979 and S. 1382. The bills would defer for one year the effective date of the amendments to Civil Rule 11. A copy of the remarks of Congressman Moorhead setting forth his concerns with the amendments is also included.

John K. Rabiej

John K. Rabiej

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

VIA FAX
August 5, 1993

MEMORANDUM TO JUDGE SAM. C. POINTER, JR.

SUBJECT: Mark-up of H.R. 2814

This morning, the House subcommittee on Intellectual Property and Judicial Administration held a mark-up session on Congressman Hughes' H.R. 2814, "Civil Rules Amendments Act of 1993." The bill would delete the amendments to Rule 26(a)(1) and Rule 30(b)(3) and amend Rule 30(b)(2). The subcommittee voted to report the bill, without change, to the full Committee on the Judiciary.

In his opening remarks, Chairman Hughes stated that the opposition to the amendments to Rule 26(a)(1) was widespread. He agreed with the opposition that the "specified with particularity" standard in Rule 26(a) was too vague and would generate needless litigation. He added that the amendment was premature and should be delayed until after evaluation of the CJRA plans. Chairman Hughes also said that his decision to keep intact the amendments to Rule 11 was very close. In the end he decided to defer to the judiciary because of the explosion in Rule 11 satellite litigation.

Chairman Hughes also expressed his concerns that audio recordings of depositions were inaccurate and unreliable. He questioned their durability. In addition, Hughes said that a stenographer often serves as a "traffic cop" during heated conversations between attorneys, asking them to stop talking simultaneously.

Congressman Moorhead withdrew his proposed amendment, which would have deleted the amendments to Civil Rule 11. He indicated his intention, nonetheless, to introduce a separate bill at a later date that would delete the amendments to Rule 11. During the subcommittee's discussion of Moorhead's amendment, Congressmen Barney Frank and Howard L. Berman stated their intent to oppose Congressman Hughes' bill if the amendments to Rule 11 were deleted as suggested by Congressman Mooorhead. Congressman Moorhead said he did not want to jeopardize Hughes' bill because

the deletion of the Rule 26(a)(1) and Rule 30(b) provisions was very important.

Congressman Moorhead gave the following reasons for his opposition to the amendments to Rule 11:

1. it would eliminate the need for a pre-filing factual inquiry;

2. it would render Rule 11 "toothless";

3. the amendments would return us to the pre-1983 rule;

4. it would violate a previous Supreme Court decision, as cited by Justice Scalia;

5. the Rule 11 survey completed by the American Judicature Society demonstrated that the present Rule 11 is effective in making attorneys "stop-and-think" before filing; and

6. the Federal Judicial Center survey demonstrated that the vast majority of judges approved of the present Rule 11.

The following Congressmen attended the mark-up:

Chairman William Hughes
Mike Synar
Barney Frank
Don Edwards
Howard Berman
John Reed
Carlos Moorhead
Howard Coble
Hamilton Fish
F. James Sensenbrenner, Jr.
Bill McCollum
Steven Schiff

Please call me if you have any questions concerning the mark-up.

John K. Rabiej

cc: Honorable Robert E. Keeton
Honorable Alicemarie H. Stotler

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103D CONGRESS
1ST SESSION

H. R. 2814

To permit the taking effect of certain proposed rules of civil procedure, with modifications.

IN THE HOUSE OF REPRESENTATIVES

JULY 30, 1993

Mr. HUGHES (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To permit the taking effect of certain proposed rules of civil procedure, with modifications.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rules Amendments Act of 1993".

SEC. 2. MODIFICATION OF PROPOSED AMENDMENTS.

The proposed amendments to the Federal Rules of Civil Procedure which are embraced by an order entered by the Supreme Court of the United States on April 22,

1993, shall take effect on December 1, 1993, as otherwise provided by law, but with the following amendments:

(1) RULE 26.—

(A) IN GENERAL.—Proposed rule 26(a) is amended so that paragraph (1) reads as follows:

"(1) INSURANCE AGREEMENTS.—A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.".

(2) CONFORMING AMENDMENTS.—(A) Proposed rule 26(a)(2) is amended by striking "In addition to the disclosures required by paragraph (1), a" and inserting "A".

(B) Proposed rule 26(a)(3) is amended by striking "the preceding paragraphs" and inserting "paragraph (2)".

(C) Proposed rule 26(a)(4) is amended by striking "(1) through" and inserting "(2) and".

(D) Proposed rule 26(f) is amended by striking "to make or arrange for the disclosures required by subdivision (a)(1),".

(E) Proposed rule 26(g)(1) is amended by striking "subdivision (a)(1) or".

(3) RULE 30.—

(A) IN GENERAL.—Proposed rule 30(b)(2) is amended by striking "Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the" and inserting "Unless the court upon motion orders, or the parties agree in writing to use, sound or sound-and-visual means, the deposition shall be recorded by stenographic means. The".

(B) CONFORMING AMENDMENT.—Proposed rule 30(b) is amended by striking paragraph (3).

(4) FORM 35.—Proposed form 35 is amended—

(A) by striking paragraph (2); and

(B) by redesignating paragraphs (3) and (4) as paragraphs (2) and (3).

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103D CONGRESS
1ST SESSION

H. R. 2979

To delay the effective date of the proposed amendments to rule 11 of the Federal Rules of Civil Procedure.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 6, 1993

Mr. MOORHEAD (for himself, Mr. FISH, Mr. SENSENBRENNER, Mr. MCCOLLUM, Mr. COBLE, and Mr. SCHIFF) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To delay the effective date of the proposed amendments to rule 11 of the Federal Rules of Civil Procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any other provision of law, the proposed amendments to rule 11 of the Federal Rules of Civil Procedure which are embraced by an order entered by the Supreme Court of the United States on April 22, 1993, shall not take effect until December 1, 1994.

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103D CONGRESS
1ST SESSION

S. 1382

To delay the effective date of the proposed amendments to rule 11 of the Federal Rules of Civil Procedure.

IN THE SENATE OF THE UNITED STATES

AUGUST 5 (legislative day, JUNE 30), 1993

Mr. BROWN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To delay the effective date of the proposed amendments to rule 11 of the Federal Rules of Civil Procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the provisions of sections 2072 and 2074 of title 28, of the United States Code—

(1) rule 11 of the Federal Rules of Civil Procedure, as embodied by the order entered by the United States Supreme Court and transmitted on April 22, 1993, to the Congress by the Supreme Court pursuant to section 2072 of title 28, United

States Code, shall not take effect until December 1, 1994; and

(2) rule 11 of the Federal Rules of Civil Procedure, effective August 1, 1983, shall continue in effect until December 1, 1994.

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Congress of the United States
House of Representatives
Washington, DC 20515-0522

COMMITTEES:

JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION
SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW

ENERGY AND COMMERCE
SUBCOMMITTEE ON ENERGY AND POWER
SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE

TO: Members of the Subcommittee on Intellectual Property and Judicial Administration

FROM: Carlos J. Moorhead
Ranking Minority Member
Subcommittee on Intellectual Property and Judicial Administration

DATE: August 5, 1993

In accordance with the suggestions made and agreements entered into at this morning's Subcommittee markup concerning the Federal Rules of Civil Procedure, in particularly, Rule 11 dealing with the sanctions imposed by the judges against lawyers who file frivolous lawsuits, I intend to introduce the attached bill tomorrow. The bill would delay the effective date of Rule 11 changes for one year, until December 1994, that would provide the Subcommittee with adequate time to hold a proper hearing and to determine for itself whether or not Rule 11 is disproportionately used against certain plaintiffs. If you wish to cosponsor, please call Sheila at x56504.

Attachment

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H.L.C.

103D CONGRESS
1ST SESSION

H. R. ____

IN THE HOUSE OF REPRESENTATIVES

Mr. MOORHEAD introduced the following bill; which was referred to the Committee on _____

A BILL

To delay the effective date of the proposed amendments to rule 11 of the Federal Rules of Civil Procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any other provision of law, the proposed amendments to rule 11 of the Federal Rules of Civil Procedure which are embraced by an order entered by the Supreme Court of the United States on April 22, 1993, shall not take effect until December 1, 1994.

Statement of Carlos Moorhead on Offering an Amendment Precluding Proposed Rule 11 Changes from Taking Effect

Explanation of Amendment

This amendment would stop the proposed Rule 11 changes from taking effect. The proposed changes would:

1) make permissive, instead of the current mandatory issuance of sanctions;

2) allow post-filing investigations to attempt to support factual contentions, instead of the current pre-filing inquiry requirement;

3) provide a 21-day "safe harbor" period to withdraw a challenged pleading with impunity; and

4) allow permissive payment of monetary sanctions to the court or the opposing side.

According to Justice Scalia, in his dissent, on these proposed rule changes, they will render Rule 11 "toothless."

To appreciate Rule 11 in its present form, that is, as amended in 1983 we should look back to the original rule adopted in 1938.

The original version of Rule 11 required an attorney to sign pleadings "as a certificate by him that he has read the pleadings; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." The rule provided for sanctions, in the court's discretion, where there was "a willful violation" by an attorney. In effect, the trial court was required to find actual bad faith prior to considering sanctions. And even after finding bad faith, the court still had discretion as to whether or not to impose a sanction.

So ineffective was the original rule that in the early 1980s the Advisory Committee to the Federal Rules of Civil Procedure suggested comprehensive changes. The Committee concluded that "Rule 11 has not been effective in deterring abuses," and found amendment necessary to "reduce the reluctance of courts to impose sanctions" and to "discourage dilatory or abusive tactics or defenses." To illustrate Rule 11's ineffectiveness, for 38 years prior to the 1983 amendments, only nineteen motions for sanctions had been reported. Of those nineteen motions, eleven violations were found and sanctions were imposed in only three cases. Today, it is universally agreed that the original Rule 11 was wholly ineffective in controlling frivolous lawsuits and discovery abuses.

And that is what we will be going back to if the rule changes take effect.

As amended in 1983, Rule 11 provides for mandatory sanctions whenever an attorney fails to make a "reasonable inquiry" to ensure that the pleadings are "well grounded in fact" and are supported either by existing law or by a "good faith" argument for a change in the law. Thus, whenever a violation of Rule 11 is found, either on motion of opposing counsel or on initiative of the court, the court must impose a sanction on the breaching party. Since the 1983 amendment of Rule 11, over 3,000 cases have been brought alleging that lawyers or litigants have filed frivolous pleadings or otherwise abused the trial process.

Why should attorneys who file frivolous lawsuits and pleadings be allowed a so-called "safe harbor"? This is protection for the abuser, not the abused. Justice Scalia pointed out in his dissent on these changes that under the revised rule, lawyers

> "will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose."

Justice Scalia went on to say that this proposed change contradicts what the Supreme Court said just three years ago:

> "Baseless filings puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after dismissal."
> Cooter and Gell v. Hartmarx Corp.
> 496 U.S. 384, 398, 1990.

In my opinion, allowing post-filing investigation of factual allegations will also undermine the Rule's current role in deterring frivolous pleadings. More importantly, coupled with the "safe harbor" authorization to withdraw a challenged pleading, without penalty, the allowance of post-filing investigation will encourage abusive conduct, and increase the costs associated with civil litigation.

A crucial element in the current Rule is the requirement for pleadings to be well-grounded in fact when filed. It should be noted that the American Judicature Society's Rule 11 study reveals that the current Rule is having a pervasive impact on lawyers' practice, particularly in prompting lawyers to engage in increased pre-filing review of factual matters. On the question of Rule 11's effect on their practice in general, the most frequent reaction was

that 32.3% of plaintiff's lawyers and 39.6% of defense lawyers said they did an extra pre-filing review of pleadings, motions or other documents prior to filing. We must support this "stop-and-think" approach to litigation.

The current Rule 11, as written in 1983, works, and is supported by the federal judiciary. The Federal Judicial Center's Rule 11 survey of federal district judges shows that 80% of federal district judges believe that Rule 11 has had an overall positive effect and should be retained in its present form. Further, 95% believed that the Rule had not impeded development of the law, and about 75% said that the benefits justify the expenditure of judicial time. That study also concluded that there is little evidence that Rule 11 has been invoked or applied disproportionately against represented plaintiffs and their attorneys in civil rights cases.

I understand that lawyers do not like Rule 11. It may cause them financial heartburn. It may also damage their professional reputation and the cost of litigation savings it produces are savings not to lawyers but to clients. Rule 11 is the one rule that should command the full attention of Congress and the bar as an important tool for policing lawyer and litigation abuse. If the proposed changes in this rule are permitted to take effect we will have totally gutted the existing rule.

August 2, 1993

Dear Member of the House Subcommittee on
Intellectual Property and Judicial Administration:

On Thursday, August 5, 1993, the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary will mark-up a bill to be introduced by Chairman William J. Hughes and co-sponsored by Ranking Minority Member Carlos J. Moorhead concerning proposed changes to the Federal Rules of Civil Procedure which were recently approved by the Supreme Court. The Hughes/Moorhead bill will address proposed changes to Rules 26 and 30.

We are informed that, at Thursday's mark-up, Congressman Moorhead also plans to propose an amendment to the bill which will prevent proposed changes to Rule 11 from going into effect. We at the American Insurance Association, (AIA) support the Hughes/Moorhead bill and the Moorhead amendment. We urge your support for Congressman Moorhead's effort to maintain the current Rule 11.

As a trade association representing over 250 property/casualty insurers who are substantially involved in civil litigation, AIA is committed to finding ways to reduce the unnecessary costs and delays in civil litigation. Our members' experience and available research convince us that current Rule 11 provides a highly effective and valuable deterrent to frivolous and abusive litigation which causes delays in the system and costs to litigants. Those unnecessary costs are ultimately passed on to consumers in the form of higher insurance premiums.

AIA is especially concerned about four proposed changes which we believe will gut Rule 11's effectiveness: 1) permissive, instead of the current mandatory issuance of sanctions; 2) allowance of post-filing investigation to attempt to support factual contentions, instead of the current requirement of a pre-filing inquiry; 3) 21-day "safe harbor" to withdraw a challenged pleading, with impunity; and 4) permissive payment of monetary sanctions to the court or the opposing side, instead of the current authorization for an "appropriate sanction" which may include reasonable attorney's fees paid to the victim of a violation.

Current Rule 11, as written in 1983, has been effective in reducing frivolous litigation, and is supported by the federal judiciary. In dissenting on the proposed revisions, Justice Scalia offered support for the current Rule 11. In that dissent, Justice Scalia pointed out that the Federal Judicial Center's recent survey

reducing frivolous litigation, and is supported by the ... judiciary. In dissenting on the proposed revisions, Justice Scalia offered support for the current Rule 11. In that dissent, Justice Scalia pointed out that the Federal Judicial Center's recent survey

of judges shows that 95% of federal district judges believe that the Rule has not impeded development of the law, 80% believe it has had an overall positive effect and should be retained in its current form, and about 75% said that the Rule's benefits justify the expenditure of judicial time. (See enclosed Scalia dissent.) We submit that this overwhelming judicial support should be given great deference when considering changes to the current rule.

We oppose a discretionary Rule because we believe it will decrease the current Rule's role as a highly effective and valuable deterrent to frivolous and abusive litigation. Judges will simply not use the Rule, if its use is not required.

Allowing post-filing investigation of allegations and factual assertions will also undermine the current Rule 11's role in deterring frivolous pleadings. The American Judicature Society's Rule 11 study shows that the Rule is having a pervasive impact in prompting lawyers to engage in extra pre-filing review of factual matters. The revision will undermine the benefits of the current Rule. Coupled with the "safe harbor" provision to withdraw pleadings without penalty, the practical consequence of the suggested allowance of post-filing investigation will be to actually encourage some litigants to intentionally abuse the litigation process, at no cost to them, while forcing their opponents to incur significant transaction costs without any chance of reimbursement.

Finally, we believe that giving judges the discretion to order payment of monetary sanctions to either the court or the victim will create a system that is unfair, particularly to defendants and insurers required by contract to fund or pay defenses, and that in practice, even where a pleading was presented to cause needless increase in litigation costs, judges will not award monetary sanctions to the victim of a violation, be it plaintiff or defendant.

In sum, we believe that current Rule 11 is an effective tool for judges to use in curbing or avoiding litigation abuse. The solution to any perceived problems with Rule 11 does not lie in the proposed amendments, rather, it lies in the coordinated efforts of judges to implement the Rule appropriately, and litigants (including lawyers), to abide by the Rule's terms.

We urge you to lend your support to our views, and reject the proposed amendments.

Sincerely,

Andrew S. Wright
Vice President,
Federal Affairs

Agenda F-19
Rules
September 1993

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure met in Washington, D.C. on June 17-19, 1993. All members of the Committee attended the meeting. Philip B. Heymann, Deputy Attorney General, attended part of the meeting, with Messrs. Roger Pauley and Dennis G. Linder representing him in his absence. The Reporter to your Committee, Dean Daniel R. Coquillette and the Secretary to the Committee, Peter G. McCabe, also participated in the meeting.

Also present were Judge Kenneth F. Ripple, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Edward Leavy, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Chief Judge Sam C. Pointer, Jr., Chair, and Dean Edward Cooper, of the Advisory Committee on Civil Rules; Judge William Terrell Hodges, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Judge Ralph K. Winter, Jr., Chair, and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

clarified the operation and effect of the amendments in civil cases and on third party witnesses. The Committee Note was also substantially revised to clarify the meanings of several phrases used throughout the rule and explain the precise extent of the rule's protections. The changes to the original draft did not alter, however, the principal purpose of the amendments, which was to protect the privacy interests of a victim of a sexual offense in all civil and criminal cases. Your Committee adopted several additional revisions, including language explicitly allowing the prosecutor to introduce evidence of prior sexual acts by the defendant with the victim.

The proposed amendments to Rule 412 of the Federal Rules of Evidence appears in Appendix D.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.

V. Report of the Advisory Committee on Civil Rules.

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 26, 43, 50, 52, and 59 and recommended that they be published for public comment. Proposed changes to Rule 23 were also submitted for discussion but without a request for immediate publication.

The proposed changes to Rule 26 would clarify the authority of a court to dissolve or modify a protective order. Several factors would be listed for the court to consider in making its decision, including the impact on the public. Rule 43 would be changed to

allow a court to view the testimony of a witness via audio or video transmission during a trial in open court. Finally, the proposed amendments to Rules 50, 52, and 59 would set uniform time periods to file certain post-trial motions consistent with the proposed changes to the Appellate and Bankruptcy Rules.

Your Committee voted to circulate the proposed amendments to the bench and bar for comment after slightly revising the changes to Rules 50, 52, and 59 to achieve uniformity with the changes in the Appellate and Bankruptcy Rules. The timing of the publication was left to the discretion of the Advisory Committee because of the possibility of confusion resulting from the large package of rules amendments now pending before the Congress.

VI. Technical Amendments and Conformance of Local Rules with National Rules.

Your Committee reviewed draft uniform provisions prepared by the committees' reporters that would: (1) authorize the Judicial Conference to make technical corrections and conforming amendments to the rules directly, without action by the Supreme Court and the Congress; (2) authorize the Judicial Conference to prescribe a uniform numbering system that must be followed in the local court rules, and (3) permit the imposition of a sanction for noncompliance with certain local court procedures only if a party has had actual notice of the requirement. The uniform provisions would be included in the following rules: (1) Rules 47 and 49 of the Federal Rules of Appellate Procedure; (2) Rules 8018, 9029, and 9037 of the Federal Rules of Bankruptcy Procedure; (3) Rules 83 and 84 of the Federal Rules of Civil Procedure; and (4) Rules 57

and 59 of the Federal Rules of Criminal Procedure. The Advisory Committee on Evidence was requested to determine whether the proposed amendments should be included in the Federal Rules of Evidence.

The amendments proposed by the Advisory Committee on Civil Rules included an additional provision that would relieve a party, who failed through negligence to comply with a local rule imposing a requirement of form, from any loss of rights. Your Committee voted to circulate the proposed amendments with the addition of the provision recommended by the Advisory Committee on Civil Rules to the bench and bar for comment.

VII. Proposed Guidelines For Filing by Facsimile.

At the request of the Committee on Court Administration and Case Management, your Committee reviewed proposed Guidelines for Filing by Facsimile. Under Appellate Rule 25, Bankruptcy Rule 7005 (incorporating the civil procedures in adversary proceedings), Civil Rule 5, and Criminal Rule 49 (incorporating the civil procedures), papers may be filed with the court by "facsimile transmission if permitted by rules of the (court), provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." In 1991, the Conference issued very restrictive guidelines that allow facsimile filing only in compelling circumstances or where it had been authorized previously by a court. The proposed guidelines would liberalize the opportunity of courts to authorize filing by facsimile.

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

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

(a) Local Rules.

(1) Each district court ~~by action of~~, acting by a majority of ~~the~~ its judges ~~thereof~~, may ~~from time to time~~, after giving appropriate public notice and an opportunity ~~to~~ for comment, make and amend rules governing its practice. A local rule must be ~~not~~ ~~in~~consistent with Acts of Congress, consistent with — but not duplicative of — ~~these~~ rules adopted under 28 U.S.C. §§ 2072 and 2075, and conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule ~~so~~ ~~adopted shall~~ takes effect ~~upon~~ the date specified by

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* New matter is underlined; matter to be omitted is lined through.

the district court and ~~shall~~ remains in effect unless amended by the ~~district~~ court or abrogated by the judicial council of the circuit ~~in which the district is located~~. Copies of rules and amendments ~~so made by any district court shall~~ must, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be ~~made~~ available to the public.

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

(b) Judge's Directives. ~~In all cases not provided for by rule, the~~ A ~~district~~ judges ~~and magistrates~~ may regulate ~~their~~ practice in any manner ~~not in~~consistent with ~~these~~ federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, ~~or~~ and local rules ~~those of the district in which~~

~~they act~~. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or local district rules unless the alleged violator has been furnished in the particular case actual notice of the requirement.

COMMITTEE NOTE

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

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

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

Rule 84. Forms; Technical Amendments

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

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

COMMITTEE NOTE

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

amendments to the rules.

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

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

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

(a) Local Rules.

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

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

(b) Judge's Directives. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or local district rules unless the alleged violator has been furnished in the particular case actual notice of the requirement.

Rule 84. Forms; Technical Amendments

(a) **Forms.** The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate. The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.

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

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(c) **Protective Orders.**

(1) ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending — and ~~or alternatively~~, on matters relating to a deposition, also the court ~~in the district~~ where the deposition ~~is to~~ will be taken — may, for good cause shown, make any

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* New matter is underlined; matter to be omitted is lined through.

order ~~which~~ that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

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

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

(~~4~~D) ~~that~~ excluding certain matters ~~not be inquired into~~, or ~~that the scope of the~~

~~disclosure or discovery be limited~~ limiting the scope of disclosure or discovery to certain matters;

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

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

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

(~~8~~H) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be

opened as ~~directed by the court~~ the court directs.

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

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

(A) the extent of reliance on the order;

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

(C) the burden that the order imposes on persons seeking information relevant to

other litigation.

* * * * *

COMMITTEE NOTE

In addition to stylistic changes, the existing provisions of subdivision (c) are divided into numbered paragraphs, and paragraph (3) is added to dispel any doubt that a court has the power to modify or vacate a protective order. This power should be exercised after carefully considering the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

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

efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

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

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

weigh for or against discovery. Public and private interests in disclosure may be great or small, as may be the interests in preventing disclosure.

Rule 26(c)(3) applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1). It does not purport to invalidate or impair purely private agreements entered into by litigants which are not submitted to the court for its approval. Nor does Rule 26(c)(3) apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information; Rules 59 and 60 govern such motions.

Rule 43. Taking of Testimony

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

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COMMITTEE NOTE

The only changes, other than stylistic, intended by this revision are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is unable to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device. What is required under the rule is that the witness be able, by some means, to communicate effectively with the trier of fact on direct and cross-examination.

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

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

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

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

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

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

* * * * *

(b) ~~Renewal of~~ Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

~~Whenever~~ If, for any reason, the court does not grant a motion for ~~a~~ judgment as a matter of law made at the close of all the evidence ~~is denied or for any reason is not granted~~, the court is ~~deemed~~ considered to have submitted the action to the jury subject to ~~a later determination of~~ the court's later deciding the legal questions raised by the motion. ~~Such a motion may be renewed by service and~~ The movant may renew its request for judgment as a matter of law by filing a motion ~~not~~ later than 10 days after entry of judgment. ~~A~~ — and may alternatively request a new trial or join a motion for a new trial under Rule 59 ~~may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative~~. ~~If a verdict was returned,~~ In ruling on a renewed motion, the court may~~, in disposing of the renewed motion,~~ :

(1) if a verdict was returned:

(A) allow the judgment to stand, ~~or may reopen the judgment and either~~

(B) order a new trial, or

(C) direct ~~the~~ entry of judgment as a matter of law~~.~~; or

(2) ~~i~~If no verdict was returned~~, the court may, in disposing of the renewed motion,~~ :

(A) order a new trial, or

(B) direct ~~the~~ entry of judgment as a matter of law ~~or may order a new trial~~.

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

* * * * *

(2) ~~The~~ Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law ~~has been~~ is rendered ~~may serve~~ must

be filed ~~a motion for a new trial pursuant to Rule 59~~ not later than 10 days after entry of the judgment.

* * * * *

COMMITTEE NOTE

The only change, other than stylistic, intended by this revision is to prescribe a uniform explicit time for filing of post-judgment motions under this rule — no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before the end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used — rather than "within" — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

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

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

* * * * *

COMMITTEE NOTE

The only change, other than stylistic, intended by this revision is to require that any motion to amend or add findings after a nonjury trial must be filed no later than 10 days after entry of the judgment. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during that period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before the end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used — rather than "within" — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

Rule 59. New Trials; Amendment of Judgments

* * * * *

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

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

(d) On Court's Initiative ~~of Court~~; Notice; Specifying Grounds. ~~Not~~ later than 10 days after entry of judgment the court, ~~on of~~ its own, ~~initiative~~ may order a new trial for any reason ~~for which it might have granted a~~

~~new trial on~~ that would justify granting one on a party's motion ~~of a party~~. After giving the parties notice and an opportunity to be heard ~~on the matter~~, the court may grant a timely motion for a new trial~~, timely served,~~ for a reason not stated in the motion. ~~In either case,~~ When granting a new trial on its own initiative or for a reason not stated in a motion, the court ~~shall~~ must specify ~~in the order~~ the grounds in its order ~~therefor~~.

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

COMMITTEE NOTE

The only change, other than stylistic, intended by this revision is to add explicit time limits for filing motions for a new trial, motions to alter or amend a judgment, and affidavits opposing a new trial motion. Previously, there was an inconsistency in the wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or

merely served, during the prescribed period. This inconsistency caused special problems when motions for a new trial were joined with other post-judgment motions. These motions affect the finality of the judgment, a matter often of importance to third persons as well as the parties and the court. The Committee believes that each of these rules should be revised to require filing before the end of the 10-day period. Filing is an event that can be determined with certainty from court records. The phrase "no later than" is used — rather than "within" — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(c) Protective Orders.

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

(A) precluding the disclosure or discovery;

(B) specifying conditions, including time and place, for the disclosure or discovery;

(C) prescribing a discovery methodother than that selected by the party seeking discovery;

(D) excluding certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) directing that a sealed deposition be opened only upon court order;

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

(H) directing that the parties simultaneously file

specified documents or information enclosed in sealed envelopes, to be opened as the court directs.

(2) If the motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

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

(A) the extent of reliance on the order;

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

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

* * * * *

Rule 43. Taking of Testimony

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

* * * * *

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

* * * * *

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law;

or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

* * * * *

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after entry of the judgment.

* * * * *

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

* * * * *

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

* * * * *

Rule 59. New Trials; Amendment of Judgments

* * * * *

(b) Time for Motion. Any motion for a new trial must be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When

granting a new trial on its own initiative or for a reason not stated in a motion, the court must specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment.

RULE 23

The proposal to amend Rule 23 has been considered by the Committee over a period of several years. In May, 1993, the Committee approved submission of a revised rule to the Standing Committee for publication at such time as the Standing Committee might next find it appropriate to publish Civil Rules amendments for public comment. During the course of studying other proposed Civil Rules amendments in the Standing Committee, it was decided that it would be better to defer publication of additional Civil Rules amendments until there has been an opportunity to digest the proposed amendments now pending in Congress following transmission by the Supreme Court. Since publication of Rule 23 amendments would not occur before the next meeting of this Committee, the chair of this Committee elected to return Rule 23 for further consideration by this Committee.

Continuing members of the Committee are likely to find the attached draft Rule 23 and May minutes sufficient foundation for any renewed deliberations that may seem appropriate. The draft has been restyled since the May meeting, but no basic changes have been made.

New members of the Committee may find it helpful to review as well the attached "Civil Procedure Buffs" letter that was circulated directly to a number of people and groups that have shown interest in the Civil Rules process, and circulated indirectly among a rather wider group. Although there have been a few changes in the structure of the draft since the letter was written, it continues to provide a convenient brief statement of the purpose of the proposed changes.

Comments on the draft have been relatively sparse. Many of the comments, particularly those from the practicing bar, suggest that lower courts have worked out the bugs in the present rule and that any change will upset current practices to no real advantage. Others — mainly academics — think the proposed changes are desirable. Fewer comments have been made on the questions that go beyond the draft, although several people have indicated an interest in making comments in the future.

There has been little exploration of the possibility that more drastic changes should be made in Rule 23. More work will be needed should the Committee conclude, for the first time, that more fundamental changes should be considered. If the present approach is found appropriate, however, the draft may be ready for final action.

As compared to drastic changes, the Committee has considered several comparatively minor matters might be addressed in the text of Rule 23 and concluded that it is better to rely on continuing judicial response. Among these matters are the availability of discovery and counterclaims against class members not active in the action; the effect of the assertion of class claims, certification, and decertification on statutes of limitations; personal jurisdiction over members of plaintiff or defendant classes; methods of calculating attorney fees; and means of coordinating overlapping class actions in different courts or satellite litigation.

There are two matters that have floated around the periphery of Committee discussion without direct confrontation. Noting them now will afford the opportunity for discussion or for concluding that there is no need for further consideration.

One question draws from the NCCUSL class action rule, which expressly allows consideration of the question whether vindication of a class claim is worth the costs involved in class adjudication. This factor could be incorporated as the eighth factor in the Rule 23(b) list of matters pertinent to deciding whether a class action is superior to other methods of adjudication:

> (8)[whether the value of the probable relief to individual class members and the public interest justify the costs of administering a class action]. {whether the relief likely to be afforded individual members of the class and the public interest are significant in relation to the complexities of the issues and the expenses of the litigation}.

The awkwardness of each of the alternative forms of drafting may suggest that the proposal is intrinsically difficult to control. A deeper challenge will be that any such factor would invite courts to discriminate against claims they do not like. On the other hand, it is fair to ask whether the public interest really is served by pointing the cannon of class litigation against asserted wrongs that, if proved, have inflicted slight injury on a sufficient number of victims to generate large aggregate awards and attorney fees but insignificant individual recoveries. The question may be sharpened by reflecting on the reality that certification of such a class usually will be followed by settlement without any adjudication of the alleged wrong. This question relates directly to the possibility of fluid or class recoveries. Class actions might be more worthwhile in this setting if they did not entail the administrative burdens and costs of distributing small sums to many people.

The other question, involving Rule 23(e), has changed shape without much direct Committee consideration. The provision for referring a proposal to dismiss or compromise to a magistrate judge or special master has been discussed at times as one that might support an active investigating role that goes beyond the ordinary passive role of a judge. This theory reflects the view that courts should not be forced to depend on representatives who are satisfied with a settlement to provide information adequate to support effective protection of the interests of nonparticipating class members. The text of the proposed rule never has reflected this theory. The Note once reflected it, but has been softened. Nothing more need be done unless the theory is to be emphasized.

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.

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

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

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

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

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

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* New matter is underlined; matter to be omitted is lined through.

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

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

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

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

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

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

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief~~ the extent to which the relief may take the form

of an injunction or ~~corresponding~~ declaratory ~~relief with respect to~~ judgment respecting the class as a whole; ~~or~~

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

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

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

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

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

(c) **Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.**

(1) As soon as practicable after ~~the commencement of an action brought as a class action~~ persons sue or are sued as representatives of a class, the court ~~shall~~ must determine by order whether and

with respect to what claims, defenses, or issues ~~it is to be so maintained~~ the action should be certified as a class action.

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

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

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

(iii) potential conflicts of interest among members;

(iv) the interest of the party opposing the class in securing a final and

consistent resolution of the matters in controversy; and

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

When appropriate, a putative member's election to be excluded may be conditioned upon a prohibition against its maintaining a separate action on some or all of the matters in controversy in the class action or a prohibition against its relying in a separate action upon any judgment rendered or factual finding in favor of the class, and a putative member's election to be included in a class may be conditioned upon its bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision

may be conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) ~~In any class~~ When ordering that an action be ~~maintained~~ certified as a class action under ~~subdivision (b)(3)~~ this rule, the court ~~shall~~ must direct that appropriate notice be given to the ~~members of the~~ class under subdivision (d)(1)(C). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing

actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(3) The judgment in an action certified ~~maintained~~ as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall~~

~~include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3)~~, whether or not favorable to the class, ~~shall include and~~ must specify or describe those ~~to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ who are ~~to be~~ members of the class or have elected to be excluded on conditions affecting any separate actions.

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

~~a class, and the provisions of this rule shall then be construed and applied accordingly.~~

(d) Orders in Conduct of Class Actions.

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

(~~1~~A) ~~determining~~ determine the course of proceedings or ~~prescribing~~ prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;

(B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(~~2~~C) ~~requiring, for the protection of the members of the class or otherwise for the fair~~

~~conduct of the action, that~~ require notice ~~be given in such manner as the court may direct~~ to some or all of the class members or putative members of:

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

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

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

(~~3~~D) ~~imposing~~ impose conditions on the representative parties, class members, or ~~on~~

intervenors;

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

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

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

(e) **Dismissal or Compromise.** An ~~class~~ action in which persons sue or are sued as representatives of a class must ~~shall~~ not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for certification as a class action, or be compromised without ~~the~~ approval of the court~~, and notice of the proposed~~

~~dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~ An action certified as a class action must not be dismissed or compromised without approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

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

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

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

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

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries — at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not however an unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts. The rule does not attempt to authorize or establish a system for "fluid recovery" or "class recovery" of damages, nor does it attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions

will be certified under this rule, and most that were not certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility respecting notice and membership in the class.

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

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

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

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words "claims, defenses, or issues"

are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

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

Factor (7) — the consideration of the difficulties likely to be encountered in the management of a class action — is revised by adding a clause to emphasize that such difficulties should be assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

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

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the

court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs" — or, in some cases, even require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class actions remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion — the fact pattern described in subdivision (b)(1)(A) — a person might nevertheless be allowed to be excluded from the class upon the condition that the person will not maintain any separate action and hence, as a practical matter, be bound by the outcome of the class action. The opportunity to elect exclusion from a class may also be useful, for example, in some employment discrimination actions in which certain employees otherwise part of the class may, because of their own positions, wish to align themselves with the employer's side of the litigation either to assist in the defense of the case or to oppose the relief sought for the class.

Ordinarily putative class members electing to be excluded from a plaintiff class will be free to bring their own individual actions, unhampered by factual findings adverse to the class, while potentially able, under the doctrine of issue preclusion, to benefit from factual findings favorable to the class. The revised rule permits the court, as a means to avoid this inequity, to impose a condition on "opting out" that will preclude an excluded member from relying in a separate action upon findings favorable to the class.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give meaningful notice of the class action to all putative members of the class. With defendant classes it may be appropriate to impose a condition that requires the "opting-in" defendant class members to share in the litigation expenses of the representative party. Such a condition would be rarely needed with plaintiff classes since typically the claims on behalf of the class, if successful, would result in a common fund or benefit from which litigation expenses of the representative can be charged.

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

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

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations it might be appropriate to certify some issues relating to the defendants' culpability and — if the relevant scientific knowledge is sufficiently well developed — general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision if this will promote the fair and efficient adjudication of the controversy. See *Manual for Complex Litigation, Second,* § 30.11.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Subdivision (c)(2) requires that notice be given if a class is certified, though under subdivision (d)(1)(C) the particular form of notice is committed to the sound discretion of the court, keeping in mind the requirements of due process. Subdivision (d)(1)(C) contemplates that some form of notice may be desirable with respect to many other important rulings; subdivision (d)(1)(C)(i),

for example, calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

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

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to

members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of the fairness of these proposals conducted by an independent master can be of great benefit to the court, particularly since the named parties and their counsel have ceased to be adversaries with respect to the proposed dismissal or settlement. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

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

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. The appellate procedure would be the same as

for appeals under 28 U.S.C. § 1292(c). The statutory authority for using the rule-making process to permit an appeal of interlocutory orders is contained in 28 U.S.C. § 1292(e), as amended in 1992.

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

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

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

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

(2) legal or factual questions are common to the class,

(3) the representative parties' positions typify those of the class,

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

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

(b) **Whether a Class Action Is Superior.** The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which separate actions by or against individual members might result in

(A) inconsistent or varying adjudications that would establish incompatible standards of conduct for

the party opposing the class, or

(B) adjudications that, as a practical matter, would dispose of the nonparty members' interests or reduce their ability to protect their interests;

(2) the extent to which the relief may take the form of an injunction or declaratory judgment respecting the class as a whole;

(3) the extent to which common questions of law or fact predominate over any questions affecting only individual members;

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

(5) the extent and nature of any related litigation already begun by or against members of the class;

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

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

(c) Determination by Order Whether Class Action to Be Certified; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) As soon as practicable after persons sue or are sued as representatives of a class, the court must determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how,

and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

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

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

(iii) potential conflicts of interest among members;

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

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

When appropriate, a putative member's election to be excluded may be conditioned upon a prohibition against its maintaining a separate action on some or all of the matters in controversy in the class action or a prohibition against its relying in a separate action upon any judgment rendered or factual finding in favor of the class, and a putative member's election to be included in a class may be conditioned upon its bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before final judgment.

