ADVISORY COMMITTEE ON CIVIL RULES

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Washington, D.C.
April 28-30, 1994

Advisory Committee on Civil Rules
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PUBLIC HEARING
ON
PROPOSED AMENDMENTS TO
RULES 26, 43, 50, 52, 59, 83, AND 84.

COMMITTEE MEETING

I. Opening Remarks of Chairman.

II. Approval of Minutes of October 1993 and February 1994 Meetings.

III. Consideration and Approval of Proposed Amendments Published For Public Comment.

A. Summary of Comments Submitted on Proposed Amendments.

IV. Report on Legislative Activity Affecting Civil Rules.

V. Rule 68.

A. Survey Results from Federal Judicial Center on Offer-of-Judgment Proposal.

B. Further Consideration of Draft Proposal.

VI. ABA Proposal on Rule 64 - Nationwide Enforcement of a Prejudgment Security Order.

A. Report by Philip A. Wittmann on Discussions with ABA Proponents of Change to Rule 64.

VII. Class Action Procedures - Justification and Practical Consequences of Changes to Rule 23. *(Note: The panel discussion will begin at 3:00 p.m. Thursday, April 28.)*

A. Panel Discussion by Herbert Wachtel, Esq., Professor Francis McGovern, and John Frank, Esq.

B. Discussion of Background Material and Draft Proposal.

VIII. Facilitating the Use of Masters in Pretrial Proceedings.

IX. Access to Judicial Records.

X. New Comments and Proposed Amendments to Rules Received from the Public.

A. Conflict Between Provisions of Rule 4 and Admiralty Rules.

B. Potential Ambiguity in Rule 37.

C. Mandatory Conference and Disclosure Prior to Filing of Lawsuit.

D. Clarification of Certain Provisions in Rule 4.

E. Amendment of Rule 26 Governing Interviews of Former Employees of Corporate Adversaries.

F. Clarification of Rule 62 on Effective Date of Judgment.

XI. Continuation of Stylizing Project (Rules 31-33).

XII. Informational Update on Facsimile Filing Guidelines.

XIII. Next Meeting.

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Opening Remarks of Chairman

Section II
Civ 4/28/94

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

October 21, 22, 23, 1993

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

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

The minutes of the May, 1993 meeting were approved.

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

Facsimile Filing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

answer is best, a clear answer should be given.

Facsimile Service

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

Particularized Pleading

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 4(m)

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

Several members of the committee suggested that the 120-day

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

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

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

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

Rule 23

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 53

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

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

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

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

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

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

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

General discussion followed this introduction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 68

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

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

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

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

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

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

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

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

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

prompting settlement.

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

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

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

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

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

revisions.

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

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

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

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

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

better ways of making the move.

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

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

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

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

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

will be designed for statutory-fee shifting cases.

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

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

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

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

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

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

Liaison to Evidence Rules Committee

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

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

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

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

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

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

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

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

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

Sealing Records

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

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

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

cases.

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

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

Proposed Amendments To Be Published

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

Style amendments

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

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

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

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

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

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

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

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

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

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

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

A number of specific style issues were discussed.

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

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

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

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

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

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

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

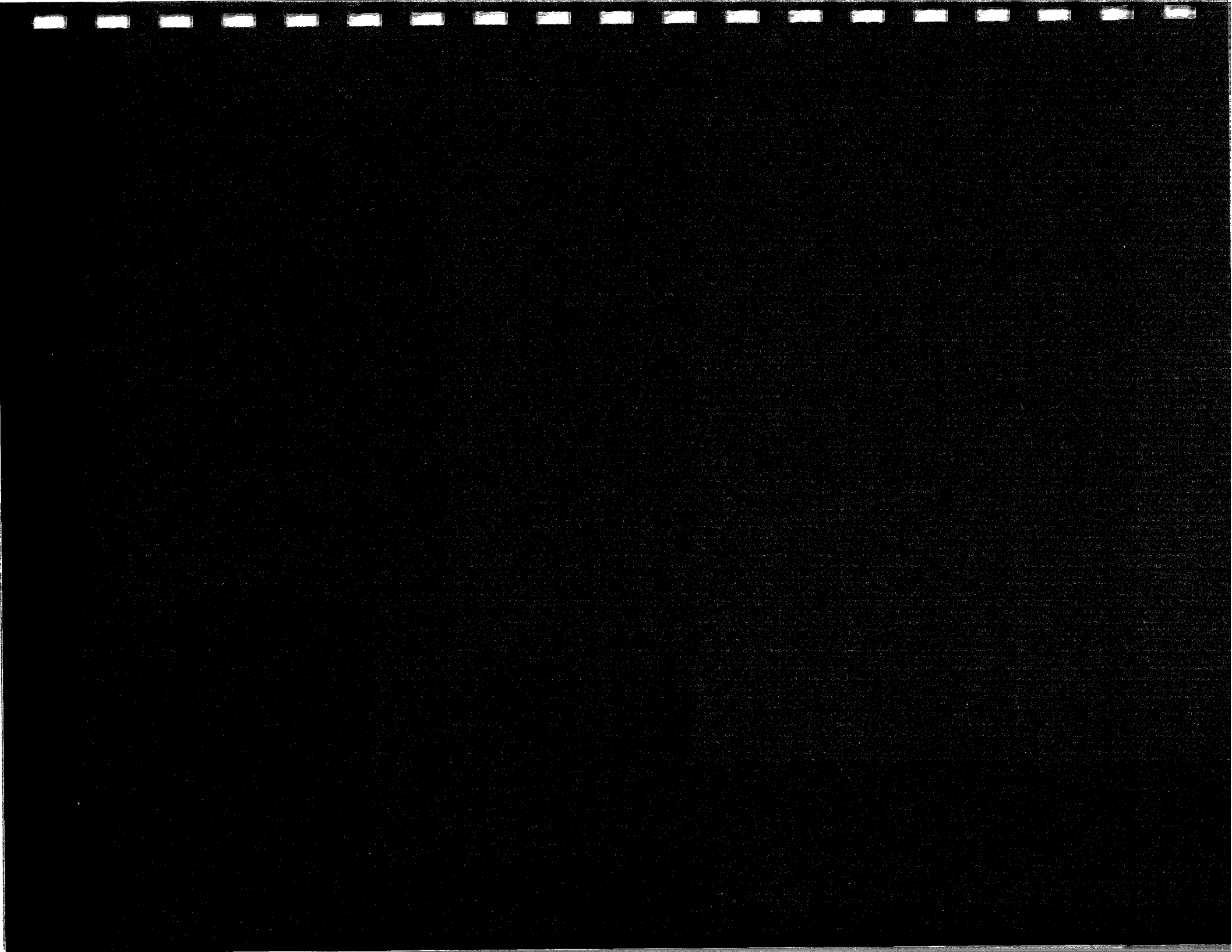
Discussion of Rule 14 renewed an earlier discussion of the need to preserve antique provisions that have served purposes now vanished. Rule 7(c), for example, abolishes demurrers, pleas, and exceptions for insufficient pleading. This provision was useful when the rules were first adopted. It is no longer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

Future Meetings

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

Respectfully submitted,

Edward H. Cooper, Reporter



MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

February 21, 22, 23, 1994

The Advisory Committee on Civil Rules met on February 21, 22, and 23, 1994, at The Cloisters, Sea Island, Georgia. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Chief Justice Richard W. Holmes; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Judge William O. Bertelsman attended as liaison member from the Standing Committee, and Judges Robert E. Keeton and George C. Pratt attended as members of the Standing Committee Subcommittee on Style. Professor Daniel R. Coquillette, Reporter of the Standing Committee, was present, as were Standing Committee consultants Joseph F. Spaniol, Jr., Esq., and Bryan A. Garner, Esq., and Peter McCabe, Esq., and John K. Rabiej, Esq., of the Administrative Office. Professor Edward H. Cooper was present as reporter.

The sole agenda item was work on the current draft of a restyled set of Civil Rules, prepared by Judge Sam C. Pointer from the Style Subcommittee draft.

Before turning to the style project, the schedule for the April meeting of the Committee was discussed. One of the major items on the April agenda will be Rule 23; background materials will be sent out soon. Three experienced lawyers have been invited to attend the afternoon session on April 28 to discuss the history of Rule 23 beginning with the 1966 amendments and to discuss its present effects. John P. Frank, Esq., Professor Francis E. McGovern, and Herbert M. Wachtel, Esq. will form a panel. It was observed that settlements of truly massive tort actions now are creating private ADR mechanisms — "the market" is pushing to develop mechanisms that up to now have eluded legislative solution.

Note was made of the October recommendation with respect to offer-of-judgment legislation, which was approved by the Standing Committee in January. The recommendation that the Judicial Conference suspend its endorsement of such legislation pending completion of Enabling Act consideration may be on the Conference discussion calendar in March.

Early experience with the voluntary disclosure provisions of new Rule 26(a)(1) was discussed. Judge Brazil has prepared a tentative list of variations among districts that have suspended

Rule 26(a)(1), those that have adopted variations by local rule, and those that operate under the national rule. Discussion of the experience with Rule 26(a)(1) led in two directions.

One part of the Rule 26(a)(1) discussion was devoted to the reactions it has stirred to the Rules Enabling Act process. Groups dissatisfied with the new rule have used it to focus attention on the Enabling Act process. The milder reactions are that Congress should lengthen the period between submission of rule amendments to it and the effective date. Stronger reactions address more fundamental aspects of the process.

Another part of the Rule 26(a)(1) discussion was devoted to the perennial problems created by local rules. Several members observed that local rules generate far more complaints than the national rules. The problems become more aggravated as practice becomes increasingly nationalized. The problems may be severe even on a local basis, however; one member reported that each judge in a large local district has a different disclosure practice. Once again, as at earlier meetings, the hope was expressed that evaluation of experience under the Civil Justice Reform Act of 1990 will provide the occasion to reduce the proliferation of local rules.

Style

The style revisions were reviewed by subcommittees for presentation to the full Committee.

Judge Doty led a group that reviewed Rules 21 through 25. Discussion of their recommendations lasted to 4:30 on Monday, February 21.

Phillip Wittmann led a group that reviewed the discovery rules. Judge Brazil had special responsibility for Rules 26 through 29 and led the discussion of those rules. That discussion ran through into Friday morning, February 23. Mr. Wittmann led discussion of Rule 30 until the meeting was adjourned at 11:30 a.m.

Some common styling questions emerged from the discussion.

In Rule 26(a)(3)(B)(ii), the style draft changed the provision that objections not timely made are "deemed waived" unless the failure is excused by the court. The style draft provided that an objection may be made only if permitted by the court. The Committee recognized that a "deemed waiver" is not a waiver at all, not an intentional and voluntary relinquishment of a known right. It further recognized that it is harsh to describe procedural forfeiture as waiver. Nonetheless, it was concluded that the

familiarity of fictive waiver concepts warrants retention of the term. The "deemed waived" language was restored.

A few word conventions were adopted. "Parts" or "partly" should be used for "portions" or "partially." "Limits" should be used for "limitations. Phrases including "pendency" ordinarily should be simplified.

A number of substantive questions were noted, often with suggestions of study for amendment outside the style project.

Rule 26(a)(3): The present rule requires that disclosures be "made," and that "[w]ithin 14 days thereafter," objections be made. The style draft, Rule 26(a)(3)(B)(i), required objections "[w]ithin 14 days after receiving the disclosure." The change was thought to entail a change of meaning, since the present rule does not define the time when a disclosure is "made." We may wish to consider amending the rule to set the time from receipt, since that would provide a clear answer for cases in which the disclosures are served by mail.

Rule 26(b)(4)(C): The present rule requires that an expert witness be paid a reasonable fee for time spend in responding to discovery. The style draft required compensation for expenses as well. This change was thought desirable — indeed mere correction of a probable oversight — but beyond the scope of the style project.

Rule 26(c)(1): This draft has been published for public comment up to April 15, 1994. It was agreed that the word "also" should be elaborated before the Committee recommends the rule to the Standing Committee: " — and, on matters relating to a deposition, ~~also~~ either that court or the court for the district where the deposition will be taken * * *."

Rule 26(e): By a 7:6 vote, the restyled version was adopted, as amended. Those who preferred to continue the present language without change agreed that the new structure is better, but feared that any variation in the still-controversial disclosure provisions might prove controversial.

The final sentence of present Rule 26(e)(1) now requires disclosure of any additions or other changes to information provided by an expert witness. The style version added the requirement that the additions or changes be "material." The requirement of materiality was thought desirable — indeed a limit that should be implicit in the present rule — but a matter that should be accomplished by amendment outside the style process.

Rule 26(g)(2): Subparagraph (A) does not contain the language

added to Rule 11 in 1993, permitting positions taken by good-faith argument for "establishing new law." The "new law" provision was deleted from styled Rule 26(g)(1)(B)(ii), with the recommendation that it be considered through the amendment process.

The final paragraph of present Rule 26(g)(2) provides for striking an unsigned "request, response, or objection." The style draft added "disclosure" to the list. Although Rule 26(a)(4) requires that disclosures be signed, the addition of disclosures to Rule 26(g)(2) was deleted as a substantive change that should be accomplished through the amendment process.

Rule 27(a)(3): The final sentence was deleted as unnecessary. Rule 34 has not referred to the court in which the action is pending since the 1970 amendments. Rule 35 still refers to the court in which the action is pending, but the style version deletes the reference. If the reference is restored to Rule 35 – as might be appropriate for orders directing a party to produce a nonparty – the cross-reference in Rule 27(a)(3) likely should be restored.

Rule 28(b)(2): [These notes include brief research by the Reporter following the meeting.] Up to 1963, Rule 28(b) provided: "A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice * * *." The limit imposed by "only when necessary or convenient" was deleted in 1963. The Rule now reads "A commission or a letter rogatory shall be issued on application and notice * * *." The 1963 Committee Note does not explain the change, but the overall purpose of the 1963 amendments was to ease access to these devices. It has been thought clear "that the discretion the courts formerly had in deciding whether to issue a commission or letters rogatory has been considerably reduced." 8 C.A. Wright & A.R. Miller, Federal Practice & Procedure: Civil § 2083. The history, at any rate, suggests that "shall" was not used to indicate that a commission or letter regatory must issue. "Shall be issued only when necessary or convenient" does not readily translate to "must be issued when necessary or convenient." The scant authority cited in § 2083 seems to bear out the view that courts still have discretion to refuse a commission or letter rogatory.

Further research must be done to verify the meaning of the current rule. If indeed it recognizes discretion to refuse to issue a commission or letter rogatory, the styled version of Rule 28(b)(2) would be introduced as follows: "A commission, a letter of request, or, in an appropriate case, both a commission and a letter of request, may be issued: * * *." Experts in international procedure should be consulted to determine whether there is an identifiable common understanding or practice.

Rule 30(a)(2)(B)(i): This Rule requires leave of court or consent of the parties if a proposed deposition "would result in

more than ten depositions being taken under this rule or Rule 31 * * *." The meaning of this provision was debated. Some thought that depositions of expert witnesses authorized by Rule 26(b)(4) do not count for this purpose, reasoning that these are Rule 26(b)(4) depositions rather than Rule 30 depositions. Others thought that Rule 26(b)(4) does not of itself supply authority for taking depositions, but simply regulates the practice for Rule 30 or 31 depositions when a party wishes to depose an expert. This view was supported by observing that Rule 26(b)(4) does not address any of the many deposition practice questions regulated by Rules 30 and 31, and Rule 37 nowhere provides for enforcing Rule 26(b)(4) depositions. If this doubt proves troubling in practice, it may be desirable to provide a clear answer by amending the rule.

Rule 30(f)(1): This Rule provides for sending a copy of the deposition to the attorney who arranged for the transcript or recording. It does not provide for sending the copy to a party who proceeded without an attorney. This omission should be cured by amendment.

Rule 30(f)(1)(B): This rule provides "that if the person producing the materials desires to retain them the person may * * * (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition." The style version, Rule 30(f)(1)(A)(ii) translates this: " * * * with originals being returned to the producing party and the copies then being used as if originals annexed to the deposition." The style version highlights a possible ambiguity in the present rule. Many members of the Committee believe that "materials" must be read in the same sense in both places in the same sentence — it is the originals, not any copies made by other parties, that may be used as if annexed to the deposition. This has been the practice of several. Others believe that it is desirable to allow the copies to be used as if annexed, and that the style draft reflects the correct meaning of the current rule.

The history of Rule 30(f)(1) is reflected in the 1970 and 1980 Committee Notes. It is not particularly helpful. The current version was adopted in 1980. The 1970 version, set out in 8 Federal Practice & Procedure: Civil § 2114, was criticized as ambiguous. The 1970 version read:

> except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person

producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition.

It was suggested that this version was intended to create two procedures: under (A), substituted copies would serve as originals for all purposes. This meaning is clear in (A) as it has been amended. Under (B), the apparent sense was that the original "materials" could be used as if annexed to the deposition.

This question too should be investigated further, to determine what meaning should be reflected in the styled rule. In addition, the Committee may wish to consider amendments to change the present rule. Some members thought it would be useful to allow use as if originals of copies made by parties other than the party who produced the originals.

Respectfully submitted,

Edward H. Cooper
Reporter

Section III
Civ 4/28/94

REPORTER'S SUMMARY

Comments on Proposed Amendments: Civil Rules 26, 43, 50, 52, 59, 83, and 84

On October 15, 1993, the Committee on Rules of Practice and Procedure published for public comment proposed amendments to Civil Rules 26, 43, 50, 52, 59, 83, and 84. The public comment period closes on April 15, 1994. A public hearing on the proposals is scheduled for April 28, 1994, to coincide with the first day of the Civil Rules Advisory Committee meeting in Washington, D.C.

This note summarizes the three written comments that have been transmitted by the Administrative Office to the Reporter as of April 1, 1994.

General

John L.A. Lyddane finds "these amendments are essentially non-controversial" and sees "no reason why they should not be implemented."

Rule 50

Judge Cornelia G. Kennedy is concerned that Rule 50(b) continues to be ambiguous on the question whether a motion for judgment as a matter of law must be renewed after verdict "where the court simply fails to rule on the motion made at the close of the evidence rather than denies it." Her court – the Sixth Circuit – does not require renewal "if the trial court reserved its decision on the motion to see if the jury verdict would make the issue moot. If the motion must be renewed under all circumstances, perhaps it would be better to say so."

Rule 83

Stephen Yagman expresses concern that the proposal "do[es] away with" the final sentence of Rule 83, which now requires that procedural orders by individual judges be "not inconsistent with these rules or those of the district in which they act." Since the proposal requires that procedural orders by individual judges be "consistent with federal law, rules adopted under * * * §§ 2072 and 2075, and local rules of the district," the concern must reflect the change from "not inconsistent with" to "consistent with." He extols the virtues of uniformity in local practice.

ADDITIONAL COMMENTS: 1993 PROPOSED AMENDMENTS

Public Citizen Litigation Group

All of the following comments were set out in a single submission by the Public Citizen Litigation Group.

Rule 26(c)(3)

Generally support the proposal. But suggests: (1) "Return or destroy" orders should be permitted only if the party providing discovery responses retains both the request and responding materials in readily accessible form for the benefit of future litigants. (2) It should be made clear that a protective order can be amended after judgment. (3) Iy may be intended to suggest, by way of an allusion to the last sentence of the Note, that Rule 26 should be amended to provide for amendment of protective provisions included in a judgment. (4) The Rule or Note should state that a court may require that unfiled materials be filed, even after the case has concluded. (5) It should be provided that a nonparty can move for modification without intervening. (6) The list of factors to be considered should be deleted in favor of a "good cause" standard. Considering the extent of reliance may too often defeat modification. Courts seem to have balanced the appropriate factors reasonably well under a general good cause standard.

Rules 50, 52, and 59

The comment reflects the belief that Rule 6(a) permits filing by mail without actual receipt by the court. If a change is intended, it should be made clear. (The source of this belief is uncertain. Rule 5(e) provides for filing with the clerk or a judge. The cases and treatises say that filing requires actual receipt by the clerk or judge; filing by mail occurs at the time of receipt, not at the time of mailing. Cooper v. City of Ashland, C.A.9th, 1989, 871 F.2d 104; Torras Herreria y Construcciones, S.A. v. M/V Timur Star, 6th Cir.1986, 803 F.2d 215, 216; Lee v. Dallas Cty. Bd. of Educ., C.A.5th, 1978, 578 F.2d 1177, 1178 n. 1, 1179; 4A C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d, § 1153.) It also is suggested that provision should be made for filing by private courier services. Local rules have conflicting provisions for filing by means other than United States mail, and should be replaced by a uniform national practice.

Rule 84(b)

This is a good idea, but it is not clear that it is authorized by 28 U.S.C. § 2072. Congress should be asked to amend the statute to confer this authority on the Judicial Conference. The procedure should include provision for notice and comment, and for transmittal to the Supreme Court and Congress at least 30 days before technical changes become effective.

Recent Comments

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

April 11, 1994

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

Dear Ed:

At its February meeting, the Advisory Committee on Bankruptcy Rules discussed the proposed amendments to Bankruptcy Rules 8018 and 9029 which incorporate the uniform amendments governing local rules. These proposed amendments are virtually the same as the proposed amendments to F.R.Civ.P. 83 that were published for public comment in October 1993.

A motion was adopted by the Advisory Committee on Bankruptcy Rules (by a 10-1 vote) to recommend to the Standing Committee that the language of the proposed new subdivision (a)(2) of Rules 8018 and 9029 be changed as follows:

> (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~~ nonwillful failure to comply with the requirement.

If this change is made, the following sentence in the "uniform" committee note also should be changed:

> "The proscription of paragraph (2) is narrowly drawn -- covering only violations ~~attributable to negligence~~ that are not willful and only those involving local rules directed to matters of form."

The Bankruptcy Committee believes that a finding of negligence should not have to be made for a violation to be protected by this rule. Other nonwillful violations also should be protected, such as when the failure to follow a local rule relating to form is due to reasons beyond the lawyer's control, or in other situations in which the lawyer's conduct does not rise to the level of negligence.

It also has been suggested that I inform the reporters of the Appellate, Criminal and Civil Advisory Committees of the Bankruptcy Committee's recommendation, with a request that each reporter inform his or her advisory committee for its reaction. It may be helpful to the Standing Committee to know whether the other advisory committees agree with this recommendation of the Bankruptcy Committee.

I understand that your next meeting will be held on April 28-30, 1994. I request that you ask your committee at that time to consider whether it agrees with the Bankruptcy Committee's recommendation.

Best personal regards.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

cc: Hon. Alicemarie H. Stotler
Hon. Paul Mannes
Prof. Daniel R. Coquillette

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April 11, 1994

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

By fax

Dear John:

Thanks for your patience as I learn the protocols by which the Advisory Committees proceed. What I had written to the Chair and Reporter of our Civil Rules committee about the pending Rule 84 proposal was as follows:

"We have pending the proposed changes to Rule 84 on Judicial Conference authority to revise forms or make technical changes without Supreme Court approval or Congressional review. I unreservedly agree that such authority should exist. I have grave doubts, though, about the power of the rules process to confer the authority on itself. I'm enough of a formalist that unless there's something here I'm missing, I can't swallow the validity of getting to this desirable end by regular rule amendment as opposed to Congress legislating to grant the authority. Either the Rule 84 proposals are pursuant to our Rules Enabling Act authority, or they aren't. If they are, they purport to authorize rule amendments by a process different from that established by the very charter of the rules process, the Enabling Act. The only route I can see to square this bootstrapping with the Act is the supersession clause in § 2072(b). I haven't done homework on the supersession clause, but I'm leery of using it to affect the REA authority itself as opposed to other jurisdictional or procedural statutes. And if these Rule 84 proposals aren't pursuant to our REA authority, then we must be claiming some inherent rulemaking authority that I should think we'd prefer not to claim. In short, I'm strongly inclined to think that if it's not too late, we should withdraw the Rule 84 proposal and ask the Judiciary Committees to put it through by statute."

I hope this gives you what you need. I look forward to seeing you at our meeting later this month.

Sincerely yours,

Tom Rowe

Appendix Containing Copies of Comments

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U. S COURTHOUSE
DETROIT, MICHIGAN 48226

November 30, 1993

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Court
Washington, D.C. 20544

Re: Proposed Rule 50

Dear Mr. McCabe:

The proposed Rule 50 seems to me to continue to have a potential ambiguity. If the motion for judgment as a matter of law is made at the close of the evidence and is not granted, the movant may renew its request for judgment as a matter of law by filing a motion in ten days. The rule then goes on to provide what the court may do in ruling on a renewed motion. The ambiguity I see is whether one must renew the motion where the court simply fails to rule on the motion made at the close of the evidence rather than denies it. The new rule states that if the motion made at the close of the evidence is not granted, the court is considered to have submitted the action to the jury subject to the court later deciding the legal question. One does not ordinarily renew a motion which is still under advisement to be decided later.

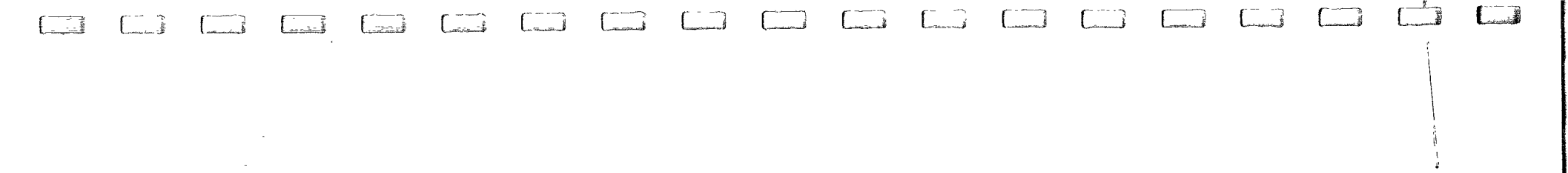
Our court, at least, has not required renewal of the motion if the trial court reserved its decision on the motion to see if the jury verdict would make the issue moot. If the motion must be renewed under all circumstances, perhaps it would be better to say so.

When motions for judgment were called motions for directed verdict and motions notwithstanding the verdict, the need to file a post-judgment motion or to renew a motion was more apparent.

Very truly yours,

Cornelia G. Kennedy

CGK/ks



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WRITER'S DIRECT DIAL NUMBER:
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December 2, 1993

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

RE: Preliminary Draft of Proposed Amendments
October 15, 1993

Dear Mr. McCabe:

Thank you for including me in those to whom the above-noted proposed amendments were circulated for comment.

I agree that these amendments are essentially non-controversial and see no reason why they should not be implemented.

Very truly yours,

John L.A. Lyddane

JLAL:fdz

LAW OFFICES
YAGMAN & YAGMAN, P.C.
723 OCEAN FRONT WALK
VENICE, CALIFORNIA 90291
(310) 452-3200

December 9, 1993

Hon. Alicemarie H. Stotler
Chair
Committee on Rules of Practice
and Procedure of the Judicial
Conference of the United States
Courts
Washington, D.C. 20544

Peter G. McCable
Secretary
Committee on Rules of Practice
and Procedure of the Judicial
Conference of the United States
Courts
Washington, D.C. 20544

Re: Proposed changes to Rule 83(b), F.R. Civ. P.

Dear Judge Stotler and Mr. McCabe:

This letter is written to express my wish to be permitted to give testimony in oppostion to the proposed change to Rule 83(b), F.R. Civ. P. at the hearing to be held in Dallas, Texas on April 6, 1994, and to set forth, briefly, the basis for my opposition to the proposed change to Rule 83(b).

The present Rule 83(b) prohibits individual judges from issuing so-called standing orders or local-local rules to govern practice before them when those orders or rules are inconsistent with provisions of the local rules of the court. The proposed changes to Rule 83(b) do away with this prohibition. The prohibition is warranted because it promotes uniformity within a given court as a whole and because it staunches balkanization of practice within a court as a whole. Such balkanization makes practice in a court more difficult, and especially so for civil rights lawyers who usually practice by themselves or with small firms, and who almost always take cases on a contingent fee basis. While large firm lawyers actually will generate more fees under the proposed rule change, civil rights lawyers will be unduly burdened both in their practice and financially by the proposed rule change. There is no good reason why federal judges of a particular court should not be required to and be able to agree among themselves on uniform rules of practice for a given court. The proposed change in the provisions of Rule 83(b) seems

to be a retreat from the abolition of standing orders or local-local rules established by the last amendment to Rule 83(b). There was good reason for the prior change, and there is no good reason, except perhaps the dislike of district judges of the prohibition of their issuance of standing orders or local-local rules, to change Rule 83(b) as is proposed. Uniformity of practice is a good thing, and doing away with the prohibition of standing orders and local-local rules both undercuts the uniformity of practice that is desirable in the federal courts, and cuts against the provisions of Rule 1, that provide for the "inexpensive" determination of every cause. The traditional independence of the federal judiciary should not need to depend upon or to include the ability of many different judges in a given district court each to require practice before him or her in a different manner. It is a better idea to require those judges to agree among themselves how practice in a given court should be regulated than to impose upon attorneys and litigants who appear in a court in the way that would be permitted by the proposed changes to Rule 83(b).

Sincerely,

Stephen Yagman

STEPHEN YAGMAN

4

PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N W
WASHINGTON, D C. 20036
(202) 833-3000

March 24, 1994

Hand Delivery

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Judicial Conference of the United States
Room 4-170
One Columbus Circle N.E.
Washington D.C. 20544

Re: Comments on Proposed Amendments to Federal Rules of Civil Procedure

Dear Mr. McCabe:

Pursuant to the notice dated October 15, 1993, I am hereby submitting the comments of the Public Citizen Litigation Group concerning the proposed amendments to the Federal Rules of Civil Procedure. I reuest that you make them available for the committee prior to its hearing scheduled for April 6, 1993. As in the past, we stand ready to assist the committee in any way possible.

Sincerely yours,

Alan B. Morrison

March 23, 1994

COMMENTS OF PUBLIC CITIZEN LITIGATION GROUP REGARDING PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE OF JUNE 1993

Public Citizen Litigation Group is a nonprofit public interest law firm that litigates in federal and state courts around the country. Although our principal work is in the District of Columbia, in any given year we are likely to be litigating in between five and ten other district courts, generally but not always, on the side of the plaintiff. Most of these comments are offered to suggest clarifications and not because of policy disagreements with the proposals.

Rules 50(c)(2), 52(b), and 59 (b)-(e)

Each of these Rules would be amended by requiring that the motions under those Rules all be filed and not just served within the time period provided therein. According to the Committee note on Rule 50(c)(2), filing was chosen because it is "an event that can be determined with certainty from court records." This suggests that the pleading must actually be received by the court within that time, but Rule 6(a) permits motions to be filed by mail. We believe that, if a motion is filed by mail within the required time, the filing should be timely regardless of when the court actually receives it (the current law). If the Committee intends to change this, so that, under these Rules only, filing is equated with receipt by the Court, then the Rules should be made explicit on this point and reenforced by the comments. If not, these Rules and their comments should be clarified to make it clear

that it remains proper and timely to file by mail. And if these Rules are changed to require actual receipt, consideration should be given to extending the time allowed so that the receipt requirement does not effect a reduction in the existing time periods.

Despite these changes, there is no mention here or elsewhere in the Civil Rules of service and filing by overnight mail services, such as Federal Express, Express Mail, or UPS. These methods of delivery are commonly used and should be covered in a clear and uniform fashion by the basic Civil Rules, not left to the various district courts, which have treated them in a variety of different ways, including, in some cases, treating the Postal Service's Express Mail Service as timely service by mail, while disallowing other more reliable methods such as Federal Express. For those who practice in more than just one district, the lack of uniformity creates unnecessary burdens and confusion, and at times it results in unnecessary motions having to be made in order to obtain compliance with procedures that sometimes are not even included in local rules. We take no position on how overnight delivery ought to be treated, both for purposes of authorizing the method of filing and computing the time for responding, i.e., should the three day extension of time when service is made by regular mail be modified? We simply urge the Committee to address this matter at this time and then to forbid local courts from adopting variations to whatever the Committee decides.

Rule 26(c)

We generally support the thrust of this amendment as it relates to the substance of the basis for dissolving or modifying protective orders. Although we believe that very broad protective orders are entered far more often than is justified by the terms of the Rules, we do not disagree with the Committee's judgment that the greater problems relate to when they should be modified or dissolved, rather than trying to attempt to control the courts at the time of entry of the order.

We do, however, have a number of suggestions. The first is a substantive one relating to a provision found quite often in protective orders: the party receiving the discovery, typically the plaintiff, must either return or destroy the materials at the conclusion of the litigation, presumably to prevent its unauthorized dissemination. However, the effect of such provisions is to make it more expensive and time-consuming for subsequent plaintiffs to obtain the same information from either the original plaintiff or the defendant. In addition, the first set of answers to interrogatories or depositions may be more candid, and hence more useful to the subsequent plaintiff, than those which are the result of additional consultation with counsel. For these reasons, Rule 26(c) should be amended to permit "return or destroy" orders only in those cases where the party providing the discovery retains, in a readily accessible form, both the discovery request and the materials supplied in response thereto, so that future litigants need not start from scratch and waste time and money to

duplicate work performed in prior cases.

The second issue relates to matters of timing of requests for modification. In many cases, the requests are made by non-parties, who often do not file motions seeking access until the case has been concluded on the merits. Thus, even if a non-party becomes aware of a protective order and believes that materials of interest to it may have been produced, motions to modify are rarely made because most attorneys recognize that the courts are extremely reluctant to modify protective orders until a case is resolved on the merits. Moreover, in many cases, the interested person will first learn of the case and of the fact that materials of interest were produced under a protective when the parties settle, often on the eve of trial, which means that motions to modify can only be made after a judgment of dismissal is entered.

The final paragraph of the comments suggests that Rules 59 and 60 should govern post-judgment motions, but those Rules seem wholly inapplicable where the request for modification is made by a non-party after judgment is entered, in some cases several years thereafter when the documents first appear to be of some interest or even relevance in subsequent litigation. To remedy this problem, Rule 26(c) should be amended to make it clear that a protective order can be modified at any time, even after the case is otherwise concluded.