(2) When ordering that an action be certified as a

class action under this rule, the court must direct that appropriate notice be given to the class under subdivision (d)(1)(C). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice.

(3) The judgment in an action certified as a class action, whether or not favorable to the class, must specify or describe those who are members of the class or have elected to be excluded on conditions affecting any separate actions.

(4) When appropriate, an action may be certified as a class action with respect to particular claims, defenses, or issues by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1).

(d) Orders in Conduct of Class Actions.

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

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;

(B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(C) require notice to some or all of the class members or putative members of:

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

(ii) the proposed extent of the judgment; or

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

(D) impose conditions on the representative parties, class members, or intervenors;

(E) require the pleadings be amended to eliminate allegations about representation of absent persons, and that the action proceed accordingly; or

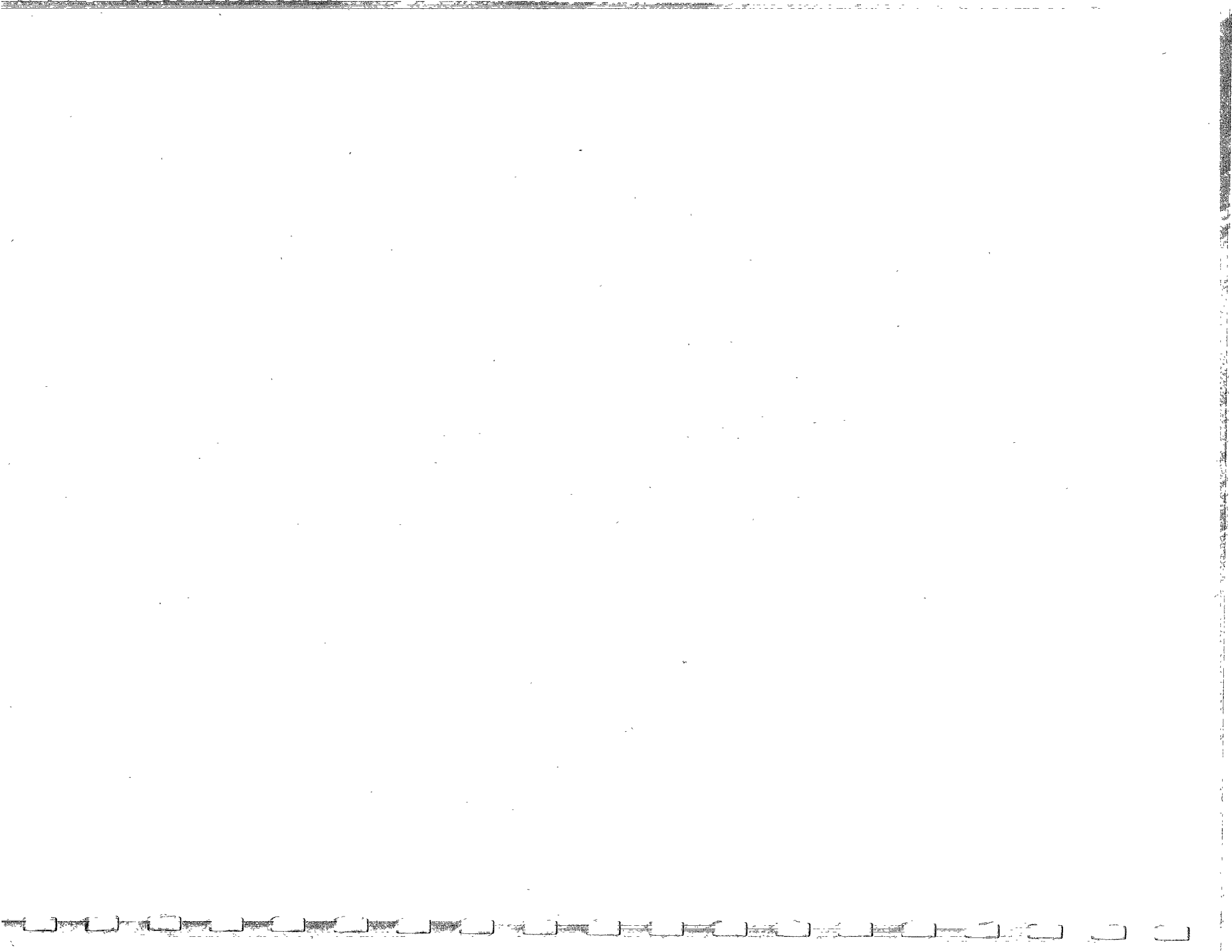
(F) deal with similar procedural matters.

(2) An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended.

(e) **Dismissal or Compromise.** An action in which persons sue or are sued as representatives of a class must not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for certification as a class action, or

be compromised without approval of the court. An action certified as a class action must not be dismissed or compromised without approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.



THE UNIVERSITY OF MICHIGAN
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ASSOCIATE DEAN

January 21, 1993

Dear Civil Procedure Buffs:

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

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

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

Timing

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

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

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

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

Style

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

Draft

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

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

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

A more dramatic change is suggested by the Note to Rule 23(e). On its face, Rule 23(e) suggests that a proposal to dismiss or compromise a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisons

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

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

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

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

Detailed Questions Not Addressed

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

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

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

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

Should there be provisions regulating discovery and

counterclaims against nonrepresentative members of the class?

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

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

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

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

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

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

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

Larger Questions

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

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

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

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

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

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

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

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

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

Thank-you for your help.

Sincerely,

EHC/lm
encls.

Edward H. Cooper
Reporter, Advisory Committee
on Civil Rules

If time permits, there will be a brief additional report on possible expansions in the use of special masters. For the moment, three items are provided as possible aids to discussion.

First are the minutes from the May meeting devoted to Rule 53.

Second is a set of materials prepared by Professor Margaret G. Farrell for an ALI/ABA conference on federal litigation.

Third is a draft rule on pretrial use of masters prepared by Judge Brazil ten years ago. The draft, in compact rule style, illustrates a wide variety of issues that should be addressed in deciding on an approach to expanding the provisions for masters. Note that the rule would be independent of Rule 53.

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.

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September 3, 1993

The Honorable Patrick E. Higgenbotham
United States Court of Appeals for the Fifth Circuit
13E1 U.S. Courthouse
1100 Commerce Street
Dallas, TX 75242

Dear Judge Higgenbotham:

Sol Schreiber asked me to send you a copy of the materials pertaining to special masters that I am providing for the ALI/ABA conference on federal litigation. I have enclosed a copy of the materials as they will appear in the conference publication.

As I think Mr. Schreiber may have mentioned, I have completed the draft of a 100 page monograph on the roles of special masters that I expect the Federal Judicial Center will publish in the next year. If it would be helpful for you to have a copy of that draft please let me know.

If you have any questions regarding this matter, I can be reached at Cardozo School of Law, 55 Fifth Avenue, New York, N.Y. 10003/ (212) 790 - 0404.

Sincerely yours,

Margaret G. Farrell

Margaret G. Farrell

THE ROLES OF SPECIAL MASTERS IN FEDERAL LITIGATION

by Associate Professor Margaret G. Farrell[1]
Cardozo Law School
Federal Judicial Fellow 1993-94[2]

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2 This outline is based on research conducted for the Federal Judicial Center in 1993 - 94. The analyses, conclusions, and points of view are those of the author. On matter of policy, the Center speaks only through its Board.

THE ROLES OF SPECIAL MASTERS IN FEDERAL LITIGATION

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I. INTRODUCTION

In the last decade, judges have increasingly sought the assistance of special masters in handling complex litigation. Increases in the caseload in the federal courts, in the technological complexity of the subject matters presented, in the vast amounts of information available (often as a result of computer technology), and in the numbers of claimants and amounts of money involved have put heavy burdens on the federal judiciary. The appointment of special masters is one of several procedures, including the use of magistrates, court appointed experts and technical advisors, available to judges to extend their effectiveness.

Cases involving such appointments of masters include Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D.Tax. 1990); In re "Agent Orange Litig.", 94 F.R.D. 173 (E.D.N.Y.) (appointing master to rule on voluminous document discovery requests); Jenkins v. Raymark Indus., Inc. ,109 F.R.D. 269, 288(E.D. Tex. 1985)(appointing master to profile the characteristics of claims of 1,000 member class for the jury in asbestos litigation); McLendon v. Continental Group, Inc. , 749 F. Supp. 582, 612 (D.N.J. 1989) (appointing master to assist the parties in post liability settlement of damage due 5,000 ERISA claimants, finally agreed to be $415 million). See also A Practical Guide to the Use of Special Masters, Wayne D. Brazil et al. eds., (1985) (Hereinafter Managing Complex Litigation.); Ronald E. McKinstry, Use of Special Masters in Major Complex Cases , in Federal Discovery in Complex Cases: Anti-trust, Securities and Energy, (1980).

This outline first sets forth basic legal authority for the appointment of special masters in federal litigation; second, describes the roles to which special masters have been appointed; and third, discusses the issues that their appointments present.

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II. THE LEGAL AUTHORITY TO APPOINT SPECIAL MASTERS

There are several sources of legal authority for the appointment of masters by the federal courts -- the consent of the parties, the inherent authority of the court, the Magistrates Act and Federal Rules of Civil Procedure Rule 53(b).

A. The Consent of the Parties

1. Constitutionally permissible.

Because Rule 53 restricts the appointment of masters in jury trials to cases in which "the issues are complicated" and in non-jury trials to cases in which there is a "showing that some exceptional condition requires it," courts have sometimes relied on other legal authority for the appointment of a master where such circumstances did not pertain. Early in its history, the Supreme Court recognized that the parties can consent to the disposition of their disputes by non-Article III personnel. Unless it conflicts with some act of Congress, the Court found one of the modes of prosecuting a suit to judgment is the appointment of arbitrators with the consent of the parties. Heckers v. Fowler, 69 U.S. (2Wall.) 123 (1864). The Court elaborated on this concept in Kimberly v. Arms, in 1889, an equity action in which the parties had agreed and the court had ordered that a master would be appointed to "hear the evidence and decide all the issues between the parties." Kimberly v. Arms, 129 U.S. 512, 524 (1889). The Supreme Court found that had the parties not consented to the reference, general equity rules would have precluded the court from referring the entire decision to a master.

The idea that the "litigants may waive their personal right to have an Article III judge preside over a civil trial," was recently confirmed in Peretz v. United States. Peretz v. United States, 111 S. Ct. 2661, 2559 (1991).and see Mobil Oil Corp. v. Altrech Industries, Inc. 117 F.R.D. 650 (9th Cir. 1987) (special master could preside over jury trial upon agreement of the parties.) However, where the parties consent to the reference, the master's determinations must be given the weight to which the parties have stipulated and may not be set aside and disregarded at the discretion of the court. See also DeCosta v. Columbia Broadcasting System, 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976)(holding that reference to a magistrate for an initial hearing and determination of a civil case did not violate Article III of the Constitution or the pre-1976 Magistrate Act.) Thus, the Court has recognized the tradition, understood by Congress, that parties can freely consent to refer cases to non-Article II officials for decision.

2. Commentary.

Commentators seem to agree that references based on the consent of the litigants should not be subject to the same requirements that apply to references made

without their consent, although they may not contravene applicable legislation or public policy. See e.g. Peter G. McCabe, The Federal Magistrate Act, of 1979, 16 Harv. J. on Legis. 343, 374-75 (1979); Linda J. Silberman, Masters and Magistrates Part II: The American Analog, 50 N.Y.U. L.Rev. 1297, 1354 (1975); Wayne D. Brazil, Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule, in Managing Complex Litigation: A Practical Guide to the Use of Special Masters, 305, 312-14 (W. Brazil, G. H). To the extent that Article III and the doctrine of separation of powers limits references under Rule 53(b), the parties cannot consent to legislative courts (or masters) that violate the separation of powers, though they may waive fairness objections. Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986) and see Erwin Chemerinsky, Federal Jurisdiction, § 4.5 (1989)

B. The Court's Inherent Powers,

Courts have "inherent power to provide themselves with appropriate instruments for the performance of their duties, including the authority to appoint persons unconnected with the court, such as special masters, auditors, examiners and commissioners, with or without consent of the parties, to "simplify and clarify issues and to make tentative findings " Ex parte Peterson, 253 U.S. 300, 314 (1920). Reilly v. United States, 863 F.2d 149, 154, n.4 (1st Cir. 1988). The court's inherent authority to appoint non-judicial personnel to assist it in discharging its judicial responsibilities is limited, of course, by the boundaries of Article III. Thus, "the Constitution prohibits ...the nonconsensual reference of a fundamental issue of liability to an adjudicator who does not posses the attributes Article III demands." Stauble v. Warrob, 977 F.2d 690, 695, citing Burlington N. R. R. v. Dep't of Revenue, 934 F.2d 1064, 1073 (9th Cir. 1991); In re United States, 816 F.2d 1083, 1092 (6th Cir. 1987): In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165,1168 (D.C. Cir. 1991) and Kimberly Arms, 129 U.S. 512, 524 (1889); but see In re Armco, 770 F.2d 103, 105 (8th Cir. 1985)(dictum).

C. The Magistrates Act.

United States Magistrate Judges may be appointed to act as special masters pursuant to three legal authorities: the Magistrates Act (28 U.S.C.§ 636) the court's inherent authority discussed above, and Rule 53.

1. Appointment of magistrates as special masters – the application of Rule 53(b).

Under the terms of the Magistrates Act, enacted after Rule 53, magistrates can be appointed as special masters in under section § 636(b)(2), first, when they are appointed under Rule 53, or second, without regard to the provisions of Rule 53, when the parties consent to the appointment.

28 U.S.C. § 636(b)(2) provides:

> A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

See Manual of Complex Litigation, Second, § 21.52 (1985). The Civil Rights Act of 1964 also provides that magistrate judges may be used as masters whenever a district court judge cannot schedule a case for trial within 120 days after issue has been joined. 42 U.S.C. § 2000e(5)(f)(5)(1992). For a discussion of the history of United States magistrates and their powers see Christopher E. Smith, United States Magistrates in the Federal Courts: Subordinate Judges, (1990).

Both kinds of special master appointments are governed by the provisions of Rule 53, except that where the parties consent to the appointment, the "exceptional condition" requirement does not apply. 28 U.S.C. § 636 The Notes of the Advisory Committee on the 1983 amendment to Rule 53 regarding magistrates state that "A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference." The Manual for Complex Litigation, Second, states that "With consent of the parties, the court may designate a magistrate to act as special master in any civil case without regard to the normal limitations of Rule 53." Manual for Complex Litigation, Second, § 21.52 (1985).

A "clearly erroneous" standard of review seems to apply to both the exercise of Rule 53 authority and 28 U.S.C. § 636(b)(2) authority for special master appointments made with the consent of the parties. Rule 53 permits the appointment of a special master only when "exceptional conditions" require it, (except "in matters of account and of difficult computation of damages.") The Rule provides that in a non-jury action, the court shall accept the master's findings of fact unless they are "clearly erroneous." Conclusions of law, of course, are reviewed de novo. In a jury action, the master's findings are admissible as evidence of the matters found. Federal Rules of Civil Procedure, Rule 53(e)(2) and (3).

2. The assignment of "special master like" duties to magistrates.

Section 636(b)(2) is the only section of the Magistrates Act that expressly authorizes the appointment of magistrates as "special masters," and, as stated above, it requires either "exceptional conditions" or consent of the parties for such appointments. However, several other sections permit courts to assign to magistrates duties that Rule 53 special masters often are asked to perform,

without regard to the consent or "exceptional conditions" requirements. Thus, apart from their appointment as special masters, under 8 U.S.C. § 636(b)(1)(A) magistrates may also be assigned, without consent of the parties, to hear and determine any pending pretrial matter, except certain enumerated motions, (i.e. ones which dispose of the merits of the case), and their determinations will be reviewed on a clearly erroneous standard.

a. Pre-trial non-dispositive motions -- clearly erroneous review.

Although the authorizations, contained in sections § 636(b)(1)(A) and (B) do not explicitly mention appointments as special masters, the Notes of the Advisory Committee on Rules on the 1983 amendments to Rule 53 observe that a reference of pretrial matters under 28 U.S.C. § 636(b)(1)(A) and (B) can be made without consent of the parties and without meeting the "exceptional condition" requirement of Rule 53.

28 U.S.C. § 636(b)(1)(A). The section provides:

> Notwithstanding any provision of law to the contrary --(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action to dismiss for failure to state a claim upon which relief can be granted and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law to conduct hearings and submit proposed findings of fact and recommendations for the disposition of dispositive pre-trial motions, of post trial motions filed by criminal defendants, and of prisoner petitions challenging conditions of confinement.

b. Dispositive motions - de novo review.

In addition, magistrates can be appointed to conduct hearings and propose findings of fact and the disposition of dispositive issues, without the consent of the parties, under 28 U.S.C. § 636(b)(1)(B). Such determinations are reviewed de novo.

28 U.S.C. 636(b)(1)(B) provides:

> A judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed

findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

c. Appointments with consent of the parties.

In addition, magistrates may be authorized to conduct any or all proceedings in a jury or non-jury civil matter, with the consent of the parties.

28. U.S.C. § 636(c)(1) The section provides:

> (1)Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

Magistrates have case dispositive authority in the later cases, and judgments in such cases may be appealed directly to the United States Courts of Appeal, unless the parties consent instead to an appeal to the District Court.

d. Appointments not inconsistent with the Constitution.

Finally, a general provision, 28 U.S.C. § 636(b)(3), permits magistrates to perform "such additional duties" as are not inconsistent with the laws or Constitution of the United States, with or without party consent. The legislative history of the latter provision indicates that it was intended to be liberally construed. S. Rep. No. 635, 94th Cong., 2d Sess. 10 (1976); H. R. Rep. No. 1609, 94th Cong. 2d Sess. 12-13 (1976) ("Under this subsection, the district courts would remain free to experiment in the assignment of their duties to magistrates...."). It has been interpreted broadly by the Supreme Court in Peretz v. United States, 111 S. Ct. 2661 (1991).

The staff of the Magistrates Judges Division of the Federal Judicial Center reports that the following references to magistrates have been made under authority of § 636(b)(3): bankruptcy matters (though the standard of review is unclear); pre-trial duties unspecified elsewhere in social security cases, jury voir dire, grand jury proceedings, arraignments, administrative proceedings, and mental incompetency proceedings. Other activities of magistrates reported under this authority include naturalization proceedings, summary jury trials, alternative dispute resolution proceedings, mental competency proceedings for federal prisoners, oversight of affirmative action plans, jail and prison inspections,

appointment of arbitrators, admission of attorneys to the federal bar, examination of judgment debtors, and certain admiralty proceedings.

Thus, there are few matters that are not assignable under the Magistrates Act, without resort to Rule 53, even when the parties do not consent to an assignment. In those circumstances, even when the duties to be assigned are not pre-trial matters set forth in § 636(b)(1)(A) or hearings and the disposition of non-dispositive motions set forth in § 636(b)(1)(B), district courts would seem to have considerable authority under § 636(b)(3) to assign tasks not inconsistent with the Constitution and laws of the United States. Thus, because §§ 636(b)(1)(A) and (B) are broad provisions, and § 636(b)(3) permits the assignment of unspecified tasks, there may be few, if any, significant tasks that a magistrate cannot perform without an appointment under Rule 53.

3. Differences between magistrates and other special masters.

The avoidance of the "exceptional conditions" requirement of Rule 53 when assigning special-master-like powers to a magistrate may be justified, even where parties do not consent, because many of the issues discussed below, associated with masters' appointments, are avoided when the appointment is made to a magistrate. Indeed, the concerns that may have lead the Supreme Court to restrictively interpret Rule 53 in *LaBuy v. Howes Leather Co.*- 352 U.S. 249 (1957) -- inexperienced, ad hoc masters, cost to the parties and delay -- may be obviated when the tasks to be performed are assigned to an experienced, full-time, government salaried, accountable U.S. magistrate. Nevertheless, because like federal district court judges, federal magistrate judges also have heavy caseloads, are generalists and are not skilled in mediation, have little experience in the use of informal procedures and lack substantive expertise, special masters continue to be appointed to handle various aspects of complex litigation.
Thus, because magistrates are full time, government paid, generalist judicial surrogates they do not present the same issues that are presented by the appointment of part time, party paid, expert masters appointed under Rule 53. Therefore, the following discussion is confined to the appointment of non-magistrate masters under Rule 53.

In addition, the Inventory of United States Magistrate Judges Duties, prepared by the staff of the Judicial Conference Committee on the Administration of the Magistrate Judges System reports that "Magistrate judges are currently performing a variety of duties analogous to special master-type duties for district courts, [which] are not described in the Magistrates Act, and any statutes authorizing these duties do not specify the involvement of magistrate judges." These include references to magistrates in condemnation proceedings, National Labor Relations Board contempt proceedings, and court employee grievance proceedings. Staff of the Judicial Conference Committee on the Administration of the Magistrate Judges System, The Inventory of United States Magistrate Judges Duties, 75-76 (1991).

D. Rule 53(b) of the Federal Rules of Civil Procedure.

Rule 53(b) provides:

> A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

1. The Background of Rule 53.

Enacted as part of the Federal Rules of Civil Procedure in 1938, Rule 53 (b) authorizes the appointment of special masters in jury cases only when the issues are complicated and in non-jury cases only when the matter is one of accounting, difficult computation of damages or one in which some exceptional condition requires it. See Linda Silberman, Masters and Magistrates Part I: The English Model, 50 N.Y. U. L. Rev. 1070, 1078 (1975); Kaufman, Masters in the Federal Courts: Rule 53, 58 Col. L. Rev. 452 (1958). In interpreting the scope of authority granted to district court judges to appoint a master under Rule 53, the Supreme Court in LaBuy v. Howes Leather Co., held that calendar congestion, complexity of the issues and the possibility of a lengthy trial were not a showing of exceptional conditions sufficient to satisfy the requirements of Rule 53 with regard to a comprehensive reference of the merits. However, it should be noted that the assignment to the special master in LaBuy was of the full fact finding function on the merits. A more limited reference to the master, of non-dispositive, pre-trial or remedial matters, might have been justified under the Rule in those circumstances.

2. Constitutional constraints.

a. In general.

The outer boundaries of Rule 53 authority are established by Article III and the due process clause of the Constitution. The decision in *LaBuy* did not hold that a reference to the master under the circumstances of that case violated Article III of the Constitution, but only that it was not warranted under the terms of Rule 53. Nevertheless, the Supreme Court has indicated that the exercise of essential judicial functions by personnel who are not judges appointed under Article III, with life tenure and protected salaries, violates the separation of powers doctrine and perhaps the due process clause unless, on balance, the benefits of such

delegations -- efficiency and expertise -- outweigh their diminution of Article III values -- neutral, independent adjudication. Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245, 3256 (1986); Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584 (1985); Northern Pipeline Construction Co. v. Marathon Pipe Line Col. 458 U.S. 50 (1982).

b. Magistrate appointments.

Nonconsensual references to magistrates have been sustained against constitutional attack where they were performed under the "total control and jurisdiction of the district court," are adjunct in the sense that the magistrate has no independent authority to enforce orders, and dispositive decisions on the law and the facts are reviewed do novo. United States v. Raddatz, 447 U.S. 687 (1980). Special master appointments can be likened to the appointment of magistrate judges assigned many of the same functions -- deciding pre-trial, non-dispositive motions, trying civil cases with the consent of the parties, and recommending decisions on dispositive motions. Cases upholding the constitutionality of appointments for these purposes include Geras v. Lafayette Display Fixtures, 742 F.2d 1037, 1044-1045 (7th Cir. 1984); Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537, 544 (9th Cir. 1984); Caprera v.Jacobs. 790 F.2d 442, 444 (5th Cir. 1986), cert. denied, 108 Sp. Ct. 331 (1987).

c. Article III.

Some Circuit Courts of Appeals have reversed appointments of special masters who were appointed to conduct formal evidentiary hearings on the merits of the case, finding that the appointment violated Article III. These courts find that the stage of litigation , i.e. the liability stage, determinative of Article III limitations on the scope of Rule 53, regardless of whether exceptional circumstances pertain. E.g. Bituminous Coal Operators' Ass'n, Inc. 949 F.2d 1165,1168 (D.C. Cir. 1991)(reversing reference to special master of nonjury trial of civil case over multi-employer trust fund where district court failed to reserve decision making authority over motions dispositive of the merits of the case). See Generally, 5A Moore's Federal Practice P. 53.05[3] at n. s 7-11. For example, in *Stauble v. Warrob,,* 977 F. 2d 690 (1st Cir. 1993) the First Circuit Court of Appeals reversed a judgment rendered on the basis of a report by a special master to whom the defendants had earlier objected, seeking a writ of mandamus. The Appeals Court found that it could not "forge an 'exceptional condition' test for cases of blended liability and damages....[T]he Constitution prohibits us from allowing the nonconsensual reference of a fundamental issue of liability to an adjudicator who does not posses the attributes that Article III demands." Distinguishing the delegation of authority over preparatory and remedy related issues, the court held that where the fundamental determinations of liability are not heard and determined by the district court, the appointment is not within the constitutional limitations that bound Rule 53. Thus the district court lacked authority to refer the case without a provision for de novo review of the master's report.

3. Weighing exceptional conditions.

A greater showing of exceptional conditions may be exacted by some courts to satisfy the requirements of Rule 53 where the appointment is one at the liability stage. E.g. Burlington Northern Railroad Company v. Department of Revenue, 934 F.2d 1064,1070,173 (9th Cir. 1991)(no exceptional circumstances to support Rule 53 reference of the entire case where reference was made "in the interest of judicial economy" and the master's reported recommendations were affirmed in a one sentence order); In re ARMCO, 770 F.2d 103 (8th Cir. 1985)(circumstances sufficient to support a Rule 53 appointment of pre-trial duties , including disposition of summary judgment and dismissal motions, in a n environmental suit, held not sufficient to support master's authority to preside at trial). Thus, perhaps, where liability is at issue, the need for expert help in dealing with complex or complicated evidence must be more clearly demonstrated. For example, in Prudential Insurance Co. of American v. United States Gypsum Co., 1993 U.S. App.Lexis 6605 (March 31, 1993) the Third Circuit Court of Appeals granted a mandamus withdrawing the appointment of a master in an asbestosis case, who was to rule on nondispositive discovery motions but who was also to hear dispositive legal motions (motions to dismiss and summary judgment motions) and report to the court "all relevant facts and conclusions of law." The appellate court relied strongly on LaBuy, for the proposition that neither the volume of work generated by a case nor the complexity of that work will suffice to meet the exceptional condition standards promulgated by Rule 53.

4. Appealing Rule 53 appointments.

A Rule 53(b) appointment may be appealed through the extraordinary writ of mandamus brought immediately upon appointment, in the court of appeals. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). See e.g. In re Bituminous Coal Operators' Ass'n, 949 F. 2d 1165 (D.C. Cir. 1991). It may also be appealed through objection and a general appeal of the district court's final judgment. E.g. Stauble v. Warrob, 977 F.2d 690 (1st Cir. 1992) (special master appointment reversed on an appeal of the judgment on grounds that trial court exercised insufficient review over the master's findings in a commercial case.); Liptak v. United States, 748 F.2d 1254, 1257 (8th Cir. 1984)(reference to special master found not supported by exceptional circumstances upon review of appeal from summary judgment). The party objecting to the appointment of a master must usually make a timely objection either at the time of appointment or promptly thereafter to preserve the assignment of error. See e.g. Martin Oil Service, Inc. v. Koch Refining Co., 718 F. Supp. 1334 (N.D. Ill. 1989), First Iowa Hydro Elec. Co-op v. Iowa-Illinois Gas and Elec. Co. 245 F.2d 613, (8th Cir. 1957) cert. denied, 355 U.S. 871 (1954). See generally, 5A Moore Federal Practice P. 53.05[3] at N. 1-6.

When challenged by way of mandamus, the appellant must establish that the district court abused its discretion in making the appointment and that

challenging it in an end of case appeal will not adequately protect the interests at risk. Stauble v. Warrob, 977 F.2d at 692 n3. See In re Fibreboard Corp. 893 F.2d 706, 707 (5th Cir. 1990)("We are to issue the writ of mandamus only to remedy a clear usurpation of power or abuse of discretion when no other adequate means of obtaining relief is available. citations omitted.) After judgment, an appeal of the reference to a master is treated as presenting a question of law and plenary review will be exercised. Stauble v. Warrob, 977 F.2d at 692 n.3. Because the standards of review are different, denial of a motion for mandamus setting aside a reference does not preclude a subsequent appeal which raises the issue again. Id. and United States v. Shirley, 884 F.2d 1130, 1135 (9th Cir. 1989); Key v. Wise, 629 F.2d 1049, 1054-55 (5th Cir. 1980), cert. denied, 454 U.S. 1103 (1981).

5. Powers of Rule 53 masters.

Special masters appointed under Rule 53 have been given many of the same powers that a district court judge has to receive and evaluate evidence submitted by the parties. Thus, unless limited by the order of reference, a special master has broad powers under Rule 53(c) and (d) to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production of documents and other evidence, rule on the admissibility of evidence, subpoena witnesses, put them under oath and examine them. It is not clear what other powers, not enumerated in the Rule, can be given to masters expressly or are assumed to be given if they are not limited by the Order. For instance, it is not clear that the powers given to remedial masters to gain access to documents and other information held by defendants can be exercised by a master appointed under Rule 53 if the Order of Reference permits it and if the Order does not.

6. The weight given masters' findings.

The effect given to a master's report depends on whether it is rendered in a jury or a non-jury proceeding. Special masters appointed under Rule 53 are required by the Rule to file with the clerk of the court a report setting forth findings of fact and conclusions of law as required by the order of reference. Fed. R. Civ. P. 53(e)(1). Effective December 1991, the master must file the report with the clerk of the court and serve a copy upon all parties. In a proceeding before a jury, the master is treated as a source of evidence to be considered by the jury in its deliberations. In a non-jury trial, the master is treated as a preliminary decision maker, whose recommended findings of fact and conclusions of law stand unless they are clearly erroneous.

a. Jury trials.

Where masters are used to make findings of fact in a jury case, based on evidence heard by the master, such evidence will be excluded from the record unless the

parties introduce it independently at trial. Thus, in a jury trial, the master's findings, but not the evidence upon which they are based, are admissible as evidence of the facts found and may be read to the jury, subject to objections. Burgess v. Williams , 302 F.2d 91 (4th Cir. 1962) (master's report given prima facie effect). Where the master nevertheless reports evidence, it may be ruled inadmissible and excluded from the record on appeal. 5A Moore, Federal Practice P. 53.10[1] n. 11. 5A James W. Moore et al., Moore's Federal Practice 53, 10 [1] at 53-90 (2d Ed. 1992). Thus, parties objecting to the master's report in a jury trial are not entitled to discover the evidence upon which it is based, though much of it may be introduced independently for the jury's consideration and may not examine the master at the trial. Manual of Complex Litigation § 21.52 (2nd Ed. 1985). Unlike a court appointed expert, a special master may not be cross examined on his/her report. Yet, unlike other testimonial evidence which may be disbelieved, the findings of a master present prima facie evidence, which standing alone are sufficient to sustain a directed verdict.

b. Non-jury trials.

When the master's report is submitted in a nonjury trial, the master must file a transcript of the proceedings and of the evidence and the original exhibits upon which his report is based, so that the court can review the evidence and decide whether the master's findings must be sustained as not clearly erroneous. 5A Moore Federal Practice P. 53.14. The weight given to the masters findings are the same regardless of whether the parties have consented to the appointment of the master or not. However, if the parties have agreed to accept the masters findings as final, only questions of law raised by the report may be considered by the court. 5A James W. Moore et al., Moore's Federal Practice §5314(4) at 53 141 (2nd Ed. 1992). Presumably, the court too, on its own motion, will review the evidence supporting the master's findings. Failure to provide this kind of review of the written record provided by the master who had held thirty nine days of hearings on the issue of liability, was the basis for the reversal of a district court judgment in a recent case and a remand for retrial. Stauble v. Warrob, 977 F.2d 690 (1st Cir. 1993). In non-jury trials, master's findings must be accepted by the district court unless they are clearly erroneous (Rule 53(e)(2).,whether the master has made findings in the course of settling discovery disputes (American Honda Motor Co., Inc. v. Vickers Motors, Inc., 64 F.R.D. 118 (W.D. Tenn. 1974). recommending action on a motion for injunctive relief, United States v. Conservation Chem. Co., 106 F.R.D. 210 (W.D. Mo. 1985) or supervising implementation of court ordered relief. Chi. Hous. Auth. v. Austin, 511 F.2d 82 (7th Cir. 1975).

c. On appeal

On appeal from a district court ruling adopting, modifying or rejecting a masters recommended findings of fact, the appellant has the usual burden of

persuading the court of appeals that the district court erred. Where the objection is to a factual finding by the district court in a jury trial, the appellant must show that the finding was not supported by a preponderance of the evidence. In a non-jury trial, a district court finding based on recommendations by the master will be sustained if the district court did not abuse its discretion in finding the master's report was not clearly erroneous. Williams v. Lane, 851 F.2d 867, 884-85 (7th Cir. 1988). See 78 Colum L. Rev. 829-30 (1978) (remedial masters reports should not be reviewed on clearly erroneous standard because absence of procedural safeguards surrounding master's post decretal fact finding). If the district court rejected the master's report as clearly erroneous, an appellant seeking review of that determination must show that ruling to be an unreasonable exercise of discretion.

III. THE ROLES OF SPECIAL MASTERS

A. Discovery Masters.

1. In general.

During discovery, special masters are sometimes appointed in complex cases to limit massive discovery requests, to rule on claims of privilege and to make factual determinations necessary to rule on the admissibility of evidence. E.g. Int'l. Business Machines Corp., 76 F.R.D. 97 (D.N.Y. 1977). United States v. AT&T, 461 F. Supp. 1314, 1347-49 (D.D.C. 1978). For a discussion of the legal history of the authority to the appointment masters to supervise discovery see Wayne D. Brazil, Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule, in Wayne D. Brazil, Geoffrey Hazard, Jr. and Paul R. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters, 305 (1983).

2. Specialized information in discovery.

Where information sought in discovery is scientific, highly technical or complex in nature, there is an even greater ground upon which to find exceptional conditions required for the appointment of a master under Rule 53. In re Agent Orange Product Liability Litigation, 94 F.R.D. 173 (E.D.N.Y. 1982). But See e.g. Caldwell Indus., Inc. v. New York Hospital-Cornell Medical Center, 1993 U.S. Dist. Lexis 2263 n. 1 (Feb. 26, 1993)(court denied motion for appointment of master where it found parties' counsel had demonstrated that they were quite capable of explaining difficult medical and scientific materials and theories to an audience unfamiliar with such subjects). These masters sometimes hold formal hearings on non-dispositive motions and preliminary facts, but sometimes they proceed more informally to make findings based on their own knowledge or information received from the parties outside of evidentiary hearings. When discovery motions involve the production of technical information in trade mark,

patent, copyright, and product liability cases, courts often appoint special masters who have special expertise in the subject matter of the suit.

3. Daubert hearings.

The need for assistance during discovery to handle proffers of scientific expert testimony may be even greater after the Supreme Court's recent decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. 113 S. Ct. 2786 (1993). In that case, the Court clarified the trial court's obligation under section 702 of the Federal Rules of Evidence to determine the reliability, as well as the relevance, of scientific evidence upon which expert opinion is based. The Court held that in a case involving scientific evidence, evidentiary reliability will be based upon scientific validity. Id. at n. 9 In order to make these determinations, trial court judges 'must determine from the outset, pursuant to Federal Rule of Evidence 104(a) whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact. Providing trial courts with a non-exhaustive list of factors to take into account in determining evidentiary reliability, the Supreme Court suggested that whether a theory or technique is "scientific knowledge" to which an expert can testify under Rule 702 will depend on at least four factors -- whether the theory or technique can be tested, has been subject to peer review, has an acceptable rate of error, and is accepted in the relevant scientific community.

The determination of these factors in a Rule 104(a) hearing may take a substantial amount of the judge's already scarce time and require the judge to become deeply involved in the science underlying the evidence offered. Bourjaily v. United States, 483 U.S. 171 (1987) (offering party must prove preliminary facts necessary for admission of evidence). Similar issues raised by a motion for summary judgment in a product liability case, required a district court to hold five days of hearings and considered extensive post hearing submissions in order to determine the validity of epidemiological data and methods upon which an expert was willing to give his opinion regarding causation. Deluca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3rd Cir. 1990).(hearings held on motion for summary judgment).

At a Rule 104(a) hearing, rules of evidence need not apply, except those with respect to privileges, and therefore, such hearings may differ from those held by the district court in Deluca. The appointment of special masters to conduct Rule 104(a) hearings may be one way for district courts to hold Daubert hearings without burdening the courts' resources. Not only can a special master devote more time to becoming familiar with the evidence submitted, a master can be selected who has special expertise in the science involved. Thus, Rule 53(b) may permit the appointment of a pre-trial special master to hold Rule 104(a) hearings and make recommended findings of fact regarding conditions necessary to the admissibility of expert testimony. Under the terms of Rule 53, these

recommended findings about conditions of admission, would stand unless clearly erroneous.

B. Case Managers.

In some complex cases, judges have needed help in addition to the supervision of discovery. They have obtained this more comprehensive assistance by appointing a master to carry out overall management of the case in its pretrial stage and advise them on scientific and technical issues. In the Ohio Asbestos Litigation two special masters were appointed to develop data collection system, hire experts, and design computer programs to evaluate claims for settlement purposes. Case Management Plan and Case Evaluation and Apportionment Process Order No., 6 (Dec. 16, 1983). See also Jenkins v. Raymark, Indust., Inc. 109 F.R.D. 269, 288 (E.D. Tex. 1985); and In re Department of Defense, 848 F.2d 232 (D.C.Cir. 1988) (a master was appointed to evaluate the classified nature of thousands of documents in a freedom of information suit. Rather than undertake an in camera review, the court charged the expert master with selecting a scientifically sound representative sample of withheld documents and summarizing contentions regarding their privileged nature.) See generally, Francis McGovern, Resolving Mature Mass Tort Litigation, 69 B.U.L. Rev. 659 (1989).