Related to the issue of timing are questions of the authority of the court to order that pleadings and other papers that were filed and then returned to the filing party, be refiled and to

direct that papers that were subject to a nonfiling order under Rule 5(d), be filed with the court. The principal reason for the return of exhibits and the non-filing of discovery materials is that filing consumes valuable court space. That rationale has no bearing on the issue of whether materials that should have been filed, but for the non-filing order, or once were filed but were return to a party, should be filed so that there can be access to them under various court record doctrines. Rule 26(c), or at least the comments thereto, should make it clear that there is no prohibition on a court requiring that materials be filed, even after the case is concluded, as the Second Circuit held in In re Agent Orange Product Liability Litig., 821 F.2d 139 (1987).

Another question that frequently arises is whether a non-party who wishes to modify a protective order must move under Rule 24 for formal intervention before being permitted to make the motion to modify. Because of the divergence of views, many persons are now moving to intervene before moving to modify, thereby generating additional work for no apparent benefit. Motions to intervene on these grounds are almost never denied, except where the modification of the protective order is being denied, and even then those rulings confuse intervention with the merits. Therefore, we urge the Committee to make it clear that motions for modifications of protective orders can be made by any person, whether or not a party.*

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*There has also been similar confusion over the issue of whether persons who are members of a class under Rule 23, or
(continued)

Finally, we urge the Committee to delete subparagraph (3), which sets out some of the factors that it suggests be considered on a motion to modify. Our concern is with factor (A), "the extent of reliance on the order," principally because, in almost every case, the party that sought the protective order will argue that it would never have complied with the discovery requests in the absence of an iron-clad protective order, and there will be no way to go behind that contention, especially where the order is entered on consent, as is often the case. But even if the motion were contested, judges often find "good cause" to include moving the case ahead and avoiding discovery disputes, with the understanding that the relevant materials will come out at trial or on dispositive motions. Since most cases settle, the reasons for finding good cause at the pre-trial stage disappear when the case is concluded. It is, therefore, our recommendation that the existing good cause standard should replace paragraph (3), with an explicit recognition in the comments that the meaning of good cause may vary depending on the stage of the litigation. The courts seem to have balanced the various interests reasonably well so far, and therefore we see no reason to change the standard or even to attempt to codify the decisions in this area, let alone to require

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stockholders in a case subject to Rule 23.1, may appeal the approval of a settlement, to which they objected in the district court, without formally intervening. We believe that the better view is that intervention is not required, and we urge the Committee to make this clear for both rules. However, we do not urge that it do so in connection with these Rule changes, although the lack of necessity of establishing party status under all three Rules involves many of the same considerations.

("the court must consider") judges to balance each of the enumerated factors.

Rule 84(b)

This proposal would permit the Judicial Conference, rather than the Supreme Court, to amend the Federal Rules of Civil Procedure in very narrow circumstances. In the past we have opposed other proposals on the ground that they gave too much discretion to the Judicial Conference. However, we believe that the delegation here is not overly broad and that the kind of changes that can be made under this proposal do not, as a matter of policy, need to go through the Supreme Court and Congress. The question nonetheless remains as to whether this type of delegation is authorized by 28 U.S.C. § 2072. We believe that it would be preferable to ask Congress to amend the statute to authorize this limited type of amendment as applied to all of the Rules subject to that provision.

In any event, even though the authorization is narrow, we believe that the Judicial Conference should be required to provide notice and an opportunity for comment before making even technical changes. Such a requirement would both assure that even technical changes are appropriate and clear and that changes which are not technical are not made inappropriately under such a delegation. Because the comment period need not be lengthy, it should not pose any significant problems, but it is an appropriate check under the circumstances. We would also urge that, as part of the amendment to § 2072 authorizing the Judicial Conference to make technical

changes, Congress should add the notice and comment provision and require that the Judicial Conference publish all such changes in the Federal Register and send copies to the Supreme Court and Congress at least 30 days before they become effective.

* * * * *

The present proposal for amending the Rules of Civil Procedure does not include any provision comparable to the proposal in Rule 53 for the amendment of the Rules of Criminal Procedure relating to photographs and broadcasting in the courtrooms. There is no reason why only criminal cases should be permitted to have photographs or broadcasting done; indeed, there are far fewer problems likely to arise in the televised trials of civil cases and appeals than in criminal trials. Therefore, we urge that whatever rule is adopted include all cases in both the district courts and the courts of appeals. While we would prefer a broader amendment with specific authorizations, we support the positive step of authorizing the Judicial Conference to issue guidelines on this issue.

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

~~Section VII~~ Section III
CW 4/28/94

April 8, 1994

Honorable Herbert Kohl
Subcommittee on Courts
and Administrative Practice
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Kohl:

Thank you for the invitation to testify on the use of protective orders in federal court litigation at a hearing before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary on Wednesday, April 20, 1994. I am unsure at this time whether my prior commitments will permit me to attend. If I am unable to testify personally, I will designate one of my colleagues on the Advisory Committee on Civil Rules of the Judicial Conference to testify on my behalf.

I am hopeful, nonetheless, that I will be able to attend the hearing, and I am looking forward to it.

Sincerely,

Patrick E. Higginbotham

Patrick E. Higginbotham

cc: Honorable Howell T. Heflin
Honorable Charles E. Grassley

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

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D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

April 12, 1994

Honorable Charles E. Grassley
Ranking Minority Member
Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
325 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

I write to advise you that the Judicial Conference of the United States, at its March 15, 1994 session, withdrew its position supporting in principle the offer-of-judgment proposal in S. 585, the "Civil Justice Reform Act." For the reasons that follow, the Conference also adopted the recommendation of its Rules Committee to take no action on the legislation at this time. The committee believed that the offer-of-judgment proposal contained in S. 585 is a matter that should be scrutinized in accordance with the Rules Enabling Act.

The Advisory Committee on Civil Rules has been actively considering proposed amendments to Rule 68 of the Federal Rules of Civil Procedure similar to the offer-of-judgment provision in S. 585. It has studied and debated extensively several drafts of proposed amendments to Rule 68. But the proposals are complex and controversial. They leave open many unanswered questions about the actual effect on settlement practices. As a result, the committee concluded that any endorsement of change to Rule 68 would be premature at this time. The committee also wishes to consider a survey by the Federal Judicial Center concerning proposed rule changes on settlement practices.

I am enclosing a paper prepared by Dean Edward H. Cooper, the reporter to the Advisory Committee on Civil Rules, which explains the issues in detail. The advisory committee will continue its study of proposed amendments to Rule 68 at its next meeting on April 28-30, 1994, in Washington, D.C. The meeting is open to the public, and we would welcome the attendance of members of your staff.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler

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

March 15, 1994

Honorable Robert J. Dole
Minority Leader, United States
Senate
Room S-230 Capitol Building
Washington, D.C. 20510

Dear Senator Dole:

I am requesting your assistance in opposing Senator Brown's amendment (No. 1496) to S.4, the "National Competitiveness Act of 1993." Senator Brown's amendment would change certain parts of the amendments to Rule 11 of the Federal Rules of Civil Procedure, which became effective on December 1, 1993. The Rule 11 amendments were submitted to Congress in May 1993 only after extensive scrutiny by the bench, bar, and public in accordance with the Rules Enabling Act.

Serious consideration of amendments to Rule 11 began about four years ago. The rule had been the subject of thousands of decisions and widespread criticism since it was substantially amended in 1983. In an unusual step, the Advisory Committee on Civil Rules issued a preliminary call for general comments on the operation and effect of the rule. It also requested the Federal Judicial Center to conduct two extensive surveys on Rule 11.

After reviewing the comments and studies, the committee concluded that the widespread criticisms of the 1983 version of the Rule, though frequently exaggerated or premised on faulty assumptions, were not without merit. There was support for the following propositions:

- Rule 11, in conjunction with other rules, has tended to impact plaintiffs more than defendants,
- it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery to determine if the party's belief about the facts can be supported with evidence,
- it has too rarely been enforced through nonmonetary sanctions, with cost-shifting being the normative practice,

- it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in law, or in fact, and
- it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.

The draft amendments broadened the scope of the obligation to "stop-and-think" before filing or maintaining a position in court, but placed greater constraints on the imposition of sanctions. The amendments were later revised by the advisory committee and the Standing Committee on Rules and approved by the Judicial Conference of the United States and then adopted by the Supreme Court, with two justices dissenting.

The amendments strike a fair and equitable balance between competing interests, remedy the major problems with the 1983-version of the rule, and should reduce both the extent of court-involvement with Rule 11 motions and the time spent on frivolous claims, defenses, and other contentions.

The amendments represent the end product of a rigorous public rulemaking process that worked as contemplated by Congress under the Rules Enabling Act. The issues were fully aired in a public forum. Interested individuals and organizations were provided, and responded to, opportunities to comment on the changes. The language of the amendment was meticulously drafted only after the Judicial Conference committees, which consist of prominent lawyers, law professors, and judges, had the benefit of this public examination.

Senator Brown's amendment to Rule 11 would undercut the Rules Enabling Act process frustrating not only the intent of the Act but also the participants in the rulemaking process, including the public and many advocates of Rule 11 change. Your leadership in maintaining the integrity of the Rules Enabling Act would be greatly appreciated.

Sincerely yours,

Alicemarie H. Stotler

Alicemarie H. Stotler

cc: Honorable Orrin G. Hatch
Honorable Charles E. Grassley
Honorable Hank Brown

which supported that subsidy, supported the GATT agreement.

I am also told that both McDonnell Douglas and Boeing oppose bringing a countervailing duty. I read from the Council on Competitiveness in June of last year. It states on page 36, and I am just taking this up by advice of counsel:

There has been industry and government consensus behind the pursuit of a negotiated solution to the trade-distorting effects of Airbus subsidies. There has, however, been little consensus behind the aggressive use of U.S. trade law to counter these subsidies. The gap between the tough talk on Airbus and the lack of trade action against it has at times been glaring.

In December 1985 and in February 1987, U.S. trade officials prepared section 301 cases against Airbus for Cabinet-level decision. Both times no decisive trade action was taken. The 1985 decision even followed a highly publicized Presidential speech, and section 301 was supported. An Airbus subsidy was singled out as a violation of trade agreements. Countervailing duty investigations were also considered several times from 1978 through 1992, and not one was initiated. A likely consequence of that inconsistency was the weakening of the credibility of the U.S. trade policy.

In lieu of trade action, negotiated solutions were sought with the objective of limiting the trade distortions associated with Airbus subsidies.

Three factors block U.S. industry-government consensus on trade action against Airbus. One, the desire of U.S. airlines for access to subsidize cheaper Airbus products; two, U.S. government's linking of trade policy goals to foreign policy priorities; three, concern of U.S. and aircraft parts producers over jeopardizing relations with their European airline customers.

In 1978, Eastern Airlines strongly opposed the Treasury Department self-initiated CBD case against Airbus. No action was taken. In 1985 the State Department blocked trade action on the grounds that it would damage U.S.-West European relations, particularly U.S.-French ties. And in 1987 McDonnell Douglas opposed Section 301 action out of fear that retaliation by Airbus governments would cost it important European airline customers.

Consequently, the action was dropped. Government officials were unwilling to take trade measures opposed by the U.S. industry, lacking full industry support and sometimes inter-government consensus. Trade policy was paralyzed.

I had a similar experience, Mr. President, with the automobile industry. I will never forget the excitement in the early part of the year when we had the three big auto companies coming here, the heads of General Motors, Ford, and Chrysler. They were going to appear for the first time before the committee. I heard a couple of days before the hearing that they intended to come and support a dumping case, initiating a joining of hands, initiating a dumping case. We know over 2 years ago—and I am just citing from memory with round figures—that the Japanese automobile industry lost about $3.2 billion on overseas sales, but back home in the domestic market they made it up with $11.1 billion in profits.

So there is an assault. Do not ask about losing any money, as has been pointed out by Airbus and not making any money. The strategy with Airbus is market share. The strategy with Japanese is market share.

We are not going to turn to that strategy here in the United States and put in a MITI and put in an Airbus and start subsidizing. But we have to do something to boost the commercialization of our technology, and that is what S. 4 is all about.

So there we are. We are back on S. 4 now. We have heard about the aerospace, and there is one point of agreement: the legitimacy of a philosophy that supports industry. That is the philosophy we have in this particular bill. We ought to assist with the research, definitely do that. That is the bare minimum, and we have been doing that over the years. We have done it in agriculture. That is the land grant colleges. The distinguished Senator knows agriculture better than any. And we at the land grant colleges conducted the research with Federal grants. We had the experimental stations to put new new ideas to the test. Then we had the extension centers to conduct outreach.

This is exactly what we have now for industry, and particularly small business industry on the industrial side, on the technology side, on the production side.

These programs are industry initiative and largely industry financed, with the National Academy of Engineering conducting peer review. We go about it in that very deliberate fashion and in a very modest way. I cannot find a business entity that opposes this. All of them have written in, all the coalitions: National Association of Manufacturers, the Competitive Technology Coalition, and all the others. So we have a good measure.

If we can move forward, I want to yield to see if we can get some amendments up and get some votes.

Mr. BROWN addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. BROWN. Mr. President, I have heard the chairman. I respond.

Mr. President, I rise to send an amendment to the desk, but I ask unanimous consent that the pending amendment be set aside.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1496

(Purpose: To amend rule 11 of the Federal Rules of Civil Procedure)

Mr. BROWN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Colorado [Mr. BROWN] proposes an amendment numbered 1496.

Mr. BROWN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of the bill add the following new title:

TITLE —FEDERAL RULES OF CIVIL PROCEDURE

SEC. . RULE 11 FEDERAL RULES OF CIVIL PROCEDURE.

(a) IN GENERAL.—Rule 11 of the Federal Rules of Civil Procedure is amended—

(1) in subsection (b)(3) by striking out "or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" and inserting "or are well grounded in fact"; and

(2) in subsection (c)—

(A) in the first sentence by striking out "may, subject to the conditions stated below," and inserting in lieu thereof "shall";

(B) in paragraph (2) by striking out the first and second sentences and inserting in lieu thereof "A sanction imposed for violation of this rule may consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party."; and

(C) in paragraph (2)(A) by inserting before the period ", although such sanctions may be awarded against a party's attorneys".

(b) EFFECTIVE DATE.—The provisions of this section shall take effect 30 days after the date of the enactment of this Act.

Mr. BROWN. Mr. President, I know this bill has become somewhat controversial, that strong words have been exchanged. But I want to pay my respects to the distinguished work of the two Senators who are on the floor right now, the distinguished chairman who has brought this forward and the distinguished Senator from Missouri, who has worked so hard and long on this bill.

I know that both of them are genuinely and sincerely committed to improving the competitiveness of this country. I particularly appreciate the commitment of the chairman of the committee to work toward that end. While we may have some disagreements as to the funding level of this measure, I have no doubt that his purpose is sincere and that his commitment is to making this Nation much more competitive and to improving job opportunities for Americans.

Mr. President, in that regard, I want to offer an amendment to the Chamber that I hope will merit inclusion in the bill. It is one that I think deals with the fundamental question of competitiveness. Included in all of the factors that go to our competitiveness is the question of what has happened to our legal system and the potential for frivolous lawsuits.

In that regard, there has recently been a change in the rules of Federal Rules of Civil Procedure that I believe has a major impact on the potential competitiveness of this Nation. Those Rules of Civil Procedure were recently amended. I know many Members are familiar with the change. For those who are not, I might outline very briefly what has happened.

The Judicial Conference of the United States recommended to the Supreme Court that some changes to the Federal Rules of Civil Procedure be made. Their advisory committee has

come up with some suggestions, many of them by trial attorneys that deal in this area, many of them by judges. Those changes have been accepted in a process that I will outline later. Many of the changes to the Federal Rules of Civil Procedure are very good and, I think, will help in the judicial process. But one particular set of changes I think presents an enormous problem for our country. And I feel that the overwhelming Members of this Chamber will be concerned about changes in the rules and will want to make some modifications in those changes in the rules.

What we are literally talking about is a change in the Rules of Civil Procedure—specifically, those changes to rule 11. We are particularly concerned about the changes in rule 11 that address the sanctions imposed for filing frivolous lawsuits. These are lawsuits that are brought without a solid basis in fact, or a solid basis in law.

In the past under rule 11, when those claims, those cases, those representations are made, we had an ability to bring meaningful sanctions against the party. The thinking was—and I believe it is valid—that bringing sanctions against a party who brings a groundless claim, one, discourages people from cluttering up our courts with those groundless claims and, two, provides appropriate compensation to the injured party. That is, if someone has a groundless claim made against them and they are injured not only by that, but by the attorney's costs and other fees to defend themselves, they are entitled to some reasonable form of compensation.

I believe that not only do the Members of this Chamber feel that is fair, but the vast majority of American people feel that is fair. Frankly, Mr. President, this amendment only deal with a portion of the rule 11 changes regarding sanctions.

The December 1 changes to rule 11 were submitted to the Supreme Court, and the Supreme Court referred them on to Congress.

Let me read into the RECORD the language used by the Chief Justice of the United States when they referred those changes to this Congress. I am quoting a letter from the Chief Justice addressed to the Speaker of the House:

> This transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.
>
> Thus, it would be a mistake to believe that the changes to rule 11 have received a formal review and endorsement of the Supreme Court.

It has been referred to us, but the Chief Justice makes it clear that this does not necessarily represent the thinking of the Court, nor the wording the Court would have submitted.

One of the Justices wrote in dissent specifically about the changes to rule 11. That Justice—joined by others—felt that it was inappropriate and harmful to change rule 11 they way the Judicial Conference suggested. I want to share with the Members the comments of Justices Scalia, Thomas, and Souter from a dissent that they filed.

Quoting in part:

> In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation.

I will repeat that. The rules as revised under the changes "will eliminate a significant and necessary deterrent to frivolous litigation." That is the issue, and that is the subject of the amendment.

The amendment attempts to address the changes in the Rules of Civil Procedure and address what I believe would be a tragic mistake: Changing our rules in a way that reduces or eliminates sanctions against frivolous lawsuits. If this Chamber closes its eyes to those rule changes, we will have had a direct hand in encouraging frivolous litigation and eliminating reasonable deterrence to frivolous litigation. I think that is a competitive issue. I think it makes a difference in whether we keep jobs in the United States or not, and it makes a difference as to the cost of goods produced in America versus the rest of the world.

To continue with the remarks of the Justices:

> The proposed revision would render the rule toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses, and by providing 21-day safe harbor within which, if a party is accused of a frivolous filing withdraws a filing, he is entitled to escape with no sanctions at all.

The amendment before the body deals with those changes in rule 11. It does not eliminate one of the changes. One of the changes was the safe harbor provision. The testimony before the Judiciary Committee by a number of attorneys indicated a feeling on the part of some that the safe-harbor provision could well be a plus in eliminating frivolous actions.

The Justice of the Court that wrote this dissent did not feel so. I must confess that I have doubts as to whether the safe-harbor provision that has been added to the rules will be helpful or not. I suspect it will not. But I have not chosen to include it in this amendment. The safe-harbor provision will remain part of rule 11 even if this amendment passes. I have done that reluctantly, but I have done it because I wanted to retain the changes to rule 11 that even had a modicum of argument in favor of improving the situation.

The amendment before the body only focuses on four parts of the changes of rule 11 and basically, in those four areas, restores the impact and value of the old rule 11. I will go through them specifically, but I want to finish the comments of the Justices, because I think they address the case very well.

Here are their conclusions on the changes relating to rule 11:

> Finally, the likelihood that frivolousness will even be challenged is diminished by the proposed rule, which restricts the award of compensation to "unusual circumstances," with monetary sanctions "ordinarily" to be payable to the court.

I will interrupt the Justices' dialog to describe that.

In the past, if somebody files a frivolous lawsuit against you, it was possible—not required, but possible—for you to get your ordinary, necessary attorney's fees refunded to you. One of the changes in rule 11 says that sanctions go to the court, not to the injured party.

What kind of incentive is that to even raise the issue? If the injured party does not get compensated, why would they even point it out or bring it up? It is just more attorney costs. The changes in rule 11 gut the deterrence of a frivolous lawsuit. This is a terribly important measure. We cannot afford to gut the Rules of Civil Procedure sanctions against frivolous actions. That is what the Justices are talking about in this quote.

I continue:

> Under proposed rule 11(c)(2), a court may order payment for "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" only when that is "warranted for effective deterrence." And the commentary makes it clear that even when compensation is granted, it should be granted sparingly—for costs "directly and unavoidably caused by the violation." As seen from the viewpoint of the victim of an abusive litigator, these revisions convert rule 11 from a means of obtaining compensation for damages resulting from frivolous litigation to an invitation to file frivolous lawsuits.

Mr. President, I think these changes in rule 11 will eliminate the incentive of the injured party to alert the Court of these violations and will eliminate the deterrent value of sanctioning frivolous actions.

As Justice Scalia said:

> I would not have registered this dissent if there were convincing indication that the current rule 11 regime is ineffective, or encourages excessive satellite litigation. But there appears to be general agreement, reflected in a recent report of the advisory committee itself, that rule 11, as written, basically works. According to that report, a Federal Judicial Center survey showed that 80 percent of district judges believe rule 11 has had an overall positive effect and should be retained in its present form.

Mr. President, that is 80 percent of the district judges did not favor—or at least according to this survey do not favor—those changes in rule 11.

The report continues:

> Ninety-five percent believed the Rule has not impeded development of the law, and about 75% said the benefits justify the expenditure of judicial time.

True, many lawyers do not like rule 11. It may cause them financial liability, it may damage their professional reputation in front of important clients and the cost-of-litigation savings it produces are savings not to lawyers but to litigants. But the overwhelming approval of the rule by the Federal district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not b

gutted as the proposed revision suggests.

Mr. President, let me repeat Justice Scalia's comments, because I think it is very important. He refers to the feeling of the district judges that dealt with rule 11 before it was revised:

> The overwhelming approval of the rule by the Federal district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.

Mr. President, I have before me a variety of comments I would like to make, and I would like to go into the details of the amendment that I have offered to the Senate for consideration. But I see my colleague from Iowa here on the floor, and I know he wishes to make remarks with regard to this proposed amendment.

I would like at this time to yield to the distinguished Senator from Iowa for the purposes of debate only.

The PRESIDING OFFICER (Mr. FEINGOLD). The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I thank the Senator from Colorado for not only yielding, but I also thank him for his leadership in this area. He may have said this before I got to the floor, but this was of some concern to us last year as we reviewed within our Judiciary Committee the work of the courts and finally the Supreme Court in changing the rules of civil procedure.

So the Senator is not bringing up an issue that is new to the concern of our committee or the concern of this entire body. And he has spelled out very well the need for his amendment. But the amendment also expresses, over a long period of time, the concern that some of us have had on the Judiciary Committee, for the disregard that there is for rule 11.

So I rise in support of the Brown amendment, and I do that because we need to make sure that Federal courts are open to all who have legitimate claims. That is not the case now, because there is such a big amount of cases coming, some without merit, clogging our courts.

It seems to me that at the same time we are concerned that the Federal courts ought to be open to all legitimate claims, we also need to ensure that frivolous cases neither compete for attention with meritorious ones, nor that frivolous Federal litigation be used as a weapon.

As Federal civil litigation has grown, the number of frivolous cases has also grown.

Due to the general caseload increase, particularly in criminal cases, the time that passes before civil litigants can receive justice has lengthened tremendously. The rules of civil procedure had always had provisions against frivolous cases. But the original rule 11 was ineffective in preventing frivolous cases. So to take care of that problem, in 1983 sanctions were made mandatory.

The provision finally became effective in deterring the filing of cases that had not been fully investigated.

After 1983, rule 11 had teeth, and some lawyers who filed frivolous cases were bitten by those teeth. The provision was unfortunately weakened last year. No longer would sanctions be mandatory.

Worse, attorneys would no longer have to certify that the case appeared meritorious after reasonable investigation. Instead, Mr. President, an attorney, without penalty, could file a case without knowing that the case was meritorious. The attorney could file first and face no penalty if he or she reasonably believed evidence might be found to support the case afterward.

There would be no penalty under these circumstances, even if no evidence were ultimately found to support the frivolous claim. Moreover, no penalty could be imposed if the attorney agreed to dismiss the case. Even if a penalty were offered, it would be measured by its deterrent effect upon others, not upon the attorney who violated the rule by the award of attorney's fees.

So these provisions soon turned rule 11 into a hollow shell. If the rule is not soon changed, we will face an increase in frivolous cases in our Federal courts, further adding to their burden. This will cause our people and our economy to suffer wasted resources in time and money, without any benefit to anyone and with the denial of justice to a lot of people, because frivolous lawsuits in litigation benefit no one. It will not be deterred or punished under the current rule 11.

It certainly makes no sense to bring suit first and to determine that it is well grounded in fact later. Just think how long anyone would put up with this rule for criminal litigation—that a prosecutor could bring criminal charges first without any current belief that the law was broken and that the defendant violated it. That would be a regime that came right out of Alice in Wonderland, and of course there is no reason to implement such a system, then, in civil litigation, either.

The Brown amendment will restore effective sanctions to rule 11—that is all we are trying to do—as when rule 11 worked. No lawyer who practices in good faith nor any client of such a lawyer would have any reason to fear the changes that Senator BROWN is proposing. Moreover, the Brown amendment will not return rule 11 to its 1983 language in its entirety. Represented parties themselves will not be able to be sanctioned, and other changes that ensure the fairness of the rule will be maintained.

Cases that are not known to have a basis in fact or law at the time they are filed should not be brought. The Brown amendment will then fairly require that such cases not be brought.

I strongly support the amendment and I request that my colleagues support it, as well. It is something that will impact very positively upon our competitive position which the underlying bill is attempting to do. It will promote competitiveness from a point that is going to make a real impact because litigation, particularly litigation that is not legitimate, has economic consequences that are very negative.

So I urge the adoption of this amendment, and I yield the floor, Mr. President.

Mr. BROWN addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado.

Mr. BROWN. Mr. President, I want to describe to the Chamber why it is this is offered on this amendment. We referred to that to some extent earlier.

It is my feeling, and I believe most Senators will agree, that the millions of dollars lost in frivolous litigation has an impact on the cost of goods and services in this country and has a significant impact on our potential competitiveness around the world. That is why I think it is important that this amendment be addressed along with S. 4.

But someone could, I think, fairly and reasonably raise the issue: Why offer it on this vehicle even though this is a competitiveness bill?

Well, the answer lies in part on how the changes were made last December to the Rules of Civil Procedure. The procedures for the adoption of these changes in the rules are basically this: A recommendation comes out of a committee, the Supreme Court forward it to us, and then it becomes effective unless Congress takes some action; that is, the changes in rules become effective automatically without any legislative action unless we act to overturn them.

The problem is this: We have had committee hearings in Judiciary, we have had discussions, but we have not had a bill referred out dealing with rule 11.

In other words, this Chamber has not had an opportunity to go on record on rule 11. I would not burden the Chamber with this amendment, even though I feel very strongly about it and I think it is important to competitiveness, if this Chamber had acted on rule 11 prior. I would not presume to move to a vote on these items if the Chamber had due consideration and had considered this and made their feelings clear.

But the reality is, the Rules of Civil Procedure are being changed without this body having a voice in that matter, without this body having a chance to vote on it. Thus, offering the amendment gives the body an opportunity to voice their concerns about it.

If the majority wants to encourage frivolous litigation or adopt these rules which encourage frivolous litigation, that, of course, will be up to each Senator and their own view of what is appropriate. But I would think it would be a tragedy to have this kind of change in the basic fundamental Rules of Civil Procedure take place in this country and not have the Senate of the United States ever review the item or vote on it.

I have chosen only four elements of the changes in rule 11 to address in this amendment. As I have already spelled out, a number of the other changes are not addressed by this amendment. The only ones that I have brought to the attention of the floor are the ones that I think are so egregious that I think they cry out for correction.

I thought I would take a few moments and outline to the Senate, very briefly, the kind of changes that have taken place.

The first I hope to draw to your attention to is the question of what kind of standards you ought to apply to the veracity of or support for allegations and claims filed in court. Should you be able to allege items in the pleadings, that is, representations of the law and facts, which you do not know to be true?

Well, here is what the old rule 11 says, and I am quoting a portion, "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and it is warranted by existing law or a good faith argument."

That is an excerpt from it, but I think it gets to the heart of it.

In other words, to make allegations in those pleadings, it has to be to the best of your knowledge and information and belief, formed after a reasonable inquiry. In other words, you have to do a reasonable check of the facts before you allege it and you have got to believe what you put down is true. I do not believe that is overly burdensome. It seems to me that is only reasonable.

What do the new changes in this regard in rule 11 say? Well, we are quoting from subparagraph (b)(3). It says this: "The allegations and other factual contentions have evidentiary support"—that seems reasonable, but here is the catch—"or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

The new rule 11 says, in effect, that you do not need to know if your claim has a basis in fact, but you think they might if you have a chance to investigate it, it might be true.

Let me use the exact language they use:

* * * likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

In other words, you can bring charges against somebody and they have to hire a lawyer and they have to answer the pleadings and they have to go through enormous expense to answer charges that you do not even know are true.

Mr. President, that is not right. That is just not right—to say you can bring a lawsuit when you do not know what you are alleging is true and have not taken reasonable measures to find out. That makes no sense.

Now, I understand why some people might favor this change in the rule. Mr. President, I suspect that many of those people are ones who might be inclined to bring this kind of claim; that is, a claim that they do not know is accurate and have not taken the time to find out is accurate.

But that is not the way I was taught law. That is not the way generations of American attorneys have been taught law. That is not in conformance with the standards of ethical behavior that decades and decades and decades of attorneys in this Nation have followed.

This suggests a standard of behavior that is beneath what has been demanded by the Rules of Civil Procedure in the past.

Should we be lowering the standard of conduct that we expect from attorneys? Should we be suggesting that you can bring a lawsuit without knowing the facts that you allege, without doing a reasonable inquiry? I do not think so.

And that is why I felt so strongly about this that I brought this amendment before this body. We should have an opportunity to vote on whether or not you want to lower the standards for attorney's conduct, whether you want to lower the standards for bringing an action, whether you want to allow people to bring an action alleging things they do not even know are true.

So that is the first part of the amendment. Allow me to read from the amendment so it will be clear. It is under subsection (1) on page 2 of our amendment. It says: "In subsection (b)(3), by striking out 'or,'"—and then they quote the following passage that I quoted. It would read this way: an attorney certifies that "the allegation and other factual contentions have evidentiary support or are well grounded in fact." It is not as strong, even with my amendment, as I believe the previous rule was. It is meant to be a compromise. But it is meant to retain the very important requirement that there is evidentiary or factual support for what you allege in court. That is the first change. We simply say let us not denigrate the standards that attorneys have complied with over the years.

The second amendment deals with a different area. Let me read the passage that it involves. This deals with the question of sanctions. The new rule reads in subsection (c):

Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subsection (b) or are responsible for the violation.

The justices that we quoted earlier referred specifically to this section, pointing out that sanctions should be mandatory, not permissive, for rule 11 violations.

The question is this: If someone has violated the rules, has brought a frivolous action, after notice and reasonable opportunity to respond, and the court determines that the rule is violated, should the court order sanctions?

Put another way: If you violated rule 11 and it is pointed out that you violated rule 11 and you have time to respond and you do not correct your mistake, should you have to pay sanctions or not? The new rule says that you may or may not have to. I suggest if you violated the rules and it is pointed out to you and you still do not correct your mistake, that you ought to have to pay for the damage you caused. So our rule change is simple. We simply drop the word "may" and change it to "shall."

I should point out in this regard that the degree of the sanctions is still discretionary. The degree of sanctions you will have to pay can vary. If it is not severe, if it is not serious, the judge has the ability to make it very small sanctions. But the primary issue of whether sanctions should be mandatory is a very clear. If you break the rules and you know you are breaking them and you do not correct it and you cause another party damage, this amendment says you have to be sanctioned. The new rules say not necessarily so.

There is a third change in the new rule 11 that I thought was so severe that we ought to address it. The new rule reads as follows:

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B) * * *.

They go on to spell out what the sanctions may be. That is a dramatic change. It says the only sanctions you are likely to get is that which would prevent you from doing it again. What is the better approach? In thinking about what is an appropriate sanction, one way of looking at it is to say if you have caused damage of $100, you ought to pay damage of $100. The new rule 11 says: No, no. Just enough so you will not do it again. It could be $1, not $100. It could be 10 cents, not $100. This does not say pay for your mistake; it does not remedy the damage caused the other party. It says we are only going to do what we think might prevent you from doing it again. That is not a sanction. That is not a deterrent.

The new rule runs counter to our philosophy of tort law. It runs counter to our sense of justice, that you ought to pay for your mistakes. Only deterring the next action is not enough. Keep in mind here what has been imposed on an innocent party—the legal fees for defending a frivolous suit or claim can be thousands upon thousands of dollars.

This Member does not feel that is right. This Member thinks the one who violates rule 11 ought to pay for the damage. So here is what our amendment does. We substitute that language that says only deter, with this:

In paragraph (2), by striking out the first and second sentences and inserting in lieu thereof "A sanction imposed for violation of

this rule may consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party."

What does it change? It focuses on the damage done to the innocent party. It drops any reference to paying only part of the damage, and it shifts the focus away from deterrence and back to compensation for damage. It raises the possibility of paying a penalty to a party and to the court. It also preserves the possibility of using nonmonetary penalties. Does anybody think if you are guilty of bringing a frivolous action you ought not to have to cover the attorneys' fees of the other side? I hope if people object to this amendment they will address that.

So the question on this portion of the amendment is pretty clear. Is rule 11 designed only for deterrence or do you allow the court to address the attorneys' fees and other costs imposed on the other party?

The fourth change that we thought was so egregious that we had to address it, involves a slight modification in the changes proposed by the Judicial Conference. They proposed adding this language, and I will read it because it is pretty brief.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

What is subdivision (b)(2)? Well, (b)(2) reads as follows:

[The party or attorney certifies that] the claims, defenses, and other legal contentions therein are warranted by existing or by a nonfrivolous argument for the extension, modification, or reversal of existing law or establishment of new law.

What does all this deal with? It deals with the case where the attorneys argue for an extension or modification or reversal of existing law. In other words, someone brings an action knowing the law has not been read that way in the past, arguing it should be read that way in the future.