These needs often arise when the claims of class action plaintiffs need to be evaluated for the purpose of settlement negotiations and trial preparation. For example, in the Ohio asbestos litigation, a case consolidating thousands of claims, the district court appointed two special masters to develop a case management plan for resolving all pending cases (eventually numbering more than 9,000) within a two year period. Ohio Asbestos Litigation, No. 83- AL (N.D. Ohio General Order No. 67 filed June 1, 1983. In addition to supervising discovery, these masters devised a plan for obtaining information on the outcome of similar cases, gathering information about outcome determinative variables among the members of the class and developing a system of computerized case-matching that permitted the parties to bargain within estimated settlement ranges. Rather than simply conducting discovery or making recommended findings of fact, these masters provided technical advice to the court, largely about techniques for gathering and analyzing large amounts of empirical data. Thus, in some large and complex suits, the judges have needed expert and technical assistance, not to understand the subject matter of the suit or issues of causation, but to handle massive amounts of non-technical information. See Francis E. McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. Chi. L. Rev. 440, 478 - 91 (1986)

C. Settlement.

Often, masters appointed to supervise discovery try to promote joint stipulations regarding undisputed scientific facts or techniques. In doing so, many have become mediators of differences between the parties regarding either scientific information offered in evidence or scientific facts necessary to findings of liability. United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), remanded 623 F.2d 448 (6th Cir. 1980), modified, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981). Wayne D. Brazil, Special Masters in Complex Case: Extending the Judiciary or Reshaping Adjudication? 53 U. Chi. L. Rev. 394, 410 (1986).

Relatively recently, courts have made this mediation function more explicit, and have expressly appointed special masters to achieve settlements in complex litigation, especially mass tort cases. See e.g. In re Joint Eastern and Southern Districts Asbestos Litigation, NYAL CV 87-1383, CV-87-2273 (E. & S. D. N.Y. 1991); In re DES Cases, CV 91-3784,, Misc. 91-456 (E.D.N.Y. 1992). Encouraged by the 1983 amendments to Rule 16(a) to facilitate settlement of the case, federal judges are permitted to "take action with respect to ...extraordinary procedures to resolve disputes." Fed. R. Civ. Proc. 16 (a) and (c). See generally, D. Marie Provine, Settlement Strategies for Federal District Judges, (federal Judicial Center 1986)

While courts can appoint masters to promote settlement at any stage of litigation, the appointment of a master at the pre-trial stage permits the judge to use firm, strict trial dates to remind the parties of the expense of litigation and create incentives to settle the case if possible. In addition, the appointment of pre-trial settlement masters permits the court to delegate more assertive tasks to the master in order to minimize judicial contacts with the parties and the apparent bias and prejudgment they suggest. Such appointments also eliminate the opportunities for party posturing and manipulation of the trial judge through discovery tactics.

Some courts choose settlement masters for their particular scientific or technical expertise (usually at the remedial stage of litigation), but other courts that find such skills important to settlement negotiations have appointed experts under Federal Rules of Evidence 706 to advise the parties and the court on settlements and the framing of consent decrees. Such appointments remain rare, however. See e.g. San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp. 34 (N.D. Cal. 1983) (appointment of a "settlement team" of experts pursuant to Rule 706, nominated by the parties and the court to draft consent decree); cf. Gates v. United States, 707 F.2d 1141 (10th Cir. 1983) (appointment of a panel of experts under Rule 706 to assist the trial court in understanding complex neurological and epidemiological issues in a swine flu vaccine case).

While most settlement masters fulfill their function through informal procedures, some hold formal hearings in the form of summary or mini-trials, used to evaluate claims for purposes of negotiation. Factual findings of specific

causation based on scientific evidence must be made when a master is appointed to evaluate individual claims for purposes of negotiating settlements as well as distributing awards. Findings of causation as a matter of fact in theses instances often require the same kind of receipt and evaluation of scientific evidence and witnesses that occur at the liability stage of litigation.

D. Fact finders.

Rule 53(b) anticipates the appointment of masters to make recommended factual findings going to the merits of the dispute before the court. Thus, it provides that in actions presenting complicated issues for the jury or exceptional conditions, masters may require the production of evidence, hold formal hearings at which the rules of evidence apply, issue subpoenas, administer oaths, and create record for review. Historically, masters were appointed by courts of equity to carry out tedious tasks necessary to report on evidence and determine the accuracy of accountings and damage calculations. See Kimberly v. Arms, 129 U.S. 512, 523 (1889).

Although modern courts use special masters more frequently in the pre-trial and remedial stages of litigation, special masters are appointed to make recommendations with regard to facts necessary to find liability. As discussed above in section II, D, 2, courts have placed constitutional and other restrictions on the appointment of masters to hear evidence and make recommended findings of facts going to the merits of the dispute.

Nevertheless, , in patent litigation, despite the holding in LaBuy special masters are commonly required to rule on technical and scientific evidence in order to make recommendations on the merits of infringement claims. And in large complex class action suits special masters expert in economics and knowledgeable about computers was appointed to determine factual issues of causation necessary to findings of liability. E.g. McLendon v. Continental Group, Inc., 749 F. Supp. 582 (D.N.J. 1989) aff'd 908 F.2d 1171 (3rd Cir. 1990) . Similarly, where scientific medical evidence was anticipated in a trial on the merits of an injunctive action against a prison, the court appointed a special master to aid the court in evaluating the quality of medical services and conduct a medical survey of all correctional institutions. Costello v. Wainwright, 387 F. Supp. 324 (M.D. Fla. 1973). In many instances, masters appointed to try issues of fact, find themselves becoming mediators of the dispute, involved in facilitating settlements, as well as finding facts.

E. Expert Advisors.

Rule 53 authority had also been used to appoint masters who are an expert in the subject matter of litigation, to act as a neutral advisor to the court during the liability stage of litigation. United States v. Conservation Chem. Co., 106 F.R.D. 210,220 (W.D. Mo. 1985)(expert on environmental law appointed master in suit to

enforce mandatory cleanup of chemical waste disposal site to prepare case for trial of liability issues, finding "[R]ule [53] is broad enough to allow appointment of expert advisors."); In Re United States Dep't Defense, 848 F.2d 232, 234-35 (D.C. Cir. 1988)(affirming appointment of a security cleared intelligence expert in national security matters to advise the court on the sensitive nature of 2,000 Defense Department documents sought in a freedom of information suit, but not to make recommendations); Patricia M. Wald, Exceptional Condition – The Anatomy of a Decision Under Federal Rule of Civil Procedure 53(b), 62 St. John's L. Rev. 405 (1988); Danville Tobacco Ass'n v. Bryant-Buchner Associates, Inc., 333 F.2d 202 (4th Cir. 1964)(expert in tobacco marketing appointed special master to provide guidance to the court).Wright and Miller, Federal Practice and Procedure, Civil §2602 at n. 16. Rather than act as a fact finder or mediator between the parties, evaluating the parties' scientific evidence and/or facilitating their agreement about scientific facts, these masters functioned more like court appointed experts than traditional masters. However, unlike court appointed experts, they were not subject to cross examination by the parties and could be given greater case management powers.

F. Remedial Masters.

Much of the justification for the appointment of remedial masters to help formulate remedial decrees and supervise compliance with institutional reform orders is the need for assistance in evaluating technical and scientific evidence submitted by the parties regarding the treatment of prisoners, mentally retarded persons, and mentally ill persons. Hart v. Community Sch. Bd. of Brooklyn, N.Y., 383 F. Supp. 699, 764 (S.D.N.Y. 1974) (court appointed expert master to serve investigator and consultative function and advise court in technical areas of desegregation case so court could approve an effective remedial order). Reed v. Cleveland Bd of Educ., 607 F.2d 737, 741-44 (6th Cir. 1979); Pennhurst, N.Y. v. Carey and Ruiz v. Estelle 679 F.2d 1172 (5th Cir. 1982). Expert masters appointed after a finding of liability in environmental and institutional reform litigation often advise the court in periodic reports, making recommendations for detailed remedial orders or amendments to remedial decrees based on their own expertise See generally, e.g. Timothy G. Little, Court-Appointed Special Masters in Complex Envtl. Litigation: City of Quincy v. Metropolitan District Commission, 8 Harv. L. Rev. 435 (1984); Alberti v. Klevenhagen, 660 F.Supp. 605, 613-18 (S.D.Tex

Although a federal judge may appoint expert masters to recommend remedial orders, in some cases, judges insteadhave appointed special masters with authority to employ experts. See generally, e.g. Timothy G. Little, Court-Appointed Special Masters in Complex Envtl. Litigation: City of Quincy v. Metropolitan District Commission, 8 Harv. L. Rev. 435 (1984); Alberti v. Klevenhagen, 660 F.Supp. 605, 613-18 (S.D.Tex). Fox v. Bowen, (subsequently Fox v. Sullivan), 656 F. Supp. 1236 (D.Conn. 1987), Civil No. h-78-541 (JAC), 656 F. Supp. 1236 (D. Conn. 1987) (Special Master's Final Report describing use of

medical experts to assist the master in making detailed findings of fact regarding the defendant s' implementation of an order requiring revision in standards and procedures for determining Medicare eligibility for nursing home benefits); U.S. v. Michigan 680 F. Supp. 928 (W.D.Mich. 1987) (special remedial master used independent expert to review proposed mental health service plans).

G. Monitors .

In institutional and other reform litigation, such as suits involving school systems, prisons, nursing homes and mental hospitals, remedial masters must often make findings of fact based on expert testimony about medical, mental health and penal practices of defendants. See generally Susan P. Strum, A Normative Theory of Public Law Remedies, 79 Geo. L. J. 1355 (1991) and James S. DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 N.Y. L. Rev. 800, 803 n.23-25 (1991). Thus, as court monitors, these masters are required to find facts regarding defendant compliance, settle disputes over refinement and amendment of remedial orders, and advise the court through their periodic reports and accountings.

The appointment of masters to monitor compliance with decrees usually occurs because the defendant has been unwilling or unable to comply and the appointment is often opposed by the recalcitrant defendant. In such cases, special masters are often selected by the judge, without the approval of both parties, on the basis of their special knowledge of the subject matter of the suit. Where parties do agree on the need for a monitor, provision for a monitor is usually included in a consent decree and thus is not made pursuant to Rule 53. Thus, masters with scientific or technical expertise are appointed to oversee compliance with remedial orders in institutional reform suits because they are able to assess the defendant's performance on the basis of their own special knowledge and to seek the opinions of other experts.

In addition, some remedial masters authorized to retain experts and to make informal findings of fact through viewing and ex parte interviews have functioned more as investigators than as experts or judges. Jack B. Weinstein, Improving Expert Testimony, 20 U. Rich. L. Rev. 473, 490 (1982). Masters who were appointed to monitor compliance with remedial decrees in institutional reform suits, although often experts themselves, commonly employed other experts to evaluate the defendants' performance of remedial obligations in specialized areas. For instance, in a suit brought to reform the Puerto Rican prison system, experts were hired by the master with court approval to evaluate compliance with constitutionally required safe and sanitary physical conditions, medical treatment and protection. Feliciano v. Barcelo, 672 F. Supp. 591 (D.C.P.R. 1986).

In this investigatory role, masters employ experts to advise them and the court through them. In a celebrated case involving pollution of the Boston harbor in

which a master was appointed to advise the court on a remedial order, the court appointed Harvard law professor Charles Haar to investigate the history and functions of present sewage system and propose remedial plans. See also Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 53 U. Chi. L. Rev. 394, 414 (1986) and Timothy G. Little, Court-Appointed Masters in Complex Envt'l. Litigation: City of Quincy v. Metropolitan Dist. Comm'n., 8 Harv. L. Rev. 435, 473-75 (1984). And, the master in a recent gender discrimination suit was ordered to hire an expert on damage issues from a list of three candidates nominated and interviewed by the parties. Hartman v. Gelb, No. 77-2019 CRR (D.D.C. 1991).

H. Masters as Claims Evaluators.

In product liability cases, special masters have been appointed to provide case management and expertise in evaluating thousands of claims prior to trial, in an effort to facilitate settlement negotiations. A law professor was appointed master in several asbestos and toxic tort cases to profile the claims characteristics of class representatives based on evaluation of medical evidence provided by expert consultants and sound questionnaire methodologies, sampling techniques and statistical analysis. Jenkins v. Raymark Indus. 109 F.R.D. 269, 272 (E.D. Tex. 1985)(Francis McGovern appointed special master to assess asbestos injury claims). Wayne B. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication? 53 Chi. L. Rev. 394, 404-06 (1986). Pre-trial claims evaluation often involves making factual determinations regarding elements of the plaintiffs' case, such as the cause of plaintiffs' losses, as well as the amount of losses suffered.

At the post liability stage, masters are also appointed to develop statistically sound, technically complex means of evaluating the damages of thousands of claimants to limited funds, such as the funds established in the Dalkon Shield and Manville asbestos cases. See generally, Symposium: Claims Resolution Facilities and the Mass Settlement of Mass Torts, 53 Law and Contemp. Prob. 1 - 205 (Francis E. McGovern, ed. 1990) (authors include Francis E. McGovern, Scott Baldwin, Lawrence Fitzpatrick, Marianna S. Smith, Robert B. McKay, Harvey P. Berman, Kenneth R. Feinberg, Mark A. Peterson, Kenneth S. Abraham, Glen O. Robinson, Ian Ayres, Deborah R. Hensler, B. Thomas Florence, Judith Gurney, and Tom R. Tyler). And see Michael Saks and Peter Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 Stan. L. Rev. 815 (1992); The Evolving Role of Statistical Assessments as Evidence in the Courts (Stephen E. Fienberg ed. 1989).

Similar techniques were used by the special master in a suit brought by 5,000 terminated employees claiming damages for firings and plant closures in violation of ERISA. The special master, in that case describes in his report to the court, the necessity for sophisticated statistical regression analysis in developing

a plan to distribute a settlement fund to 5,000 class members who fell into four different complicated vesting categories, five different award categories, and had wide ranging individual earning capacity and consequential losses. Report of the Special Master, McLendon v. Continental Group, Inc. 749 F. Supp. 582 (D.N.J. 1989) aff'd 908 F.2d 1171 (3rd Cir. 1990). And see Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987) cert. denied, 108 S. Ct. 495 (1987).

The same needs arise after a finding of liability when the damages of thousands of successful claimants must to be determined. In re DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1991). Knowledge of sound empirical methods, statistical techniques and computer technology was needed to perform these tasks. Most often such expertise was provided by independent experts hired by the master.

IV. ISSUES RAISED BY THE APPOINTMENT OF MASTERS.

A. Selection of the Master.

1. Judicial selection.

Some judges simply select a master from among professional acquaintances, persons whose professional skills they admire and whose integrity and loyalty they trust. Thus, where masters were expected to pass on evidence presented by the parties in formal hearings, and make recommended findings of fact, at any stage of litigation, judicial-like qualifications are often sought and usually found in retired judges, former magistrates, or experienced hearing masters with whom the judge was acquainted. While these qualifications open the judges to the criticisms of cronyism, it may be difficult for judges to assure the integrity and trust worthiness of masters by other means.

2. Party approval.

Alternatively, particularly when making pre-trial appointments where settlement seemed possible, judges select one or several candidates for appointment and seek the parties approval. Settlement masters feel they cannot be effective mediators unless the parties, at least, agreed to their selection. Even when making post trial appointments, some judges who hope that the remedial master would be able to affect a settlement on outstanding damage and compliance issues and sought party approval of the master he selected. It has been held that a hearing is not necessary before appointing a master, nevertheless, judges will often ask the parties to interview several candidates for master or comment on the appointment of a proposed judicial selection. Gray W v. Louisiana, 601 F.2d 240 (5th Cir. 1979).

3. Party nomination.

Finally, where scientific or technical expert assistance was needed to help the parties arrive at settlement, provide case management, investigate facts, hire experts, and evaluate claims, judges were more likely to permit parties to participate by nominating candidates with particular skills. E.g. BIEC Int'l., Inc. v. Global Steel Services, Ltd. 791 F. Supp. 489 (E.D. Pa. 1992) (trade secrets determinations referred to Rule 53 master.) Each party proposed 10 names of qualified persons to serve as master and the court selected. While these suggestions are not treated as restricting the judge's discretion, they were respected, and judges were satisfied to select a candidate named by both sides Where courts have sought recognized experts in their fields to observe and make findings regarding scientific facts, they rely less on their personal acquaintances and nominations from the parties, and more on referrals from other judges and scientific or technical professional bodies. Thus, in institutional reform litigation, judges sometimes seek out experts through informal networks of judges and other experts, sometimes seeking referrals from recognized professional societies.

B. Conflict of Interest and Other Ethical Problems.

1. Ethical constraints on judges.

United States judges are constrained by a body of standards collectively known as judicial ethics which have a number of legal sources, including the Code of Conduct for United States Judges, federal disqualification statutes, financial disclosure requirements, and the judicial oath of office. See 1992 Code of Conduct. 28 U.S.C. §§ 144 to 455 (1988); 5 U.S.C. app. 6 (1992); 1992 Code of Conduct, Canon 5C; Beth Nolan, Report to the National Commission on Judicial Discipline and Removal: The Role of Judicial Ethics in the Discipline and Removal of Federal Judges. (1992). It is not clear which of these restrictions do, or should, apply to special masters While it is appropriate to disqualify candidates from serving as masters where they cannot provide neutral, objective determinations, it may not be appropriate to apply all judicial cannons of ethics to special masters.

2. Ethical constraints on masters.

Some courts have reasoned that since masters are subject to control by the court, and are needed for their expertise in particular subject matters, masters should not be held to the strict standards of impartiality that apply to judges. Morgan v. Kerrigan, 530 F.2d 401, 426 (1st Cir.), cert. denied, 426 U.S. 935 (1976). Other courts have concluded that because the "clearly erroneous" standard of review required by Rule 53, does not permit the district court plenary control over a master, the special master must be held to the same high standards applicable to the conduct of judges. Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988); Belfiore v. N. Y. Times Co., 826 F.2d 177, 185 (2d Cir. 1987), cert. denied, 484 U.S. 1067 (1988). And see In re Joint E. & S. Districts Asbestos Litigation, 737 F. Supp. 735, 739 (E. & S. D.N.Y. 1990) (In general,a special master or referee should be

considered a judge for purposes of judicial ethics rules).See also In re Gilbert, 276 U.S. 6 (1928)(special masters assume the duties and obligations of a judicial officer) and Jenkins v. Sterlacci, 849 F.2d 627, 630 (D.C. Cir. 1988) (Model Code of Judicial Conduct applied to special master. "Insofar as special masters perform duties functionally equivalent to those performed by a judge, they must be held to the same standards as judges for purposes of disqualification."). Several of the judges interviewed believed that masters were subject to the same ethical constraints as judges and entitled to the same judicial immunity, without qualification. In the final analysis, the applicability of judicial ethical proscriptions to special masters may depend on what functions they perform.

3. Special ethical problems – conflicts of interest.

The fact that appointment under Rule 53 assigns judicial tasks to people who are not full time judges raises particular conflict of interests issues. For example in United States v. Lewis, 308 F.2d 453, 457 (9th Cir. 1962) the court noted that those qualified to act as [masters] in a particular area are likely to have had prior association with those qualified as expert witnesses from that area. It decided that the test should be whether actual abuse appears.

Practicing attorneys who are appointed (and their firms) have an interest in maintaining their professional reputations, sometimes as members of a plaintiffs' or defendants' bar, and in obtaining employment in the future. Such attorneys may have represented one of the parties in the past, or have litigated against lawyers who appear before them as masters. In re Joint E. & S . Dists. Asbestos Litig., 737 F. Supp. 735, 742 (E. & S. D. N.Y. 1990) (motion to disqualify special master denied where master was appointed to act as a settlement master in cases involving asbestos exposure, and where master and his firm had acted on behalf of the moving defendant in conception with legislative efforts in the past). Mister v. Ill. Cent. Gulf R.R. Co., v. TWA 790 F.Supp. 1411 (attorney master was plaintiffs attorney in another suit in which same expert appeared for defense as appeared before him as master).

Retired judges have an interest in being appointed to future cases and some also maintain private practices. Law professors sometimes have ideological positions and academic credentials that can affect or be affected by their performance as masters.

Non-legal experts, such as prison experts, have sometimes been hired as expert witnesses in previous litigation by the parties whom they monitor as special masters, or they hope to be hired by such parties in the future. Lister v. Commissioners Ct., 566 F.2d 490, 493 (5th Cir. 1978) (appointment of a special master to devise a reapportionment plan who had testified as an expert witness for the plaintiffs in the same suit held improper, citing In Re Gilbert, 276 U.S. 6 (1928).

4. Dealing with conflicts of interest.

Courts deal with conflict of interest issues in several ways. First, most provide some opportunity, either at a formal hearing on a motion to appoint a master or at a more informal conference with attorneys, for the parties to question the master about possible conflicts of interest and to raise any objections they might have before the appointment is made. Second, some conflicts are fully disclosed on the record so that parties who did not object can be estopped from complaining later. Where a master is appointed to facilitate a settlement, parties who object to a conflict of interest after appointment of the master may withhold their agreement to a settlement by way of objection. Thus their continued participation can be seen as a continuing waiver of any objection. Waiver was implied by the parties agreement to the appointment or a subsequent party settlement with knowledge of the alleged conflict. In one case, a party that subsequently objected was estopped from doing so. Third, some courts take steps to eliminate conflicts by restricting the master's subsequent employment by either party or the master's concurrent representation (or that of his firm) of other parties with conflicting interests.

C. Orders of Reference.

Orders of reference vary considerably in specificity. Some of the most complex tasks, for instance those involved in providing case management in a mass tort case, have sometimes been assigned in short, general orders.

Rule 53(c) provides:

> The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.

Some of the issues that are addressed in orders of reference include the following:

1. Scope and limitations on authority, i.e. functions assigned and specific authority to carry them out
2. Scope of the master's investigative authority
3. Discovery rights to evidence supporting master's findings
4. Disclosure of conflicts of interest.
5. Weight to be given findings and recommendations
6. Periodic reporting requirements
7. The duration of the appointment
8. Standards of performance
9. Periodic accountings - approval by the court

10. Compensation - rate and manner of payment
11. Ex parte communications with the judge
12. Ex parte communications with the parties
13. Ex parte communications with the experts and third parties
14. Liability and immunity of master (insurance and bonds)
15. Expiration of the appointment

Issues that go to the propriety of the appointment itself -- conflicts of interest, ex parte communications, scope of authority -- may be addressed expressly in the order of reference, while more procedural issues -- discovery process, the appointment of experts, formal hearing procedures -- may be left to negotiation between the master and the parties after the appointment. Express terms put the parties on notice with regard to essential features of the appointment and permit them to object and appeal through mandamus if they choose. Procedural issues decided by the master after the appointment can be appealed to the judge.

D. Ex Parte Communications.

There is a question whether ex parte communication between a special master and the parties and between the special master and the judge should be permitted under Rule 53. See James S. DeGraw, Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters, 66 N.Y.U. L. Rev. 800, discussion at notes 95 -145 (1990). Rule 53 does not address ex parte communications, but seems to be based on the assumption that masters, like judges, will generally not proceed ex parte. Thus, Rule 53(d) provides: If a party fails to appear at the time and place appointed [for meeting with the parties], the master may proceed ex parte or , in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

1. Constraints on judges' ex parte communications.

There is significant authority that holds ex parte communications by a judge with parties or third parties is improper. The Model Code of Judicial Conduct Cannon 3B(7)(1990) provides: A Judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceedings. Some cases hold that such communications are improper for both the master and the judge and must be prohibited whether or not the parties consent to such procedure. The Model Code of Judicial Conduct Cannon 3B(7)(1990) provides: A Judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning pending or impending proceedings. To the extent that masters take on judicial responsibilities, these constraints on ex parte communication may be applicable.

Other authority holds that masters may communicate ex parte with both the parties and the judge if the Order of Reference expressly permits it. See. e.g. Alberti v. Klevenhagen, 660 F. Supp. 605, 610 (S.D. Tex. 1987); Ruiz v. Estelle, 679 F. 2d 1115,1170 (5th Cir. 1982); and Thompson v. Enomoto, 815 F. 2d 1323, 1326, n. 7 (9th cir. 1987). Still other would hold such procedure proper only if expressly consented to by the parties.

2. Ex parte communication between the master and the parties.

Proponents of such ex parte communication argue that many judicial functions such as case management and settlement facilitation, require a judge to play a more active litigation role to which ex parte communications is appropriate. For example, the Civil Rules permit judges to discuss settlement at pretrial conferences. Fed. R. Civ. P. 23(e)-66. Therefore, when mediating disputes before trial or facilitating the settlement of damage issues after liability, judges may individually consult the lawyers, the parties, insurance companies and others to gain information necessary to their task. In re Joint E. & S. Dists. Asbestos Litig., 737 F. Supp. 735, 739 (E. & S. D.N.Y. 1990). It is felt that when masters perform these same functions, they, too, may properly engage in ex parte communications. United States v. Conservation Chem. Co., 106 F.R.D. 210, 234 -35 (W.D. Mo. 1985) (master appointment would not be revoked where Master engaged in settlement negotiations ex parte with the parties and the record was completely void of any evidence suggesting that the Master's impartiality might reasonably be questioned). In fact, some masters argue that assignment of settlement and mediation to a master, insulates the judge from ex parte communications, and permits the judge to subsequently try the case without pre-judgment based on those communications.

Master's findings of fact based on informal, ex parte information are often circulated in draft to the parties before they were reported to the judge. Thus, a party may challenge ex parte facts, in writing, before the master reports them to the court. In addition, parties who renewed their objections to the master's report when it was submitted to the court were given a de novo hearing on the disputed facts, rather than the court giving "clear and erroneous" weight to the report.See Alberti v. Klevenhagen, 660 F.Supp. at 609; Ruiz v. Estelle, 679 F.2d 1115, 1163, amended in part 688 F.2d 266 (5th Cir. 1982) and 78 Colum. L. Rev. 829 - 30 (1978). At these hearings, parties are permitted to cross examine the master, cross examine observation witnesses upon whose testimony the master relies in making his findings, and present witnesses of their own. In this way, it is felt that prejudice that might result from ex parte communication was eliminated. Finally, orders of reference provide that ex parte communications between the master and the parties would be permitted. See order of Judge Sarokin, McLendon v. Continental Group, Inc. 749 Supp 582 app. at 612-16. Where objections are made to the reference, limitations on ex parte communications may be necessary to avoid charges it violates due process and Article III guarantees.

3. Ex parte communication between the master and the judge.

It can be argued that masters can not carryout their duties effectively if they are completely prohibited from discussing scheduling, strategies and procedures with the judge outside of the presence of the parties. Yet, in light of ethical constraints judges may feel uncomfortable meeting with their masters without the parties present. The appropriateness of such communication can turn on the characterization of the master as a judicial agent or as an outside adjunct. If viewed an agent of the court, it is proper for the judge, as principal, to discuss with the agent the performance of his/her duties. If the master is viewed as an third party adjunct, it is improper for the judge as ultimate decision maker to receive undisclosed evidence and information from the master that could influence his or her decisions or which might reasonably be thought to do so.

However, it may again be more useful to consider the functions and roles of the master. Thus, where the purpose of the appointment is to obtain the master's recommended findings of fact, ex parte communication would seem inappropriate to discuss the performance of the master's duties since the judge will review those findings and the record upon which they are based to determine whether they are clearly erroneous. Information outside the record could prejudice that review. Similarly where the master's role is that of mediator and facilitator, information going to the substance of proposed settlements and the facts of the case should not be communicated to the judge ex parte. But, a master appointed as an expert to advise the court might appropriately talk with the judge privately in order to provide the one-on-one education some judges want. Masters who bring their expertise in quantitative analysis to bear on the presentation of non-scientific and technical data would seem to serve a similar role, and private discussions with the master regarding his or her performance do not seem to prejudice the judge's independence or the parties ability to present their case.

E. Liable for Malfeasance.

Appointed under Rule 53, masters may acquire judicial immunity and not be exposed to much, if any, legal liability for dereliction of duty. Masters involved in cases in which large sums of money is at stake, may not be able to afford insurance to cover all of the potential liability. Discussed in Wayne Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication? 53 Chi. L. Rev. 394, 409 (1986). Even if immune from liability, the expense of defending such suits could be significant.

To the extent that masters perform functions that are essentially juridical, they may enjoy judicial immunity. Smith v. District of Columbia, No. 92-555 (D.D.C. 1992) Order No. 42192 (April 20, 1992), on appeal, No. 93-7046 (D.C. Cir. 1993), (complaint seeking to hold a special master personally liable for malfeasance

failed to state a claim upon which relief could be granted and was dismissed under Rule 12(b)(6) because the master was cloaked with judicial immunity when performing his official duties). It has also been held that judicial immunity extends to mediators, arbitrators and others appointed by the court to play a role in alternative dispute resolution programs. Wagshal v. Foster, No. 92-2072 (TPJ)(Feb. 5, 1993) 61 U.S.L.W. 1126 (Mar. 2, 1993) (Litigant challenged a case evaluator for conflict for interest).

Yet, absolute judicial immunity does not extend to all the functions performed even by judges. In suits against judges for personal liability, courts have taken a functional approach, making a distinction between the case-deciding functions of judges, on the one hand, and their administrative, managerial, and executive functions, on the other. Forrester v. White, 484 U.S. 219 (1988). The appointment of a special master pursuant to Rule 53 would seem to be a judicial, not an administrative function. Thus, although judges have qualified, good faith immunity for acts that do not violate clearly established statutory or constitutional rights of which a reasonable person would have known they may be liable where their administrative actions do not meet that standard. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

F. Compensation.

Rule 53 provides that "compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct...." See generally, David I. Levine, Calculating Fees of Special Masters, 37 Hastings L. J 141 (1985). Therefore, cost to the parties is a factor that must be taken into account in appointing a special master. E.g.Fraver v. Studebaker Corp., 11 F.R.D. 94 (W.D. Pa. 1950) (motion for appointment of master in patent suit denied because of burdensome cost to plaintiff).

The compensation of the master is set by the court and allocated between the parties as a cost. In some suits, where one of the parties is impecunious or the other party was blameworthy, judges allocate the whole cost to one party or divide it among several defendants, and even amici. See e.g. Hart v. Community Sch. Bd., 383 F. Supp. 699,767 (E.D. N.Y. 1974) aff'd, 512 F.2d 37 (2d Cir. 1974) (holding of court had broad discretion to allocate costs and assess against defendant whose action necessitated the school desegregation suit). In Nebraska v. Wyoming and Colorado, 112 S. Ct. 2267 (1992), the Supreme Court approved assessment of amicus with costs of master on theory that they did not object and that proceedings were longer and more costly because of their participation.

There is considerable variation in the standards used by judges to determine the rate of the master's compensation. The Supreme Court has adopted the not particularly helpful standard of "liberal but not exorbitant" compensation for

masters. Newton v. Consolidated Gas Co., 259 U.S. 101, 105 (1922). Most often, the rate is set in relation to the market in which the master -- private practitioner, retired judge, academic, or scientific or technical expert consultant -- could otherwise sell his or her services. Where a master has skills as a legal practitioner and technical expert, such as some of the expert prison masters, the court must decide which of the two markets will establish a basis for the master's fee. In that case, the rate should be the higher of the two, if the master will use both skills, and they can only be procured by others at the higher rate. Some masters have been asked to discount their fees to "subsidize" justice in the public interest, and sometimes the parties and the master are allowed to negotiate a rate and report back to the court. This approach has been disapproved by at least one court. Finance Comm. of Pennsylvania v. Warren, 82 F. 525, 528 (7th Cir. 1897). The masters and parties in those cases were apparently satisfied with that process, although it raises questions about possible bias where only one party is paying the master.

Apart from the master's hourly rate, expenses are usually billed separately. Law professors also tend to use paid assistants and bill them separately. The separate expenses of masters (particularly those that compiled empirical, statistical data themselves in an effort to evaluate and settle claims) were significant, and need to be taken into account in determining whether the aggregate expenses of the master's efforts are cost effective.

Orders of reference vary in the timing, detail and frequency of the masters accounts of fees and expenses. Some masters provide extremely detailed descriptions of meetings and telephone calls, research and reading, while others provide a summary statement of hours, rates and expenses only. Most submitted accounts monthly or quarterly. Court approval of payments to the master, either before they are incurred or before they are paid at least eliminates the possibility of later objections to the amount or purpose of particular expenses. And, because of the extremely large amount money paid to masters in some complex cases, detailed support on the record for master's expenses, provides assurance that the expenses are justified in the eyes of the court.

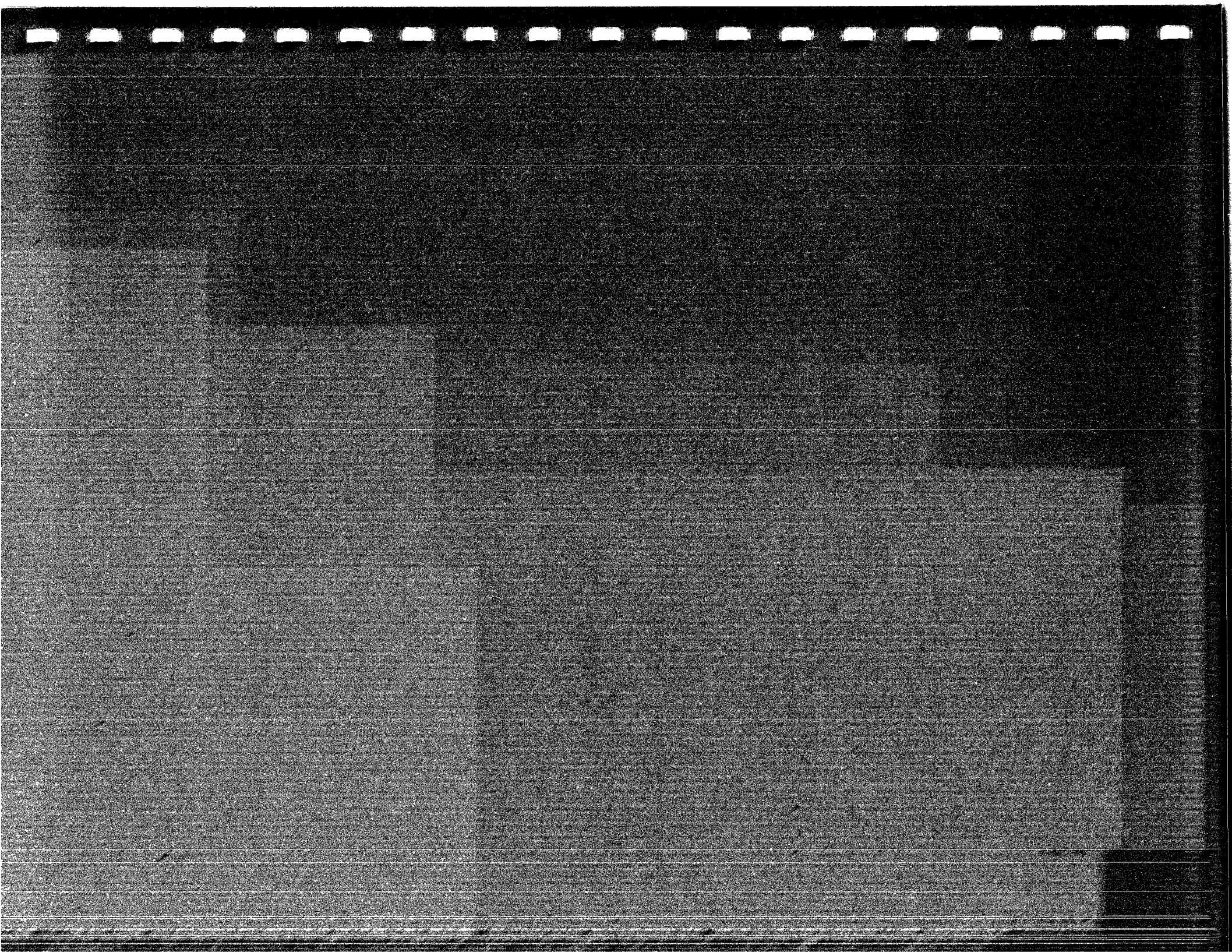
Special masters are paid in several ways. In some cases, payment is made through the court registry, i.e. after submission of the accounting, the charged party pays the approved amount into the court registry, whose clerk made out a check to the master. This procedure makes payment part of the court record, and may promote a perception that the master is the court's agent and not the agent of one of the parties. In other cases, court have ordered the creation of a pool, funded by the parties charged, out of which the master's compensation and expenses are paid after approval by the court. Some masters were paid directly by the party charged, after submitting accountings for the court's approval.

V. ADVANTAGES AND DISADVANTAGES OF USING MASTERS

The appointment of special masters to handle complex, technical issues and voluminous information has several advantages and disadvantages. On the one hand, masters may be able to bring special expertise to bear on the issues referred that would be difficult to secure by other means; they can spend more time on the case and become more intimately acquainted with technical facts and the parties than can a judge with a full caseload; when permitted, they can engage in ex parte discussions with the parties facilitating settlement without pre-judging the merits; they can provide immediate resolution of technical, pre-trial discovery issues by telephone and informal conferences; they can conduct efficient, informal, as well as formal, hearings; they can engage in intensive, some times round the clock, efforts to bring about settlement or ready the case for trial; and may be able to save the parties time and expense in the long run by developing efficient informal procedures and promoting settlements. See generally, Wayne Brazil et al., Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983).

On the other hand, the appointment of a master adds immediate, additional litigation expense for the parties; it can cause delay, particularly when the judge must conduct reviews of voluminous masters' reports; it can impair supervision by the judge; it can distance the court from the case before trial and it can appear to provide only "justice at a price." Manual for Complex Litigation §20.14 (1985). More fundamentally, it may represent a deviation from the traditional adversary model of justice, interjecting a neutral, but not passive, specialized decision maker in our judicial system which otherwise depends on more passive, generalist judges. Unlike court appointed experts, masters are not witnesses to be examined and cross examined by the parties, but neither are they full time, government paid jurists, like magistrates. Regardless of the judicial model envisaged, the appointment of masters in some circumstances is seen as an improper delegation of judicial authority, violating Article III, the due process clause or the authority granted in Rule 53(b).