The new rule 11 says that when you bring that action knowing the law does not support your position and you lose, sanctions cannot be brought against you.

We do not strike that section. Although, Mr. President, I think it would make sense to strike it. But we do modify it slightly. We leave in the part that does not allow sanctions against the complaining party, but we do permit sanctions against the party's attorney. Our fourth change simply says: "although such sanctions may be awarded against a party's attorney."

So we have retained the limitation on sanctions against the party whose attorney tries to reverse or extend the law, but, under our amendment, it would be possible to sanction the attorney.

What is the logic for that? A client does not know or understand the law as the lawyer does. It is the lawyer who makes the recommendation or decision to attempt to reverse or extend existing law. So if the attorney engages in frivolous arguments—and that is what we are talking about here, a frivolous argument that costs the other party money to defend—at least the attorney ought to bear responsibility for that. Otherwise, there is no disincentive against every lawyer in every lawsuit from filing a frivolous attempt to reverse existing law.

Mr. President, that is the body of the amendment. Those are four small, modest changes in the rules. It brings rule 11 partially back to what it was before the commission made its recommendation. It accepts those portions of the commission's recommendations that have some basis in logic.

This issue is fundamental. It is much more significant than simply some technical procedures under our Federal rules. The question that is before the Senate with this amendment is simply this: Do we sanction frivolous actions, or do we close our eyes and do away with the ability to sanction frivolous legal actions? Some may say, "Look, the new rule still has some restrictions in it." That would not be an unfair comment. But it is also quite clear that the heart and the soul and the guts of rule 11 have been torn out of it. It is also quite clear that rule 11's ability to deter frivolous actions has been abated.

Ultimately, the question we must answer on this amendment is whether it is in the Nation's interest to encourage attorneys and parties to bring frivolous actions, to misstate the law, to allege facts that they do not believe or do not know to be true or have not investigated. It seems to this Senator that it is only reasonable to ask somebody to investigate what they are going to allege in court. It seems to this Senator that parties should know some of the facts underlying what they charge in the pleadings. It seems reasonable to ask them to have some knowledge of it. It seems reasonable to ask that frivolous arguments not be made.

The question is whether or not we address the need for improved competitiveness in this Nation by making sure we do not gut the rules that protect us against frivolous lawsuits.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who seeks recognition?

Mr. HOLLINGS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HEFLIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HEFLIN. Mr. President, that amendment has no place on this bill. It obviously deals with a matter pertaining to the operation of courts. I do not know why it is even being brought here.

But let me explain a little bit about the procedure which happens regarding the Federal Rules of Civil Procedure, which include rule 11.

There has been controversy as to how courts ought to take care of its rulemaking authority, but the prevailing point of view is that the judiciary has the inherent power to determine its own rules. Congress felt it had a role, so it adopted the Rules Enabling Act by which the Rules of Procedure would be changed by first having a committee appointed by the Judicial Conference of the United States to study any proposed changes.

After the committee made its report to the Judicial Conference, which is a body composed of judges from all levels of the judiciary, the Judicial Conference would study any proposals and then make recommendations to the Supreme Court of the United States. Then the Supreme Court of the United States would consider the issue and make recommendations to Congress. Under the Rules Enabling Act, Congress has 6 months to either adopt the recommendations, to modify them, or to delete them.

This particular rule 11 that came up was submitted to the Congress and the 6-month time period expired prior to Congress' taking any action, and so all of the proposed Rules of Civil Procedure, including rule 11, went into effect on December 1. We knew toward the end of the Congress last year that if any changes had to be made, they had to be made before December 1.

If a Senator is interested in making a change to a rule, he or she could introduce a bill, but no bill was introduced proposing to change rule 11.

During that 6-month period last year in the House or in the Senate, if there were reasons for change, a bill could have been introduced in the House or the Senate.

In all fairness to Senator BROWN, he said that he did not like rule 11, but he never took the steps to modify the proposed changes, and now he is now belatedly taking steps on this particular bill, which is unrelated and not germane to Senator HOLLINGS' technology bill.

My colleague from Colorado raises issues about frivolous lawsuits and let me say that this has been considered by many concerned groups of people. The Brown amendment is completely opposed by the civil rights community. The Brown amendment is opposed by the Department of Justice. Six members of the Supreme Court approve rule 11 that is now in effect. Senator BROWN quoted from Justice Scalia's dissent. There are always going to be dissents over at the Supreme Court, but if you have a 6 to 3 vote in the Supreme Court of the United States, that is a pretty good vote.

As I listened to the criticisms of the new rule 11 from Senator BROWN and Senator GRASSLEY, I do not agree with them. I have before me a memorandum

from the Administrative Office of the U.S. Courts which says:

I am writing to address criticism raised during the markup of H.R. 2814 that the amendments to Rule 11 of the Federal Rules of Civil Procedure will eviscerate the rule's effect on parties filing frivolous proceedings and papers.

The amendments to Rule 11 retain the rule's core principle to "stop and think" before filing. By broadening the scope of Rule 11 coverage and tightening its application, the amendments reinforce the rule's deterrent effect and also eliminate abuses that have arisen in the interpretation of the rule. Although the amendments strike a balance between competing interests, the changes strengthening the rule have been neglected by those critical of the amendments and need to be highlighted.

First, the amendments expand the reach of the rule by imposing a continuing obligation on a party to stop advocating a position once it becomes aware that that position is no longer tenable.

What they would like to go back to under the old rule, as I interpret it, would be to allow "a party to continue advocating a frivolous position with impunity so long as it can claim ignorance at the time the pleading was signed, which could have been months or years ago."

Second, the amendments specifically extend liability to a law firm rather than limiting the liability to the junior associate who actually signs the filing.

Third, the amendments specifically extend the reach of Rule 11 sanctions to individual claims, defenses, and positions, rather than solely to a case in which the "pleading-as-a-whole" is frivolous. Some court decisions have construed the rule to apply only to the whole pleading, relieving a party of the responsibility for maintaining a single or several individual frivolous positions.

So rule 11 that went into effect on December 1 was designed to strengthen this matter.

Fourth, the amendments equalize the obligation between the parties by imposing a continuing obligation on the defendant to stop insisting on a denial contained in the initial answer. Frequently, answers are general denials based on a lack of information at the time of the reply. The amendments impose a significant responsibility on the defendant to act accordingly after relevant information is later obtained.

It is also important to highlight the provisions of the rule that the amendments retain. A party must continue to undertake "an inquiry reasonable under the circumstances" before filing under the amendments. In those cases where a party believes that a fact is true or false but needs additional discovery to confirm it, the amendments allow filing but only if such "fact" is specifically identified. The provision does not relieve a party of its initial duty to undertake a reasonable prefiling investigation. In cases of abuse, the court retains the power to sanction sua sponte and the aggrieved party can seek other remedies, e.g., lawsuit for malicious prosecution.

The existing rule does not require a court to impose a monetary sanction payable to the other party. Instead, the rule does provide a court with the discretion to impose an appropriate sanction, including an order requiring monetary payments to the opposing party and to the court.

Now, as to the hearings that we had in the Judiciary Committee, the old rule 11—that is one that was in effect before December 1 of 1993—had language that said that signature to a pleading demonstrated that the pleading "is well grounded in fact."

Senator BROWN at the subcommittee hearings on July 28, 1993, grilled the chairman of the Rules Advisory Committee that had proposed to the Judicial Conference this aspect of the rule change.

Senator BROWN claimed that under the new rule 11, a party "no longer has to research a claim and know that it is true." He feels that a party "no longer has to know his facts" before bringing a lawsuit.

Well, what Senator BROWN ignores from the testimony and the response the chairman of the committee, Judge Sam Pointer, gave is that the new rule 11 "still calls for and demands that attorneys have made a reasonable investigation under the circumstances."

As Judge Pointer demonstrated, oftentimes a party does not get all the facts until the discovery is finished, and the new rule does, indeed, require high standards and is not an egregious loosening of standards.

The point is that under this new rule 11, "if a plaintiff is going to make an allegation that he does not have hard support for, the plaintiff should say, I do this on information and belief, and be under a responsibility to withdraw that or not continue to assert it, if after reasonable opportunity for discovery, it turns out there is no basis for it."

Now, the new rule 11 has changes from the old rule in that if a violation regarding a pleading is found, then the court may impose sanctions.

Under the old rule, the language was that a court must impose a sanction if it found a violation of the rule.

As Judge Pointer demonstrated in his testimony, a court needs the flexibility or discretion to impose sanctions because a complaint, or for that fact an answer or motion to dismiss may contain a technical violation, but the rest of that pleading could be perfectly acceptable. Why, then, should a court be required to impose a sanction? Such discretion would not, in my judgment, giveaway to mass, irresponsible pleading.

Obviously, those who are purporting to change rule 11 raise the possibility that a party could intentionally bring a frivolous action and, upon a finding of such by the court, might escape a penalty. The response to that concern is that well, yes, there could be no penalty, but in that type of egregious intentionally frivolous pleading a court will most likely impose a sanction.

Under the new rule—

[I]f warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

Also, a court on its own initiative may begin a show-cause proceeding as to whether a party has violated the rule. This should take care of concerns by Senator BROWN that plaintiffs co irresponsibly plead, claim, et cete The court has its own power to initiate an inquiry as to whether rule 11 has been violated.

As the Senate can clearly see, thi a highly technical matter that we being called upon to consider, and it is attempting to be amended onto an unrelated bill without the Members this body having an adequate opp tunity to study the issues. For us h in Congress on Friday afternoon to have to consider this amendment on an unrelated bill seems to me to be an responsible way of legislating.

So it is my opinion that we ought not to be involved in this at this time. The Judiciary Committee had hearings, and there was ample opportunity for act to be taken. But no action was brou forth through the form of a bill being introduced to make any changes to rule 11.

There was some effort to make so changes to rule 26(a)(1), which de with discovery, and rule 30(b)(2) relating to the taking of depositions. The House did make some changes in th areas, but it was not passed here in Senate.

There is still some effort being made to try to reach some sort of an agreement with the Department of Justi the civil rights groups, and others p taining to those matters, but that has not proceeded to the point where any thing has been finalized.

It seems to me that it is just i proper and an inappropriate time bring this matter up at such a late stage as this. If there had been a real sincere effort, it could have been do within the 6-month time period allow pursuant to the Rules Enabling Act. It seems to me that we ought not to be dealing with this amendment at this time on this unrelated technology b

It may be that a bill could be intr duced, referred to the Judiciary Committee, hearings could be held, and then its merits could adequately considered.

In closing, I do feel that the new r 11 is a flexible rule, and it has provi sions that strengthen, not weaken, efforts to prevent frivolous lawsuits. T new rule is expected to reduce t number of inappropriate motions requesting sanctions, thereby allowing courts to focus more attention to gitimate sanction requests.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mrs FEINSTEIN). The clerk will call the roll

The legislative clerk proceeded call the roll.

Mr. KERRY. Madam President, I as unanimous consent that the order fo the quorum call be rescinded.

The PRESIDING OFFICER: Witho objection, it is so ordered.

Mr. KERRY, Madam President, would like to say a few words about S 4. I would like to compliment the Senator from South Carolina on what he trying to accomplish with this bill. hope that we in the Senate can move

beyond some of the divisions of the last few days and try to focus on what this bill does.

We have had an extraordinary amount of debate in the U.S. Senate about jobs and the economy. During the NAFTA debate, there was a lot of discussion on the floor about the problems of the American workplace. There are, as you know, major problems in the American workplace. Raytheon Corp. in Massachusetts just announced that it will have to lay off some 4,400 more people over the course of the next couple of years—over 1,000 of them in Massachusetts itself.

Most of the companies in the country are downsizing in one way or the other. There are enormous numbers of jobs that are moving to low-skill, low-wage countries. There have been a series of articles in the newspapers recently commenting on the fact that—notwithstanding the improvements in the economy—there has not been an improvement in wages in America.

Americans are working longer, they are working harder, and they are taking home less. In the 1950's, *most* Americans could look forward to a major increase in income in the course of just a couple of years. Well, in the 1980's, it took the average American 10 years to achieve in income growth what it took only 2 years to achieve back then. In 1989 and 1990, American workers lost in each year what it had taken them those entire 10 years to get. That is the predicament of the American worker.

And it is that predicament that S. 4 seeks to address.

S. 4 has received support from a wide variety of technology businesses who recognize that America has a competitiveness problem, and who know there is nothing in this bill that smacks of industrial policy or the Government making decisions.

S. 4 is an effort to facilitate our ability to take products from the laboratory out into the workplace. It will help us avoid the situation we have faced in the past when Americans have developed technology—for the VCR, the fax machine—only to see it developed and manufactured by the Japanese, the Europeans, and others.

The fact is this bill will help create jobs.

Maybe this seems abstract to some. Let me cite a couple of examples of the tangible results the programs of the National Institute of Technology produce. In Massachusetts, Teradyne, Inc., is now marketing a new software package that was developed in conjunction with NIST. That package allows manufacturers of analog and analog/digital electronic components to actually test the components of these devices without compromising test accuracy.

This is a technique which would not have been developed, marketed, or produced without the NIST effort. And, without NIST, Americans would not be employed in this activity.

Studies by NIST researchers have pointed the way to significant processing improvements adopted by Ibis Technology, Inc., which is a company in Danvers, MA, the sole U.S. supplier of an experimental material. The NIST assistance can reduce by a hundredfold the number of defects in this material, making Ibis more competitive and allowing it to be a more secure employer of American workers.

I sincerely hope we can understand what is at stake here. We need to be able to commercialize ideas faster—better—and this bill permits industry to make choices about how to do that. It is an important bill for creating jobs and making this country more competitive.

I hope we can look a little harder at the ways in which S. 4 helps America to be competitive and helps us to create jobs and move away from a partisanship that seems to characterize so much of what happens in Washington.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Madam President, the distinguished Senator from Massachusetts is right on target. There is no question that our dilemma was foreseen by many over the past 10 years, specifically the U.S. Council on Competitiveness, headed up by John Young of Hewlett-Packard, George Fisher, then with Motorola and now Kodak, and other business leaders, certainly a nonpartisan group, which issued a document entitled "Gaining New Ground, Technology Priorities for America's Future" back in 1992, 2 years ago, and it says:

> The U.S. position in many critical technologies is slipping and, in some cases, has been lost altogether. Future trends are not encouraging.

I ask unanimous consent to print the entire document in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

GAINING NEW GROUND: TECHNOLOGY PRIORITIES FOR AMERICA'S FUTURE

EXECUTIVE SUMMARY

Throughout America's history, technology has been a major driver of economic growth. It has carried the nation to victory in two world wars, created millions of jobs, spawned entire new industries and opened the prospect of a brighter future. In many respects, technology has been America's ultimate comparative advantage. Because of our great technological strength, U.S. manufacturing and service industries stood head and shoulders above other nations in world markets.

That comforting view is under assault. As a result of intense international competition, America's technology edge has eroded in one industry after another. The U.S.-owned consumer electronics and factory automation industries have been practically eliminated by foreign competition; the U.S. share of the world machine tool market has slipped from about 50 percent to 10 percent; and the U.S. merchant semiconductor industry has shifted from dominance to a distant second in world markets. Even such American success stories as chemicals, computers and aerospace have foreign competitors close on their heels.

Blame for the problems has been laid at many doorsteps: sluggish domestic productivity growth, closed foreign markets, the deteriorating U.S. education and training system, poor management and misguided government policies in areas ranging from capital formation to product liability laws. Some fear the United States is too preoccupied with national prestige technology projects to worry about investing in the generic enabling technologies that are critical to the competitiveness of many industries. Others charge that the United States is increasingly turning over the difficult job of commercialization and manufacturing technology to foreign companies. Unfortunately, in turning over technology to its competitors, America is turning over the keys to economic growth and prosperity.

The American people and its leaders have too readily assumed that preeminence in science automatically confers technological leadership and commercial success as well. It does not. America assumed that government support for science would be adequate to provide for technology. It is not. In too many sectors, America took technology for granted. Today, the nation is paying the price for that complacency.

This report examines the U.S. position in critical technologies and the actions the nation must take to strengthen it.