To date, Rule 53 has provided a flexible, if loosely bounded mechanism through which courts can fashion procedures for dealing with complex issues, technical information and massive data that are suited to the special needs of an individual case. Deciding whether or not to request the appointment of a special master to assist the court in handling these issues requires an identification of the kind of expertise and assistance required, the purposes to be served, and the relative ability of court appointed experts, masters, and magistrates to further those purposes fairly and efficiently.



The footnote that accompanied the passage in *Raddatz* where Chief Justice Burger disposed of defendant's argument based on *Crowell v. Benson* leaves little doubt that the Court would reject an Article III attack on a delegation of nondispositive powers to special masters in pretrial. In this note,[514] Burger described approvingly how the Supreme Court, when exercising its "original jurisdiction under Art. III," uses special masters to take evidence and then to recommend findings on legal and factual issues. The Chief Justice explicitly observed that these special masters "may be either Art. III judges or members of the Bar."[515]

In sum, it seems clear that at least in some situations federal courts have inherent power to refer discovery matters to special masters. What is lacking is clear guidance about when and how to exercise that power.[516] Since Rule 53 was designed to regulate references of a different kind, it is of little utility for this purpose. Federal judges need a new federal rule (or a major addition to an existing rule) that outlines the considerations and procedures for *pretrial* references. As a first step in that direction, I offer a tentative proposal for such a rule in the concluding section of this article.

V. Toward a New Federal Rule

Guidelines for the pretrial use of special masters probably should be added, in a separate section, to Rule 16. It does not seem wise to add provisions for this purpose to Rule 53, which appears in the section of the rules devoted to "Trials" and which has generated a body of doctrine that is consistently helpful only with respect to conventional trial-stage references. I offer the following model rule as a first step toward formulating new provisions for using masters in the pretrial period.

Special Masters in the Pretrial Period

(a) *Special Master: Defined.* As used in this rule, the phrase "special master" refers to an attorney, a retired judge, or a law professor who has the qualifications described in paragraph (g)(1) of this rule, who is appointed, with or without the consent of the parties, in the manner prescribed in paragraph (g)(2) of this rule, and to whom a district judge refers specified pretrial duties in connection with a particular case or group of related cases.

(b) *Rule 53 Distinguished.* None of the provisions of Rule 53 ("Masters") applies to a reference of pretrial duties under this rule. The phrase "special master" as used in this rule does not include "a referee, an auditor, an examiner, a commissioner, [or] an assessor"[517] as those terms are used in Rule 53.

None of the provisions of this rule apply to references of trial-stage responsibilities under Rule 53.

514. *Id.* at 683 n.11.

515. *Id.* Footnote 11 of Chief Justice Burger's opinion is reproduced in its entirety in note 400 *supra*.

516. Cf. Comment, *supra* note 60, at 1004, where the authors conclude, after reviewing *La Buy, First Iowa,* and Judge Kaufman's views: "To clear up the uncertainty [about whether pretrial discovery references are permissible and about what standards should be used to evaluate the propriety of such references], it would seem advisable to amend Rule 53 so as to provide express authorization for the appointment of masters to supervise discovery."

517. Fed. R. Civ. P. 53.

(c) *Scope of Discretion to Refer Pretrial Duties to Special Masters: Generally.*

(1) No district judge may refer to a special master initial responsibility for all pretrial matters in any category of cases within the subject matter jurisdiction of the United States district courts.

(2) A district judge may not refer pretrial tasks to a special master if the judge has the resources (time and expertise) to perform those tasks effectively.

(3) Without the consent of the parties, a district judge may not refer a pretrial matter to a special master if it appears that the direct cost of the reference would be out of reasonable porportion to the amount in controversy, or if the cost of the reference would impose an unjustifiable burden on any party who might incur any part of the financial responsibility for the master's fees or expenses, or if there is a substantial disparity between the economic resources of the parties and that disparity, in combination with the location of responsibility for the cost of the reference, might give one or more of the parties an unfair advantage.

(4) When deciding whether to order a pretrial reference, or what kinds of pretrial duties to refer, a district judge should be sensitive to the need to maintain public confidence in the adjudicatory process and in the courts.

(5) Without the consent of the parties, a district judge may not empower a special master to define or delimit the substantive issues involved in litigation.

(6) Without the consent of the parties, a district judge may not delegate to a special master authority to hold a hearing on or recommend disposition of a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to strike substantive claims, counterclaims, or affirmative defenses, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action.[518]

(7) Subject to the qualifications described in subparagraphs (c)(1) through (c)(6) above, when a district judge, exercising sound discretion,[519] determines that it would contribute substantially to the expedition or orderliness of case preparation, he or she may refer to a special master, with or without the consent of the parties, responsibility to supervise the pretrial development of a civil action or to perform discrete tasks related to the preparation of an action for trial. Subject to the rights of appeal described in paragraph (f) below, such discrete tasks may include, but need not be limited to:

(aa) monitoring distant, sensitive, or significant discovery events and ruling on disputes that arise in connection with such events;

(bb) evaluating the propriety of deposition questions, interrogatories, requests for admission, or requests to produce or inspect documents or other tangibles, and evaluating the validity of objections or the sufficiency of responses to such questions or requests;

(cc) evaluating claims that data, documents, or other tangibles are protected from disclosure by privilege or by the work product doctrine or because they constitute trade secrets;

(dd) supervising exchanges by the parties of narratives, contentions, and descriptions of evidence in procedures designed to promote stipulations and admissions and to organize a case for subsequent discovery and trial;

518. The model for this subparagraph is 28 U.S.C. § 636(b)(1)(A) (1976) (describing some of the jurisdiction of United States magistrates).

519. The purpose of including this phrase is to indicate that courts of appeal should employ an "abuse of discretion" standard when reviewing challenged pretrial references that exceed none of the limitations set forth in subparagrahs (1) through (6) of paragraph (c).

(ee) helping the parties to devise an overall discovery plan and to coordinate, sequence, and pace specific discovery events;
(ff) assisting the parties or the court in settlement negotiations;
(gg) hearing and determining pretrial motions not dispositive of a claim or defense, including, but not limited to, motions to compel discovery, for orders to protect parties, witnesses, or data, to terminate or limit discovery probes, or to fix the time, place, or procedure for discovery events.

(d) *Additional Limits on Powers of Special Masters.*
(1) A special master appointed under this rule may exercise only those powers conferred upon him or her by the order(s) of reference. Parties who wish to expand a master's powers or duties may petition the court for an order supplementing the original order of reference.
(2) No special master appointed under this rule shall have the power to impose a judgment of contempt.
(3) When referring matters under this rule a district judge may authorize a special master to order a party or an attorney who has failed to meet a discovery obligation, or who has violated a pretrial duty imposed by a court order, local rule, or Federal Rule of Civil Procedure, to compensate other parties for the litigation expenses (including reasonable attorney's fees) incurred because of the failure or violation. Any such compensatory award granted by a special master is subject to review by the trial court but can be modified or set aside only if based on findings of fact that are clearly erroneous or on misunderstanding of controlling law.
(4) Except as specified in the preceding subparagraph, a district judge referring matters under this rule may not authorize a special master to impose sanctions. A special master who believes that an award of expenses under the preceding subparagraph is not a sufficient response to a situation may ask the district judge to initiate proceedings to consider imposing sanctions.

(e) *Procedures for Reference.*
(1) Every order of reference made under this rule must describe the tasks the master is to perform, the scope of authority being conferred upon the master, the timetable within which the master is to complete assigned tasks or to file progress reports with the court, the procedures and time limits under which parties may appeal decisions by the master and the standards of review the district court will apply if appeals of decisions by the master are filed. Every order of reference also must state that the master may communicate with the district judge about the merits of the action only in writing and that copies of any such communications must be sent simultaneously and by registered mail to counsel of record for every party to the action. Every order of reference also must state that no party may communicate *ex parte* with the master about the merits of the action.
(2) Whenever a court delegates tasks whose performance requires or would be expedited by a description of the issues the order of reference should identify the issues involved in the litigation with as much particularity as feasible.
(3) Where advisable, the district judge should hold a conference with all counsel of record and the special master shortly after ordering a reference. At this initial conference the judge should introduce the master, explain the tasks and powers being delegated, describe the procedures and timetables to be followed, and encourage a spirit of cooperation. Such a conference also might present an appropriate opportunity to refine the definition of the issues in the action and to encourage stipulations.
(4) An order of reference may authorize a master to hold a discovery conference as provided in Rule 26(f), to enter protective orders as provided in Rule 26(c),

or to impose limitations on or to terminate discovery proceedings as provided in Rule 30(d).

(5) Within limits set by the order of reference, a special master shall have discretion to fix reasonable schedules for discovery events and deadlines for submissions from the parties.[520]

(6) Where requested by a party, or deemed advisable by the district judge or the special master, arrangements may be made to preserve a record of proceedings before the master.

(7) Where appropriate, the order of reference should specify the dates on which or the intervals at which the master is to submit status reports to the district judge. Such an order should indicate the medium the master should use for reporting (e.g., telephone, letter, face-to-face conference) and the subjects the judge expects the reports to cover.

(8) Before deciding particular issues or submitting formal reports to the district judge a master may circulate among the parties, for their comments, drafts of proposed findings, rulings, or opinions.

(9) If so directed in the order of reference, the master shall prepare a final report upon the matters submitted to him or her. The master shall file the report with the clerk of the court in which the action is pending and simultaneously shall send, by registered mail, copies thereof to counsel of record for every party to the action. Exceptions or objections to any matter in the master's final report are waived unless filed with the clerk of the court in which the action is pending, and simultaneously mailed to the master, within 15 days after receiving the final report. Application to the district judge for action on or objections to the report shall be made by motion and upon notice as prescribed in Rule 6(b).

(f) *Standards for Review of Rulings by Masters; Allocating Expenses Caused by Appeals.*

(1) A district judge may modify or set aside a master's ruling on a pretrial matter properly referred under this rule and not dispositive of a claim or defense only if the ruling is based on findings of fact that are clearly erroneous or on a misunderstanding of controlling law.[521]

(2) A district judge who finds that a party has filed an essentially groundless or frivolous appeal of a master's ruling shall order that party to compensate other parties for the litigation expenses (including reasonable attorney's fees) they incurred responding to the appeal.[522]

(g) *Special Masters: Qualifications; Selection Procedure; Removal; Compensation.*

(1) *Qualifications.* No person may be appointed to serve as a special master under this rule unless he or she:

(aa) is not related by blood or marriage to a judge of the appointing court;

(bb) is not an attorney of record or otherwise involved in any matter pending before the appointing judge;

(cc) does not have a business or professional relationship with any of the parties or counsel in the case in which he or she will serve as special master;

520. See Hazard & Rice at pp. 88–91 *supra*.

521. Compare 28 U.S.C. § 636(b)(1)(A) (1976) and Citicorp v. Interbank Card Ass'n, 87 F.R.D. 43, 46, 48 (S.D.N.Y. 1980).

522. Compare 1912 Equity Rule 67:

Costs on Exceptions to Master's Report

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

226 U.S. 668 (1913).

(dd) is not involved in other litigation or business transactions in which any of the attorneys in the case in which he or she will serve as special master is involved;
(ee) has no personal knowledge of the matters in dispute in the case in which he or she will serve;
(ff) has no financial interest in the matter in which he or she will serve, or in any party to the action, and has no personal or financial stake in the outcome of the matter in controversy;
(gg) is not so identified with particular types of clients, or with views about matters involved in the case in which he or she will serve, that questions are likely to be raised about his or her impartiality;
(hh) has sufficient time available and has had sufficient experience to perform well the tasks to be referred;
(ii) has the temperament and maturity required of a person who will serve as a representative of the court.

(2) *Selection Procedure.* A district judge who has decided to appoint a special master should ask the parties to try to agree on a mutually acceptable nominee. If the parties identify such a person, the judge should acquire information about the nominee's background and qualifications, then interview the person. During the interview the judge should explain the contemplated assignment, assess the nominee's temperament and maturity, and determine whether he or she will have sufficient freedom from other obligations to perform the delegated tasks punctually. If satisfied with his or her qualifications, the judge should appoint the parties' nominee.

If, within a reasonable time, the parties cannot agree on a nominee, the district judge may appoint any person who meets the qualifications set forth in paragraph (g)(1), above.

(3) *Removal.* A special master appointed under this rule serves at the pleasure of the district judge to whom the case is assigned and may be removed or replaced at any time and for any reason by that judge.

(4) *Compensation.* Special masters appointed under this rule shall be paid at an appropriate hourly rate fixed by the district judge and described in the order of reference. The district judge, exercising sound discretion, may apportion responsibility for the master's fees and expenses among the parties in accordance with principles of fairness. In deciding how to apportion this financial responsibility, the judge may take into account any behavior by parties or counsel that helped create the need for a master or that unjustifiably increased the expense of the reference.

APPENDIX 1

FEDERAL RULES OF CIVIL PROCEDURE 53

Rule 53. Masters

(a) Appointment and compensation

Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of

Particularized Pleading

The pleading questions raised by Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 1993, 113 S.Ct. 1160, were discussed at the May meeting and put on the agenda for the October meeting. The portion of the May meeting minutes relating to these questions is attached.

The Leatherman decision involved two actions asserting that a municipal employer was liable because its law enforcement officers had violated the Fourth Amendment rights of the plaintiff and it had failed to train them to avoid Fourth Amendment violations. The district court dismissed, invoking the "heightened pleading standard" required by the Fifth Circuit in § 1983 actions. The heightened pleading requirement began with decisions requiring pleading "with factual detail and particularity" in actions against officers who likely would plead official immunity, so that the complaint would show arguments defeating immunity. It was later extended to actions asserting municipal liability. The Court of Appeals for the Fifth Circuit affirmed the dismissal. The Supreme Court reversed.

The core of Chief Justice Rehnquist's opinion for a unanimous Court is "that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." A plaintiff is not required to set out in detail the facts underlying the claim. Rule 9(b), which requires particularity in pleading fraud or mistake, does not include "any reference to complaints alleging muncipal liability under § 1983. Expressio unius est exclusio alterius."

The rationale of the opinion may be slightly clouded by a reservation expressed at the outset. The Court noted that municipalities do not enjoy immunity from suit; the limits on municipal liability are more direct. "We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." On the face of things, this reservation is puzzling. The "expressio unius" theory seems to apply to individual official immunity in the same way that it applies to municipal liability. The answer may be that "expressio unius" interpretation carries only so far; it can be overcome by pressing interests. Municipal corporation defendants do not have pressing interests that justify overriding ordinary pleading doctrine. Individual official defendants may have pressing interests that deserve to be protected by strict pleading requirements that were not contemplated when the Federal Rules were written. Protecting the immunity interests of individual defendants has generated a complicated body of doctrine that justifies appeal before final judgment, see 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10. Similar impulses may still justify special pleading doctrine after the Leatherman decision.

At the close of the opinion, the Court observed that Rules 8 and 9 were written before it had recognized grounds for holding municipal corporations liable because of constitutional wrongs by their employees.

> "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the addedd specificity requirement of Rule 9(b).. But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

This passage may be a veiled invitation to consider amending the pleading rules. An explicit suggestion for amendment has been made by Chief Judge Harry Lee Hudspeth of the Western District of Texas, who wrote to the Committee that an order for a more definite statement has been a valuable tool in determining whether pro se complaints are supported by any ground for litigation.

Beyond the setting of the Leatherman case, it seems clear that the required level of pleading specificity varies widely among different types of litigation. An exhaustive demonstration of this proposition was provided by Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 1986, 86 Colum. L. Rev. 433. A survey of more recent decisions by Judge Keeton led to the same conclusion: "[S]pecificity requirements are not limited to cases decided under Rule 9(b) or under Admiralty Rules C(2) and E(2)(a). Rather, the 'degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context.'" Boston & Maine Corp. v. Town of Hampton, 1st Cir., 1993, 987 F.2d 855, 866.

There is room to debate the desirability of this contextual specificity phenomenon. It may seem a wilful defiance of notice pleading philosophy. It also may seem a desirable reinstatement of the easily ignored requirement of Rule 8(a)(2) that the short and plain statement of the claim "show[] that the pleader is entitled to relief." A requirement that a complaint do more than identify the transaction that gives rise to litigation could support early disposition of actions that proceed on inadequate legal theories or without hope of establishing indispensable facts.

These general questions invite consideration of a range of responses. One response is to do nothing. Doing nothing could be appropriate on either of two opposed points of view, or on a more relaxed conclusion that it is too early to do anything.

One set of arguments for doing nothing would begin with the premise that all heightened pleading requirements are wrong. Pleading should do no more than identify the transaction underlying

suit, paving the way for discovery and formal pretrial procedures that establish more reliable means for disposition without trial. There is no need for amendment on this view if the Leatherman decision will, in relatively short order, cause most courts to abandon all explicit and implicit heightened pleading requirements.

The opposing point of view would be that heightened pleading requirements are a good thing, and that courts will continue to impose them without any particular deference to the apparent force of the Leatherman decision. This point of view would be bolstered by the argument that it would be virtually impossible for the rulemaking process to regularize the process by which heightened pleading requirements are enforced. The rulemaking process cannot keep abreast of the intricacies of desirable pleading practice for the ever-changing array of claims that can be brought to federal courts. Detailed rules for specific categories of cases must always be incomplete and must lag far behind the lessons of emerging experience. It is better to rely on the present requirement that a complaint show that the pleader is entitled to relief, allowing courts to tailor this requirement to the circumstances that may make early disposition more appropriate. Some categories of cases, for example, may frequently involve ill-founded claims; such tendencies may vary between different parts of the country, and over time. Discretion to insist on more particular pleading, allowing opportunity to amend to meet perceived deficiencies, may work far better than detailed rulemaking. Many categories of cases, as another example, may threaten to impose exhausting pretrial burdens before it is possible to consider disposition apart from the pleadings. Courts should be empowered to protect themselves and the adversaries by requiring a preliminary assurance that the burdens are justifiable. Yet other categories of cases may involve areas in which special desires to protect against the burdens of litigation contend with the need to enforce rights — the official immunity question put aside in the Leatherman opinion is a good illustration.

If the detailed rule approach is rejected, an alternative approach would be to regularize the process for demanding more helpful pleading. In one form or another, the rules could adopt a modernized form of the antique motion for a bill of particulars. The most obvious means of following this approach would be amendment of the procedure for demanding a more definite statement. This approach seems the most promising if any rules amendment is to be attempted. The rule could be framed directly in terms of the need to facilitate disposition by pretrial motions. It would not have the appearance of singling out particular categories of apparently disfavored claims for hostile treatment.

Expansion of the more definite statement procedure would provide a clear focus for arguments about the need to expand the

role of pleading motions. One range of arguments surely will be that a seemingly neutral procedure will in fact be used to dispose of disfavored claims by artificially elevated pleading requirements. Another will be that augmented pleading demands are inherently undesirable. Rule 12(e) originally provided for bills of particulars. It was amended in 1948 to provide only for a more definite statement, and to limit the occasion for more definite statement to situations in which a responsive pleading is required and cannot reasonably be framed. The purpose of the amendment was to reinforce the basic structure of the rules: the exchange of fact information and identification of the issues should be accomplished through discovery and pretrial conference. Apparent failure to state a claim should be raised by motion under Rule 12(b)(6); if the pleading as framed is sufficient, Rule 12(e) should not be used to require more detailed statements that may make it insufficient. Pretrial disposition should be by summary judgment after opportunity to explore the facts, not on the pleadings. Pleading should not be used to force allegations that can be made only after discovery. More particular statements are seldom appropriate even if a pleading suggests that a particular defense may be available — the absence of allegations of time or writing may suggest a limitations of statute of frauds defense, but that does not of itself make more a more definite statement appropriate. All of these matters, and more, are explored in 5A Federal Practice & Procedure: Civil 2d, §§ 1374-1379.

The wide variety of heightened pleading requirements that have emerged in practice provides the foundation for a response to this history. It may show that the collective wisdom of many judges, growing over time, is better than the abstract passion for minimized pleading. Whatever may have been desirable in 1938 or 1948 is no longer desirable. The burdens imposed by going to pretrial stages beyond pleading continue to grow. As the law keeps growing to regulate more and more human activities in increasingly complex ways, so grows the opportunity to bring lawsuits founded on theories that cannot withstand the light of full statement. Pleading must be restored as a protection against the procedures that help to prepare for trial or summary dispostion.

Some support for these arguments may be found in recent experiences of the Committee. A few years ago it was proposed that the Rule 12(b)(6) motion to dismiss for failure to state a claim be abolished; the Committee did not accept the proposal. More recently, the amendments now pending in Congress encourage more particular pleading in at least two ways. Rule 11 would allow for specific identification of factual allegations as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 26(a)(1)(A) and (B) provide for disclosure of information "relevant to disputed facts alleged with particularity in the pleadings." The Rule 26 provisions were

informed by extensive testimony at the hearings on disclosure, especially from product liability defense attorneys, asserting that notice pleading often provides little guidance for an adversary attempting to understand the purpose and character of an action.

A final approach might be to amend Rule 8(a)(2) to emphasize the perhaps overlooked requirement that a pleading show that the pleader is entitled to relief. This approach might work best if the purpose of the amendment were left to statement in a Note suggesting that the Leatherman decision may cause some courts to forswear desirable opportunities to dispose of actions on the pleadings.

The Rule 8, 9, and 12 approaches can be illustrated by the following rough drafts.

Rule 8(a)(2)

A pleading * * * shall contain * * * (2) a short and plain statement of the claim in sufficient detail to show~~ing~~ that the pleader is entitled to relief * * *.

NOTE

Rule 8(a)(2) is amended to reinvigorate the requirement that the pleading show that the pleader is entitled to relief. The amount of detail sufficient to show a right to relief will depend on the nature of the action. Heightened pleading requirements often have been exacted in a wide variety of actions, particularly those that promise to involve protracted and expensive pretrial and trial proceedings. Illustrative opinions are gathered in Boston & Maine Corp. v. Town of Hampton, 1st Cir., 1993, 987 F.2d 855. The wisdom of this practice has been proved by its gradual evolution. The lack of clear support for the practice in the text of the rules led to the ruling that heightened pleading requirements could not be required in actions asserting municipal liability under 42 U.S.C. § 1983, see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160. The Court observed in the Leatherman decision that if heightened pleading requirements are desirable, "that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." It is not feasible or desirable to draft specific pleading requirements for all of the different actions that may come before a federal court. This amendment restores the gradual process of judicial evolution that developed up to the time of the Leatherman decision.

Rule 8(e)(1)

Each averment of a pleading ~~shall~~ must be simple, concise, and

direct. No technical forms of pleading or motions are required. The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).

Note

(The Note would draw from the Note set out for Rule 12(e) below.)

Rule 9

Rule 9(b): "In all averments of fraud, ~~or~~ mistake, or civil rights violation by a public official, the circumstances constituting fraud, ~~or~~ mistake, or civil rights violation by a public official ~~shall~~ must be stated with particularity." -or-

[*A pleading of fraud, mistake, or civil rights violation by a public official must be stated with particularity.*] -or-

Rule 9(x, renumbering later subdivisions): An averment of a civil rights violation by a public official must be stated with particularity.

NOTE

Many courts have found it useful to require specific statement of civil rights claims against public officials or against public bodies responsible for official wrongs. In Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160, the Court held that the relationship between Rules 8 and 9 shows that particular statement can be required only by specific rule provision. This amendment restores the heightened pleading requirements that had evolved in many courts before the Leatherman decision. It does not attempt to define the nature of a claim that may properly be classified as a "civil rights violation by a public official." The classification should be made according to the needs that have informed the evolving practice up to the time of the Leatherman decision.

Rule 12(e)

(e) Motion for More Definite Statement. ~~If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days~~

~~after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.~~

(1) On motion or on its own, the court may order a more definite statement of a pleading:
   (A) If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a responsive pleading cannot reasonably be required; or
   (B) If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).
(2) A motion for a more definite statement must point out the deficiencies in the pleading and the details desired.
(3) A more definite statement must be made within the time fixed by the order or, if no time is fixed, within 10 days after notice of the order. If a more definite statement is not made the court may strike the pleading or impose other sanctions.

NOTE

Rule 12(e) is amended to reinvigorate the function of pleading as a method of disposing of actions – or portions of actions – that rest on inadequate legal premises. The structure of these rules places primary reliance on discovery, pretrial conferences, and summary judgment not only to shape a case for trial but also to winnow out matters that ought not go to trial. Pleading is intended primarily to establish the framework for these later proceedings. It is important that cases not be decided on the pleadings before all parties are afforded adequate opportunity to discover the fact information that may be needed to support a clear statement of legal theory. Post-pleading procedures, however, have come to pose increasingly heavy burdens on litigants and courts in more and more cases. Recognizing the nature of these burdens, a host of decisions have developed increasingly detailed pleading requirements for a wide variety of cases. The framework of the present rules requires that such requirements be imposed by a process of moving to challenge the pleading, consideration of often limited allegations, and – if the pleading is inadequate – working through the process of amendment. A more direct procedure is provided by a motion for more definite statement.

The need to expand the role of the motion for more definite statement arises in part from the decision in Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160. The Court ruled that heightened pleading requirements cannot be imposed outside the categories specifically enumerated in Rule 9. At the same time, it suggested that the appropriate means of establishing such requirements is "by the process of amending the Federal Rules." It is not feasible to establish detailed

catalogues of pleading requirements for every legal category that may warrant such requirements, nor to express adequately the nuanced shades of specificity that may be appropriate for different categories. The more definite statement procedure can be used to restore the process of gradual judicial development that, up to the time of the Leatherman decision, was responsible for establishing pleading requirements adapted to the needs of different actions.

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 4

Rule 4(j), renumbered as 4(m) in the amendments pending in Congress, sets a 120-day period for serving summons and complaint. In November and again in May the Committee considered a recommendation from the Eastern District of Pennsylvania that the period be shortened. The discussions were inconclusive, resulting in a recommendation that the Reporter study the question and report back to the Committee. The best recollection of the group was that although Rule 4 was much discussed during the process that led to the current proposed revisions, there may not have been much attention devoted to this specific point.

Rule 4(j) was added in 1983 as part of the reforms that phased marshals out of the service process. Until then, the standard had been a nonspecific "due diligence" requirement. The Advisory Committee Note explained that there was no need for a time limit for service "[a]s long as service was performed by marshals." The proposal adopted by the Supreme Court set the period for service at 120 days but differed from the rule that emerged from Congress in two respects. There was no explicit provision for extending the period on a good cause showing; instead, the Note explained that failure to meet the deadline would result in dismissal "[u]nless the time is enlarged by the court pursuant to Rule 6(b)." 93 F.R.D. 255, 258, 263. The Supreme Court proposal included a provision integrating the 120-day period with service by mail by treating service by mail as made "as of the date on which the process was accepted, refused, or returned as unclaimed."

The Reporter believes that choosing the appropriate period for service depends on actual experience, not on abstract theory.

The first question is whether in fact there are many cases in which service is deliberately delayed up to the limits of the 120-day period, and whether this delay often has bad effects for the defendant or the court. If there are a significant number of troubling cases, it is useful to ask what good may result from setting the period so long.

It has been suggested that it is useful to provide a relatively long period for effecting formal service as a means of facilitating settlement discussions. On this view, actions frequently are filed as a signal of serious intentions that initiates a period of serious negotiation. How useful this may be is a question of fact, not theory. Part of the question is whether actual service somehow interferes with a delicate balance between the hard signal of filing and the soft signal of delaying service.

It also is possible that there are significant problems in effecting service in a shorter period. It seems likely that service is easily accomplished promptly in a high percentage of all cases. Some defendants, however, may be difficult to locate, evasive, or otherwise hard to serve. Hard knowledge, not speculation, is needed to determine the significance of this possibility.

Significant reduction in the 120-day period may have the effect of generating more requests for extensions, and more attempts to show good cause for failure to comply. Again, it is difficult to predict the significance of this effect. If the 120-day period indeed is

unnecessarily long, there may be little to fear on this score.

The other side of the question involves the potential harm from allowing a period as long as 120 days. One harm may befall court dockets and clerk's offices; the practical and symbolic nature of these problems is unclear. Another harm may be that a relaxed period for service adds to delay in litigation without any offsetting benefit. Yet another harm may be that deliberate delay is used as a means of prolonging the limitations period, a question that often depends on state law. Perhaps there are other harms. The frequency and importance of these harms again is more a matter of fact than abstract theory.

Local rules may bear on this question. A request to Mary Squiers, director of the Local Rules Project, provided an answer that as of the time of her Report in April, 1989, there were three local rules setting forth different periods. Two of them were later amended to incorporate the 120-day period of Rule 4. Local Rule 702 of the District of Puerto Rico requires that service be made, or an extension obtained, within 30 days "in all bank cases." It was pointed out at the November meeting that the Northern District of California has a local rule requiring service within 40 days of filing. No search has been made for other local rules. Such rules may be some evidence of experience with problems arising from the 120-day period. Of course the absence of such rules may not show that there are no problems, particularly since shortening the period may seem to conflict with Rule 4.

Any effort to shorten the period of Rule 4(m) must take account of pending Rule 4(d), which replaces the mail-service provisions of present Rule 4(c)(2)(C)(ii). The present rule provides that if the sender does not receive acknowledgment of service within 20 days from mailing, service is to be made by other means. Rule 4(d) encourages plaintiffs to request that defendants waive service. The request to waive must allow a defendant a reasonable time to return the waiver, allowing at least 30 days from the date on which the request is sent. (The 60-day period for returning the waiver if the defendant is outside any judicial district of the United States does not complicate matters, since Rule 4(m) "does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).)"

The most straight-forward approach, if an amendment seems wise, will be to substitute a different number in the text of the present rule. Since it is too early to reconsider the waiver provisions of Rule 4(d), the most obvious approach would be to set a period that allows time both to request waiver and to make service after waiver is refused. One possibility would be to set the Rule 4(m) period at 80 days for defendants in the United States. A more complicated revision would be to integrate Rule 4(m) with the waiver provisions, allowing a longer period to effect service that is available only in cases in which waiver is requested and refused. Still more complicated versions would also revise Rule 4(d) to provide a limited period in which waiver may be requested, drawing from the model in current Rule 4(c).

If a new and shorter period is adopted for Rule 4(m), it may be desirable to add a

provision for seeking an extension by motion made during the initial period.

These alternatives may be illustrated by a draft chosen from the middle of the range of complexity:

(m) Time Limit for Service. ~~If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint,~~

(1) The summons and complaint must be served:

(A) on a defendant within 40 days after the complaint is filed, unless on motion made by the plaintiff within the 40-day period the court grants an extension to a time no later than 120 days after the complaint is filed;

(B) on a defendant in any judicial district of the United States that has been requested to waive service under subdivision (d), within 80 days after the complaint is filed, unless on motion made by the plaintiff within the 80-day period the court grants an extension to a time no later than 120 days after the complaint is filed.

(2) If service of the summons and complaint is not made as required by paragraph (1), the court ~~upon~~ motion or on its own initiative after notice to the plaintiff, ~~shall~~ must:

(A) extend the time for service for an appropriate period if the plaintiff shows good cause for the failure;

(B) dismiss the action without prejudice as to that defendant; or

(C) direct that service be effected within a specified time ~~provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period~~.

(3) This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

NOTE

[Perhaps the Note should say something about problems of defective service. Shortening the period for service may increase the situations in which service is in some way defective. Dismissal seems inappropriate if the defendant in fact had notice; dismissal seems questionable if limitations would bar institution of a new action and the plaintiff had grounds to belief that effective service was made; dismissal may seem questionable even if all it means is that a new action must be formally filed.99]

RULE 68

Rule 68 was before the Committee in November, 1992, and May, 1993. The November meeting considered a draft based on the proposal advanced by Judge Schwarzer. A revised draft Rule and Note were prepared on the basis of the November discussion. The minutes of the May meeting devoted to Rule 68 are attached.

The several other attachments flesh out the basis for further discussion. First are slightly revised versions of a draft Rule and Note. It should be emphasized that the Note in its present form is designed to identify and address as many questions as possible. It is longer than most Notes, but it provides a convenient format for raising important issues. The answers given in the Note, as the positions taken in the Rule, are tentative. Many of them have not been discussed by the Committee at all. Some of them are set out simply for the purpose of providing the semblance of an answer. Opposite answers may be better. The discussion of contingent fees on page 8, for example, states that a Rule 68 fee award should be based on a reasonable hourly rate, not an apportionment of the contingent fee. That is not inevitably right.

A copy of Judge Schwarzer's article is provided to set out the origins of the current proposal.

Finally, the longest enclosure is the first draft of a paper prepared for a conference at NYU, expressing a number of doubts about the wisdom of the proposal. Even a limited fee-shifting system will encounter significant opposition. If the proposal is to be pursued, it will be better to be able to lay such doubts to rest.

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.

Rule 68. Offer of Settlement

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

(1) The offer must:

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

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

(C) [not be filed with the court] {be filed with the court only as provided in (b)(2) or (c)(2)};

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

(E) specify the relief offered.

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

(b) Acceptance; Disposition.

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

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

(c) Expiration.

(1) An offer expires if [rejected or] not accepted before withdrawal or the end of the period stated or ordered under (a)(1)(D).

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

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

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy} [sanction] to the offeror.

(1) If the offeree is not entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

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

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

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

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

(2) If the offeree is entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

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

(B) denial of attorney fees incurred by the offeree after the offer expired.

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

(B) No {remedy may be given} [sanction may be imposed] on disposition of an action by acceptance of an offer under this rule or other settlement.

(4)(A) A judgment for a party demanding relief is more favorable than an offer to it:

(i) if the amount awarded – including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] – exceeds the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment includes all the nonmonetary relief offered, or substantially all the nonmonetary relief offered and additional relief.

(B) A judgment is more favorable to a party opposing relief than an offer to it:

(i) if the amount awarded – including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] – is less than the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment does not include [substantially] all the nonmonetary relief offered.

(f) Nonapplicability. This rule does not apply to an offer made in an action certified as a class or derivative action under Rule 23, 23.1, or 23.2.

Fee statute alternative

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy}[sanction] to the offeror.

(1) The {remedy}[sanction] must include:

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

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

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

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

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

(B) No {remedy may be given}[sanction may be imposed]:

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

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

(e)(2)(B)(i) might take less protective forms: No remedy may be given:

Costs but not fee shifting

(i) that requires payment of attorney fees by a party that is entitled to a statutory award of attorney fees; or

Statutory fees not affected

(i) that affects the statutory right of a party to an award of attorney fees;

COMMITTEE NOTE

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

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

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

The amended rule allows any party to make a Rule 68 offer. The incentives for early settlement are increased by increasing the consequences for failure to win a judgment more favorable than an expired offer. A plaintiff is liable for post-offer costs even if the plaintiff takes nothing, a result accomplished by removing the language that supported the contrary ruling in Delta Air Lines, Inc. v. August, 1981, 450 U.S. 346. Post-offer attorney fees are shifted, subject to two limits. The amount of post-offer attorney fees is reduced by the difference between the offer and the judgment. In addition, the attorney fee award cannot exceed the amount of the judgment. A plaintiff who wins nothing pays no attorney fees. A defendant pays no more in fees than the

amount of the judgment.

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

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

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

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

The requirement that an offer remain open for at least 21 days is intended to allow a reasonable period for evaluation by the recipient. Consquences cannot fairly be imposed if inadequate time is allowed for evaluation. Fees and costs are shifted only from the time the offer expires; see subdivision (e)(1) and (2). A party who wishes to increase the prospect of acceptance may set a longer period. The court may order a different period. As one example, it may not be fair to require a defendant to act on an offer early in the proceedings, under threat of Rule 68 consequences, without more time to gather information. If the court orders that the period for accepting be extended, the offer can be withdrawn under

paragraph (2). The opportunity to withdraw is important for the same reasons as the power to extend — developing information may make the offer seem less attractive to the plaintiff just as it may make the offer seem more attractive to the defendant. As another example, the 21-day period may foreclose offers close to trial; the court can grant permission to shorten the period to make an offer possible.

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

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

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

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

illustration of unfairness would be an agreement to allocate all of a limited fund to one party, excluding others. Less extreme settings also might justify refusal to enter judgment.

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

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

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

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

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

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

remedies to a single proceeding upon completion of the entire action. If there is a special need to determine remedies promptly, however, an interim award may be made as soon as it is inescapably clear that the final judgment will be more favorable than the offer.

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

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

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

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

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

Example 1. (No shifting) After its offer to settle for $50,000 is not accepted, the plaintiff ultimately recovers a $25,000 judgment. Rejection of this offer would not result in any award because the judgment is more favorable to the offeree than the offer. Similarly, there would be no award based on an offer of $50,000 by the defendant and a $75,000 judgment for the plaintiff.

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

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

Example 4. (Successive offers) After a defendant's $50,000 offer lapses, the defendant makes a new $60,000 offer that also lapses. (a) A judgment of $50,000 or less requires an award based on the amount and time of the $50,000 offer. (b) A judgment more than $50,000 but not more than $60,000 requires an award

based on the amount and time of the $60,000 offer. This approach preserves the incentive to make a successive offer by preserving the potential effect of the first offer.

Example 5. (Counteroffers) The effect of each offer is determined independently of any other offer. Counteroffers are likely to be followed by judgments that entail no award or an award against only one party. The plaintiff, for example, might make an early $25,000 offer, followed by $20,000 of fee expenditures before a $40,000 offer by the defendant, an additional $15,000 fee expenditures by each party, and judgment for $42,000. The plaintiff's $25,000 offer is more favorable to the defendant than the judgment, so the plaintiff is entitled to a fee award. The $35,000 of post-offer fees is reduced by the $17,000 benefit of the judgment, netting an award of $18,000. The defendant is not entitled to any award.

In some circumstances, however, counteroffers can entitle both parties to awards. Offers made and not accepted at different stages in the litigation may fall on both sides of the eventual judgment. Each party receives the benefit of its offer and pays the consequences for failing to accept the offer of the other party. The awards are offset, resulting in a net award to the party entitled to the greater amount. As an example, a plaintiff might make an early $25,000 offer, then incur reasonable attorney fees of $5,000 before the defendant's $60,000 offer, after which each party incurred reasonable attorney fees of $25,000. A judgment for $50,000 would support a fee award for each party. The $50,000 judgment is more favorable to the plaintiff than the plaintiff's expired offer. The $50,000 is less favorable to the plaintiff than the defendant's expired offer. The attorney fee award to the plaintiff would be reduced to $5,000 by subtracting the $25,000 benefit of the judgment from the $30,000 of post-offer fees. The attorney fee award to the defendant would be reduced first to $15,000 by subtracting the $10,000 benefit of the judgment from the $25,000 of post-offer fees. The $15,000 award to the defendant would be set off against the $5,000 award to the plaintiff, leaving a $10,000 net award to the defendant.

Example 6. (Counterclaims) Cases involving claims and counterclaims for money alone fall within the earlier examples. Each party controls the terms of any offer it makes. If no offer is accepted, the final judgment is compared to the terms of each

offer. (a) The defendant's offer to pay $10,000 to the plaintiff to settle both claim and counterclaim is followed by a $25,000 award to the plaintiff on its claim and a $40,000 award to the defendant on its counterclaim. The result is treated as a net award of $15,000 to the defendant. This net is $25,000 more favorable to the defendant than its offer. If the defendant's reasonable post-offer attorney fees were $35,000, the attorney fee award payable to the defendant is $10,000. (b) If the defendant's reasonable post-offer attorney fees in example (a) had been $45,000, the attorney fee award payable to the defendant would be limited to the $15,000 amount of the net award on the merits. (c) The defendant's offer to accept $10,000 from the plaintiff to settle both claim and counterclaim is followed by an award of nothing to the plaintiff on its claim and a $40,000 award to the defendant on its counterclaim. The result is treated as a net award of $40,000 to the defendant, which is $30,000 more favorable to the defendant than its offer.

Contingent Fees. The fee award to a successful plaintiff represented on a contingent fee basis should be calculated on a reasonable hourly rate for reasonable post-offer services, not by prorating the contingent fee. The attorney should keep time records from the beginning of the representation, not for the post-offer period alone, as a means of ensuring the reasonable time required for the post-offer period.

Hardship or surprise. Rule 68 awards may be reduced to avoid undue hardship or reasonable surprise. Reduction may, as a matter of discretion, extend to denial of any award. As an extreme illustration of hardship, a severely injured plaintiff might fail to accept a $100,000 offer and win a $100,000 judgment following a reasonable attorney fee expenditure of $100,000 by the defendant. A fee award to the defendant that would wipe out any recovery by the plaintiff could be found unfair. Surprise is most likely to be found when the law has changed between the time an offer expired and the time of judgment. Later discovery of vitally important factual information also may establish that the judgment could not reasonably have been expected at the time the offer expired.

Statutory Fee Entitlement. Rule 68 consequences for a party entitled to statutory attorney fees have been governed by the decision in *Marek v. Chesny*, 473 U.S. 1 (1985). Revised Rule 68

continues to provide that an otherwise existing right to a statutory fee award is cut off as to fees incurred after expiration of an offer more favorable than the judgment. The only additional Rule 68 consequence for a party entitled to statutory fees is liability for costs incurred by the offeror after the offer expired. The fee award provided by subdivision (e)(1)(B) for other cases is not available. These rules establish a balance between the policies underlying Rule 68 and statutory attorney fee provisions. It is desirable to encourage early settlement in cases governed by statutory attorney fee provisions just as in other cases. Effective incentives remain important. The award of an attorney fee against a party entitled to recover statutory fees, however, could interfere with the legislative determination that the underlying claim deserves special protection. The balance struck by Rule 68 does not address the question whether failure to win a judgment more favorable than an expired offer should be taken into account in determining whether any particular statute supports an award for fees incurred before expiration of the offer.

Settlement. All potential effects of a Rule 68 offer expire upon acceptance of a successive Rule 68 offer or other settlement. This rule makes it easier to reach a final settlement, free of uncertainty as to the prospect of Rule 68 consequences. The prospect of Rule 68 consequences remains, however, as one of the elements to be considered by the parties in determining the terms of settlement.

Judgment more favorable. Many complications surround the determination whether a judgment is more favorable than an offer, even in a case that involves only monetary relief. The difficulties are illustrated by the provisions governing offers to a party demanding relief. The comparison should begin with the exclusion of costs, attorney fees, and other items incurred after expiration of the offer. The purpose of the offer process is to avoid such costs. Costs, attorney fees, and other items that would be awarded by a judgment entered at the expiration of the offer, on the other hand, should be included. An offer that matches only the award of damages is not as favorable as a judgment that includes additional money awards. Beyond that point, comparison of a money judgment with a money offer depends on the details of the offer, which are controlled by the offeror. An offer may specify separate amounts for compensation, costs, attorney fees, and other items.

The total amount of the offer controls the comparison. There is little point in denying a Rule 68 award because the offer was greater than the final judgment in one dimension and smaller — although to no greater extent — in another dimension. If the offer does not specify separate amounts for each element of the final judgment and award, the same comparison is made by matching any specified amounts and treating the unspecified portion of the offer as covering all other amounts. For example, a defendant's lump-sum offer of $50,000 might be followed by a $45,000 judgment for the plaintiff. The judgment is more favorable to the plaintiff than the offer if costs, attorney fees, and other items awarded for the period before the offer expired total more than $5,000.

Comparison of the final judgment to successive offers requires that the judgment be treated as if entered at the time of each offer and adjusted to reflect any Rule 68 award that would have been made had judgment been entered at that time. To illustrate, a plaintiff's $25,000 offer might be followed by reasonable attorney fees of $15,000 before a defendant's $35,000 offer, followed by a $30,000 judgment. The judgment is more favorable to the plaintiff than the offer because a $30,000 judgment at the time of the offer would have supported a $10,000 fee award to the plaintiff. The judgment and fee award together would have been $40,000, $5,000 more than the offer.

Nonmonetary relief further complicates the comparison between offer and judgment. A judgment can be more favorable to the offeree even though it fails to include every item of nonmonetary relief specified in the offer. In an action to enforce a covenant not to compete, for example, the defendant might offer to submit to a judgment enjoining sale of 30 specified items in a two-state area for 15 months. A judgment enjoining sale of 29 of the 30 specified items in a five-state area for 24 months is more favorable to the plaintiff if the omitted item has little importance to the plaintiff. Any attempt to undertake a careful evaluation of significant differences between offer and judgment, on the other hand, would impose substantial burdens and often would prove fruitless. The standard of comparison adopted by subdivision (e)(4)(A)(ii) reduces these difficulties by requiring that the judgment include substantially all the nonmonetary relief in the offer and additional relief as well. The determination whether a

judgment awards substantially all the offered nonmonetary relief is a matter of trial court discretion entitled to substantial deference on appeal.

The tests comparing the money component of an offer with the money component of the judgment and comparing the nonmonetary component of the offer with the nonmonetary component of the judgment both must be satisfied to support awards in actions for both monetary and nonmonetary relief. Gains in one dimension cannot be compared to losses in another dimension.

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

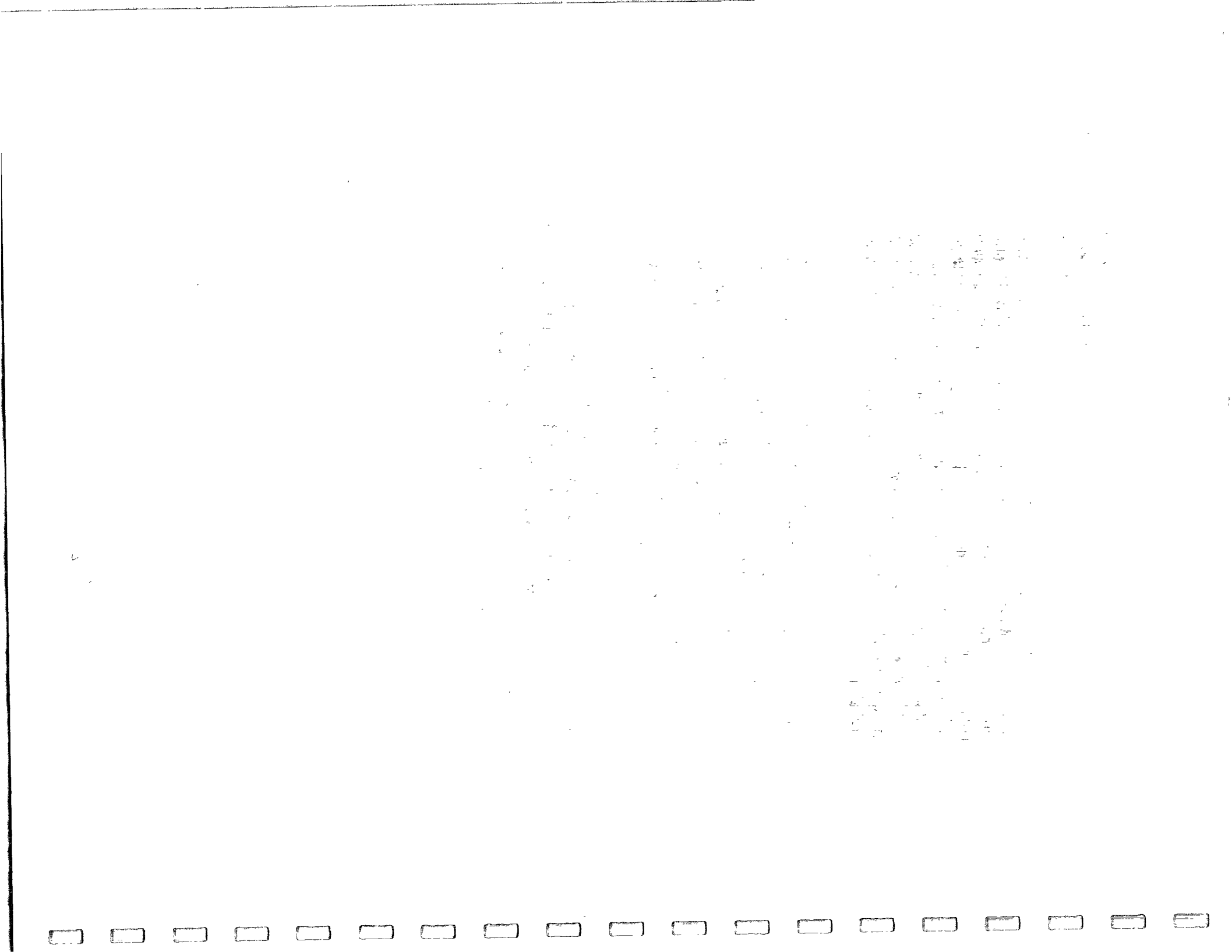
There is no separate provision for offers for structured judgments that spread monetary relief over a period of time, perhaps including conditions subsequent that discharge further liability. The potential difficulties can be reduced by framing an offer in alternative terms, specifying a single sum and allowing the option of converting the sum into a structured judgment. If only a structured judgment is offered, however, the task of comparing a single-sum judgment with a structured offer is not justified by the purposes of Rule 68, even when a reasonable actuarial value can be attached to the offer. If applicable law permits a structured judgment after adjudication, however, it may be possible to compare the judgment with a single sum offer. Should a structured judgment offer be followed by a structured judgment, it seems likely that ordinarily the comparison should be made under the principles that apply to nonmonetary relief, since the elements of the structure are not likely to coincide directly.

Multiparty offers. No separate provision is made for offers that require acceptance by more than one party. Rule 68 can be applied in straight-forward fashion if there is a true joint right or joint liability. An award should be made against all joint offerees without excusing any who urged the others to accept the offer; this result is justified by the complications entailed by a different approach and by the relationships that establish the joint right or liability. Rule 68 should not apply in other cases in which an offer requires acceptance by more than one party. The only situation

that would support easy administration would involve failure of any offeree to accept, and a judgment no more favorable to any offeree. Even in that setting, a rule permitting an award could easily complicate beyond reason the already complex strategic calculations of Rule 68. Offers would be made in the expectation that unanimous acceptance would prove impossible. Acceptances would be tendered in the same expectation. Apportioning an award among the offerees also could entail complications beyond any probable benefits.

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

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



Fee-shifting offers of judgment—an approach to reducing the cost of litigation

While the English loser-pays rule is a flawed approach to reducing the cost of litigation in the United States, the English payment-into-court rule offers a model for limited fee shifting to encourage early settlement. This process can operate through amendment of Rule 68 of the Federal Rules of Civil Procedure.

by William W Schwarzer

After fighting since 1988 over "The Uncollected Stories of John Cheever," the publishing firm Academy Chicago and the late writer's family reached a settlement this week .... The Cheevers have now agreed to drop a lawsuit they had filed in New York. In exchange, Academy Chicago said it would not publish any out-of-copyright material by the celebrated writer ....

The Cheevers, whose legal fees were estimated at more than twice the $420,000 Academy paid, could not be reached for comment. Their lawyer... said yesterday: "They are elated."

Elated?

"They're elated it's over," he amended.

But is "elated" really the word he wanted to use?

"I think 'relieved' is more accurate," he agreed.[1]

Is it possible to reduce the cost of litigation by creating incentives to settle quickly? Virtually nobody disputes that costs have skyrocketed and are often disproportionate to the stakes. One recent study reported that it costs $2.33 to deliver $1 in compensation to tort victims.[2] The total cost of tort litigation alone in 1985 has been estimated as high as $29-36 billion, only $14-16 billion of which went to compensate victims.[3]

Some argue that the cost of litigation could be reduced by adopting the English "loser pays" rule. Advocates of the rule maintain that it would not only restrain frivolous or marginal litigation, but would also more fully compensate the prevailing party. Yet a closer look at the rule reveals that, at least on this side of the Atlantic, it would be counterproductive. It would tend to deter meritorious as well as frivolous claims and defenses, fail to distinguish between the real winners and losers, and produce windfalls as well as draconian penalties.

English practice does, however, offer an alternative approach of greater promise—the "payment into court" rule under which a defendant may deposit in court a sum in satisfaction of the plaintiff's claim. If the plaintiff does not accept it, goes to trial, and recovers less than the sum offered, it is not entitled to recover costs and instead must pay the defendant's costs (which in England include reasonable attorney fees as determined by a taxing master) from the time of the payment into court.

Our own Rule 68 of the Federal Rules of Civil Procedure is a cousin of the English practice. But Rule 68 has never had a significant impact, largely because it is limited to court costs. The utility of the English practice of payment into court (coupled with growing interest in the United States in experimenting with fee shifting) suggests that revision of Rule 68 to encourage early settlement without inflicting draconian penalties or generating windfalls deserves renewed and serious consideration.

Twice before, in 1983 and 1984, the Advisory Committee on Civil Rules considered amendments of Rule 68 to include attorney fees, but both attempts met with vigorous opposition and failed. The principal objections were that fee-shifting offers of judgment could have a devastating impact on plaintiffs (including those with

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The views expressed in this article are not necessarily those of the FJC. The author is indebted to John Shapard, who conceived the make whole principle. Edward Sussman helped prepare this article. Professor Tom Rowe provided valuable assistance, and Professor Roy Simon facilitated our research.

1. Streitfeld, *Cheevers, Publisher End Fight*, WASHINGTON POST, January 25, 1992, at C5.

2. Hensler *et al.*, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 27 (1987), as cited in Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not*, 140 U. PENN. L. REV. 1147, 1282 (1992) (statistic based on non-auto torts).

3. Drawing on data from Kakalik & Pace, COSTS AND COMPENSATION PAID IN TORT LITIGATION vi, 67-68, 75 (1986) and Sturgis, "The Cost of the U.S. Tort System: An Address to the American Insurance Association" (1985), cited in Saks, *supra* n. 2, at 1281-1283.

meritorious claims), and that they could circumvent the statutory provisions for attorney fees in civil rights cases, undermining important policies underlying the civil rights laws.

The revision proposed in this article meets these objections. It would permit plaintiffs as well as defendants to make offers of judgment. If the offeree fails after a trial to improve his or her position over what it would have been had the offer been accepted, the offeror is entitled to post-offer costs (including reasonable attorney fees). But the amount of costs that could be recovered under the rule would always be limited to the lesser of the following: the amount of the judgment, or the amount needed to make the offeror whole for having had to go to trial. Claims subject to statutory fee shifting and class and derivative actions would be exempted.

This article first analyzes the operation of the English loser-pays and payment-into-court rules as background for the proposed revision. It then describes how the proposed amendment would function and explores its impact on the dynamics of the settlement process.

The loser-pays rule in England

Under the English rule, "costs follow the event." Generally, in civil non-family litigation, the losing party pays the costs of the prevailing party as taxed, including reasonable attorney fees. This practice, however, has significant limitations and qualifications.

First, costs are not awarded where the losing party's representation is financed through legal aid. Parties whose incomes fall below blue-collar or middle-class levels are eligible for such aid, although they may be required to make some contribution as their means permit.[4] Control is exercised over the acceptance of cases to screen out complaints with no reasonable chance of success.

Second, the loser-pays rule is circumscribed by the way in which costs are awarded. On the entry of final judgment, or of an interlocutory order such as an injunction, the prevailing party applies for taxation of costs attributable to that event. Costs, therefore, are awarded not only at the end of the litigation but also at intermediate stages and may be awarded to a party that does not prevail in the end. Costs, which include both solicitors' and barristers' fees, are considered to be a reasonable amount in respect of all costs reasonably incurred, with any doubts the taxing officer may have resolved in favor of the paying party. The taxing officer, who functions somewhat like a federal magistrate judge, determines fees with reference to a fee schedule, taking into account the time spent, a reasonable hourly rate (which is less than that actually charged by attorneys), and a multiplier based on the amount at stake, the complexity of the matter, and the degree of skill required. Awards tend to run at 60-70 percent of actual fees.[5]

As long as civil cases are tried before juries, fee shifting must be approached with caution.

Costs are taxed against parties, not the attorneys, except in a case of misconduct, which does not include maintaining an unsuccessful action. Taxing masters have wide discretion, but the losing party's financial situation is generally not regarded as relevant. Losing a lawsuit can therefore have severe financial consequences. Even if a party is unable to pay a cost order, the order remains on the books as a continuing liability.

Loser-pays in the U.S.

How would the English rule work in the United States? In the absence of comparable legal aid, access to the courts by economically disadvantaged people would be burdened. Although contingent fee arrangements would still be available, unsuccessful plaintiffs would be exposed to the risk of losing their assets to pay the defendant's fees. (The English rule does not tax costs against attorneys and, presumably, any American version would not do so either.) But the rule's potentially harsh impact would not be limited to those on the lowest rungs of the economic ladder. Even individuals with annual incomes in the $50,000 to $75,000 range would face difficult decisions whether to hazard having to pay an opponent's fees that might equal or exceed their annual income. This risk falls equally on plaintiffs and defendants. An individual or small business confronted with an uninsured claim, for example, might settle rather than assert a reasonable defense and risk having to pay the plaintiff's fees if the defense is unsuccessful. The rule would deter some litigation, but it would do so more on the basis of a litigant's risk averseness than the merits of the litigant's case.

Why, then, does the loser-pays rule survive in England? Apart from tradition and legal aid, one explanation lies in the profound differences between the British and American civil justice systems. England virtually abolished juries in civil cases (except for libel and malicious prosecution) more than 50 years ago.[6] Cases are tried before judges whose decisions are narrowly bound by precedent, not only on liability but on damages as well. Outcomes, therefore, tend to be more predictable in England than in the United States.

As a result, litigation decisions in the two systems are fundamentally different. A case that might to some appear frivolous or marginal upon filing in an American court may still lead to a plaintiff's verdict; similarly, an apparently weak defense may prevail before a jury. As long as civil cases are tried before juries, fee shifting must be approached with caution, lest it result in

4. Published reports indicate that the proportion of people eligible for aid has decreased in recent years from about 70 percent to about 40 percent. *See A Survey of the Legal Profession*, THE ECONOMIST, July 18-24, 1992, at 15-17.

5. *Id.*

6. Administration of Justice (Miscellaneous Provisions) Act, 1933 (restricting the right to trial by jury in civil cases to defamation and other limited exceptions).

imposition of possibly devastating penalties against actions or defenses that could have been winners.

Moreover, lack of predictability in American law is not limited to juries. Substantive and procedural law has undergone constant and sometimes dramatic change during the past 40 years. Law in America is more volatile and less precedent-bound than in England. Propositions that might at one time have been thought frivolous or at least highly speculative, have become accepted. It is a rare case of which one can say with assurance that it cannot prevail.

If, then, there are circumstances that tend to lead to what many regard as an excess of litigation, they probably reflect the nature of our system more than the litigiousness of the population. It does not seem wise to try to cure problems inherent in our legal system by exposing parties who use it to severe and uncontrollable hazards.

At least two additional reasons exist for rejecting the conventional loser-pays rule: it mistakenly equates "loser" with "party against whom judgment is entered," and it fails to account equitably for the costs that the "winner" may impose on the "loser."

To illustrate this point, suppose the plaintiff in a personal injury action recovers a judgment of $30,000, after incurring attorney fees of $10,000. Under the loser-pays rule, the defendant would have to pay the plaintiff $40,000. But suppose further that the defendant had offered to settle the case for $35,000, and thereafter had to pay substantial attorney fees to defend the case at trial. Had the plaintiff accepted the defendant's offer, the matter would have cost the defendant only $35,000. But by virtue of the loser-pays rule, the defendant—who was the real "winner" in the sense that the judgment was less than what he or she had offered to pay—incurred a loss of more than $40,000 ($30,000 to pay the verdict and $10,000 for the plaintiff's reasonable attorney fees, plus the defendant's own fees).

Or suppose the plaintiff had recovered a judgment of only $500 after rejecting the defendant's $35,000 offer. It makes no economic sense to regard the plaintiff as the winner in this situation and require the defendant to pay the fees, which would probably vastly exceed the amount of the judgment.

These cases illustrate the need for a fee-shifting process to determine the true winner and consider the true costs imposed on the winner by the loser's actions, without generating windfalls or inflicting draconian consequences. An offer-of-judgment rule, appropriately designed, can accomplish these purposes.

The payment-into-court rule in England

The English payment-into-court rule permits a defendant (or cross- or counter-defendant) to deposit in court a sum it believes is sufficient to meet the claim. If the claimant does not accept the deposit, continues through trial to judgment, and recovers less than the amount deposited, it is the losing party. It will not be entitled to costs and will have costs taxed against it from the time for acceptance of the deposit. If, on the other hand, the claimant recovers a judgment for a greater amount it will be the prevailing party and as such recover costs under the loser-pays rule. The procedure does not preclude a party from recovering costs in connection with an interlocutory proceeding. The deposit may be made at any time, even during the course of trial, though the later it is made, the less its potential benefit. A deposit that has not been accepted within 21 days lapses, but it may be renewed in the same or a different amount.

The procedure creates a strong incentive to early settlement. It provides defendants with the opportunity to reduce the risk of having to pay the plaintiff's costs as well as their own. And it gives plaintiffs the option to accept an offer, eliminating the risk of losing the lawsuit and having to pay both sides' costs. It is a more flexible procedure than the loser-pays rule, because both sides have some control over their fate, beyond the decision whether to file and whether to defend. Decisions about making and accepting offers occur in the course of the litigation when both sides have acquired information enabling them to evaluate their prospects and risks. Moreover, the practice enables parties to avoid proceedings for the taxation of post-offer costs.

An offer-of-judgment rule for the federal courts

Rule 68 of the Federal Rules of Civil Procedure resembles the English practice, except that by its terms it is limited to court costs, generally only a fraction of attorney fees. As now written, it permits a defendant at any time more than 10 days before trial to serve an offer of judgment for money or other relief and costs then accrued. If the plaintiff accepts the offer within 10 days, judgment is entered. If the plaintiff does not accept and the final judgment "is not more favorable [to the plaintiff] than the offer," it must pay the costs incurred after the making of the offer. If an offer is not accepted, a subsequent offer may be made.

Because Rule 68 ordinarily applies only to court costs,[7] it is rarely used. Moreover, it is limited to offers by defendants; plaintiffs do not have the option to make cost-shifting offers. And it invites uncertainty and disputes in the determination of whether a non-monetary judgment is "more favorable than the offer."

Rule 68 could be made into an effective and fair vehicle to encourage early settlements without generating objectionable consequences by adoption of the revision here proposed. The full text of the proposed revision appears on page 151. It has the following elements:

- Recoverable costs include reasonable attorney fees as well as court costs incurred following expiration of the time for acceptance of the offer;
- Offers of judgment may be made by plaintiffs as well as defendants;
- Recoverable costs are limited to the amount of the judgment;
- Recoverable costs are limited to what is needed to make the offeror whole. That is, they would be reduced by the amount by which the offeror benefits from paying or receiving the judgment compared with what it would have paid or received under its offer;
- The period for acceptance of the offer is extended to 21 days, or such additional time as the court may allow, to allow reasonable time for evaluation;
- The court has discretion to reduce costs where necessary to avoid inflic-

7. See text at note 11, *infra*.

tion of undue hardship on a party;

• Claims arising under fee-shifting statutes and class and derivative actions are excluded.

How it would work

The following discussion describes the operation of the revised rule in various typical circumstances. Suppose a defendant offers to settle for $25,000, but the plaintiff rejects the offer and obtains judgment for $20,000. The defendant's reasonable post-offer costs are $10,000. The defendant would be entitled to recover its post-offer costs because the plaintiff's judgment was not more favorable to the plaintiff than the defendant's offer. Had the plaintiff accepted the settlement offer, not only would its recovery have been greater, but both the defendant's and plaintiff's post-offer costs would have been avoided. The proposed rule would reward the defendant for having made a settlement offer the plaintiff could have accepted to its benefit.

Note, however, that the defendant is $5,000 better off under the $20,000 judgment than had the $25,000 offer been accepted. Here the make-whole restriction comes into play. Under the proposed revision, the offeree pays costs "only to the extent necessary to make the offeror whole" and "in no case shall an award . . . exceed the amount of the judgment obtained."

To make the offeror whole, the amount by which the offeror is better off after trial than had the offer been accepted—$5,000—is deducted from the defendant's costs of $10,000. The defendant is therefore entitled to recover only $5,000 of its $10,000 in post-offer costs, and this amount is set off against the plaintiff's $20,000 judgment, making the defendant's net liability to the plaintiff $15,000.

Suppose the defendant's post-offer costs had been $30,000. Under the second limitation mentioned above—the amount of the judgment—the defendant could not recover more than $20,000, the amount of the plaintiff's judgment. This restriction serves to protect plaintiffs against out-of-pocket liability to defendants and to deter offering parties from incurring excessive litigation costs. Both sides' incentives to make

The risks and opportunities created by the rule should exert constant pressure on parties to move toward agreement.

offers that are likely to lead to settlement remain substantial, however; plaintiffs because they may lose the benefit of their judgments and defendants because they risk doubling their exposure in case of an adverse judgment.

Now suppose the plaintiff, rather than the defendant, had made a $25,000 offer. Since the judgment of $20,000 was not more favorable to the plaintiff than the offer made, the plaintiff would not be entitled to post-offer costs. The revised rule provides equal incentives for plaintiffs and defendants to make reasonable offers—that is, offers that appear to have a reasonable chance of being more favorable to the offeree than the judgment it is likely to obtain and thereby shifting post-offer costs. As each side moves toward such offers, the negotiating gap between the parties should narrow.

Suppose the plaintiff had offered to settle for $15,000 instead of $25,000. Since the judgment was for $20,000, the plaintiff's offer "beat" the judgment by $5,000 (in other words, the judgment was "more favorable to the offeree") and the plaintiff is entitled to post-offer costs. But the plaintiff's costs will be reduced, just as in the defendant's case, by the amount gained from the rejection of the offer, $5,000. If the plaintiff's reasonable post-offer costs were $10,000, this amount would be reduced by $5,000 and the balance added to the judgment, making it $25,000. The plaintiff's recoverable costs could in no event, however, exceed $20,000, the amount of the judgment.

Confronted with the risk of having to pay all or part of their opponents' fees, litigants are likely to consider offers more seriously. And each is likely to want to hedge its bets by making counter-offers. Thus, the negotiating process will tend to be energized by the rule's incentives. These incentives, moreover, encourage early offers, because the more fees that remain to be incurred, the greater the potential gains and risks. To enable parties to evaluate offers, the time for acceptance is extended to 21 days, with the court having discretion to extend it further. No restriction is imposed on how early an offer can be made. This will create a strong incentive, in cases where the outcome appears relatively certain from the outset, to make early offers to avoid most litigation costs.

The revised rule's incentive structure is based on the imposition of risks on the parties, but the make-whole and capping restrictions limit these risks. No costs are recoverable when judgment is for the defendant. And neither side can expect to recover disproportionate attorney fees and costs.[8]

Multiple offers

The revised rule is designed to accommodate multiple offers. Suppose a defendant rejects the plaintiff's offer to settle for $25,000. Following discovery, the defendant offers $30,000. Meanwhile the plaintiff has incurred $10,000 in costs since making the offer. The case goes to trial, and judgment is for the plaintiff for $27,500. The defendant may have calculated that by making a last-minute offer the plaintiff could probably not beat at trial, it could deprive the plaintiff of the cost-shifting benefits of the earlier

8. In some cases in which the plaintiff has a contingent fee contract with its attorney, the rule could operate to reduce the amount available to pay attorney's fees if the plaintiff recovers judgment but fails to improve on the defendant's offer, and the defendant's post-offer fees absorb much of that judgment. But this disadvantage should be offset by the tendency of the rule to encourage earlier and more attractive settlement offers by defendants.

offer. To promote the ongoing exchange of realistic offers throughout the pretrial period, while preventing game playing that might defeat this purpose, the revised rule provides that a party making an offer "shall not be deprived of the benefits thereof by a subsequent offer unless and until the offeror fails to accept [a more] favorable offer." In other words, if a later offer from the opponent is not more favorable to the offeror than the judgment, taking into account costs incurred in the interim, the earlier offer prevails. But if the opponent's later offer is more favorable to the offeror than the judgment, that offer prevails.

Under the rules stated above, suppose the plaintiff incurred costs of $10,000 after its offer until the time of the defendant's offer. This amount would be deducted from the defendant's offer of $30,000 for purposes of determining whether that offer was more favorable to the plaintiff than the $27,500 judgment. So adjusted, the defendant's offer becomes a $20,000 offer and is not more favorable to the plaintiff than the $27,500 judgment. The defendant has not succeeded in "cutting off" the plaintiff's earlier offer, and the plaintiff recovers its reasonable post-offer costs minus the make-whole reduction of $2,500.

The revised rule's incentive structure remains dynamic throughout the litigation. An offeror is likely to be faced with a counter-offer that will require evaluation. The risks and opportunities created by the rule, amplified by the passage of time and the accumulation of costs, should exert constant pressure on parties to move toward agreement.

Other variables

Improving one's offer. Suppose that sometime after having its offer of $25,000 rejected, the plaintiff offers to settle for only $15,000. Meanwhile it has incurred additional costs of $5,000. The defendant again rejects the offer, causing the plaintiff to incur an additional $10,000 in costs. The judgment is for $30,000. Both the first and second offer are more favorable to the offeree than the judgment, but each has different consequences. Recall that under the revision, an offeror is entitled to the benefit of its offer unless and until it declines to accept a subsequent more favorable offer. Since no subsequent offer was made to the plaintiff, it is still entitled to the benefits of the first offer if they are greater than those of the second. In other words, in the absence of a counter-offer, the plaintiff can choose the offer that will lead to the greater recovery. In this case, the plaintiff can recover $10,000 in costs under the first offer but nothing under the second because of the impact of the make-whole restriction.[9]

Non-monetary offers. When the of-

9. The plaintiff incurred costs of $15,000 following the first offer. But $5,000—the amount by which the judgment exceeded the offer—must be deducted from this amount. Thus, under the first offer, the plaintiff can recover $10,000 in costs in addition to the judgment. Following the second offer, the plaintiff incurred only $10,000 in costs. Since it received a $15,000 benefit, the amount by which the $30,000 judgment exceeded the offer, the plaintiff would not be entitled to recover costs under the second offer.

The proposed revision of Rule 68 of the Federal Rules of Civil Procedure

(a) At any time, ~~more than 10 days before a trial begins, a~~ *any* party ~~defending against a claim~~ may serve upon ~~the~~ *an* adverse party ~~an~~ *a written* offer to allow judgment to be ~~taken against the defending party~~ entered for the money or property or to the effect specified in the offer, with costs then accrued. If within ~~10~~ *21* days after service of the offer, *or such additional time as the court may allow,* the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk, *or the court if so required,* shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs *and reasonable attorney fees.* If the judgment finally obtained by the offeree is not more favorable *to the offeree* than the offer, the offeree must pay the costs *and reasonable attorney fees* incurred after the ~~making of~~ *expiration of the time for accepting the offer, but only to the extent necessary to make the offeror whole for costs and reasonable attorney fees incurred as a consequence of the rejection of the offer, and in no case shall an award of costs and attorney fees exceed the amount of the judgment obtained. A court may reduce an award of costs and attorney fees to avoid the imposition of undue hardship on a party.* The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, ~~the party adjudged liable~~ *any party* may make an offer of judgment, which shall have the same effect as an offer made before trial ~~if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability~~, *except that a court may shorten the period of time an offeree may have to accept an offer, but in no case to less than 10 days.*

(b) An offeror shall not be deprived of the benefits of an offer by a subsequent offer, unless and until the offeror fails to accept an offer more favorable than the judgment obtained.

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

(d) This rule shall not apply to class or derivative actions under Rules 23, 23.1 and 23.2, or to claims brought under statutes with fee-shifting mechanisms.

fer and judgment include non-monetary relief, the proposed revision calls for a straightforward comparison: "if the judgment obtained includes non-monetary relief, a determination that it is more favorable to the offeree than was the offer shall not be made except when the terms of the offer included *all* such non-monetary relief" (emphasis added). Suppose the defendant offered $25,000 and no additional non-monetary terms. If the judgment is for $20,000 but also includes injunctive relief, the defendant would not be entitled to costs despite its more favorable monetary offer.

Suppose the defendant offered $25,000 and an agreement not to publish material for five years, but the judgment was for $20,000 and an order imposing a trust with all publication profits for three years going to the plaintiff. Because the offer did not include all the non-monetary relief awarded in the judgment, though its monetary terms were more favorable, the defendant is still not entitled to costs. This would be true even if a comparative appraisal were to establish that the terms of the offer had been more favorable than the judgment obtained. The terms must be the same (or subsumed therein) for the offer to be considered more favorable than the judgment obtained. This restriction is necessary to avoid collateral litigation over the evaluation of non-monetary relief.

If, in the above case, the judgment had been for $20,000 and an order not to publish the material for three years, the terms of the offer would have included all the non-monetary relief awarded by the judgment, and the defendant would have been entitled to recover costs. The three-year ban can be said to have been completely subsumed under the offer of a five-year ban (even if the words differed). Note, however, that since the award of fees cannot exceed the amount of money awarded in a judgment, an award of only non-monetary relief precludes fee shifting under the revised rule.

Impact of the proposed revision

As the foregoing discussion has shown, the proposed revision has none of the objectionable features of the 1983 and 1984 proposals:

- It does not threaten plaintiffs with out-of-pocket loss;
- It does not undercut the policy of fee-shifting statutes;
- It does not permit windfall recoveries;
- It does not permit recovery of disproportionate costs;
- It eliminates the need for judicial review of the reasonableness of offers and rejections.

The revised rule eliminates the need for judicial review of the reasonableness of offers and rejections.

Scope of the rule. The revised rule has three exclusions. First, claims arising under fee-shifting statutes, such as the civil rights and antitrust laws, are excluded to avoid undercutting the congressional policy encouraging private enforcement.[10] The effect of this exclusion would be to supersede the Supreme Court's 1985 decision in *Marek v. Chesny*.[11] *Chesny* held that Rule 68 could bar an award of statutory attorney fees to a prevailing civil rights plaintiff who had rejected a settlement offer that exceeded the judgment. The decision did not shift the defendant's fees; the plaintiff remained the prevailing party for purposes of the civil rights statute.

The revised rule also excludes class and derivative actions because Rules 23, 23.1, and 23.2 require settlements of such actions to be approved by the court. To permit unapproved offers of settlement to be operative to shift fees would be prejudicial to the parties and create an irreconcilable conflict with these rules.

The revised rule does not exclude actions in which the parties by prior agreement have provided for recovery of attorney fees by the prevailing party. In such cases, in which a final judgment may include attorney fees, the rule will treat offers as including that component of monetary relief as well as others. Similarly, punitive damages would be treated as an element of monetary relief encompassed in an offer. Doing so is consistent with the normal practice of settling such cases.

Judicial impact. Because of the limits the revised rule imposes on cost recoveries, there is no need for judicial review of rejected offers. But because the revised rule also limits recovery to reasonable attorney fees, the court is the ultimate arbiter of the award. If the rule operates as contemplated, however, the court should rarely have to be called on, because the vast majority of cases will settle, and because it is reasonable to expect that more often than not, the rule's make-whole and capping limits will make it self-evident that reasonable attorney fees exceed the amount allowable, obviating the need for court proceedings. If the revised rule accomplishes its purpose of generating not only more but earlier settlements, and with less need for judicial intervention than currently, the resulting savings in judicial time should more than offset the amount of time required by the occasional attorney fees proceedings under the rule.

Impact on settlements

The assumption underlying the proposed revision is that it will encourage parties to make earlier and more reasonable offers, leading to earlier settlement negotiations with greater prospects of success.