KEY FINDINGS

1. There is a broad domestic and international consensus about the critical generic technologies driving economic growth and competitiveness

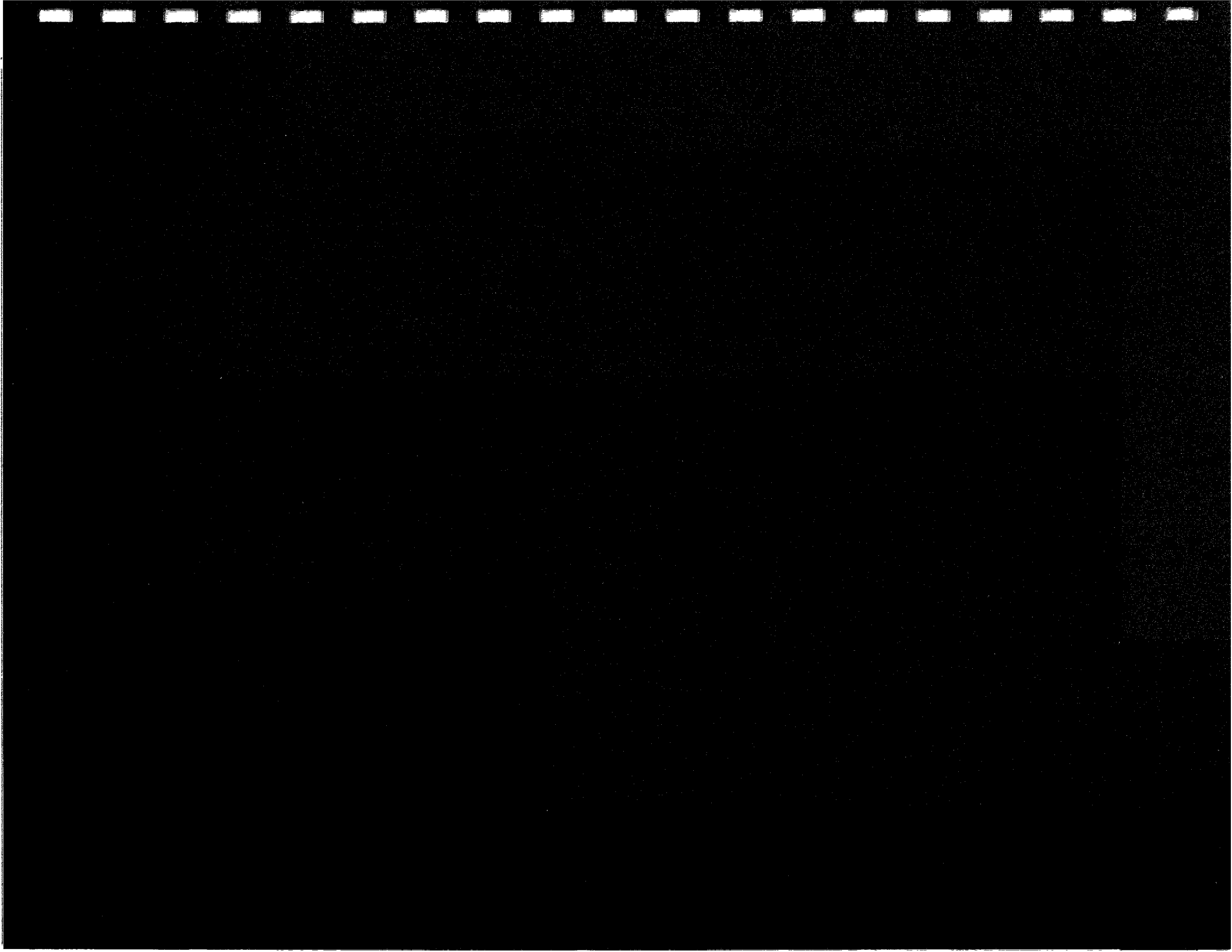
The U.S. Office of Science and Technology Policy, the U.S. Department of Commerce, the U.S. Department of Defense, Japan's Ministry of International Trade and Industry, the European Community and many individual industry groups have all compiled similar lists of critical technologies. This project examined critical technologies from the point of view of a cross section of U.S. industry and confirmed the overlap of critical technologies that appears in these other studies. Given the broad consensus about critical technologies, it is time to move beyond making lists and begin implementing programs that will strengthen U.S. technological leadership.

2. The U.S. position in many critical technologies is slipping and, in some cases, has been lost altogether. Future trends are not encouraging

America pioneered such technologies as numerically controlled machine tools, robotics, optoelectronics and integrated circuits only to lose leadership in them to foreign competitors. Moreover, in many critical technologies, ranging from leading-edge scientific equipment to precision bearings, trends are running against U.S. industry. (See lists on pages 7 to 11.) The erosion of the U.S. position in critical technologies has helped to highlight an important lesson about industrial competition in the late 20th century: a lead in science is not sufficient to sustain technological leadership. Scientific excellence also must be supplemented by a strong position in critical technologies and by the ability to convert these technologies into manufactured products, processes and services that can compete successfully in the marketplace. Otherwise, America's jobs, standard of living and national security will be in jeopardy and, because technology is increasingly driving new scientific advances, so will America's future lead in science.

3. Foreign governments are systematically pursuing leadership in critical technologies.

Governments in other major industrialized countries have used R&D incentives, public-private technology consortia, infrastructure



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UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

March 29, 1994

MEMORANDUM TO HONORABLE PATRICK E. HIGGINBOTHAM AND DEAN EDWARD H. COOPER

SUBJECT: S. 1976, *Private Securities Litigation Reform Act of 1994*

Attached for your information is an article from the Monday, March 28, 1994 issue of the Washington Post and a copy from the Congressional Record of S. 1976, the *Private Securities Litigation Reform Act of 1994*. The bill, if enacted, would affect the Federal Rules of Civil Procedure relating to class actions.

The bill would require courts to appoint a plaintiff steering committee or a guardian to direct lawyers in class actions involving securities. Their powers would include the authority to retain or dismiss counsel and reject or accept an offer of settlement. The bill seeks to ensure that investors, not lawyers, decide whether to bring a suit, whether to settle, and the appropriate lawyers' compensation. Under the bill, a plaintiff in whose name the case is brought must hold either 1% of the securities that are the subject of the litigation or $10,000 worth of securities. The bill also imposes stricter pleading requirements in securities fraud claims. Finally, the professional liability of accountant firms in securities cases is limited under the bill.

Our Office of Legislative and Public Affairs is currently making inquiries into the likelihood of passage of this bill. We will inform you as soon as we receive this information. Please contact me, if you want us to mail copies of the bill and the article to each committee member.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

Levine, a California member of the House.
Today, as lawyers describe that frenzied grab for high-priced former government talent, many

See LAWYERS, H6, Col. 1

BY RANDY MAYS FOR THE WASHINGTON POST

strike an

Shareholder Suits Move From Courts to Congress

Several Bills Aimed at Curbing Frivolous Cases

By Albert B. Crenshaw
Washington Post Staff Writer

Thousand of small investors profited handsomely in the bull market of the past decade, and none more so than those able to pick out emerging high-technology companies and ride them to the end of the rainbow.

But not all of these small companies brought home the bacon for their investors. Some were based on

PERSONAL FINANCE

ideas that weren't viable; some couldn't keep up with the competition; and some had managements that put out misleading information about their firm's prospects, pumping up the stock before an inevitable crash.

Some investors react to these ups and downs philosophically, regarding them as part of the risk you take in buying small-company stocks. But others see things differently: They sue.

These disgruntled investors—and their lawyers—argue, in effect, that the company cheated them. Typically, they say that the company misled them—that it failed to disclose critical information, such as a sales decline or loss of a key contract, and thus induced them to invest or stay invested when the company knew it was about to take a dive.

In some cases, the suits have unearthed significant misconduct. In others, the companies, right or wrong, have simply settled—as with a recent lawsuit involving Netrix Corp. of Herndon.

Settling such suits "is a cost of doing business, and I don't believe it should be," Netrix President Chuck Stein said in January.

Legent Corp. of Vienna also has been hit with such a case.

In addition, when such settlements are divided up, investors individually often get far less than the lawyers representing them.

In any event, such suits are commonplace. Indeed, critics say it has almost reached the point where any significant drop in a company's stock price will trigger a suit.

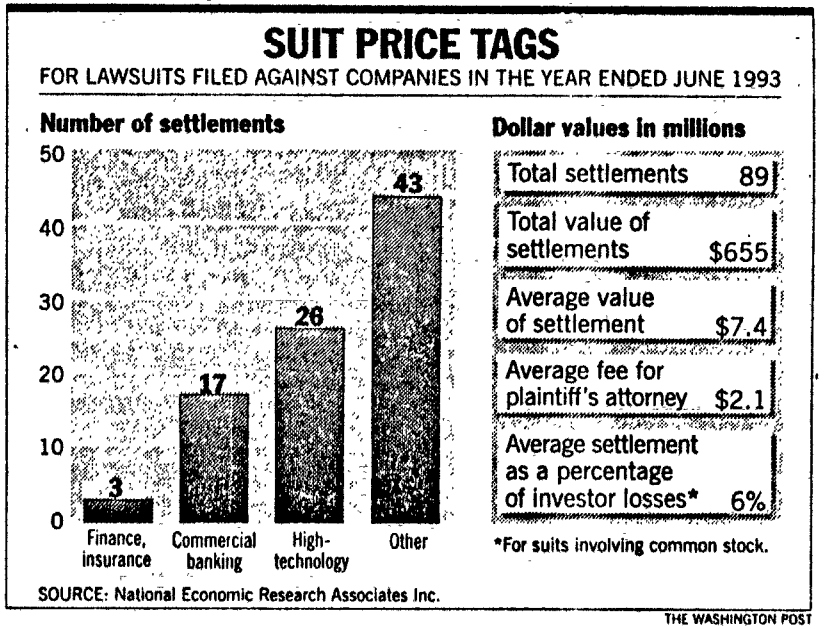
Small high-tech companies contend that the litigation diverts resources that should be going into product development. In the worst cases, they say, the massive legal fees and judgments can put them out of business. They say these suits are usually without merit and are filed simply to force the companies into settling. Legalized extortion, some call it.

These complaints have now touched off a massive lobbying battle on Capitol Hill—and one that is of serious interest to small investors.

Several members of Congress have introduced legislation aimed at curbing the practice. If the changes they offer work as advertised, a drain on the resources of some of the nation's most innovative companies will be plugged.

But if they don't—as some consumer groups and others fear—they could make it easier for companies to cook their books and for their auditors and lawyers to get away with it. And small investors, who are least likely to get wind that something is wrong in a company, might find small-company stocks even more risky.

See PERSONAL FINANCE, H3, Col. 1



H0

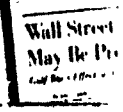
Wall Stre Over Revi

There are plenty of reasons for financ market jitters, an them the Whitewater aff anxiety over North Kore nuclear threat and the Fe Reserve Board's now-cle intention to nudge short-t interest rates higher.

But one element that a little public attention as a of uncertainty—but is ve much on the minds of Wal Street—is the Clinton administration's threat to impose trade sanctions on for its failure to boost imp U.S. goods.

After talks on a new "framework" for trade bet the two countries flared u open dispute between Pre Clinton and Prime Ministe Morihiro Hosokawa, the president decided to rest equivalent of the now-laps "Super 301" section of the trade law.

INSIDE



Rise of Shareholder Suits Sparks Calls for Reform

PERSONAL FINANCE, From H1

Rep. John Dingell (D-Mich.), chairman of the House Energy and Commerce Committee, last week said some of the proposals "need refinement" lest they end up shielding crooks. But he, like others, endorsed the idea of limiting frivolous suits.

Many of the suits now being filed amount to "high-tech ambulance chasing," said Sen. Christopher J. Dodd (D-Conn.), who last week introduced a bill that would rewrite the rules governing shareholder lawsuits. His measure is designed to make it harder for securities lawyers to bring frivolous suits while continuing to allow suits to redress genuine wrongs.

"This bill is one that deals with a broad spectrum of issues," said Dodd, who is chairman of the securities subcommittee. He said he is concerned not only with frivolous litigation but also over whether investors are well served even by meritorious suits. Studies show investors recover 6 cents on the dollar, Dodd said, and in one recent case, the lawyers got $8 million out of a settlement that totaled $12 million.

However, a number of consumer groups, as well as the national organization of state securities regulators, say they are fearful that attempts like Dodd's and a bill offered by Rep. W.J. "Billy" Tauzin (D-La.) in the House might do more harm than good.

The key issues revolve around ways to discourage frivolous suits without making it too difficult for legitimately wronged shareholders to recover.

Many of the suits now being filed amount to "high-tech ambulance chasing."

— Sen. Christopher J. Dodd

The Dodd bill would, among other things:

■ Eliminate the doctrine of "joint and several liability." Under this doctrine, all defendants are equally liable for damages, and if one or more of them is insolvent or has fled, the others must pay the damages, even if their role was minor.

Dodd would replace this doctrine with one of proportionate liability, so that those at the center of any fraud would pay the bulk of the damages. Those whose involvement was marginal—such as, say, an accounting firm that failed to detect a scam—would pay less.

Consumer groups and of course trial lawyers don't like this provision, contending that it would shield accountants and other professionals from liability; investors often rely on their representations of the company's financial health.

■ Require investors to hold a minimum of $10,000 worth or 1 percent of the securities at issue to have standing to sue. Backers of the bill say this would be easy to get around; it is included mostly as a "speed bump" to slow down attorneys who find a person with one share of stock to act as the named plaintiff in a class-action suit.

Opponents argue that this would make it difficult for small investors to recover damages in court.

■ Extend the statute of limitations so that investors could sue up to five years after the alleged violation or two years after the violation was discovered. Currently the standards are three years and one year.

SEN. CHRISTOPHER J. DODD ... bill aims to discourage frivolous suits

However, the measure allows the pr posed two-year limit to run from the ti the violation should have been discovered through exercise of due diligence. Opponents say that is too vague and might allow comp nies to hide behind the statute of limitatio more easily.

■ Require the establishment of a plaint steering committee or appointment of a cla guardian in class-action suits. The committee or guardian would act as the client, determining, among other things, whether accept settlement offers. Critics of the pr sent system say lawyers and defendants often work out deals that provide the plaintiff lawyers with a handsome fee while giving i dividual investors 6 cents on the dollar.

One thing the Dodd bill would not do is require losers in lawsuits to pay the winner legal costs. The idea of moving to the s called English system was heavily criticized by consumer and other groups for its "chilling effect" on lawsuits. A discussion draft the bill had contained what Dodd's aide called a minor provision concerning fees but that was dropped as not being worth all th heat it was generating.

The battle over these issues is not likely to be resolved soon. For small investors and small companies, in the meantime, class-a tion suits are likely to remain a fact of life.

Thus, investors should take seriously any notices they receive about suits against firm they hold stakes in. Read documents you r ceive and in the case of a large investment, perhaps consult an attorney.

Settlements in weak or frivolous case aren't likely to bring you much, but som times investors do make significant recoveries and you don't want to be left out when that happens.

Study Says Refinancing Helped Many

Homeowners who refinanced last year reduced the interest rate on their loans to 7.23 percent from 9.12 percent, on average, and cut the term of their loans by four years, according to data from the Washington-based Federal National Mortgage Association.

The reductions will save these homeowners an average of $60,000 over the life of their loans, Fannie Mae calculated.

Of the people who refinanced last year, slightly more than half opted for intermediate-term loans—15-year and 20-year loans—and more than 90 percent chose fixed-rate mortgages.

"The lowest interest rates we've seen in a generation gave homeowners tremendous short-term and long-term benefits," said Donna Callejon, Fannie Mae's senior vice president.

— Albert B. Crenshaw

SECTION V
CIVIL: 4/28/94

FJC Survey Will Be Sent As A Separate Mailing

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.

SECTION III
Civ: 4/28/94

Two-Page Excerpt on Rule 64 from Agenda on May 1993 Meeting

Rule 64

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

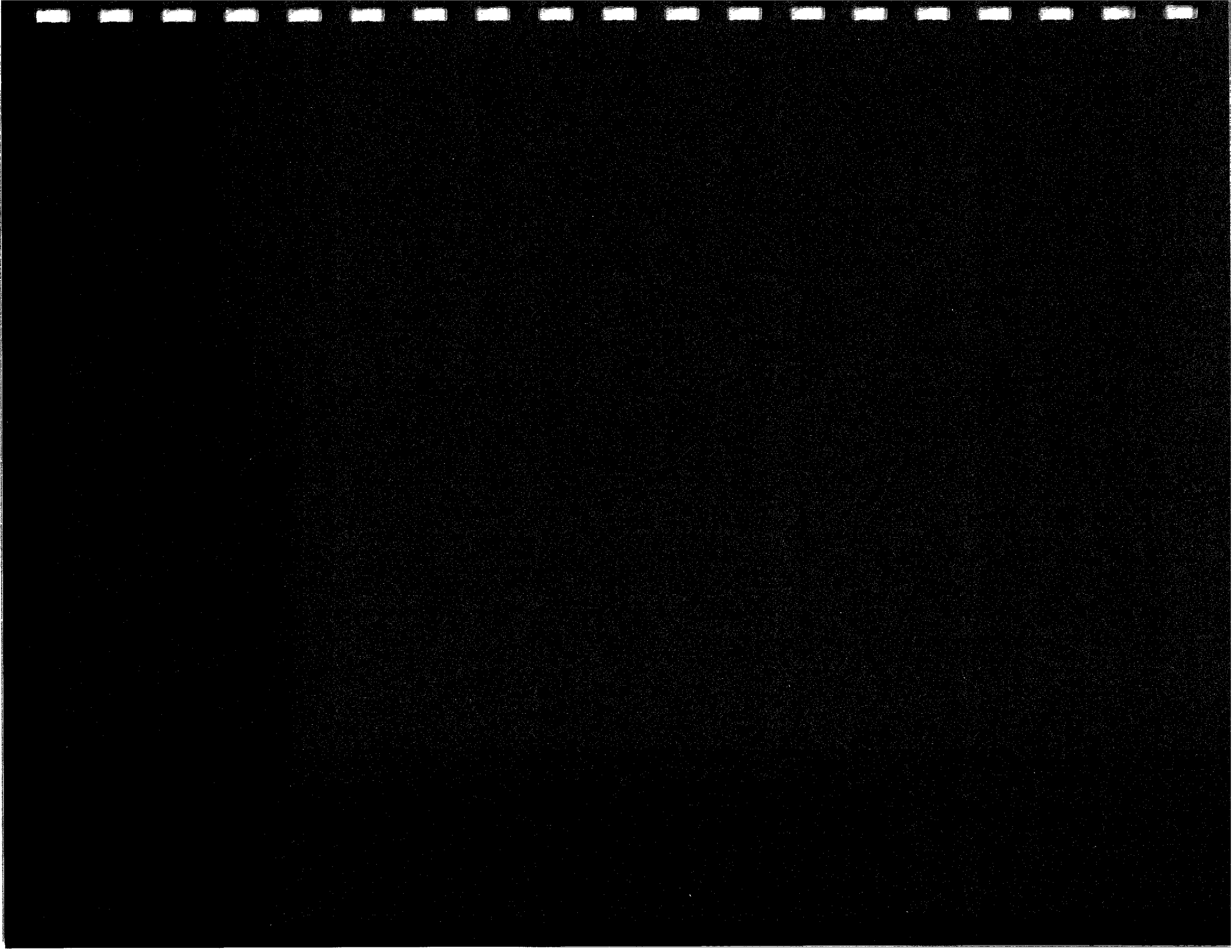
Only preliminary discussions have been held with the ABA proponents of this recommendation. It is clear that they are prepared to introduce legislation, and believe that they can find substantial support in Congress. It also is clear that they would prefer to work through the problems with this Committee,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

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

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

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

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



RULE 64

The ABA Proposal in Brief

In 1986 the House of Delegates of the American Bar Association adopted a resolution supporting enactment of a federal statute governing prejudgment security in federal courts and suggesting corresponding revisions of Civil Rule 64. The proposal and some of the questions it raises are sketched below. The proposal itself envisions a clear link between statute and rule. Absent a statute, action by way of rule at best would test the limits of "practice and procedure," and in the eyes of many would enter the realm of substantive rights. The proposal is one that should be considered first in terms of recommending legislation by Congress. That task may be appropriate for the Civil Rules Committee if it seems important to undertake revisions of Rule 64 that stretch or exceed the limits of the Rules Enabling Act.