The legal literature abounds with economic analysis of fee-shifting mechanisms. Not surprisingly, given the complexity of the subject, opinions differ on whether such mechanisms encourage early settlement. One writer recently concluded that

10. Pendent state law claims would be included.
11. 473 U.S. 1 (1985).

"[u]ntil a better empirical foundation has been established, the existing theoretical arsenal is still too weak to resolve many of the ultimate questions of interest."[12] "Institutional details" motivating and constraining the behavior of parties and lawyers, the writer noted, are not necessarily accounted for by the current economic analysis of fee shifting.

Indeed, a host of not readily quantifiable factors can influence the incentive structure in any particular case. Deep-pocket litigants determined to eliminate their adversaries or those driven by principle or policy might be impervious to economic incentives. Highly risk-averse litigants, on the other hand, would be extremely sensitive to the threat of added costs and opt for settlement.

Some commentators have argued with respect to a loser-pays rule that it might actually discourage settlement rates by driving apart litigants who both firmly believe they will win. According to this argument, in such a case only the prospect of the parties bearing their own attorney fees creates a range of possible settlements. If, instead, each party believed that the other side would ultimately bear all the costs of the litigation, the incentive to settle to avoid expenses would disappear. For example, under the American rule, if the plaintiff firmly believed he or she would recover $10,000, and the defendant firmly believed there would be no recovery, but each anticipated having to spend $6,000 to take the case through trial, the parties might enter settlement discussions anyway, because even a $5,000 settlement would leave each party in better financial shape than a trial. Yet under the loser-pays rule, the argument goes, the litigants might dig in since each anticipates no net loss following a verdict.

Even if this argument has some validity under a loser-pays rule, it carries little weight under the proposed offer-of-judgment rule. For the defendant, there is no advantage in digging in without ever making an offer, as there might be under a loser-pays scheme, for by digging in it gives up any chance of recovering costs, regardless of any recovery by the plaintiff. For the plaintiff, in turn, there is no advantage in refusing to make an offer that might beat the judgment. And once such an offer is on the table, the defendant's risk of loss escalates unless it accepts the offer or makes a counter-offer attractive to the plaintiff. Unlike the loser-pays scenario under which the parties may be stalemated, the revised rule provides incentives that should energize the negotiating process.

The incentive structure under the revised rule will not be equally powerful in all cases. In large and especially multiparty litigation—in which the stakes are high relative to costs and control may be dispersed—fee-shifting offers of judgment may have little utility. But as the cost of litigating a dispute rises in relation to its value, the power of the revised rule increases. Because the incentive will be to confront the opponent with an offer it would not lightly refuse, offers and counter-offers should move toward the middle ground.

It is true that the larger the gap between an offer and a judgment, the larger will be the offeror's make-whole offset against the costs he or she can recover to reflect the resulting benefit. Thus, if a defendant offering to settle for $35,000 succeeds in holding the plaintiff to a $5,000 judgment, the defendant will recover less in costs than if the plaintiff won a judgment of $30,000. Similarly, the larger the excess of a judgment over a plaintiff's offer, the greater the offset against a plaintiff's cost recovery. This result is a necessary corollary of the make-whole principle underlying the rule. But it does not significantly weaken the revised rule's incentives and is justifiable on the basis of the benefit derived by the offeror from the more favorable result obtained.

The principal impact of the revised rule will likely be on cases in which the cost of litigation could become disproportionate to the amount at stake. It would also have a significant impact in cases where liability is all but certain. Suppose a creditor is owed $50,000. He or she estimates that to take the case through trial will cost approximately $50,000. The defendant may currently be able to escape having to pay the debt by simply stonewalling, figuring that the creditor may not wish to throw good money after bad. The revised rule would enable the creditor to file suit and make an offer of judgment for $49,999. If the debtor refuses the offer, it risks having to pay the debt as well as the creditor's and its own costs. The creditor can go to trial and incur costs up to $50,000 without jeopardizing any of the $50,000 recovery. The debtor, facing up to $100,000 in potential losses, plus its own attorney fees, has a strong incentive to settle. Similarly, a defendant with a strong defense against a doubtful claim can make a modest offer, with a high expectation of setting off its costs against a judgment if the offer is rejected.

No doubt, even under the proposed revised Rule 68, some litigation will continue to be protracted and costly. Some cases will not, and should not, settle for any number of reasons. But the revised rule may often give parties the push that is needed to initiate settlement negotiations on a basis that is likely to lead to agreement. □

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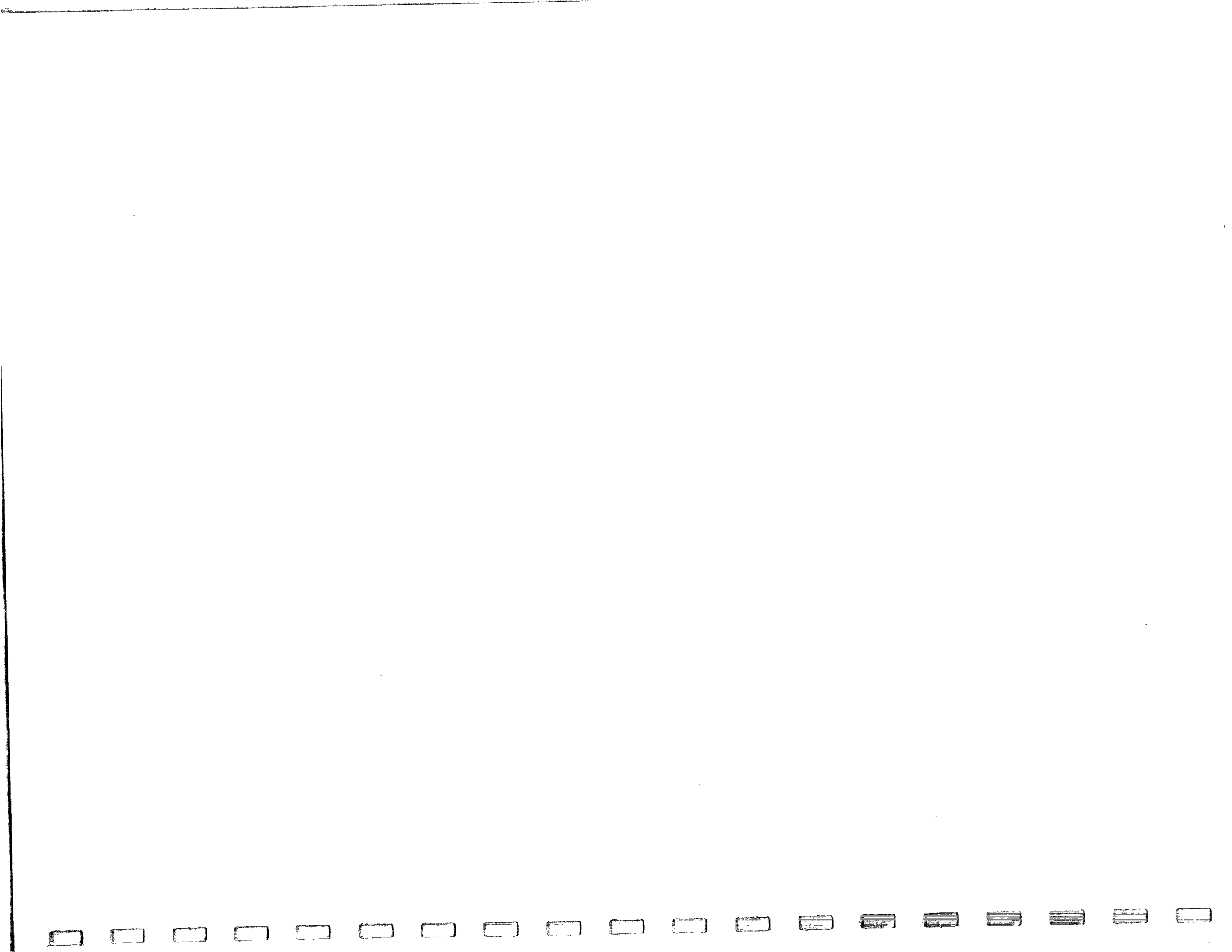
12. Donohue, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 LAW & CONTEMP. PROB. 195 (1991). There have also been several analyses focusing on the question of including legal fees under Rule 68. See Rowe, *American Law Institute Study on 'Paths to a Better Way': Litigation, Alternatives and Accommodation—Background Paper*, 1989 DUKE L. J. 824; Rowe and Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROB. 13 (1988); Miller, *An Economic Analysis of Rule 68*, 15 J. OF LEGAL STUD. 93 (1986); Toran, *Settlement, Sanctions and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68*, 35 AM. U. L. REV. 301 (1986); Woods, *For Every Weapon a Counterweapon: The Revival of Rule 68*, 14 FORD. URB. LAW J. 283 (1986); Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1985).

Civil Rule 68: A First Exposure

Edward H. Cooper



I INTRODUCTION

This is the story of a first exposure to the offer-of-judgment procedure of Civil Rule 68. The context is the workaday setting of the rulemaking process. Rule 68 has been viewed by many, including me, as an uninteresting provision that remains on the fringe of procedure because it has been little used to scant effect. Past efforts to make it more effective were abandoned. Now a carefully worked-out proposal for revision has brought the subject back for renewed attention.[1] The proposal is in the early stages of consideration by the Civil Rules Advisory Committee. My own thinking is at an equally early stage. As I go about learning something of Rule 68, the prospect of revision seems to present remarkably complex questions. More than anything else, this review of the puzzlements is a catalogue of questions that must be considered. If in the warm light of collective examination they stand revealed as ghosts easily put to rest, so much the better.

A. The Simple Purpose of Rule 68

Figures vary from one survey to another, but fewer than ten percent of the civil actions filed in federal court survive to trial. A large portion of those that disappear are settled. Notwithstanding the high

disappearance rate, Civil Rule 68 has once again attracted interest as a potential means of improving the settlement process. Two forms of improvement are contemplated. One is to increase the total number of cases that settle. Another is to accelerate the time of settlement for cases that now settle later than could be.

The benefits from increasing the number of cases that settle could be dramatic. A seemingly small increase in the total fraction of cases that disappear before trial could yield a large decrease in the number of cases that are tried. If 92% of all cases are now resolved without trial, an increase to 94% would effect a 25% reduction – from 8% to 6% – in the number of trials.

The benefits from accelerating the time of settlement might not be as easily observed, but could be even more important. If earlier settlements reduced the total volume of pretrial activity, particularly through disclosure and discovery, the savings would be obvious and valuable. Even if earlier settlements resulted from accelerating a constant level of pretrial activity, there would be real benefits from achieving earlier repose.

The case for amending Rule 68 rests on the belief that traditional unregulated settlement processes are not

as effective as should be. A formal offer-of-judgment or offer-of-settlement process, on this view, enhances the overall process. The proposals that have been considered in the rulemaking process have assumed that the formal process should supplement the traditional process, not supplant it. The formal process is made available to facilitate settlement when an offering party believes that added incentives are useful. Negotiations outside the Rule 68 framework can continue unimpeded, and perhaps enhanced, by one or more Rule 68 offers.

These simple hopes may be attainable. They do not rest on detailed knowledge of present settlement processes. Not enough is known about the factors that cause cases to settle or not. They do not rest on uncontested theory; at least for the moment, too much is known about the complications of theory and no means is available to cut through the competing complications. The following discussion will focus on a specific model based on a proposal of Judge William Schwarzer to amend Rule 68.[2] The proposal is a thoughtful one that addresses many of the concerns that surrounded earlier efforts to amend Rule 68. After sketching the proposal and one version of the highest hopes that might be advanced for its success, I will concentrate on the doubts that beset this and any other proposal to

strengthen Rule 68. This focus reflects caution, not a judgment that the doubts are right.

B. The Current Proposal

A first draft of an amended Rule 68 is set out as an appendix. This proposal raises the stakes of Rule 68 offers by a limited shift of attorney fees to a party who fails to improve on a Rule 68 offer at trial. It also authorizes offers by all parties, whether advancing or resisting claims, and allows successive offers by a single party that do not cancel the potential consequences of earlier offers.

Shifting attorney fees is a constant feature of Rule 68 proposals. At least two distinct reasons account for this interest. One is the view that settlement, and ideally early settlement, is an important means of reducing litigation expenditures. Attorney fees are a substantial part of litigation expenditures. A party who has offered a settlement that accurately forecasts the result of trial should not have to bear the expense of proving the accuracy of the forecast. Instead, the party who has failed to accept the trial-vindicated offer should compensate for the harm caused by its rejection. The other reason is the pragmatic judgment that substantial consequences are required to make Rule 68

work. Attorney fee shifting is a familiar and natural enforcing device.

Shifting attorney fees also is a lightning rod for controversy. The "American Rule" that each party bears its own attorney fees – win, lose, or draw – continues to have strong emotional support notwithstanding legions of statutes and occasional common law rules that provide for fee shifting. Any proposal that may require a plaintiff to bear defense attorney fees stirs immediate and hostile reaction.

The proposal limits the introduction of fee shifting by two major features that seek an accommodation to achieve the advantages of fee shifting while assuaging the potential disadvantages. First, reasonable fees incurred after the offer expires are reduced by the benefit that results from the difference between offer and judgment. If a defendant's $50,000 offer is followed by reasonable attorney fees of $15,000 and a $40,000 judgment, for example, the first $10,000 of post-offer fees is discarded. The fee award is $5,000. This feature seeks to put the offering party in the same position as if the offer had been accepted. Next, the fee award is capped. An award to the defendant cannot exceed the amount of the judgment: if the defendant had incurred reasonable post-offer fees of $60,000, the award

would be not $50,000 but $40,000. This feature protects the plaintiff against out-of-pocket losses greater than the costs that also are shifted under Rule 68. A symmetrical provision equalizes the fee-shifting stakes by limiting a fee award against a defendant to the amount of the judgment.

The questions that must be addressed in considering this proposal do not flow along any obvious linear path. They include the simple predictive question whether it would increase the number of cases that settle or at least advance the time of settlement in cases that eventually would settle in any event, and the more contentious question whether an increase or acceleration of settlement is necessarily desirable. At quite a different level, they invoke unanswerable questions of responsibility for attorney fees, questions that go deeper than the familiar debate over the virtues of the "American" and "British" rules. Another set of problems arises from the constraints and habits of the rulemaking process: a single rule is proposed to reach all federal civil actions, without regard to the nature of the dispute, or the character of the uncertainties, that may make settlement difficult; concerns for administration invite compromises that may seem of doubtful intrinsic merit; and fair questions may be raised whether

feeshifting in this setting is authorized by the Rules Enabling Act. Still different problems arise from the details of implementation: as pedestrian as these problems may seem in the realm of lofty discourse, they reflect constraints that must be considered in attempting to move from theory to practice. The many interdependencies among these problems foreclose neat exposition, but at least some rough order is possible in the thoughts that follow.

II Promoting [Early] Settlement

A. The Optimistic View

There are many ways to describe the hope that offer-of-judgment procedure can be made more effective by adding limited fee-shifting consequences and allowing any party to make an offer. The common element is a belief that there are cases that should settle, but now settle later than sould be or not at all. Beyond that point, the reasons for deferred or failed settlements must be set out. One set of reasons may involve strategic calculation. Although all parties understand that settlement is more rational than litigation, settlement fails because each holds out for a larger share of the potential settlement benefits. Enhanced consequences may help by changing an opening offer from an implicit

confession of weakness to an aggressive adversarial act. Incentives may be reduced for advancing ill-founded claims or defenses that exploit an imbalance between the costs and prospective benefits of litigation.[3] Bargaining over division of the potential gains from settlement may be placed on a more even footing that facilitates agreement. Another set of reasons may involve simple failure to think rationally about settlement. These reasons turn on the prospect that settlement is not approached rationally – ever, or as early as might be – even after the parties all have sufficient information to make intelligent predictions about probable outcomes, or else that they are too slow to gather the information.

The optimistic description of the process must include an element that runs parallel to the emphasis on settlement. Allowing plaintiffs to shift fee responsibility by making offers close to the expected result at trial should encourage plaintiffs to file strong small claims. When the defendant shares the plaintiff's estimate, settlement should follow. When the defendant has a significantly lower estimate of the plaintiff's success, however, the result may be a trial.

In addition to improving the settlement process,

Rule 68 fee shifting may seem intrinsically desirable.[9] A party who offers to settle for a figure at least equal to the eventual judgment may seem to deserve compensation for wasteful fee expenditures caused by failure to accept. The judgment proves that failure to accept was unreasonable, at least to the extent that justice requires protecting the offering party. Fee shifting both deters improvident refusals to settle and compensates the provident offer.

B. The Doubting View

1. Predicted Behavior. One range of questions arises from doubts as to the number of cases in which present incentives to settle will be enhanced by a limited fee-shifting scheme. There is a large and growing body of literature devoted to economic exploration of the general effects of fee-shifting rules and the more particular effects of fee-shifting inducements in offer-of-judgment rules. Even without accounting for strategic behavior, it is possible to identify many plausible situations in which settlement behavior is not likely to be affected by Rule 68, and some situations in which a fee-shifting rule may make settlement more difficult.[4] When game theory is invoked, matters become ever so much more complicated.[5]

Moving from abstract theory to more pedestrian terrain, similar concerns may be voiced. Whatever purposes the rulemakers may have, adversary lawyers will seek to use Rule 68 to maximum adversary advantage. Offers will be made not only in hopes that acceptance will end the litigation, but also in hopes that rejection will pave the way for strategic advantage. The opportunity to make multiple offers may be seized by opening offers close to the extremes, generating risks and corresponding adjustments of later offers that are further complicated if fee shifting is limited in the ways currently proposed. Sheer complexity and confusion may deter settlement.[6]

Much effort has been devoted to the process of settling complex litigation involving large stakes. The regular amendments of Civil Rule 16 regularly include provisions aimed at enhancing the prospects of early settlement. There is little prospect that limited fee shifting under Rule 68 can contribute much to these efforts. The stakes, both direct and often indirect, are likely to dwarf the prospective benefits of fee shifting, and the resources of the parties often will soften further any potential incentive effect. For many such cases, it seems likely that settlement will occur when the parties believe they know enough to assess probable

results, or will not occur at all. To the extent that this prediction holds good, a major potential benefit will disappear. Greater hope may be held out for encouraging early settlement of litigation for smaller stakes, involving one or more parties of modest means. Such cases, however, raise the question whether even a limited fee-shifting incentive involves encouragement or coercion.

The concern with coercion arises from the potential effect of fee shifting on risk-averse litigants. Most concern is directed toward individual plaintiffs who have something to lose and who face well-endowed institutional litigants. Even under the limited fee shifting currently proposed, a plaintiff can lose all the value of an important and valid claim. Particularly in cases in which there is a realistic prospect that the defendant may win at trial, or in which there is a wide range of reasonably predicted awards, the pressure to accept a relatively modest Rule 68 offer may be far greater than the pressure to accept an identical offer made outside Rule 68. The fear is not that an enhanced Rule 68 will fail to increase the number of settlements, but that it will increase the number of settlements in undesirable ways.

2. Desirability of settlement. The premise that it is

useful to encourage earlier settlement of cases that settle now has not drawn much dissent beyond fear for the impact on risk-averse plaintiffs. If early settlement means curtailment rather than acceleration of discovery, however, it may be based on relatively greater ignorance – either mutual or one-sided – and involve distortions that must be weighed against the savings of discovery costs. The premise that it is useful to encourage settlement of cases that now do not settle is more controversial. There are many reasons why a reasonable settlement may not satisfy the needs of one or more parties.

Familiar illustrations involve stakes beyond the prospective money judgment. Putting aside specific relief as a matter of obvious difficulty, an action for money alone may involve reputation, a desire to vindicate principles of public importance, or a test case. Both the plaintiff and defendant in a newspaper defamation action, for example, may fight for interests more precious than any predictable judgment. Attaching sanctions to Rule 68 offers in this setting may occasionally deter any litigation at all. It may occasionally facilitate a settlement that otherwise would not occur. It may occasionally – and perhaps often – simply shift attorney fees according to comparative

strategic skill or luck in picking the offer figure.

Equally familiar but less discussed concerns may be involved in an action in which money is the only stake. A simple version is provided by a case in which damages are uncontested at $1,000,000. The plaintiff believes there is a .5 probability of winning $1,000,000, with predicted future fee expenditures of $200,000. The plaintiff's expected value is $300,000. The defendant may believe the plaintiff has a .3 probability of winning $1,000,000, with predicted future defense fees of $250,000. The defendant's expected cost is $550,000. A settlement anywhere in a range from $300,000 to $550,000 would be "better" for both parties. The plaintiff, however, may need $800,000 to restore the business that was destroyed by the defendant; anything less is futile. The defendant may be barely able to manage the costs of defense before diverting assets from equally important needs. A rule that increases the pressure to settle often will have no effect in such circumstances, apart from adding fee shifting to the judgment after the defendant's $250,000 offer and the plaintiff's $800,000 offer both fail.

The last example raises the broader question whether litigation can properly be viewed as a matter of probabalistic money equivalencies alone. Quite apart

from the suggested special needs that may establish sharp discontinuities in the marginal value of money to a particular party, there may be legitimate desires for vindication or even vindictiveness. There is no demonstrably right answer to the plaintiff who protests that the defendant should not be allowed to buy off a million dollar liability for half price merely because we are dissatisfied with a system that will not compensate the costs of defense should the plaintiff in fact lose. Perhaps we have not yet reached the pass in which our system is forced to operate as nothing for principle, all for money.[7]

3. *Risk-Averse Plaintiffs.* By far the most vehement criticism of efforts to give more bite to Rule 68 has come from those who fear coercion of risk-averse plaintiffs. This criticism will not be much muted by the limited form of fee shifting currently proposed. The common illustration is the plaintiff of modest means pursuing a single claim that is personally important and confronting a relatively wealthy defendant who repeatedly engages in litigation. The illustration describes many cases. Even with a cap set at the amount of the judgment, such a plaintiff can win a valid claim and still lose it all because of a wrong guess in response to a Rule 68 offer. The resulting pressure to accept an

offer increases in the many cases in which damages are subject to fair dispute over a relatively wide range, and in which there is a prospect that a court may mimic the settlement process by compromising the determination of liability with the computation of damages. The response that such plaintiffs should not be more free than any others to impose unnecessary fee expenditures on such defendants is not fully satisfying.

The problem of the risk-averse plaintiff may be matched by a potential conflict of interest generated by the offer. The conflict arises because the prospect that the plaintiff will have the means to pay attorney fees, whether on a contingent-fee agreement or otherwise, is affected by Rule 68. The spirit of the cap implies that counsel cannot contract to recover a share of the judgment before accounting for Rule 68 consequences. The theory that contingent-fee counsel should have a portfolio of cases, and should be able to rely on realistic assessments of settlement offers across them all, may not respond to all facets of reality.

4. Fee statutes and conflict of interest. The potential for conflicting interests just described is acute if Rule 68 offers can cut off the right to recover statutory fee entitlements, as happens now.[8] Some plaintiffs may be represented by counsel who have a wide portfolio of

statutory fee cases and who are unmoved by the prospect that denial of fees in any particular case under Rule 68 will defeat any compensation for pursuing that case. It is difficult to believe that all will fall into that category.

III. Fee-Shifting Rationale

Rule 68 fee-shifting proposals are most reasonably considered against the background of the "American Rule" that ordinarily each party bears its own attorney fees. The proponents do not seem moved by a secret desire to use Rule 68 as a step toward general adoption of a rule imposing the winner's reasonable fees on the loser. Perhaps more important, the rulemaking process is not an appropriate means of adopting a general fee-shifting system. Whether fee-shifting is regarded as "procedural" or "substantive" for purposes of the Rules Enabling Act,[9] the topic is far too sensitive and bound up with political concerns to be addressed in this process.

Scant comfort is afforded by the conclusion that Rule 68 must be considered in the framework of the American Rule unchanged. Any effort to impose liability on one party for an adversary's attorney fees, whoever has prevailed on the merits, must be supported by a theory that justifies the imposition in defiance of the

American Rule. That task in turn requires a coherent theory that justifies the American Rule in comparison to at least two alternatives. The obvious alternative is a rule that makes the prevailing party whole, so that nominally complete relief for a plaintiff is not diluted by liability for the expense of suit and vindication of a defendant is not impaired by the expense of suit. At best it is very difficult to explain adherence to the American Rule in these terms. The alternative less often considered is a system that provides public representation for any party who wishes, leaving private representation an affair properly financed by any party who prefers it. If we fear that the risk of bearing all attorney fees will deter just claims and force surrender of just defenses, the fear can be addressed by offering free lawyers just as we offer free judges. The question is not whether we should force public representation on all parties, a system most of us would reject readily; it is only whether access to public justice should be rationed by ability to pay or to find contingent-fee representation. It is not even a start to speak of the inherent character of an adversary system in which each adversary sportingly bears the costs of the contest, nor to protest that we need some means of rationing access to justice lest we be swamped by grossly inefficient levels of litigation incurring social costs far out of

proportion to the tangible private stakes.

The lack of any coherent theory to explain the general refusal to shift attorney fees might seem to justify reliance on purely pragmatic concerns in approaching Rule 68. If we have no theory to test the changes, why bother with theory? All that need concern us is actual effects, as well as we can predict them. Unfortunately, the matter is not so simple.

The first complication arises from the multiple statutes and occasional judicial doctrines that provide for attorney fee-shifting, most frequently in favor of plaintiffs. As Rule 68 is now interpreted, a plaintiff's statutory fee right is cut off as to fees incurred after an offer that is as at least as good as the judgment, so long as the statute characterizes the fees as "costs."[10] There is no reason whatever for distinguishing between fee statutes that happen to have been expressed in terms of costs and other statutes that characterize fees as fees; if nothing else is done to Rule 68, it should be amended to eliminate this unintended linguistic consequence. It is far more important to consider the question whether Rule 68 should cut off statutory fee rights in any case. So long as fee-shifting statutes stand as exceptions to a general rule, they are most easily understood as attempts to support and encourage

litigation of particularly favored types of claims. Such purposes can be overcome by offer-of-judgment policies only if those policies are clearly understood.

The second complication is far more pervasive. So long as the American rule stands, it represents a determination that the cost of advancing or resisting judicial claims should be borne by each party, not by the adversary and not by the public. Failure to accept a formal offer of judgment seems much less serious conduct. The innocence of such behavior is most apparent when the offer and judgment are close together; indeed both Rule 68 and the proposed amendment impose consequences when offer and judgment are the same. Adhering to the American Rule when a plaintiff has lost utterly or has been vindicated completely stands in stark contrast to a rule that shifts attorney fees if plaintiff or defendant guesses wrong by rejecting an offer that – in the extreme example – happens to match the judgment perfectly. The proposed "benefit of the judgment" adjustment and cap may even seem perverse in this light, since the result shifts a larger portion of the offeror's fees as the offer and judgment converge. Thus a defendant whose $100,000 offer is rejected may, after a $100,000 judgment, recover up to $100,000 of fees if reasonably incurred; but after judgment for the defendant will recover nothing. In

either case the plaintiff gets nothing. We accept that result as right when it is the judgment on the merits. To accept it as a departure from the American Rule when the plaintiff was $100,000 right on the merits but wrong in predicting the actual judgment is more difficult. The difficulty may be underscored by considering two extreme examples in which the defendant spent all $100,000 of post-offer fees either in seeking to contest liability or in seeking to contest damages. If the expenditure was all for liability and the defendant lost on liability, it might fairly be asked why failure to accept the offer should impose on the plaintiff the cost of defense fees that proved waste. If the expenditure was all for damages, and was well-advised, it may well have cost the plaintiff more than a $100,000 reduction of the judgment. Again, it might fairly be asked why the plaintiff should pay twice for this "benefit." The response that the plaintiff should make the defendant whole in relation to the position that would have resulted from accepting the offer assumes that the duty to accept the offer imposes greater obligations, in relation to the general rule against fee shifting, than the decision to file suit.

Consideration of this second complication may be advanced by focusing on the implied duty to settle. By far the most satisfactory explanation that falls to hand

for imposing Rule 68 consequences is that litigants have a duty to behave reasonably in settlement. It is unfair to focus criticism on the extreme illustrations in which one party makes a better prediction of the outcome in the face of massive uncertainties as to liability and the amount of damages, whether as a matter of better luck or greater sophistication. What is called for is realistic, reasonable, accommodating settlement behavior. Litigation is a gamble. The more uncertain the outcome, the less reasonable it is to insist on pursuing any outcome on the merits. It is reasonable to persist to final judgment if all parties want to gamble, and to make all parties to the gamble carry their own costs. If a party prefers the more rational course of a certain settlement, and offers to settle on terms at least as favorable to the adversary as the final judgment, the offer should shield against the costs of continuing the gamble.

There is much to commend a duty to behave reasonably in settlement. The argument is strongest to those whose faith in litigation is weakest. It may seem overwhelming to those who reject pursuit of litigation as a means of vindicating substantive rights, either because of intrinsic doubts about the rationality of litigation results or because of the costs of litigation. Even if

a duty of reasonable settlement is recognized, however, it remains necessary to implement it reasonably.

If Rule 68 is to be explained as implementing a duty of reasonable settlement behavior, the means of implementation are questionable. One dimension of doubt is set out above: great consequences may hinge on very small differences between offer and judgment. There is no reason to draw inferences of unreasonable behavior from the bare fact that an offer was, by whatever margin, more favorable than the judgment. This problem could be reduced by adding a margin-of-difference element; the wider the margin, the weaker the objection. If Rule 68 imposed consequences only if the offer were at least 50% more favorable than the judgment, for example, it would be more plausible to infer that it was unreasonable to reject the offer. In some cases the inference would be strong or even overwhelming.

A margin-of-difference feature would not abate all of the difficulties in using actual outcome to assess the reasonableness of settlement behavior. Reasonableness is affected by the character of uncertainty and confidence in assessing uncertainty. It is easy to illustrate the purely economic reasonableness of settling cases in which all parties agree on the same probability of liability and the same range of damages, and have equal stakes and

like risk aversion. It is much more difficult to define reasonable settlement behavior even in purely economic terms when the picture is more complicated. Some cases do present genuine uncertainty as to liability, and the parties may reasonably evaluate the uncertainty at different levels. Some cases do present genuine uncertainty as to damages over relatively wide ranges, and again the parties may reasonably evaluate the uncertainty at different levels. These complications alone may mean that it is entirely reasonable for two parties to adhere to settlement figures that cannot be brought together. If it is reasonable to consider matters other than the expected dollar results of the instant litigation, the problem is even worse. The simple illustration offered above illustrated a range of mutually beneficial settlement between $300,000 and $550,000. Somehow the parties must divide the expected benefits of settlement. It seems difficult to say that it is unreasonable for the plaintiff to ask for more than $300,000 and for the defendant to offer less than $550,000. We expect them to divide the difference by bargaining. And the bargaining process may reasonably go astray. The very precise figures used for purposes of illustration, moreover, disguise the fact that the parties may lack confidence in their best efforts to predict the outcome. It seems reasonable to prefer

litigation to settlement based on guesses that are known to be unreliable.

The difficulty of predicting outcomes is entrenched by jury trial. Views about the predictability of jury verdicts may vary, but it seems likely that juries do the unexpected often enough to add a wild element to reasonable predictions.

Enough has been said to support a simple assertion. A duty of reasonable settlement behavior cannot support fee shifting based on simple differences between offer and judgment. Reasonable behavior often will lead to rejection of an offer that proves better than the eventual judgment.

If a duty of reasonable settlement behavior cannot support the present Rule 68 proposal, some other theory must be found. Fee shifting is serious business, and deserves a serious theory. The theory cannot be found in analogies to the attorney fee sanctions imposed for violation of various procedural rules. Such procedures as discovery have been adopted for clear purposes, often wisely, and we have a clear theory of duty to comply with such procedures. Fee sanctions are a natural means of enforcement. This theory would support imposition of sanctions, including fee shifting, for refusal to

participate in good faith in court-ordered settlement processes. It does not support sanctions for refusal to reach settlement until we have a theory of duty to reach settlement.

IV. Limits of Rulemaking

The full course of the rulemaking process may show that these doubts mean much or little. However that may be, they do deserve consideration as part of the process. In addition, they suggest the value of reflecting on the process itself. Several features of the process may suggest caution in approaching fee shifting by rule. The Civil Rules ordinarily apply to all litigation, or at least to very broad categories of litigation. Abstract theoretical goals must be compromised to meet the needs of workaday adminsitration. And the rules are not to abridge, enlarge, or modify substantive rights.

A. Universalizing Tendencies

The universalizing tendency of the Civil Rules is frequently described by the ugly adjective "transsubstantive." The rules characteristically are written in broad terms that rely on trial court discretion to fit general procedures to the more specific needs of individual litigation. There are many reasons for this approach. Among them are limits on the

rulemaking process; it is not possible to understand all of the needs of the full range of present litigation, much less future litigation, and craft detailed rules carefully adapted to each particular setting. Attempts to define specific rules for specific categories of litigation, moreover, might eventually raise questions whether the rules were intended to affect specific substantive rights. Perhaps the most important set of reasons involves faith in the ability of district courts to exercise discretion wisely. Although it would be easy for anyone to identify many instances of inept procedural decisions, the results often seem better than might be expected from a more detailed code of procedure.

An offer-of-judgment rule must be addressed in this light. It is not enough to suggest situations in which fee shifting may be a desirable means of encouraging settlement. Instead it must be shown that the overall result is desirable, either across the full range of federal court litigation or across narrower categories of cases that can be described in a rule limited to those cases. The earlier discussion suggests the nature of the problem. There are cases in which it seems inappropriate to impose fee-shifting consequences merely because of a difference between an offer and the judgment. Such cases exist even if settlement is approached solely as a matter

of economic rationality defined in expected net present dollars. Wide divergences in expected outcomes not only occur, but occur for good reasons. Nothing can be said with confidence about the frequency of such cases, but that of itself is reason for caution. If account also is taken of other factors that properly affect settlement decisions, the number of cases that properly are not settled increases. The increase is greater as more weight is assigned to such elusive factors as the desire for vindication, protection of public interests, and the like. Any sensible accounting also must reckon with the prospect that revisions of Rule 68 may affect the very character of the cases that are brought into the system.

It may prove possible to draft a rule identifying categories of cases that justify a fee-shifting offer-of-judgment rule. That possibility has yet to be explored. A more common response to such difficulties is to draft a rule that relies on district court discretion to distinguish cases that merit fee shifting from those that do not. That alternative also is questionable, unless some clear guidance can be given on the factors that merit fee shifting.

B. Reasonable Refusal.

If the purpose of Rule 68 is to encourage reasonable

settlement behavior, an obvious ploy would be to draft the rule in those terms. That ploy in fact was adopted in the 1984 proposal, which authorized imposition of "an appropriate sanction" if "an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation." The attempt to guide this decision deserves quotation in full:

> In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

Determination of the appropriateness of the sanction was to consider, among other factors, the costs, expenses, and attorney fees incurred "as a result" of the rejection, and the burden of the sanction on the offeree.

The open-ended list of illustrative factors in this proposal covers many of the most important elements bearing on the reasonableness of settlement behavior. The implication that only "questions of far-reaching

importance" justify consideration of abstract stakes may seem begrudging. The suggestion that the offeree should be sympathetically concerned with the impact on an adversary offeror is somewhat puzzling. Nonetheless the list provides a rich illustration of the costs of implementing a rule geared to reasonable settlement behavior. A judge who has tried a case without a jury would have to disentangle the process of decision, however clear or difficult it was, from the retrospective attempt to evaluate the case as a party might reasonably have seen it at the time of the offer – or offers, since successive offers were allowed. A judge who has tried a case to a jury might have to disentangle speculation about a process of decision that the judge may think led to a wrong result from the retrospective evaluation. Gathering full information and assessing it from the perspective of the offeree would be difficult. An attempt to make the assessment in the context of actual or potential counter-offers would be all the more difficult.

The difficulty courts would face in evaluating the reasonableness of settlement behavior would feed back to affect behavior in the offer-of-judgment process. The need to predict the outcome in relation to the offer would be compounded by the need to predict potential fee-

shifting consequences. Stragegic behavior would be confused even more if courts came to assess the "fairness" of bargaining behavior as well as more tangible factors.

If Rule 68 consequences are to be justified by a duty of reasonable settlement, the consequences should be measured by a process that resembles the 1984 proposal much more than an automatic comparison of offer and judgment. The manifest burden of implementing such a process, however, must weigh heavily against pursuing it.

C. Enabling Act Concerns

Rule 68 does not now refer to "sanctions." The 1984 proposal did refer to sanctions. Reliance on the sanction concept may seem to alleviate Enabling Act concerns that liability for an adversary's attorney fees is too much a matter of substantive right to be addressed through the rulemaking process. The analogy to discovery sanctions falls ready to hand: the rules create a procedural duty to respond to discovery, and provide sanctions that compensate for the cost of enforcing proper demands. The framework of the 1984 proposal was calculated to rely on this analogy. The rules create a duty to behave reasonably in response to settlement offers, and a sanction that compensates for the cost

caused by unreasonable refusal to settle.[11] Early reactions to the 1993 draft, however, have expressed concern that reliance on the sanctions concept creates untoward collateral consequences. Assuming that Rule 68 sanctions are imposed on the party alone, the fact remains that advice on settlement is provided by counsel. If counsel is tainted by sanctions imposed on a party – who may indeed have rejected advice to accept a Rule 68 offer – the potential distortions of attorney-client relationships threatened by Rule 68 may be exacerbated. Attribution of the sanction to counsel seems increasingly unfair, moreover, as the failure to settle seems increasingly reasonable.

The unfairness of tarring counsel with the sanctions brush may be no greater than the unfairness of forcing the client to pay adversary counsel fees, a question that can be answered only with a sound theory of the American Rule. That question, however, remains the main point of inquiry. It is easy enough to draft a rule that shifts counsel fees without referring to sanctions. Reliance on the sanctions concept, indeed, simply papers over the real question: is a duty to accept a reasonable settlement a matter of procedure akin to a duty to cooperate in authorized discovery? At this point it may be important to insist on that definition of the issue –

it is not a matter of a duty to engage in reasonable settlement behavior, but of a duty to accept a settlement. It might be a duty to accept a settlement offer that is reasonable in light of all the things that are known, predictable, and unpredictable. It might be a duty to accept a settlement offer that in the event proves at least as favorable as the judgment. But it is a duty to accept a settlement.