Present Rule 64

Rule 64 now invokes the law of the state in which the district court is held to govern "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered * * *." Federal statutes govern when applicable, but apparently there are few federal statutes. The Rule 64 principle of dynamic conformity superseded a statute that invoked state law governing attachment and similar remedies as state law existed on June 1, 1872, but allowed district courts to adopt current state remedies by general rules.

Rule 64 has not been amended since its adoption.

The ABA Proposal in detail

One critical part of the ABA proposal seems to get lost from view in most of the summaries. It would retain present Rule 64, designating it as Rule 64(a). Federal remedies would be added. The federal remedies would be available in any case properly brought in federal court. Although the statute at times seems to imply contrary inferences, it does not seem to be intended that an action could be brought solely to obtain the benefit of federal attachment; the underlying claim must be the subject of a federal action.

The most important effect of the proposed statute is to enable a district court to order prejudgment seizure of property anywhere in the United States or the territories. The order could be registered by filing in any district court. The argument made in support of this expansion is twofold. Modern technology makes it increasingly easy to spirit attachable property around the country. The effort required to institute multiple attachment proceedings in several different courts is expensive.

The statute also undertakes to list the grounds that support prejudgment security orders. The supporting ABA memorandum describes them as grounds generally available in the states, often available in the states, sometimes available in the states, or logical extensions of the remedies sometimes available in the states. This description alone makes it clear that the statute

would effect significant expansions in the availability of prejudgment security.

In addition to the grounds that support attachment, the statute sets the time the order becomes effective and seeks to govern priority among competing liens. There is a specific provision that makes an attachment a lien on real estate from the time of docketing "even though the officer fails to especially atttach the same or part thereof; and the defendant cannot thereafter assign, transfer or convey the same or any interest therein." Although the statute further provides for recording in accordance with state law, these provisions do not explicitly qualify the seemingly absolute effect of the attachment at the time of docketing.

The basic statutory procedure for attachment requires no less than three days notice. Provisions for ex parte attachment are included, based on a showing that the defendant is about to abscond or that notice to the defendant is likely to defeat execution of the attachment. An ex parte attachment can be undone by posting bond to secure the damages claimed in the action (rather than in the value of the attached property), or by motion seeking immediate dissolution "which shall be granted unless the plaintiff proves those statutory grounds upon which the order or writ was issued."

The new Rule 64 drafted to implement the statute is modeled on New Jersey law. It fills ten single-spaced pages. Many of the provisions would be difficult to fit with federal practice, and some are at best arcane. One subdivision, for example, forbids issuance of an attachment against a defendant who has been arrested in the same action upon a capias ad respondendum or ne exeat; it further forbids an order to hold to bail unless specified findings are made.

The methods of making levy on the writ are spelled out for tangible personal property; tangible personal property in the possession of a bailee for which a negotiable document of title is outstanding; choses in action evidenced by negotiable commercial paper; negotiable investment securities; other choses in action; legacies or distributive shares in an estate, or beneficial interests in a trust; and real property. Some of these methods refer to state law; others do not.

The Rule 64 draft includes provisions that might give new meaning to the scope of supplemental party jurisdiction under 28 U.S.C. § 1367. There is an elaborate system for allowing creditors of the defendant to participate as "applying claimants" who may defend against the claims of the plaintiff and other applying claimants. If the defendant enters an appearance, the claim of each applying claimant is to "proceed in the same manner as a separate action."

Random Questions

Need for Federal Remedies: The first question is whether there is a need for independent federal prejudgment remedies. The question should be addressed separately for federal-question and for diversity cases. The ABA Sections of Litigation and Tort and Insurance Practice manifestly believe that there is a need to enhance the utility of prejudgment remedies in ways that

would be difficult to accomplish in state courts. Federal legislation, implemented by appropriate Civil Rule provisions, is an obvious response with respect to federal-question cases. It may be more difficult to determine whether federal diversity jurisdiction should be used to provide more effective remedies than state courts can provide. This use of diveristy jurisdiction would seem to some a highly appropriate means of fulfilling the purposes for maintaining access to federal courts. To others it would seem an unwise invitation to take still more state-law claims to federal court, and an improper intrusion on state interests when attachment rests on a ground not available under the state law that governs the claim.

Nationwide Remedies: The desire to avoid multiple independent proceedings for prejudgment relief in different courts, invoking different rules that may require different showings, is understandable from the perspective of a person who has a valid claim against a defendant who may be able to delay or defeat payment. The sheer ferocious efficiency of a single proceeding that can be used to freeze assets throughout the country may seem less attractive from the perspective of a defendant that is sued on a questionable claim or who wants and needs control of its own assets pending litigation. There is room to challenge the basic premise of the ABA proposal, however the challenge is resolved.

Integration with other proceedings: The ABA proposal includes answers to many of the obvious questions that must be addressed by a proposal to create federal prejudgment remedies. The questions and answers all must be explored independently. Among the most important are developing means to govern the relationships between the federal security order and security orders entered in other proceedings, state or federal--the problems may go beyond proceedings involving only one defendant, including proceedings against different combinations of defendants who have shifting joint interests in various properties, and so on; integrating these prejudgment security orders with security interests that do not arise from prejudgment remedies; developing ways to test and ensure the personal jurisdiction of the court entering the security order; determining whether a security order can be made only in a court where an action on a claim is pending; providing convenient means to resolve disputes by people claimed to hold property of the defendant in distant districts; and determining the relationships between federal prejudgment remedies and the state remedies that continue to be available in federal court.

State law exemptions: It must be decided whether federal prejudgment security orders can attach to property exempted from attachment by state law. If state law is to be invoked, it will be necessary to provide for a choice of state law--looking to the location of suit, the domicil of the debtor, the domicil of any person claiming an interest in the property, the location of the property, or whatever other connecting factors may seem relevant.

No notice security: The ABA proposal seeks to define a procedure for effecting security without advance notice. The first need is to satisfy the requirements of due process. The next question is whether to go beyond due process minimum requirements. These questions may deserve consideration even if no other change is made in Rule 64. Rule 64 provides prejudgment security "under the circumstances and in the manner provided by" state law. It may be desirable to establish a uniform federal notice procedure. A uniform federal procedure may seem

particularly appropriate with respect to security orders entered under "any existing statute of the United States."

Location of intangibles: In one view it might seem that a nationwide system could avoid the frequently difficult problem of assigning a location to intangibles. If there is to be any effort to integrate a federal prejudgment security scheme with other interests, however, the problem likely cannot be avoided.

Relationship of statute and rule: If both statute and rule are to be used, it is important that they be integrated. The matters better covered by statute should be identified, separating out matters better left to the rulemaking process. If an ambitious role is assigned to the rulemaking process, it may be desirable to include specific enabling authority in the statute.

Summary

The ABA proposals can be evaluated only on the basis of deep familiarity with prejudgment security devices. Many of the issues seem better suited to legislation than judicial rulemaking. Even the modest goal of amending Rule 64 to provide uniform notice provisions may raise unexpected difficulties in relation to different state law remedies. The first question should be the need for legislation, to be implemented as appropriate by rulemaking.

SECTION VII
4/28/94
CIV. AGENDA

Class Action Discussion

SECTION VIII
CIV AGENDA 4/28/94

RULE 16.1. PRETRIAL MASTERS

(a) **Appointing.**

(1) **Magistrate Judge.** A court may appoint a United States magistrate judge as pretrial master in any action.

(2) **Other Person.** A court may appoint a person who is not a United States Magistrate Judge as pretrial master in any action if the parties consent or if the master's duties cannot be adequately performed by an available magistrate judge. Unless the parties consent to the appointment, the person appointed must not have a relationship to the parties, counsel, action, or court that creates an actual or apparent conflict of interest.

(b) **Grounds for Appointing.** A court may appoint a pretrial master to perform any of the duties described in subdivision (c) when it is likely that:

(1) a master will advance substantially the just, speedy, and economical determination of the action; and

(2) any fees and expenses charged under subdivision (h) will not impose an unfair burden on any party.

(c) **Master's Duties and Powers.** A pretrial master may be appointed to:

(1) mediate or otherwise encourage settlement;

(2) formulate a discovery plan; supervise discovery; make discovery orders under Rules 26 through 31, 32(d)(4), 33 through 36, and

45; make recommendations [to the court] for orders under Rules 26 through 36 and 45; make orders under Rule 37(a); or make recommendations [to the court] for orders under Rule 37;

(3) conduct conferences and make orders under Rule 16;

(4) hear and determine any other pretrial motion, except a motion:

(A) for injunctive relief,

(B) to dismiss for failure to state a claim,

(C) for judgment on the pleadings,

(D) to strike any claim or defense,

(E) for involuntary dismissal or transfer,

(F) for summary judgment,

(G) to certify, dismiss, or approve settlement of a class action, or

(H) to establish for trial under Evidence Rule 104 the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence;

(5) conduct hearings and make proposed findings and recommendations for disposition of a motion described in subdivision (4);

(6) manage other pretrial proceedings;

(7) assist in coordinating separate proceedings pending before the court or in other courts, state or federal; or

(8) perform any duties agreed to by the parties.

(d) **Order Appointing Master.**

(1) **Contents.** The order appointing a pretrial master must state:

(A) the master's name;

(B) the master's duties and powers under subdivision (c), and any additional powers for performing those duties;

(C) the times for performing the master's duties;

(D) the circumstances[, if any,] in which the master may communicate ex parte with the court;

(E) the topics[, if any,] on which the master must make reports or recommendations to the court;

(F) the time limits, methods, and standards for reviewing the master's orders and recommendations;

(G) any bond required of a master who is not a United States magistrate judge; and

(H) the procedure for fixing the master's compensation under subdivision (h).

(2) **Amendment.** The order appointing a pretrial master may be amended at any time [after notice to the parties].

(e) **Master's Orders.** A pretrial master who makes an order must file the order and serve a copy on each party. The clerk must enter the order on the docket.

(f) **Master's Reports.** A pretrial master must report to the court as required by the order of appointment, and may report on any other matter. Before filing a report, the master may submit a draft to counsel for all parties and receive their suggestions. The master must:

(1) file the report;

(2) serve a copy of the report on each party; and

(3) file with the report any relevant exhibits and a transcript of any relevant proceedings and evidence.

(g) **Review of Master's Orders or Recommendations.**

(1) **Time.** A motion to review a pretrial master's order, or objections to – or a motion to adopt – a pretrial master's report or recommendations, must be filed at a time directed by the court, or within 10 days from the time the order is docketed or the report is filed.

(2) **Findings of Fact.** The court may set aside findings of fact or recommendations for

findings of fact by a pretrial master only for clear error, unless:

(A) the order of appointment provides for more searching review, or

(B) the parties stipulate that the master's findings will be final.

(3) **Questions of Law.** The court must independently decide questions of law raised by a pretrial master's order, report, or recommendations, unless the parties stipulate that the master's disposition will be final.

(h) **Compensation.**

(1) **Fixing Compensation.** The court must fix the compensation of a pretrial master who is not a United States magistrate judge.

(2) **Payment.** After considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a pretrial master, the court must order payment of any compensation fixed under subdivision (1) either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

COMMITTEE NOTE

The appointment of masters to participate in pretrial proceedings has developed into an extensive practice. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well regulated by Rule 53, which focuses on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See *Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 16.1 is adopted to confirm and regulate the use of pretrial masters. It does not apply to trial or post-trial masters. A court that wishes to appoint a pretrial master to serve also as trial or post-trial master must proceed separately under Rule 53 [or Rule 65.2].

Subdivision (a). United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). In addition, the statute specifically authorizes appointment of a magistrate judge as special master. § 636(b)(2). Appointment as a pretrial master is appropriate when needed to perform functions outside those listed in § 636(b)(1). A magistrate judge ordinarily should be appointed in preference to other persons. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that often deters appointment of a master is much reduced. There is no need to impose on the parties the burden of paying master fees to a magistrate judge. A magistrate judge, moreover, is less likely to be involved in matters that raise conflict-of-interest questions.

Despite the advantages of designating a magistrate judge, the occasion may arise for appointment of another person as pretrial master. Appointment of another person is readily justified if the parties consent. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that require review of numerous documents, or perhaps supervision of depositions at distant places. Expert experience with the subject-matter or specialized litigation may be important in cases in which a magistrate judge could

devote the required time.

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master who is not a magistrate judge. A lawyer, for example, may be involved with other litigation before the appointing judge or in the same court, directly or through a firm. A lawyer may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

Subdivision (b). Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master, even if the master is also a magistrate judge. The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

The risk of imposing unfair costs on a party is a particular concern in determining whether to appoint a pretrial master without the consent of the parties. Parties are not required to defray the costs of providing public judicial officers, and should not lightly be charged with the costs of providing private judicial officers. Disparities in party resources are not automatically cured by disproportionate allocations of fee responsibilities – there is some risk that a master may appear beholden to a party who pays most or all of the fees.

Subdivision (c). Pretrial masters have been used for a variety of purposes. The list of powers and duties in subdivision (c) is intended to illustrate the range of appropriate assignments. The only explicit limitation is set out in paragraph (4), but courts must be careful to assign only those pretrial tasks that can be better performed by a master than a judge or magistrate judge, just as care must be taken in assigning trial tasks. See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1926). Judicial exercise of judicial functions may be

particularly important in cases that involve important public issues or many parties. At the extreme, broad and unreviewed delegations of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir.1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir.1991); *Burlington No. R.R. v. Department of Revenue*, 934 F.2d 1064 (9th Cir.1991).

Paragraph (1) confirms the frequent practice of relying on masters to mediate or otherwise encourage settlement. A master may have several advantages in promoting settlement. The parties may share with a master information they would not reveal to a judge who might try the case. The master may be able to offer assessments of the case and suggestions for settlement that would not be appropriate from a trial judge. The parties may have special respect for advice from a master with experience in a particular field, whether as litigator or otherwise. In multiparty cases, a master may be able to develop models of injury and damages that facilitate settlement of large numbers of claims. The advantages, however, do not all weigh in favor of a master. A master may lack the extensive experience and aura of office that may lend special weight to a judge's efforts to promote settlement. A master whose sole function is to promote settlement, moreover, may attach exaggerated importance to the value of settling.

Paragraph (2) refers explicitly to discovery, but includes disclosure as well. Supervision of discovery has been one of the tasks most frequently assigned to masters. The need for a master may be acute in overworked courts presented with claims that privilege, work-product, or protective order shield thousands of documents against discovery. A master also may be able to help the parties plan realistic discovery programs in ways that parallel help in settlement negotiations, to lower the tone of contentious discovery maneuvers, or to resolve disputes or even preside at depositions when reason fails. The limits of the adversary process must, however, be observed. It would be improper, for example, to appoint a masster with "the power to restate the questions and to recommend the answers," see *Wilver v. Fisher*, 387 F.2d 66 (10th Cir.1967). The power to supervise discovery can include power to make orders under Rule 37(a)(4). The master also may be given power to recommend more severe sanctions.