Although the nature of the question is not directly changed by invoking or discarding the sanctions label, the sanctions characterization is useful because it suggests that the procedural character of a regulation cannot be separated from its consequences. A rule that required a party to accept a settlement offer found reasonable by the court without a decision on the merits, on pain of contempt or dismissal, would not do. A rule that requires a party to pay costs, including forfeiture of post-offer statutory attorney fees otherwise allowable as "costs," does do. We have it now. A rule that shifts attorney fees, requiring one party to bear fees incurred by another, occupies an uncertain middle ground. It can be argued that if present Rule 68 does not abridge, enlarge, or modify a substantive right when it defeats a statutory right to recover attorney fees as costs, an amended Rule 68 would no more abridge, enlarge, or modify

a substantive right by requiring one party to compensate another for costs incident to rejection of an offer more favorable than the judgment. It can be argued in response that defeating a statutory qualification of the basic rule that each party bears its own expenses is not as fundamental – substantive? – as changing the basic rule.

Confronting a question of Enabling Act authority in the course of the rulemaking process is different from the finest point of academic analysis. Even a clear answer to an initially troubling question of authority may not justify pushing ahead. A clearly desirable rule may responsibly be promulgated if close examination justifies rejection of cogent doubts. Greater caution is appropriate if the justification for a proposed rule is less certain, particularly if prediction of its consequences also is uncertain. The American Rule remains a venerable part of our tradition, qualified much more often by one-way pro-plaintiff exceptions than by equal opportunity two-way shifting. Even if it is purely procedural, and even if – indeed perhaps because – it is difficult to identify and articulate its premises, it deserves deep respect in the rulemaking process. We should be quite sure of what we are doing before adopting the current proposal.

V. Difficulties of Implementation

One of the most enduring lessons of drafting exercises is that a promising idea is throughly tested by translation into detailed implementation. The simple illustrations used above involved a single offer on a single claim between two parties. Many lawsuits involve only one claim and two parties. Even such suits may involve a complicating series of offers, particularly if Rule 68 is extended to both parties. Greater complications ensue from a proliferation of parties, particularly if the substantive law has abolished joint and several liability. These and other problems must be weighed in deciding whether to press ahead with revision of Rule 68. The problems described below have been chosen in the hope of viewing Rule 68 from a variety of perspectives.

A. Successive Offers

The proposal expressly permits all parties to make successive offers. The most obvious reasons for allowing repeated resort to Rule 68 spring from the conjoint purpose to encourage settlement and to encourage early settlement. Early offers – and thus early settlement – are encouraged if an early offer does not cut off further use of Rule 68. Later offers, moreover, can readily

promote settlement as the parties' expectations are brought closer together by continuing preparation for trial and even external events. Another reason may be that allowing only one offer per party, or even requiring the parties to bid for the right to make the only offer, would so confuse Rule 68 strategy as to discourage frequent use.

1. Calculating the comparison. Permitting successive offers requires careful attention to the grounds for comparing each offer to the final judgment. The problem is more than a drafting challenge alone. A series of three related examples illuminates the complexities.

The plaintiff offers $50,000. After the plaintiff's offer expires, the plaintiff occurs $20,000 in attorney fees. Then the defendant offers $60,000. Each party incurs an additional $15,000 in attorney fees after the defendant's offer expires. Judgment is for $55,000. If the plaintiff had won a litigated judgment of $55,000 at the time of the defendant's $60,000 offer, the plaintiff would have received $15,000 toward its $20,000 fees after deducting the $5,000 benefit of the judgment, and netted the same $50,000 it would have won had the defendant accepted the plaintiff's offer. In this sense, the judgment is better than the defendant's $60,000 offer. There is much to be said for writing Rule 68 to reach

this result. There will be some proper resistance, however, arising from two facts: the defendant's $60,000 offer was greater than the actual judgment, and likely was made without knowing the amount of attorney fees incurred by the plaintiff after the plaintiff's $50,000 offer expired.

The second example is the same as the first, except that the plaintiff incurred only $5,000 in attorney fees before the defendant made the $60,000 offer. Now the $55,000 judgment, together with that attorney fees incurred by the plaintiff between expiration of the plaintiff's $50,000 offer and the defendant's offer, is not better than the defendant's offer. The plaintiff is not entitled to attorney fees on the basis of its offer unless the effects of the offer persist beyond the plaintiff's rejection of the defendant's offer: although the $50,000 offer was more favorable to the defendant than the $55,000 judgment, the $5,000 benefit of the judgment eliminates the $5,000 in fees incurred by the time of the defendant's offer. It would seem strange indeed, however, to allow the plaintiff to recover fees incurred after it rejected the $60,000 offer that would have netted $55,000 after deducting the interim fees. The defendant's offer supersedes the plaintiff's offer. The defendant is entitled to $10,000 in attorney fees

after deducting the $5,000 benefit of the judgment from the $15,000 incurred after expiration of the defendant's offer.

The second example is intended to underscore the importance of the attorney fees incurred by one party during the period between expiration of its own offer and an offer made by another party. The consequences to the defendant in these two examples are remarkably different because of the different figures used for interim fee expenses. To be intelligent, a second offer must account for these expenses. Each of the three most obvious strategies for making the calculation is questionable. One is to guess, based on an estimate of visible attorney time and the closeness of trial. The guess and estimate depend on the work habits and other commitments of opposing counsel, often difficult to guess. Another is to make an offer that allows the court to determine attorney fees – in a case that has not been tried, that may be won by either party, that may not include a statutory fee right, and in which the amount of the fee may affect the attraction of the offer drastically. Yet another is to ask the other party – at best, that would lead to informal negotiations with an eye to formulating the formal Rule 68 offer.

The third example simply increases the defendant's

offer to $80,000. The defendant gets no award because its post-offer fees are wiped out by the $25,000 benefit of the judgment. Although the defendant was willing to pay $80,000 to get out of the further proceedings, and guessed better than the plaintiff, it may be argued that this and countless additional variations simply demonstrate the sporting character of the proposed system in cases that include substantial uncertainty as to liability, damages, or both. In addition, a somewhat inconsistent argument may be made that when the outcome of litigation is as uncertain as it often is, the reasonableness of settlement behavior should be tested by some measure more rational than the perhaps compromised outcome.

2. Offer strategy. A more important concern can be stated in shorter compass. A system that allows successive offers that do not negate the consequences of failing to accept an earlier offer invites strategic offers. Initial offers will be made, not for the purpose of winning early settlement but for the purpose of generating consequences that will affect subsequent bargaining. Defendants and plaintiffs alike should make routine offers barely less favorable than the best result to be hoped for. A plaintiff should demand everything. A defendant who offers next to nothing has little to gain

if fee recovery is capped by the amount of the judgment, but may gain powerful bargaining leverage in cases that seem likely to impose at least a significant liability. The greater the incentives for early settlement that are created by a revised Rule 68, indeed, the greater effect the incentives should have on bargaining both within and without the Rule 68 framework. At times settlement will be impeded, not promoted, by adding this element to the strategic calculation.

It seems difficult to predict the courses of behavior that experienced litigators would be able to develop with years of practice in manipulating a revised Rule 68. If it is difficult to predict – if we cannot be confident in predicting the strategic behavior that will develop – revision can be justified only by stronger justifications than would suffice with more certain prediction.

B. Multiple Parties

Multiparty litigation can complicate Rule 68. A defendant, for example, may much prefer a global settlement that establishes the full limits of liability. A plaintiff may prefer, for a variety of reasons, to settle separately with some defendants. More complex combinations can easily emerge. These complexities must

be overcome in private bargaining. The Rule 68 question is whether formal account should be taken of multiparty complications in drafting the rule.

Multiple plaintiffs provide an easy illustration. The defendant, as master of its offer, should be free to offer terms that require acceptance by all plaintiffs. Suppose all but one accept, the offer expires, and the judgment is less favorable to all? Can those who sought to accept be held to pay post-offer fees to the defendant? Should all of the burden be imposed on the one who held out? If only those who reject are subject to Rule 68 consequences, what happens if those who reject do better by the judgment and those who would have accepted do worse, as should happen whenever each made an accurate prediction of the judgment?

Comparative fault can provide a simple illustration of the problems that may arise from multiple-defendant cases. The plaintiff in an automobile accident case offers to settle with the two defendants for $50,000 each, then wins judgment allocating $100,000 damages 60% to one defendant and 40% to the other. Should the rule be written so that one defendant pays a portion of the plaintiff's post-offer fees, but not the other, when the outcome depends on a matter as elusive as the allocation of fault?

Multiple defendants provide a more complicated illustration if the case arises under law that has rejected joint-and-several liability. One defendant wishes to settle with the only plaintiff. The plaintiff must evaluate the offer not only for its direct impact, but also for its uncertain impact on the other defendants. An offer that seems acceptable if the defendant is held liable for 20% of total damages may not be acceptable if, following settlement, trial allocates 30% of the total to that defendant. Arizona is considering a Rule 68 amendment that would allow the plaintiff to tender a conditional acceptance to the defendants who do not join in the offer. If all defendants accept, no fault is apportioned to the defendant who settled; the amount of the settlement is subtracted from the plaintiff's full damages, and the remainder is allocated among the remaining defendants. If one or more defendants reject the conditional acceptance, the defendants who rejected share equally "any Rule 68 sanctions which would otherwise be assessed against the plaintiff in favor of the offering defendant."[12] At best, this system complicates the process of calculating the offer, and imposes a difficult prediction on defendants faced with a plaintiff's conditional acceptance. If Rule 68 sanctions actually generate significant settlement incentives, a defendant

would among other things have to predict how other defendants would react. Different complications would arise from alternative approaches. If, for example, it were decided to allow acceptance by one or more defendants, so that some were entitled to a reduction of damages according to fault calculated without regard to the settling defendant, while others were involved in litigating the fault of the settling defendant, trial would be complicated still further. The current Rule 68 proposal does not account for this problem. Silence presumably would mean that Rule 68 consequences flow without accommodation to the circumstances of several liability, or for that matter the various ways in which settlement affects joint-and-several liability. A plausible argument can be made, however, that Erie doctrine[13] commands adherence to a state offer-of-judgment rule specifically adapted to state rules allocating shares of liability.

C. Fee-shifting statutes

Any project to revise Rule 68 must consider the decision in Marek v. Chesny.[14] After the plaintiff in an action under 42 U.S.C. § 1983 had incurred $32,000 in attorney fees, the defendant offered $100,000 to settle the claim and attorney fee liability under 42 U.S.C. § 1988. The plaintiff persisted to trial and won $60,000.

The Court ruled that Rule 68 cut off the § 1988 claim for $139,692 in fees incurred after the offer, observing that this expenditure "resulted in a recovery $8,000 less than petitioners' settlement offer."[15] Rule 68 provides that if the judgment is not more favorable than the offer, "the offeree must pay the costs incurred after the making of the offer." Section 1988 provides for an award of attorney fees "as part of the costs." The meaning of the two provisions together was found "plain." "Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68."[16] Justice Brennan dissented, arguing first that it is foolish to hinge application of Rule 68 on the accident whether a particular fee-shifting statute refers to fees as "costs." He went on to argue that the Court's decision "will lead to a number of skewed settlement incentives that squarely conflict with Congress' intent" in providing attorney fee recovery. This argument was extended to the conclusion that application of Rule 68 to defeat a statutory right to attorney fees modifies a substantive right in violation of the Rules Enabling Act.[17]

If nothing else, any revision of Rule 68 should correct the dependence on the frequently happenstance

statutory choice whether to refer to attorney fees as costs. There is no apparent reason for distinguishing between fee statutes in this way. And matters may become worse confused if an occasional sophisticated attempt is made to take advantage of the current rule in drafting new legislation.[18]

The question whether to perpetuate Marek v. Chesny will prove far more contentious. The arguments for overruling it are forceful. Cutting off statutory fee rights seems inconsistent with the probable purpose of one-way fee-shifting statutes to encourage enforcement of particularly favored rights. Even if Rule 68 is amended to provide for offers by plaintiffs, the prospect of losing statutory fees as well as limited liability to pay defense fees makes the effects of Rule 68 more pressing as to these seemingly favored plaintiffs. So long as the plaintiff need only "prevail" to be entitled to statutory attorney fees, moreover, there is little apparent benefit in making a Rule 68 offer; the only obvious advantage would be to curtail the discretion to deny costs to the plaintiff even though successful. And the risk of losing statutory fees may create a painful conflict of interest for counsel advising on the attractiveness of an offer.

Rule 68 could be written to exclude fee-shifting, or

to exclude both fee-shifting and costs liability, as to any claim that entails statutory fee-shifting. That leaves the problem of cases that combine fee-shifting claims with other claims. A modest variation on Marek v. Chesny illustrates the problem. A plaintiff advancing constitutional and state-law claims arising from assault by a police official is offered $20,000 to settle all claims and wins $19,000 on each theory at trial. Should the defendant be allowed to recover post-offer reasonable attorney fees in excess of $1,000 up to the amount of the judgment because the state-law claim does not invoke a fee-shifting statute? If so, exemption of the § 1983 claim alone does not fully protect the pro-plaintiff policies that may underlie the fee-shifting scheme. The protection would be diluted further still if the Rule 68 consequences were considered in determining the extent of the plaintiff's recovery of statutory fees as "prevailing party." If not, the exemption would be extended at least to the fee-shifting claim and any other theory that is part of the same "claim" as defined by the claim preclusion branch of res judicata.

Exclusion of claims governed by fee-shifting statutes would raise other, perhaps minor, questions. One is whether so many cases would be affected as to dilute the potential benefits of providing fee shifting

under Rule 68. Another is whether it is backward to provide fee shifting under Rule 68 only as to claims that have been left outside the apparently growing number of statutory fee-shifting provisions.

D. Determining Reasonable Fees

Fee sanctions entail responsibility for determining reasonable fees. The Civil Rule 11 amendments now pending in Congress are designed in part to subordinate the role of private sanctions, including attorney-fee sanctions. Experience with determining reasonable fees in other settings has generated lengthy litigation. A rule that blandly calls for determination of reasonable fees is not very helpful. An attempt to devise a helpful formula for determining reasonable fees, however, is not to be undertaken lightly. It is appropriate to ask that Rule 68 be expanded to include fee-shifting only if there are solid grounds for expecting that the benefits will more than compensate the added labors. Perhaps this will happen because so many cases settle, and because actual fees will so far outstrip any possible shift after reduction for the benefit of the judgment and capping at the amount of the judgment that reasonableness is not an issue.[19] Perhaps not.

E. Other Implementation Questions

1. Forgiveness. There are attractive reasons for allowing discretionary exemption from Rule 68 consequences. Only the most obvious examples are needed. An offer may be made in a state of legal uncertainty that is resolved after expiration. Facts that seemed clear at the time of the offer may later become uncertain or worse, and unknown facts may appear. A low defense offer may be followed by an even lower compromise verdict that would be swallowed up even after recognizing the benefit of the judgment. If discretion is recognized, however, it must be kept narrow lest it undermine the possible benefits of fee shifting by diminishing the incentive to accept an offer and increasing the occasions for collateral litigation.

2. Bilateral cap. The proposal limits fee sanctions to the amount of the judgment. Beginning from the desire to ensure that a claimant not be out-of-pocket, this feature appears to achieve rough equality between claimants and defendants. In some cases, however, the equality may prove illusory. Suit on a $100,000 life insurance policy, for example, could turn entirely on the question of fraud by the insured. The insurer is liable for $100,000 or nothing. The plaintiff offers $100,000 and the defendant offers nothing. If the plaintiff wins $100,000 the defendant is liable for reasonable attorney

fees up to $100,000. If the plaintiff wins nothing, the defendant receives no attorney fees. Occasional consequences such as these need not defeat the proposal. They do illustrate that it is not entirely simple.

3. Specific relief. The draft proposal caps any fee award at the amount of the judgment. If only specific relief is involved, fees are not shifted because the "amount" of the judgment is zero. This approach has at least two benefits. One is that it enables plaintiffs in "public interest" litigation to reduce or eliminate exposure to fee-shifting under Rule 68 by reducing or eliminating demands for money damages. The other is that it avoids any need to find an alternative cap for cases that involve only specific relief.

Cases that involve both monetary and specific relief raise the question of comparing the specific relief terms of offer and judgment. The most easily managed approach would be to set the threshold at a judgment that includes every term of the offer. Rule 68 benefits flow to a plaintiff who offered to settle for the same or less relief, and to a defendant who offered to settle for the same or greater relief. The draft proposal sets a lower threshold, looking to "substantially all the nonmonetary relief offered." This approach rests on the belief that it would be remarkable to develop an offer that included

all the elements of a litigated decree in complex institutional reform litigation. It also might reflect concern that choices in shaping the decree should not be subject to the pressure of Rule 68 consequences. Administration of the more flexible test, however, may require more effort than it is worth.

VI Alternative Approaches

Any number of different approaches could be taken to encourage settlement, either through offer-of-judgment rules or through other means. A few may be noted briefly.

The strategic calculus of Rule 68 would be changed greatly if each party could make only one offer, and even more if only one party could make an offer.

The stakes of Rule 68 would be reduced if it were limited to an award of post-offer costs. To make the rule a meaningful tool for plaintiffs, it would be accompanied by a change in the rule that ordinarily the prevailing party recovers its costs.[20] The stakes could be increased, but ordinarily not to the level of attorney fee shifting, by including expert witness fees in the costs.

Concern that Rule 68 may entail serious consequences

for a clsoe miss in predicting the judgment could be reduced by introducing a margin of error. The extent of the margin would be based on perception of the average for reasonable error across a wide range of cases. If fees were shifted only if the judgment falls more than 50% beyond the offer, for example, objections to the proposal might be softened substantially.

The other means of encouraging settlement most prominent today are a host of devices grouped together under such labels as "court-annexed arbitration." Refusal to accept the recommended judgment can carry whatever consequences might be attributed to Rule 68. The advantage of these procedures is that they rely on an impartial assessment of the case as seen by an outsider, and ideally should lead to a recommendation based on that assessment without strategic calculation of what is likely to prove acceptable to whom. This feature may suggest that it is better to rely on such procedures to expedite settlement than to tinker with Rule 68. The disadvantage of these procedures is that ordinarily they are curtailed; the parties may arrive and leave with a much better understanding of the case than can be communicated at a brief hearing or even "mini-trial." This characteristic may make Rule 68 seem more attractive after all.

Although no alternative is obviously better than "capped benefit-of-the-judgment" fee shifting under Rule 68, both alternative versions of Rule 68 and other procedures should be considered before adopting the proposed version with the improvements that inevitably will occur in the drafting process.

VII Conclusion

This exercise in doubt is more a quest for reassurance than a dissent. Much of it can be assigned to two categories: doubts about the duty to settle and its relationship to fee shifting; and doubts about difficulties of implementation.

Fundamental doubts arise from questions about the imperative of settlement and the American Rule that ordinarily litigants bear their own attorney fees, win, lose, or draw. Even a carefully regulated fee-shifting revision of Rule 68 seems to rest on two assumptions. One is that a party who makes a formal Rule 68 offer that proves at least as favorable to the offeree as the eventual judgment deserves to be made whole for attorney fee expenditures "caused" by rejection of the offer. The implicit duty to settle is not measured by reasonable litigation behavior, nor by reasonable settlement behavior, but primarily by the actual result. The other

assumption is that we can redress this attorney-fee injury, at least within limits, without intruding too far on the values served by the American Rule. Neither assumption can be accepted uncritically. No theory has yet been advanced to clearly justify the proposition that although attorney fees should not be shifted merely because a party has brought an action and lost, or has defended an action and lost, shifing is proper because a party has made a wrong prediction in response to a formal offer of judgment.

The doubts that arise from implementing a fee-shifting approach have been detailed in ways that at times may seem unfair. It is easy to emphasize particularly troubling situations, no one of which may arise with any frequency. The cumulative impact of these situations, however, deserves some attention in approaching revision of Rule 68. Occasional untoward results may be reduced by recognizing discretion to excuse Rule 68 consequences. The untoward results that remain can be tolerated if there is a clear prospect of substantial redeeming advantage. Those who doubt the rationale and impact of the proposal, however, may fairly suggest that the costs of bearing some untoward results and the administrative costs of avoiding others bear on the decision.

With all of this, the current proposal commands attention. It offers a carefully thought-out attempt to establish an effective offer-of-judgment procedure. It avoids many of the objections that can be made to unlimited fee shifting, and also avoids the great administrative costs that attend an effort to enforce directly a duty of reasonable settlement behavior. Practical judgment about actual impact may be more important than abstract dithering. Help will be found in surveying practicing attorneys to learn their experiences with settlement and their predictions of the impact of limited fee shifting, a project now underway at the Federal Judicial Center.[21] Much help will be found in the public comment process if the rulemaking process moves forward to that stage. Perhaps in ten or fifteen years we will have so much favorable experience with a limited fee-shifting version of Rule 68 that early doubts will seem captious.

1. The impetus for consideration by the Civil Rules Advisory Committee was provided by an article by Judge William W. Schwarzer, Director of the Federal Judicial Center. See Schwarzer, Fee-Shifting Offers of Judgment – An Approach to Reducing the Cost of Litigation, 76 Judicature 147 (1992). The draft Rule 68 appended at the end departs from Judge Schwarzer's proposal in some ways. The discussion in text likewise ranges beyond Judge Schwarzer's proposal. The core, however, is taken straight from it.

The central provisions of Judge Schwarzer's proposal are adopted in S. 585, 103d Cong. 1st Sess., § 3 (1993).

2. See note 1.

3. Both nuisance claims and "stonewalling" defenses may be reduced. Bringing suit on an unfounded claim is more likely to scare a profitable settlement if the plaintiff can impose greater costs on the defendant than the plaintiff must bear. An offer procedure that promises to transfer some of the defense costs to the plaintiff reduces the potential divergence of costs. Resistance to a valid claim based on knowledge that the costs of winning a judgment exceed the value of the judgment can be undermined by the same process.

4. There are too many articles to list. Among the good articles are Cooter & Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. of Econ.Lit. 1067 (1989); Donohue, Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?, 104 Harv.L.Rev. 1093 (1991); Donohue, The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees, 54 L. & Contemp. Prob. 195 (Summer 1991); Hause, Indemnity, Settlement, and Litigation, or I'll be Suing You, 18 J.Leg.Stud. 157 (1989); Katz, Measuring the Demand for Litigation: Is the English Rule Really Cheaper?, 3 J.L., Econ. & Org. 143 (1987); Miller, An Economic Analysis of Rule 68, 15 J.Leg.Stud. 93 (1986); Rowe, Predicting the Effects of Attorney Fee Shifting, 47 Law & Contemp. Prob. 139 (Winter 1984); Rowe & Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 L. & Contemp. Prob. 13 (Autumn 1988); Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J.Leg.Stud. 55 (1982); Snyder & Hughes, The English Rule for Allocating Legal Costs: Evidence Confronts Theory, 6 J.L., Econ. & Org. 345 (1990); and Toran, Settlement, Sanctions, and Attorney Fees: Comparing English Payment Into Court and Proposed Rule 68, 35 Am.U.L.Rev. 301 (1986).

Articles focusing on earlier efforts to revise Civil Rule 68 include Simon, The Riddle of Rule 68, 54 Geo.Wash.L.Rev. 1 (1985); and Woods, For Every Weapon, a Counterweapon: The Revival of Rule 68, 14 Ford.Urb.L.J. 283 (1986).

5. Game theory is touched upon in several of the articles cited in note *XX above. Good examples of recent work in progress include David A. Anderson, Improving Settlement Devices: Rule 68 and Beyond (1993 ms.); Kathryn E. Spier, Pretrial Bargaining and the Design of Fee-Shifting Rules (1993 ms.).

6. The possibilities for confusion may be greater than they seem. Many experienced lawyers who have reviewed the first draft set out in the appendix have thought the scheme too complicated to administer. Although regular litigators would come to understand the complications, others might remain stymied.

7. Of course official decision may be sought not to vindicate but to humiliate or intimidate. The value of establishing precedent by a test case may be tarnished by the ability of institutional litigants to select favorable cases and tribunals by settling less favorable cases. These facts may diminish, but do not defeat, the value of public adjudication.

8. See Marek v. Chesny, 473 U.S. 1 (1985).

9. 28 U.S.C. § 2072.

10. Marek v. Chesny

11. The virtue of the sanctions approach in assuaging Enabling Act concerns is explored in Burbank, Proposals To Amend Rule 68 — Time To Abandon Ship, 1986, 19 Mich.J.LRev. 425.

12. How cite?

13. Erie R.R. v. Tompkins, 1938, 304 U.S. 64..

14. 473 U.S. 1 (1985).

15. 473 U.S. at 11.

16. 473 U.S. at 9.

17. 473 U.S. at 28-38. The shortest statement was that: "The Court's interpretation of Rule 68 * * * clearly collides with the congressionally prescribed substantive standards of § 1988, and the Rules Enabling Act requires that the Court's interpretation give way." 473 U.S. at 37.

18. The attempt to overrule Marek v. Chesny for claims arising under Title VII of the Civil Rights Act of 1964 is a good illustration. Section 9 of H.R. 1, 102d Cong., 1st Sess. (1991), would have amended § 706(k), 42 U.S.C. § 2000e-5(k), by deleting "as part of the," so that the statute would allow recovery of a "reasonable attorney's fee *(including expert fees) and* ~~as part of~~ the costs." The reasons for overruling Marek v. Chesny in this

setting were described in H.Rep. No. 102-40(I), Educ. & Labor Comm., 102d Cong., 1st Sess., p. 82 (1991), and H.Rep. No. 102-40(II), Judiciary Comm., p. 30 (1991). In the end, the Civil Rights Act of 1991 did not effect the proposed amendment. New § 706(g)(2)(B), 42 U.S.C. 2000e-5(g)(2)(B), however, does allow "attorney's fees and costs" on proving a violation of § 703(m), 42 U.S.C. § 2000e-2(m). This is, to say the least, a subtle method of drafting.

19. See Schwarzer, note 1, at p. 152.

20. See Miller, note 3 above.

21. John Shappard of the Federal Judicial Center, who has worked for years with Rule 68 proposals, has designed a survey that should be completed soon.

Rule 68. Offer of Settlement

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

(1) The offer must:

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

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

(C) [not be filed with the court] {be filed with the court only as provided in (b)(2) or (c)(2)};

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

(E) specify the relief offered.

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

(b) Acceptance; Disposition.

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

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

(c) Expiration.

(1) An offer expires if [rejected or] not accepted before withdrawal or the end of the period stated or ordered under (a)(1)(D).

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

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

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy} [sanction] to the offeror.

(1) If the offeree is not entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

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

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

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

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

(2) If the offeree is entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

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

(B) denial of attorney fees incurred by the offeree after the offer expired.

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

(B) No {remedy may be given} [sanction may be imposed] on disposition of an action by acceptance of an offer under this rule or other settlement.

(4)(A) A judgment for a party demanding relief is more favorable than an offer to it:

(i) if the amount awarded – including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] – exceeds the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment includes all the nonmonetary relief offered, or substantially all the nonmonetary relief offered and additional relief.

(B) A judgment is more favorable to a party opposing relief than an offer to it:

(i) if the amount awarded – including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] – is less than the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment does not include [substantially] all the nonmonetary relief offered.

(f) Nonapplicability. This rule does not apply to an offer made in an action certified as a class or derivative action under Rule 23, 23.1, or 23.2.

Fee statute alternative

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy}[sanction] to the offeror.

(1) The {remedy}[sanction] must include:

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

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

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

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

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

(B) No {remedy may be given}[sanction may be imposed]:

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

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

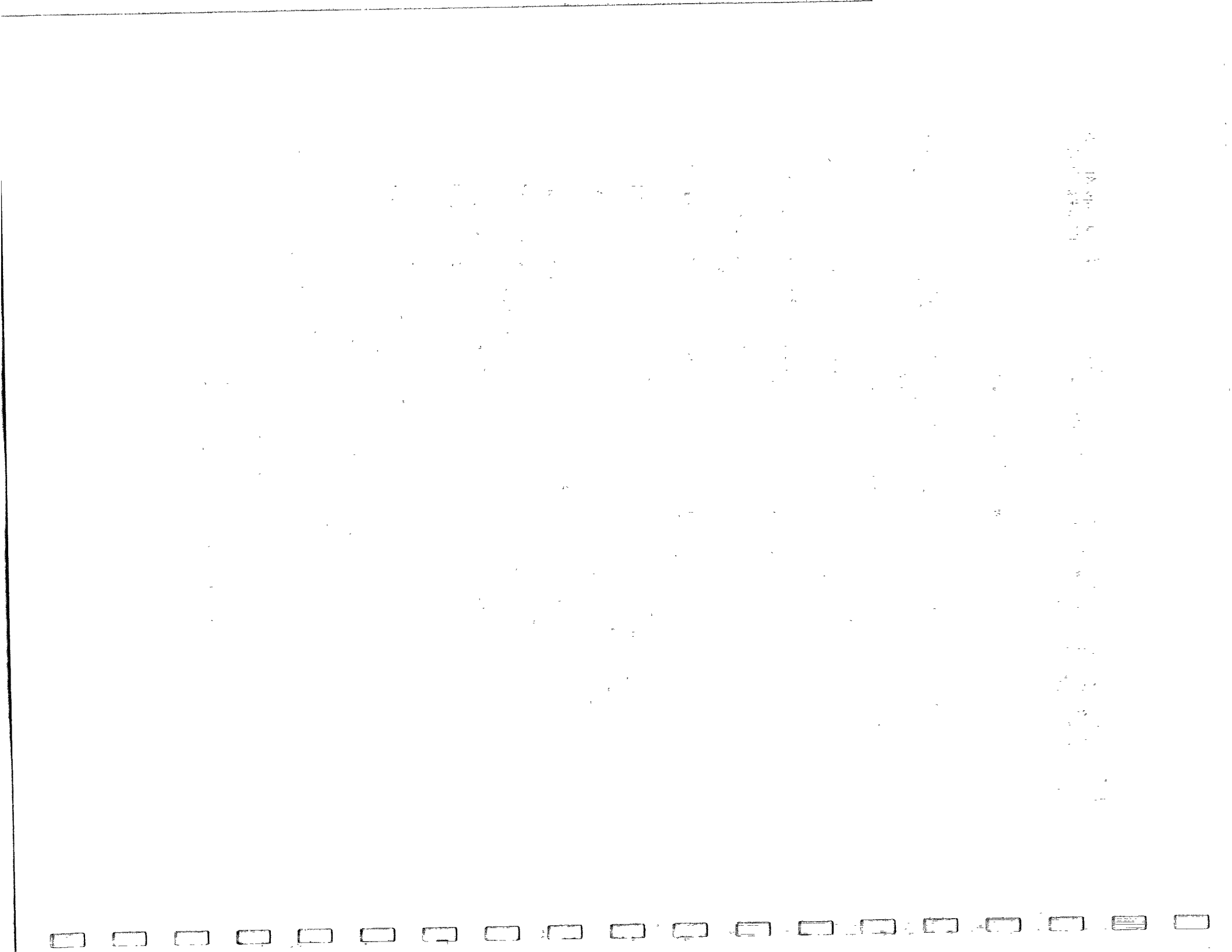
(e)(2)(B)(i) might take less protective forms: No remedy may be given:

Costs but not fee shifting

(i) that requires payment of attorney fees by a party that is entitled to a statutory award of attorney fees; or

Statutory fees not affected

(i) that affects the statutory right of a party to an award of attorney fees;



Agenda F-7
Court Administration/Case Mngt.
September 1993

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Committee on Court Administration and Case Management met in Washington, D.C., on June 14-15, 1993. All members of the Committee were present with the exception of Judge Roger Wollman (8th Circuit), Judge David Sentelle (D.C. Circuit) and Judge D. Brock Hornby (District of Maine). The Committee was staffed by the following Administrative Office personnel: Duane R. Lee (Chief, Court Administration Division), Glen K. Palman (Deputy Chief), Robert Lowney (Assistant to the Chief) and Abel J. Mattos (Chief, Programs Branch). Also in attendance from the Administrative Office for portions of the meeting were Clarence A. Lee, Jr. (Associate Director), Noel J. Augustyn (Assistant Director, Court Programs), Thomas C. Hnatowski (Chief, Magistrate Judges Division) and David E. Weiskopf (General Counsel's Office). The Federal Judicial Center was represented by Russell R. Wheeler (Deputy Director), William B. Eldridge (Director, Research Division), Donna J. Stienstra (Senior Research Associate) and John E. Shapard (Research Associate). Juliet Griffin (Clerk, Middle District of Tennessee), Judge James R. Browning (Ninth Circuit Court of Appeals) and Doug Letter (Department of Justice) also participated.

Civil Justice Reform Act of 1993

The Civil Justice Reform Act of 1993 (S. 585), recently introduced by Senators Grassley and DeConcini, has been referred to your Committee for review. The bill contains proposals to reduce costs and delays within the civil justice system. While many of the provisions of the bill are similar to those included in the Access to Justice Act considered by the Congress and the Judicial Conference last year, there are some provisions on which there is no prior Judicial Conference position.

Offers of Judgment

Section 3 of the bill adds § 1721 to title 28 of the United States Code. The provision provides a framework for an offer of judgment similar to Rule 68 of the Federal Rules of Civil Procedure. However, the section differs from Rule 68 in several respects. First, the amendment would allow any party to an action to make an offer of judgment while Rule 68 limits offers to defendants. Second, the bill provides the adverse party with 14 days in which to accept the offer before it is deemed withdrawn while Rule 68 only allows 10 days. Finally, the bill would stipulate that if the offer is not accepted and the final judgment obtained is not more favorable to the offeree, the offeree must pay the offeror's reasonable attorney fees. Currently under Rule 68, attorney fees are only sometimes included in costs depending on individual case circumstances. Attorney fees awarded cannot exceed the amount of the judgment and the court can reduce attorney fees awarded to prevent undue hardship on a party. Your Committee believes that this provision would strengthen the offer of judgment procedure, would provide increased incentive for settlements and is consistent with its

position that the primary utilization of traditional jury trials should be in the most complex cases. The Committee on Rules is currently considering several proposed amendments to Rule 68 including a provision similar to Section 3 of S. 585. Your Committee endorses the substance of Section 3 of S. 585. If the proposal is within the authority of the federal rules, the Committee urges the appropriate committees to adopt it. If the procedure is beyond that authority, your Committee urges the Judicial Conference to support legislation to establish it.

Pro Se Cases

Section 5 of the bill would amend Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997(e)) to direct the courts to continue any action brought by an inmate pursuant to § 1983 of title 42 for up to 180 days in order to extend the period required for exhausting administrative remedies. The Judicial Conference took no position on a similar provision which was included in the Access to Justice Act.

This provision would have a significant effect on the manner in which many courts process these types of cases particularly in light of the Civil Justice Reform Act of 1990 (CJRA). Under CJRA many courts are implementing a system of more careful scrutiny of prisoner complaints. This method allows a court to weed out the clearly frivolous claims as well as insure prompt attention to time sensitive matters. This procedure also allows the dismissal of the complaint against improper defendants (e.g., those with immunity, etc.). Your Committee is concerned that an automatic continuance for up to six months without individual assessments or monitoring would make it more difficult for courts to manage these types of cases effectively. Your

Committee is also concerned with the breadth of cases covered by the section. Certain cases under the purview of § 1983 do not lend themselves to adjudication by an administrative system. Additionally there are certain actions under § 1983, such as claims for medical treatment, which by their nature demand immediate attention. The general ineffectiveness of current inmate grievance procedures, both at the federal and local levels must also be addressed. Until an effective system of administrative dispositions is in place, this provision would seem premature.

As an alternative to the provisions in the Civil Justice Reform Act of 1993, your Committee recommends the provisions included in the judiciary's "housekeeping bill" of last year. This provision called for shorter continuances and, more importantly, addresses the problem of delay in certification of the administrative grievance procedures by the Attorney General. The housekeeping provisions would allow a case to be continued for up to 120 days as opposed to 180 as contemplated by the Civil Justice Reform Act of 1993. This would also allow adequate time for the administrative procedures to work without causing the case to become stale. The housekeeping provisions would allow a judge to determine if the administrative procedures are "otherwise fair and effective" eliminating the need to wait for certification by the Attorney General. The proposal in the housekeeping bill is substantially similar to that of the Federal Courts Study Commission which was supported by the Executive Committee in May, 1990.

Expert Witnesses

Section 6 of S. 585 would add § 1829 to title 28 of the United States Code. This section would limit the number of expert witnesses allowed to testify on any single

issue to one from each side. Your Committee believes that the implementation of this provision would have a significant impact on the Federal Rules of Civil Procedure and the Federal Rules of Evidence and as a result this Committee defers to the views of the Committee on Rules of Practice and Procedure.

Recommendation 1: That the Judicial Conference a) support in principle the substance of Section 3 of the Civil Justice Reform Act of 1993 and refer the issue of whether the matter is more appropriately within the authority of federal rules to the Committee on Rules of Practice and Procedure for a report to the March 1994 Session of the Judicial Conference; b) support Section 5(b) of the Act; and c) oppose Section 5(a) of the Act as written and offer the provisions of the judiciary housekeeping bill as an alternative.

Fee for Electronic Access to Court Data for Appellate Courts

In March of 1990 the Judicial Conference approved an amendment to the Miscellaneous Fee Schedules for district and bankruptcy courts to provide for a fee for electronic access to court data (JCUS MAR 90, p.21). Your Committee has considered whether a similar amendment of the Miscellaneous Fee Schedule for appellate courts is advisable at this time. There is clear authority under the Judiciary Appropriations Act for FY 1991 for the Judiciary to retain revenue generated by a fee for electronic access to court data in the appellate courts. The mechanism for implementing this fee is by amendment to the Miscellaneous Fee Schedule promulgated under 28 U.S.C. § 1913.

In the interest of maintaining a consistent national policy with respect to fees for similar services in the federal courts, your Committee believes, in theory, that there should be an appellate fee for electronic access to court data. However, your Committee notes that currently this service is available in only three appellate courts

103D CONGRESS
1ST SESSION

S. 585

To provide greater access to civil justice by reducing costs and delay, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 16 (legislative day, MARCH 3), 1993

Mr. GRASSLEY (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide greater access to civil justice by reducing costs and delay, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Justice Reform Act of 1993".

SEC. 2. DIVERSITY OF CITIZENSHIP JURISDICTION; AWARD OF ATTORNEYS' FEES TO PREVAILING PARTY.

(a) AWARD OF FEES.—Section 1332 of title 28, United States Code, is amended by inserting after subsection (e) the following new subsection:

"(f)(1) The prevailing party in an action under this section shall be entitled to attorneys' fees only to the extent that such party prevails on any position or claim advanced during the action. Attorneys' fees under this paragraph shall be paid by the nonprevailing party but shall not exceed the amount of the attorneys' fees of the nonprevailing party with regard to such position or claim. If the nonprevailing party receives services under a contingent fee agreement, the amount of attorneys' fees under this paragraph shall not exceed the reasonable value of those services.

"(2) In order to receive attorneys' fees under paragraph (1), counsel of record in any actions under this section shall maintain accurate, complete records of hours worked on the matter regardless of the fee arrangement with his or her client.

"(3) The court may, in its discretion, limit the fees recovered under paragraph (1) to the extent that the court finds special circumstances that make payment of such fees unjust.

"(4) This subsection shall not apply to any action removed from a State court under section 1441 of this title, or to any action in which the United States, any State, or any agency, officer, or employee of the United States or any State is a party.

"(5) As used in this subsection, the term 'prevailing party' means a party to an action who obtains a favorable final judgment (other than by settlement), exclusive of interest, on all or a portion of the claims asserted in the action.".

(b) STUDY AND REPORT.—(1) The Director of the Administrative Office of the United States Courts shall conduct a study regarding the effect of the requirements of subsection (f) of section 1332 of title 28, United States Code, as added by subsection (a) of this section, on the caseload of actions brought under such section, which study shall include—

(A) data on the number of actions, within each judicial district, in which the nonprevailing party was required to pay the attorneys' fees of the prevailing party; and

(B) an assessment of the deterrent effect of the requirements on frivolous or meritless actions.

(2) No later than 4 years after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall submit a report to the appropriate committees of Congress containing—

(A) the results of the study described in paragraph (1); and

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

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

SEC. 3. OFFER OF JUDGMENT.

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

"CHAPTER 114—PRETRIAL PROVISIONS

"§ 1721. Offer of judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"§ 483. Prior notice of civil action

"(a)(1) No less than 30 days before filing a civil action in a court of the United States the claimant intending to file such action shall transmit written notice to any intended defendant of the specific claims involved, including the amount of actual damages and expenses incurred and expected to be incurred. The claimant shall transmit such notice to any intended defendant at an address reasonably expected to provide actual notice.

"(2) For purposes of this section, the term 'transmit' means to mail by first class-mail, postage prepaid, or contract for delivery by any company which physically delivers correspondence as a commercial service to the public in its regular course of business.

"(3) The claimant shall at the time of filing a civil action, file in the court a certificate of service evidencing compliance with this subsection.

"(b) If the applicable statute of limitations for such action would expire during the period of notice required by subsection (a), the statute of limitations shall expire on the thirtieth day after the date on which written notice is transmitted to the intended defendant or defendants under subsection (a). The parties may by written agreement extend that 30-day period for an additional period of not to exceed 90 days.

"(c) The requirements of this section shall not apply—

"(1) in any action to seize or forfeit assets subject to forfeiture or in any bankruptcy, insolvency, receivership, conservatorship, or liquidation proceeding;

"(2) if the assets that are the subject of the action or would satisfy a judgment are subject to flight, dissipation, or destruction, or if the defendant is subject to flight;

"(3) if a written notice prior to filing an action is otherwise required by law, or the claimant has made a prior attempt in writing to settle the claim with the defendant;

"(4) in proceedings to enforce a civil investigative demand or an administrative summons;

"(5) in any action to foreclose a lien; or

"(6) in any action pertaining to a temporary restraining order, preliminary injunctive relief, or the fraudulent conveyance of property, or in any other type of action involving exigent circumstances that compel immediate resort to the courts.

"(d) If the district court finds that the requirements of subsection (a) have not been met by the claimant, and such defect is asserted by the defendant within 60 days

after service of the summons or complaint upon such defendant, the claim shall be dismissed without prejudice and the costs of such action, including attorneys' fees, shall be imposed upon the claimant. Whenever an action is dismissed under this subsection, the claimant may refile such claim within 60 days after dismissal regardless of any statutory limitations period if—

"(1) during the 60 days after dismissal, notice is transmitted under subsection (a); and

"(2) the original action was timely filed in accordance with subsection (b).".

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 23 of title 28, United States Code, is amended by adding at the end the following:

"483. Prior notice of civil action.".

SEC. 5. CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.

(a) EXHAUSTION OF ADMINISTRATIVE REMEDIES.—Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended—

(1) by amending subsection (a) to read as follows:

"(a) In any action brought pursuant to section 1979 of the Revised Statutes of the United States, by any adult convicted of a crime confined in any jail, prison, or other

correctional facility, the court shall continue such case for a period not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available."; and

(2) in subsection (b)—

(A) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and

(B) by inserting immediately after "(b)" the following:

"(1) Upon the request of a State or local corrections agency, the Attorney General of the United States shall provide the agency with technical advice and assistance in establishing plain, speedy, and effective administrative remedies for inmate grievances.".

(b) PROCEEDINGS IN FORMA PAUPERIS.—Section 1915(d) of title 28, United States Code, is amended to read as follows:

"(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action fails to state a claim upon which relief can be granted or is frivolous or malicious.".

(c) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall take effect on the date of the enactment of this Act.

SEC. 6. EXPERT WITNESSES.

(a) IN GENERAL.—Chapter 119 of title 28, United States Code, is amended by inserting after section 1828 the following new section:

"§ 1829. Multiple expert witnesses

"In any civil action filed in a district court, the court shall not permit opinion evidence on the same issue from more than 1 expert witness for each party, except upon a showing of good cause.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 119 of title 28, United States Code, is amended by inserting after the item relating to section 1828 the following new section:

"1829. Multiple expert witnesses.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendments to any other person or circumstance shall not be affected by that invalidation.

SEC. 8. EFFECTIVE DATE.

Except as expressly provided otherwise, this Act and the amendments made by this Act shall become effective 90 days after the date of the enactment of this Act. This

Act shall not apply to any action or proceeding commenced before such effective date.

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Miscellaneous Rule Proposal

The only proposal "from the mail bag" that is ripe for present consideration is advanced in the attached letter from Judge J. Rich Leonard to Peter McCabe. The proposal addresses the problem created by a stand-off between orders that seal judicial records without time limits and depository rules that bar records that cannot be unsealed by a specific date.

It is not entirely clear where the problem might best be addressed in the Civil Rules. Rule 26(c) is the obvious location for discovery confidentiality orders. Orders that seal other records do not have as obvious a location. Rule 43 may be the best place.

The discovery confidentiality rule would fit best as a new paragraph (4) in the revised form of Rule 26(c) approved for eventual publication at the June meeting of the Standing Committee. As a starting point, it might look something like this:

> (4) An order sealing discovery records filed with the court expires 25 years after final judgment unless the order or a later order sets a different expiration date.

It is more difficult to guess at the shape of a Rule 43 provision without some Committee discussion. Probably it is better to have separate provisions for discovery orders and for other sealing orders. The most difficult question is whether it is desirable to adopt a rule that sets a presumptive termination date for sealing orders but does not address any other questions about sealing. Such questions as the proper occasions for sealing records quickly become mingled with problems that involve the work of the Appellate Rules, Criminal Rules, and Evidence Rules Committees. Even if the only question to be addressed is the sunset provision, uniform language likely should be worked out with those committees. A suitable basis for discussion can be provided by slight changes in the discovery language sketched above:

> **(g) Expiration of sealing orders.** An order sealing court records expires 25 years after final judgment unless the order or a later order sets a different expiration date.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

J. Rich Leonard
Bankruptcy Judge

The Thomas Milton Moore Building
1760 Parkwood Boulevard
Post Office Drawer 2807
Wilson, North Carolina 27894-2807
919-291-6413

June 2, 1993

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U. S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D. C. 20544

Dear Peter:

Last year, the Administrative Office and the Federal Judicial Center established a joint Committee on Court Records. The committee is generally concerned with the selection and preservation of the significant records of the federal courts. I am writing on behalf of a subcommittee on sealed records whose members include, besides me, Pamela Krems, AO, Court Administration Division; Charles Summmers, AO, Printing, Mail and Records Management Branch; Cynthia Harrison, Federal Judicial History Office, FJC; and Elizabeth C. Wiggins, Research Division, FJC.

The records schedule adopted in 1982 by the Judicial Conference requires the permanent preservation of designated case files to document the work of the federal courts. Many permanent cases contain portions of records that have been sealed by court order. The concern we are now raising is that neither the Civil, Criminal, or Bankruptcy Rules provide any timetable or process for vacating orders sealing records. As a result, records sealed in permanent cases can never be examined but can never be destroyed.

The lack of any standard procedure for unsealing records creates practical problems. The current records schedule does not allow for the shipment of sealed records. Consequently, these records are accumulating in vaults in local courthouses throughout the country, often separated from other portions of the case file, and causing increasing storage problems. NARA will not accept sealed material without a specific date at which the material will be available.

The lack of any provision for vacating seals is particularly troubling because these court records will never become available for public use. Although researchers recognize the need for temporary confidentiality, it is difficult to accept as an economic matter the premise that the contents of government documents should routinely be saved but sealed in perpetuity.

We believe that there is a simple solution. The transfer of court records to the National Archives for permanent retention as

a government record usually occurs at 25 years. Non-permanent records are destroyed. For ease of administration, the courts should adopt a policy that would, under normal circumstances, automatically unseal documents in case records at the time that those records are transferred to the National Archives and become part of the historical record of the United States. The following language is a starting point:

> Unless otherwise ordered in a particular case, an order sealing all or any portion of the record in any case will expire 25 years after termination of the case.

Since cases are governed by all of the three sets of procedural rules, amendment of each would be necessary to effectuate this change through the rulemaking process. If you believe that this change should more appropriately be pursued through other avenues, please let me know.

Thank you for your consideration.

Sincerely,

J. Rich Leonard

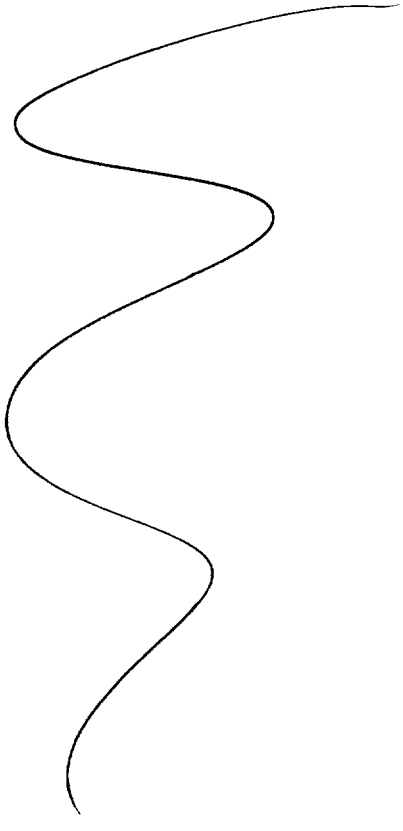
J. Rich Leonard
Bankruptcy Judge

Supplemental

Agenda

Book

Materials



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

VIA FAX
October 6, 1993

MEMORANDUM TO CHAIRS AND REPORTERS OF ADVISORY COMMITTEES ON BANKRUPTCY, CIVIL, AND CRIMINAL RULES

SUBJECT: Facsimile Filing Guidelines

I am writing to advise you that the Judicial Conference deferred adoption of the facsimile filing guidelines proposed by the Committee on Court Administration and Case Management and approved the following recommendation at its September 1993 session:

> The Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

The filing guidelines considered by the Conference were much improved over the original draft guidelines and included substantial changes suggested by the rules committees' reporters at the June 1993 Standing Rules Committee. Nonetheless, the guidelines raised serious problems.

The Advisory Committee on Appellate Rules met soon after the September Conference session and voted to publish for public comment a revised abbreviated set of facsimile filing guidelines. Many of the items contained in the revised guidelines were excluded and left to local rules. A copy of the revised guidelines approved by the Appellate Rules Committee for publication is attached for your information.

It appears that at least some members of the Judicial Conference were pressing the Rules Committees for expedited action. In light of the Conference's action, I am requesting that you advise me whether it is feasible for your committee to

approve for publication for public comment the filing guidelines, as revised by the Appellate Rules Committee, and any necessary rules amendments in time for the November 1, 1993 scheduled publication date.

I am also sending to you a copy of a memorandum from Judge Robert E. Keeton describing the Judicial Conference actions.

Please call (TEL 202-273-1820) or fax (FAX 202-273-1826) your response to John Rabiej.

Alicemarie H. Stotler

Alicemarie H. Stotler

Attachments

GUIDELINES FOR ~~FILING BY~~ FACSIMILE TRANSMISSION

I. *General Purpose and Scope:*

(1) Purpose of the Guidelines: The Guidelines for ~~Filing~~ Receiving by Facsimile are the standards established by the Judicial Conference of the United States to assist those courts that permit ~~filing of papers by facsimile transmission pursuant to~~ their clerks, under the Federal Rules of Appellate, Civil, Criminal and Bankruptcy Procedure, to receive for filing by means of facsimile transmission.

(2) Compliance with Rules of Procedure: These Guidelines for ~~Filing~~ Receiving by Facsimile are designed to guide the activities of litigants and court personnel relating to facsimile ~~filing~~ transmission consistently with, and where authorized by, all applicable rules of procedure adopted under 28 U.S.C. §§ 2072 and 2075. They do not amend, modify, or excuse noncompliance with any applicable rules.

(3) ~~Prohibited Documents: Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.~~

II. *Definitions:*

(1) "Facsimile transmission" means sending a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals, and reconstructs the signals ~~to print~~ so a duplicate of the original document can be printed at the receiving end.

(2) ~~"Facsimile filing" or filing by fax" means a court's receipt of a paper generated by a facsimile machine in the clerk's office. Electronic transmission of a document by facsimile machine does not constitute filing; rather, filing is complete only when the document is received by the clerk.~~ "Receive by facsimile" means a clerk's receiving by one or the other of the following means: (1) receiving by a facsimile machine in the clerk's office of a facsimile transmission of a document: (2) receiving in the clerk's office a document sent by facsimile transmission to a facsimile

machine located outside the clerk's office.

(3) "Facsimile machine" means a machine used to transmit or receive documents that meets the standards stated in part III of these guidelines.

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

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to ~~accept the filing of papers by facsimile on a routine basis~~ receive by facsimile the following technical requirements must be met. [1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(b) The receiving unit must be connected to and print through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Additional Facsimile Standards for Senders:

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

(i) CCITT Compatibility - Group 3 [2];

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

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

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

(iii) Image Resolution - Standard 203 x 98.

(b) A facsimile machine used to send documents to a clerk of court must be able to produce a transmission record, as proof of transmission at the time transmission is completed. [3]

~~VIII.~~IV. *Fees:*

(1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.

(2) If a court authorizes the filing of papers by facsimile on a routine basis, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax [4]

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

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

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court, for each page [5] . . . . . $ .50

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

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[3] This is in addition to the requirement that the original document be maintained.

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

[5] See Miscellaneous Fee Schedules.

THE FOLLOWING ITEMS WERE WITHDRAWN FROM THE GUIDELINES. THEY WILL BE LEFT TO THE DISCRETION OF THE INDIVIDUAL COURT.

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

V. *Original Signature:* If authorized by local rules or by order in a particular case, a clerk may provisionally accept a document having the image of the original manual signature on the facsimile copy. A court may order prompt filing of the original signed document, as well. If not filed, the original signed document must be maintained by the attorney of record or the party originating the document until the litigation concludes.

VI. *Transmission record:* The sending party must maintain a copy of all papers filed by facsimile and a copy of the transmission record until the litigation concludes.

VII. *Cover sheet:*

(1) Each document transmitted to the clerk must be accompanied by a cover sheet which lists the following:

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

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

(c) the case title information;

(d) the case number identification (except when the document is the original complaint);

(e) the title of document(s);

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

(g) the number of pages transmitted including cover sheet;

(h) the billing or charge information for court fees; and

(i) the date and time of transmission.

(2) Unless a local rule or court order in a particular case requires otherwise, the cover sheet must be the first page transmitted. The cover sheet need not be filed in the case and is not counted toward any page limit established by the court.

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

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

September 23, 1993

MEMORANDUM TO THE HONORABLE ALICEMARIE H. STOTLER

FROM: ROBERT E. KEETON

SUBJECT: *Judicial Conference Action of 9/20/93 on FAX Filing*

I write to confirm and supplement my oral report to you about the Judicial Conference action of September 20, 1993, on fax filing.

The formal action was adoption of the following motion made by Chief Judge Mikva:

> The Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

Judge Mikva's explanation of his motion included a comment that I interpreted as meaning the Rules Committee may need to be exposed to a little heat from the Judicial Conference to get it moving. This comment was made after I had explained that the Rules Enabling Act process would require a minimum of four months - and preferably a longer period - for public comment, as well as consideration by Advisory Committees and the Standing Committee both before and after the period of public comment. Judge Mikva had earlier supported my comment that for the Judicial Conference to bypass the Rules Enabling Act process would be an embarrassment to our continuing efforts to get Congress not to do that in other matters of greater significance than fax filing. Thus, when I put his several comments together, I infer that he, at least, and perhaps many others among those who contributed to the substantial majority voting for Judge Mikva's motion, are pressing the Rules Committees to find a way to expedite the Rules Enabling

Act process so a proposal can be ready for the Judicial Conference to adopt it (or vote to send it on to the Supreme Court and Congress, if rules amendments are required) at the September 1994 meeting of the Judicial Conference.

Is it possible to proceed that rapidly, consistent with the requirements of the Rules Enabling Act? The answer may depend on what the proposal is and how controversial it turns out to be in the Bench and Bar. In any event, however, in order to be well prepared for the September 1994 Conference meeting, you will need to be able to demonstrate that the Rules Committees have done their best to comply with both the letter and spirit of the September 1993 vote.

If you wait for a vote of the Standing Committee (at its January 1994 meeting) to approve publication of a draft for comment, the comment period could not commence before February or March and could not close before May or June. That would be too late for reconsideration by the Advisory Committees in time to have their recommendations before the Standing Committee at its June 1994 meeting, when it would need to act in order to have a recommendation before the Judicial Conference in September 1994.

If you want to consider requesting the Standing Committee to approve publication by telephone vote before the Committee meets in January 1994, the key obstacle is the necessity of stirring the Advisory Committees to prepare almost immediately, for publication, a suitable draft or drafts of proposed rules amendments (it might need to be more than a single draft, because the Bankruptcy Committee strongly believes it has special reasons for not allowing local option for fax filings in bankruptcy clerks' offices).

Judge Boyle from Rhode Island (the district judge member of the Judicial Conference from the First Circuit) made the point both in the meeting and more fully to me outside the meeting that if we have either a rule of procedure, or a Judicial Conference guideline, or both, regarding fax filing, probably it should also deal with fax service by lawyer upon lawyer. Fax service may be less difficult to deal with because of the consensual context - both lawyers must have fax machines and machines that are compatible before it can happen. But problems may nevertheless arise about how quick and reliable the service will be, and we may get a fair amount of public comment about any proposed rule on fax service.

I have two comments as an ex officio member of the Subcommittee on Style (through September 30 only, of course).

First, on the flight down to Washington on September 20, I was reading over the latest draft of "GUIDELINES FOR FILING BY FACSIMILE," Agenda F-7 (Appendix A), which you will note bears a striking similarity to the high-pressure draft done by the conscripts we sent off to a separate room to work while the Standing Committee was meeting in June. In part II (2) you will see a proposed style change I interlined to deal

with what seemed to me an ambiguity. In the Conference session, somebody raised a question about whether II (2) meant the fax machine had to be in the Clerk's office? Before I could answer, "Clearly not," others said, "Yes, of course." For me, this was a clear demonstration of the Standing Committee's point that the current draft is still imperfect.

Second, my other interlineations on the attached draft (changing the title to "Guidelines for Facsimile Transmission" and proposing associated changes) are suggestions I was thinking about, as a means of avoiding conflicts between guidelines and rules, before the discussion this morning (September 23) in the meeting of the Advisory Committee on Appellate Rules. By one or more separate communications, you will receive more information about the very constructive recommendations of that Committee.

I will leave further distribution of this memorandum to your discretion.

Bob

Robert E. Keeton

Attachments

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

October 7, 1993

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: Attached Draft FJC Questionnaire on Proposed Amendments to Civil Rule 68

Judge Higginbotham requested me to send to you a copy of the draft questionnaire prepared by John Shapard of the Federal Judicial Center. The material will be discussed at the San Francisco meeting as part of agenda item VIII.

Please bring the material with you to the committee meeting.

John K. Rabiej

John K. Rabiej

Attachments

cc: Honorable Patrick E. Higginbotham

Research Division
202-273-4070

memorandum

DATE: October 5, 1993
TO: Advisory Committee on Civil Rules
FROM: John Shapard
SUBJECT: Questionnaire concerning potential amendments to Rule 68, FRCP

At the May meeting of the Advisory Committee on Civil Rules, Judge Pointer designated Mr. Kasanin and Judges Sirica and Doty as a liaison committee to advise me on shaping a survey of counsel on possible amendments to Rule 68. After consultation with the liaison committee, we provided a copy of my draft proposal to Judge Higginbotham, who asked that it be provided with to the full committee for discussion at its October meeting. The enclosed materials incorporate a few revisions suggested by the liaison committee and Judge Higginbotham, but still remain in draft form, subject to further revision.

My understanding of the task is to conduct a survey that can help inform Advisory Committee decisions about a range of possible amendments to Rule 68. This is in contrast to the survey proposal that I presented at the May meeting, which was focused on a specific proposed rule (essentially that which was proposed by Judge Schwarzer and the subject of Mr. Cooper's analysis--the "two-way" benefit-of-the-offer attorney fees idea). The other options discussed by the committee included:
(1) simply abolishing Rule 68,
(2) making it a two-way rule (permitting offers to be make by claimants as well as by parties defending against a claim) but retaining the mild incentive of the existing rule: an offeree failing to obtain judgment better than the terms of the offer would pay offeror's post-offer statutory costs
(3) making it a two-way rule with an incentive that is more significant than payment of post-offer costs but not as significant as post-offer attorney's fees (e.g. allow the offeree to recover a multiple of costs or a percentage of reasonable attorney fees).

The enclosed proposal includes two items, both of which are revisions of items included with the May agenda materials: a draft questionnaire cover letter and the draft questionnaire. The plan is to send these to counsel in 600 civil cases, randomly selected in the manner outlined in the May agenda materials.[1]

Because the discussion at the May meeting included concern about application of Rule 68 (either the existing rule or an amended version) to cases in which a prevailing plaintiff is by statute

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[1] In short, the plan is to send the questionnaire to counsel in six groups of 100 cases each, with each group representing combinations of tried and non-tried cases sounding in tort, contract, and in an "other" category (i.e., 100 of the cases would be tried contract actions, another 100 would be non-tried torts). Because the number of attorneys appearing in a civil case averages more than 2, roughly about 1500 attorneys will receive the questionnaire.

entitled to recover reasonable attorney fees "as part of the costs,"[2] we are also planning an additional questionnaire, to be sent to counsel in 200 civil rights cases (half tried and half disposed of short of trial, half employment discrimination and half from the "other civil rights" category). This second questionnaire would pose questions similar to those in the enclosed draft questionnaire, except questions that in the enclosure ask the respondent's opinion about the likely influence of an amended rule would be recast to ask about the actual influence of the current rule as applied to civil rights cases.

I should emphasize that I view the cover letter and questionnaire as mere drafts, and I will be very grateful for any suggestions you may have (including changes to the wording of questions or to the layout of the questionnaire, and deletion or addition of questions). You should defer very little if any to my "expertise" in the matter of drafting questionnaires. If you think a question is confusing, ambiguous or stupid, others almost certainly will also, and that will undermine the validity and utility of the survey results.

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[2] Marek v. Chesney, 473 U.S 1 (1985), held that a plaintiff entitled to recover attorney fees pursuant to a statute allowing recovery of reasonable attorney fees as "part of the costs" in the action cannot recover such fees incurred after the making of a Rule 68 offer if plaintiff's failure to obtain a judgment better than the offer results in a shift to plaintiff of liability for post-offer costs.

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

Research Division
Telephone: (202) 273-4070

March 25, 1993

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

[DRAFT Questionnaire Cover Letter]

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

Dear Mr. Smith,

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

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

Possible amendments to Rule 68 could have major effects on litigation of civil cases in the federal courts, and it is of utmost importance that the Advisory Committee have the benefit of the views of trial lawyers concerning the possible effects and their virtues and vices. Although the Advisory Committee always requests and receives public comment on formally proposed amendments, it often hears only from a limited audience, including legal scholars and organizations representing particular segments of the bar or particular interests. Response to the enclosed questionnaire will provide the committee with the views of a more representative sample of federal civil trial lawyers, including some from whom the committee might not otherwise hear.

As you will see from the questionnaire, assessing possible amendments to Rule 68 requires reflection. I recognize that questionnaires are rarely welcome, but your response will make a valuable contribution to improving the administration of justice in the federal courts.

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

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

Sincerely,

William W Schwarzer

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

Questionnaire Concerning Proposed Amendments to Rule 68, FRCP

Explanation of Rule 68 and possible amendments.

No proposed amendment has yet been published for comment or otherwise formally entertained by the Advisory Committee on Civil Rules. The committee wishes to consider a number of possible alternatives, including abolition of the current rule.

As it now stands, the rule allows a party defending against a claim to serve an offer of judgment. If the offer is not accepted within 10 days, and the judgment finally obtained is not more favorable to the offeree than was the offer, the offeree must pay the statutory costs incurred after making the offer. The existing rule is thought to have little use or effect, at least in cases where costs are minor compared to the amount at stake in the litigation. The rule may be of significance in cases where a statute permits the prevailing plaintiff to recover attorney fees "as part of the costs" in the action, since the Rule has been interpreted to include such attorney fees. Hence an unaccepted Rule 68 offer can result in plaintiff failing to recover the post-offer attorney's fees to which plaintiff would ordinarily be entitled.

The purpose of Rule 68 is to encourage the making and accepting of early and reasonable settlement offers. The incentive to make and accept reasonable offers is provided by the prospect of cost recovery if the offer is not accepted and not bettered by the final judgment. The incentive to make early offers is provided by the fact that only post-offer costs are recoverable under the rule.

The current rule has been criticized not only because the incentive of cost recovery is thought to be too weak to be effective, but also because it is available only to defendants--it is a "one-way" rule. Most ideas for amending the Rule call for making it a "two-way" rule, available to plaintiffs as well as defendants, and increasing the incentives by allowing recovery of sums greater than recovery of post-offer costs. Some alternative types of incentive are set forth in question 1, on the next page.

Application of the existing Rule 68 or of possible amended versions of the rule to cases in which a prevailing party might otherwise be entitled to recover attorney fees (e.g. class actions, civil rights) raises different questions than does application to cases in which each side ordinarily bears its own attorney fees. **All questions in this questionnaire pertain <u>only</u> to the application of an offer of judgment rule to cases in which each side would ordinarily bear its own litigation expenses, except for taxation of statutory costs.**

PART I.

1. Five general ideas have been proposed for increasing the incentive to make and accept early and reasonable settlement offers. A sixth idea, advocated in the belief that the current rule is unfair or pointless, is simply to abolish Rule 68. Which of the following options do you believe would generally lead to the fairest outcomes for all parties in civil litigation? (Please check one)

- ❑ a. Allow recovery of the reasonable attorney fees incurred by the offeror after making the offer. .
- ❑ b. Allow recovery of reasonable attorney fees, but only to the extent that they exceed the difference between the offer and the judgment. The rationale of this idea is that rejection of the offer has benefited the offeror to the extent that the judgment is superior to the offer. For instance, a judgment for $100,000 is $20,000 better for plaintiff than plaintiff's offer to accept $80,000. If plaintiff's reasonable post-offer attorney fees were $30,000, the defendant would be obliged to pay only $10,000 in compensation for plaintiff's post-offer attorney's fees.
- ❑ c. Allow recovery of some percentage of reasonable attorney's fees (which could be more or less than %100). What percentage?: _____% of reasonable fees.
- ❑ d. Allow recovery of some multiple of statutory costs. What multiple? ___ times costs.
- ❑ e. Allow recovery of some percentage of the amount of the judgment? What percentage?: _____% of judgment.
- ❑ f. Allow recovery of taxable costs plus reasonable expert witness fees or other expenses not ordinarily taxable as costs (what other expenses?: _____).
- ❑ g. Abolish Rule 68 altogether.

2. Another proposal, that can be added to any of the first six ideas mentioned above, is to preclude recovery in an amount that exceeds the value of the judgment. If, for instance, plaintiff obtained judgment for $10,000, the amount recoverable by defendant could not exceed $10,000. Do you favor or oppose this provision?

- ❑ a. Favor
- ❑ b. Oppose
- ❑ c. Unsure or inapplicable (e.g., because I support abolition of Rule 68)

The questions in the remainder of the questionnaire address various issues that are thought relevant to possible amendments to Rule 68. Because reflection on these issues may cause you to change your views regarding the questions presented in the preceding questions, we afford an opportunity at the end of the questionnaire for you to change your answers to the preceding questions.

PART II. The questions in this part pertain specifically to the case referenced in the cover letter. Before answering the following questions, you may find it helpful to retrieve your files on the referenced case in order to refresh you memory concerning its litigation and the associated expenses.

3. How was this case resolved? (please check only one answer)

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

_____

_____

_____

4. If this case was not settled, why not? Please check each answer that is applicable to this case. (If the case did settle, skip this question.)

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

_____

_____

5. Please check <u>each</u> of the following statements that is applicable to the settlement of this case. (If the case did not settle, skip this question.)

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

6. What remedy or remedies were sought in this case? (please check only one)

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

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

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

8. In some cases, there is little doubt that trial would result in a judgment for plaintiff, but there is uncertainty about the amount of damages that will be awarded (a clear-liability personal injury case in which damages may include pain and suffering, for example). In other cases, liability is seriously at issue, but there is little doubt about the damages that would be awarded in the event of a judgment for plaintiff. Still other cases present a mixture of these two scenarios, so that the outcome is uncertain for both the decision on liability and the amount of damages to be awarded in the event of a finding of liability. Please indicate to what extent this case fell into one extreme or the other by using percentages to indicate to what extent the significant issues in the case had to do with liability or damages. The percentages should add to 100%.

_____% of the uncertainty in this case pertained to the issue of liability.
_____% of the uncertainty pertained to the amount of damages to be awarded

NOTE: THE FOLLOWING TOW QUESTIONS COULD BE REVISED TO FOCUS ONLY ON ATTORNEY FEES (OR ATTORNEY HOURS). SHOULD THEY BE SO REVISAED? SHOULD THEY BE CLARIFIED IN OTHER WAYS?

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

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

$_____

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

_____%

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

$_____

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

_____%

10. Please estimate what percentage of the total litigation expenses in this case fell into each of the following categories (The percentages should sum to 100%.)

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

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

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

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

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

11. What was the nature of the fee arrangement with your client in this case?

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

12. What type of party was your client in this case?

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

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

$_____

14. Suppose that Rule 68 were amended to permit offers by plaintiffs as well as defendants, with 50% of reasonable post-offer attorney fees payable by a party who fails to accept an offer and does not obtain a better result in the judgment. Please check <u>each</u> of the following statements that is applicable to this case (whether or not it settled).

Such an amended Rule 68 probably would have:

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

PART III. The questions in this part pertain to your general experience, practice, or opinions concerning civil litigation.

15. Again suppose that Rule 68 were amended as explained in the previous question. Please check <u>each</u> of the following statements with which you agree concerning the likely effects of the rule, in civil cases generally.

The amended rule probably would:

- ☐ a. make no difference
- ☐ b. lead more cases to reach settlement
- ☐ c. lead cases to settle earlier than they would in the absence of the rule
- ☐ d. make settlement less likely
- ☐ e. delay settlement
- ☐ f. lead to case outcomes (<u>net</u> outcome from settlement or trial) that are more fair
- ☐ g. lead to case outcomes that are unduly generous to plaintiffs
- ☐ h. lead to case outcomes that are unduly generous to defendants
- ☐ i. lead to case outcomes that are unduly generous to wealthier litigants
- ☐ j. lead to case outcomes that are unduly generous to poorer litigants
- ☐ k. increase the expenses of litigation
- ☐ l. decrease the expenses of litigation
- ☐ m. Inhibit actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation, and this is currently a substantial problem.
- ☐ n. Inhibit actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation, but this is currently a minor problem.
- ☐ o. Increase the frequency of actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation.
- ☐ p. Inhibit taking reasonable and/or necessary steps in litigation, out of fear that the party may have to compensate opponent for the expense of responding to those actions.
- ☐ q. Encourage taking reasonable and/or necessary steps in litigation, owing to the possibility that those expenses will be compensated by opponent.

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

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

17. Please check the statement that best describes how you generally arrive at a <u>final</u>, bottom line settlement offer that you would recommend your client make or accept. Please check only one answer.

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

_____

_____

_____

_____

_____

_____

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

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

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

_____%

20. If your reflections in the course of answering this questionnaire have led you to change your opinion regarding possible amendments to (or abolition of) Rule 68, please return to questions 1 and 2 and answer them again, this time placing the numeral "2" next to the answer you now prefer.

❑ Please check here if you wish to receive a copy of the report of this study. If your address is not shown correctly on the cover letter, please indicate the correct address here:

_____

_____

_____

_____

Thank you for your cooperation and assistance. Please return the questionnaire in the enclosed envelope (or addressed to: Research Division, The Federal Judicial Center, One Columbus Circle, N.E., Washington D.C. 20002-8003, Attn.: Rule 68). If you have questions concerning the survey, please contact John Shapard at (202) 273-4070.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 24, 1993

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: Attached Agenda Materials

I have attached a copy of the agenda materials for the October 21-23, 1993 meeting of the Advisory Committee on Civil Rules. Please bring this copy to the meeting, which is scheduled to start on Thursday at 8:30 a.m.

Judge George C. Pratt, chair of the Subcommittee on Style, expects to complete a review of the "stylized draft" of the civil rules, which was sent to you in July 1993. A copy of the style subcommittee's written comments and suggestions on the July draft will be sent to you as soon as it is finished.

John K. Rabiej

John K. Rabiej

cc: Honorable Alicemarie H. Stotler
Dean Daniel R. Coquillette

MODEL LOCAL COURT RULES
FOR
FACSIMILE FILING

25.1 *Facsimile Filing.* The court will accept for filing a paper transmitted by facsimile (fax) subject to the Guidelines for Facsimile Transmission established by the Judicial Conference of the United States and the provisions of ___Cir. R. 25.2 through 25.8.

25.2 *Transmission to the Clerk.* A paper may be faxed to the clerk for filing. Faxed documents must satisfy the requirements of the Federal Rules of Appellate Procedure and the rules of this court except that only one copy should be faxed, unless the clerk requests additional copies, and any color cover requirement is waived and except further that Cir. R. 25.5 governs signatures.

* * OR * *

25.2 *Transmission to the Clerk.* The clerk may authorize a paper to be faxed to the clerk for filing in an emergency or other appropriate circumstance. Unless authorized in advance, a paper faxed to the clerk will not be accepted for filing. A paper faxed after advance authorization must satisfy the requirements of the Federal Rules of Appellate Procedure and the rules of this court except that only one copy should be faxed, unless the clerk requests additional copies, and any color cover requirement is waived, and except further that Cir. R. 25.5. governs signatures.

25.3 *Transmission to a Fax Filing Agent.* A paper may be faxed to a private person or entity (fax filing agent) for filing with the clerk. When a fax filing agent presents a faxed document for filing, it must satisfy all requirements of the Federal Rules of Appellate Procedure and the rules of this court, including being accompanied by the required number of copies and having any required colored cover, except that Cir. R. 25.5 governs the signature. The fax filing agent also pays any applicable filing fee.

25.4 *When Filing is Complete.* Fax transmission to a fax filing agent or to the clerk does not constitute filing. Filing is complete only when papers are filed by the clerk. Papers received by the clerk after normal business hours, or on Saturdays, Sundays or Holidays, will be filed on the next business day.

25.5 *Signatures.* A paper faxed to a fax filing agency or to the clerk will be filed subject to receipt by the clerk of a signed original within 3 days.

* * OR * *

25.5 *Signatures.* The image of an original signature on a faxed paper constitutes an original signature for filing purposes. If the original signed document is not filed, it must be retained by the attorney of record or the party originating the document until the litigation concludes.

25.6 *Copies.* A party faxing a paper to the clerk for filing must send by first class mail, before the end of the next business day, the number of copies required by the Federal Rules of Appellate Procedure or the rules of this court. If circumstances require, however, the clerk may make copies of faxed papers and charge the filing party for the number of copies required by the applicable rule.

25.7 *Cover Sheet.* A paper faxed directly to the clerk must be have a fax cover sheet (in addition to any other cover required by the rules) showing the following:

a. the name of the case and the case number, if known;

b. the title of the document or documents being faxed;

c. the sender's name, address, telephone number and fax number;

d. the number of pages, including the cover sheet, being faxed;

e. the date and time faxed;

f. billing or charge information for court fees; and

g. whether acknowledgment of receipt is requested.

This cover sheet will not count against page limitations otherwise applicable to the document.

25.8 *Acknowledgment of Receipt.* At the sender's request, the clerk will acknowledge receipt of faxed papers on a copy of the cover sheet required by Cir. R. 25.7 which the clerk will fax to the sender. The clerk also will note any transmission defect on the copy of the cover sheet before faxing it to the sender.