Paragraph (3) permits assignment of Rule 16 pretrial conference duties. Final pretrial conferences directly focused on shaping the trial, however, ordinarily should

be conducted by the trial judge. A pretrial master's special experience and knowledge of the case can be tapped by having the master participate in the conference.

Paragraph (4) permits assignment of authority to hear and determine pretrial motions, with stated exceptions. The listed exceptions are frequently encountered matters of great importance. It is not possible to capture in a general list all matters that may be equally important in a particular case. Trial judges must be careful to retain initial decision responsibility for all matters central to a case.

Paragraph (5) complements paragraph (4) by permitting reference to a master for hearings and recommendations for disposition of any motion described in paragraph (4), including those listed in paragraphs (A) through (H). Even though the court retains responsibility for independent determination of matters of law, and can retain responsibility for independent determination of matters of fact in the order referring the proceedings to the master, references should be limited to cases presenting special needs. Courts have frequently noted the undesirability of referring dispositive motions to masters. See *Prudential Ins. Co. v. U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir.1993); *In re U.S.*, 816 F.2d 1083 (6th Cir.1987); *In re Armco*, 770 F.2d 103 (8th Cir.1985); *Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698, 711-713 (7th Cir.1984).

Paragraph (6) is a general authorization to assign authority to manage pretrial proceedings. This provision reflects the difficulty of foreseeing the innovative procedures that may evolve under the spur of litigation that is complex in subject matter, number of parties, or number of related actions. It also can encompass a variety of alternative dispute resolution devices. A master might, for example, preside at a summary jury trial. Matters that bear directly on the conduct of trial, however, are seldom apt to be suitable for delegation to a master. See Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U.Pa.L.Rev. 2131, 2147 n. 88 (1989).

Paragraph (7) reflects an emerging practice of relying on masters to help coordinate separate proceedings that involve the same subject matter. One form of coordination is to appoint the same person as master in several actions. Other, often informal, forms of coordination may be possible as well. As experience

develops with this practice, it may be possible to achieve many of the benefits of consolidation without the complications that might arise from attempts to consolidate actions pending in different court systems.

Paragraph (8), finally, emphasizes the importance of party consent. Just as parties may consent to arbitration, so consent has an important bearing on the means of processing disputes under judicial auspices. Courts cannot be asked to abandon all responsibility for proceedings conducted under their authority or judgments entered on their rolls. Party consent, however, reduces concerns about expense and limiting access to public judges.

Subdivision (d). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and powers. Care must be taken to make the order as clear as possible.

The simple requirement that the master be named does not address the means of selecting the master. Often it will be useful to engage the parties in the process, inviting nominations and review of potential candidates. Party involvement may be particularly useful if the master is expected to promote settlement. However much the parties are involved, courts should guard against repetitive selection of a single small group of familiar candidates.

Precise designation of the master's duties and powers is essential. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or recommendations is an important part of this process. It also is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between master and court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that would not be shared with the court. Yet there may be circumstances in which the

master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exhanges with the court. The rule does not attempt to provide guidance on these questions. It requires only that the court address the topic in the order of appointment.

There should be few occasions for requiring that a pretrial master be bonded. If special circumstances suggest a risk that inadequate performance may cause significant harm, however, a court may wish to ensure a source of damage payments. Although a court rule cannot address the question of official immunity, it is proper to provide for a bond that serves the function of individual liability.

The provision for amending the order of appointment is as important as the provisions for the initial order. New opportunities for useful assignments may emerge as the pretrial process unfolds and the master becomes intimately familiar with the case. Conversely, experience may show that an initial assignment was too broad or ambitious, and that the court should resume control. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

Subdivision (e). A pretrial master's order should be filed and entered on the docket. In some circumstances it may be appropriate to have the clerk's office assist the master in effecting service of the order.

Subdivision (f). The report is the master's primary means of communication with the court. The nature of the report determines the need to file relevant exhibits, transcripts, and evidence. A report at the conclusion of unsuccessful settlement efforts, for example, often will stand alone. A report recommending action on a motion for summary judgment, on the other hand, should be supported by all of the summary judgment materials.

Subdivision (g). The time limits for seeking review of a master's order, or objecting to — or seeking adoption of — a report, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to excuse the failure to seek timely review.

The clear error test provides the presumptive standard of review for findings of fact. The clear error phrase is used in place of the clearly erroneous standard of Rule 52 to suggest the subtle distinctions that may justify somewhat more searching review of a master. A court may provide for more searching review in the order of appointment; because the parties may rely on the standard of review in proceedings before the master, the order should be amended to change the standard of review only for compelling reasons. A court may not provide for less searching review without the consent of the parties; clear error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may stipulate that the master's findings will be final.

Absent consent of the parties, questions of law cannot be delegated for final resolution by a master. The subordinate role of the master may at times warrant treating as questions of law matters that would be treated as questions of fact on reviewing a trial court.

Subdivision (h). The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be compensated at a rate of about half that earned by private attorneys in commercial matters. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir.1979). Even if that suggestion is followed, a discounted public-service rate can impose substantial burdens. Two obvious measures of the burden are provided by the amount in controversy and the means of the parties. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees.

NOTE

March 31, 1994

EXPERT WITNESS-MASTERS-JUDICIAL ADVISERS

This note is a preliminary description of a question not addressed in the first rough draft Rule 16.1 on pretrial masters. The Evidence Rules Advisory Committee has expressed concern that courts have come to confound the roles of expert witnesses appointed by the court under Evidence Rule 706 with the roles of special masters. A third role as adviser to the court at times seems to be added to the blend. Many potential problems arise from these practices. The problems and solutions are likely to vary with the nature of the master element in the formula: pretrial, trial, and post-trial masters play distinctive roles. Much more must be known of present practices before it will be possible to identify the potential benefits and risks of combining different roles in one person. It is too early to offer advice on what provisions should be incorporated in which rules.

In the abstract, there is much to be said for clear separation of three distinct functions. A master exercises the powers of a judge on a temporary, restricted, and controlled basis. After appointment, the relationship between master and appointing judge should be much the same as the relationship between a trial court and an appellate court. The relationship between master and parties should be much the same as the relationship between judge and parties. A court-appointed expert is a witness who communicates with the judge only through testimony in open court, and is subject to pretrial discovery. An adviser is a law clerk, or possibly some other member of the judge's official staff, who deals with the judge in confidence and who does not engage directly in the adversary process. Combination of these functions can defeat one of the central premises of the adversary process. The parties should have access to all information that affects the decision, both to challenge or clarify the information and to understand and have confidence in the result.

A variety of reasons may be guessed for the apparent tendency to depart from clear separation of roles among master, witness, and adviser. One reason is the inherent complexity of many litigated subjects. Centuries ago, Lord Mansfield sought advice from experts on the law merchant. If questions of commercial practice then seemed too complicated for judicial reasoning alone, the problems that today furnish the stuff of litigation are overwhelmingly complex. Routine product liability, medical malpractice, patent infringement, and like traditional litigation can generate confusion aplenty. Antitrust, securities, advanced technology, environmental, retirement benefit, and other modern topics can far outstrip these examples. Expert help is necessary for understanding, and may be more reassuring when traditional role lines are crossed. Similar phenomena occur in litigation undertaken to control and reform social institutions. Expert help

is sought especially with the tasks of formulating, enforcing, and modifying complex decrees.

A second reason may lie in failures of the adversary process when confronting these complex subjects. Judges may seek help in nontraditional forms because the traditional forms simply have not done well enough. If the judge cannot understand a case as presented by traditional means, it seems natural to try other means.

Yet another reason may lie in procedural rules that at times allow litigation to run out of reasonable control. Current discovery rules have combined with modern information technology to facilitate exchanges of information in quantities that far exceed the possibilites of comprehending decision. Effective control of these processes may require resort to judicial adjuncts who operate outside traditional roles.

These speculations are fueled by occasional vicarious glimpses of practice. The blending of expert witness and master roles has been noted in various places. In the summary of her Federal Judicial Center paper on masters, Professor Farrell notes that masters "sometimes * * * proceed more informally to make findings based on their own knowledge," at times based on expert experience (pp. 13-14). She also notes that experts have been appointed under Rule 706 "to advise the parties and the court on settlements and the framing of consent decrees." A few reported decisions are similar. In B.H. by Pierce v. Murphy, 7th Cir.1993, 984 F.2d 196, 198 & n. 2, the court refers to "the settlement process, conducted pursuant to" Evidence Rule 706, adding that 13 experts had been appointed to review ten substantive areas of the lawsuit and two people had been appointed "to manage the process." Johnson Controls, Inc. v. Phoenix Control Systems, Inc., 9th Cir.1989, 886 F.2d 1173, 1176-1177, rejected the contention that the master was in fact an expert witness who should have been subjected to cross-examination, noting that consideration of information not available to the defendant was proper because the defendant had stipulated that documents involving trade secrets could be submitted under seal. In U.S. v. Cline, 4th Cir.1968, 388 F.2d 294, 296, the court found that a "master" appointed to execute the court's definition of a boundary line was in fact an expert, who must be made available for examination by the parties.

The more mysterious role of judicial advisers also has been noted. Professor Farrell notes reliance on Rule 53 to appoint experts to serve as neutral advisers to the court, pp. 17-18. The Manual for Complex Litigation Second, § 21.54, notes that a court may consult with a confidential adviser, but urges caution unless the parties agree to this device. Others have noted a case in which a pretrial master was kept on as technical adviser to the court during trial, Brazil, Special Masters in the Pretrial Development of Big Cases: Potential and Problems, 1982 Am. Bar

Found.Res.J. 287, 302; appointment of a master as law clerk, Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 1986, 53 U.Chi.L.Rev. 394, 405; and appointment of technical advisers under authority of Rule 53, Rule 706, or inherent power, Silberman, Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure, 1987, 137 U.Pa.L.Rev. 2131, 2170-2172. Again, a few opinions have provided tantalizing glimpses. In Danville Tobacco Assn. v. Bryant-Buckner Assocs., 4th Cir.1964, 333 F.2d 202, 208-209, the court noted that after testifying, a witness had been appointed as "master," but concluded that he was not really a master. "He was subject to questioning as a witness before and after his counseling advice to the court." A year later, in Bullard Co. v. General Elec. Co., 4th Cir.1965, 348 F.2d 985, 990, a case in which the trial judge appointed a master who sat with the judge at trial, the court observed that the trial court "has the right on an intricate subject of suit, as here (in a patent action), to engage an advisor to attend the trial and assist the court in its comprehension of the case. * * * But when there is a merger of master and advisor the result may have a hybrid status." In Reed v. Cleveland Bd. of Educ., 6th Cir.1979, 607 F.2d 737, 747-748, the court ruled that it was proper to appoint an education expert as adviser to the decree master in school desegregation litigation, but that it was not proper to appoint a law professor as legal adviser to the master. "[T]he adversary system as it has been developed in this country precludes the court from receiving out-of-court advice on legal issues in a case."

The most extensive discussion is provided by Reilly v. U.S., 1st Cir.1988, 863 F.2d 149, 154-161. The court approved appointment of an economist as adviser on damages calculations, relying on inherent power, putting Rule 53 to one side, and explicitly denying reliance on Rule 706. The complexity of the calculation was found sufficient justification; the trial judge may have relied as well on the ground that the defendant's evidence was weak and not helpful. The court suggested that the adviser should be named in advance, so the parties can object; that written instructions should be given, and the master should at the end file an affidavit of compliance with the instructions; but that there is no need for a formal report of the advice given.

Casual conversation suggests that these vignettes are a thin layer on top of proliferating and diverse practice. More must be learned before undertaking to regulate this practice by Civil Rule, Evidence Rule, Criminal Rule, or other means. A start may be provided by Professor Farrell's full paper when it becomes available. Help also may be found in early coordination with the Evidence Rules Advisory Committee, a task that may be the next logical step.

— Edward H. Cooper

Code of Conduct for U.S. Judges: Masters
(November, 1993 issue)

Application: General

The Code applies to "[a]nyone who is an officer of the federal judicial system performing judicial functions." Paragraph B of the Compliance section reaches masters as judges pro tempore: "A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master." Special masters are specifically exempted from Canons 4C; 5B (except the first sentence); 5C (2), (3), and (4); 5D; 5E; 5F; 5G; 6C; and 7.

Exemptions

4C: Permits judges to participate in the activities of organizations devoted to improving the law, but limits the range of permitted activities.

5B: The first sentence, which does apply to special masters, permits participation in civic and charitable activities that do not reflect adversely on the master's impartiality or interfere with the performance of judicial duties. The balance, from which special masters are exempt, regulates participation in civic and charitable activities.

5C(2), (3), and (4): These provisions regulate business activities, remunerative activity, investments, and acceptance of gifts, favors, or loans.

5D: Regulates fudiciary activities as executor, trustee, guardian, and the like.

5E: Prohibits acting as arbitrator or mediator.

5F: Prohibits the practice of law.

5G: Limits extra-judicial appointments.

6C: Canon 6 generally regulates compensation for permitted law-related and extrajudicial activities. 6C relates only to required financial disclosures.

7: Canon 7 directs judges to refrain from political activities.

Applicable Provisions

The exemptions leave many Canons applicable to masters. Study of these provisions provides one perspective on the use of masters. Masters are used to perform vital judicial functions. It seems clear that they should be regulated as judges. At the same time, they are not judges and frequently are involved in many other matters as lawyers. Some of the regulations that properly apply to

full-time judges seem poorly adapted to the role of part-time masters. A few of these provisions are noted below. The purpose of noting these provisions is to illustrate issues that may shed light on the role of masters. The lessons may be as much about the use of masters as about the need to urge further exemptions from the Canons. Canon 3A(4) on ex parte communications is a particularly telling example.

2B: The final sentence prohibits a judge from testifying voluntarily as a character witness.

2C: Bars membership "in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."

3A(4): "[E]xcept as authorized by law," a judge should "neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." A judge may, with notice to the parties and opportunity to respond, "obtain the advice of a disinterested expert [the master?] on the law applicable to a proceeding before the judge."

3B(3): "A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer."

3C: These disqualification provisions may affect the role of masters more than first appears. Canon 3C(1)(a) requires disqualification if the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." This provision has an obvious bearing on "expert masters." It also may bear on the investigatory functions discharged by some masters, particularly in the decree-enforcement stage: is information acquired by investigation, not adversary presentation in open court, "personal knowledge"? Canon 3C(1)(e) requires disqualification "if the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case or controversy." The "expressed an opinion" provision is not clearly related to the "governmental employment" preface, and in any event raises questions about the combination of expert witness and master functions.

5(c)(1): "A judge should refrain from financial and business dealings that * * * involve the judge in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves." Read literally, this could create significant problems for a master who is a lawfirm partner.

5(c)(6): "A judge should report the value of any gift, bequest, favor, or loan as required by statute or by the Judicial Conference of the United States." Perhaps this is covered by the express exemption from the reporting requirements of Canon 6C.

6: Masters are exempt from the reporting requirements of 6C. They remain subject to the balance of Canon 6. This canon permits compensation "for the law-related and extra-judicial activities permitted by this Code," if: there is no improper appearance; the compensation is reasonable; and expense reimbursement is limited to actual costs.

Different Master Roles

The difficulties in thinking about these problems arise in part from the differences between masters and judges, and in part from the fact that masters play many different roles that may deserve different rules. Perhaps the present rules have struck precisely the right balance, but reconsideration of the functions served by masters requires reconsideration of the balance. At the same time, the problems of defining rules of conduct in turn suggest the need to be careful about using masters.

Some of the more obvious differences between masters and judges are easily listed. All masters are subject to supervision by a judge, a fact that may justify more relaxed treatment. Few are judicial professionals, a fact that may justify more relaxed treatment in some dimensions and more stringent treatment in others. Some are viewed as assistants to the judge, a role that conjures up conflicting images of pro tempore judge and staff.

Apart from the general differences from judges, masters may play an even greater variety of roles than judges can play. A master whose only role is that of mediator may differ from a settlement master. The role of a master who reviews mountains of documents and makes recommendations for final action by a judge is different from the role of a master given greater powers to manage discovery and make rulings subject to review. These roles approach, but may differ from, the role of master as hearing officer. Masters who supervise decree enforcement, perhaps with investigating responsibilities, are different still.

Masters, in short, are not judges. Confusions in fitting them into the Code of Conduct for judges reflect deeper conflicts about the appropriate use of masters. Working through these issues may shed new light on the proper roles of masters.

SECTION IX
CIV AGENDA 4/94

Materials To Be Distributed At A Later Time

SECTION X
CIVIL AGENDA
4/94

RULE 4(i)(3)

Michael Marks Cohen has written that new Rule 4(i)(3) conflicts with the provision for service in the Suits in Admiralty Act, 42 U.S.C. § 742. Rule 4(i)(1) provides generally for service upon the United States by delivering a copy to the United States Attorney and also sending a copy by mail to the Attorney General. Rule 4(i)(3) provides that the court must allow a reasonable time for service for the purpose of curing failure to serve multiple officers if the plaintiff has effected service on either the United States Attorney or the Attorney General. Section 742 requires that the libelant "forthwith" serve the United States Attorney and mail a copy to the Attorney General. Mr. Cohen believes that the "forthwith" requirement in § 742 is inconsistent with the provision in Rule 4(i)(3) allowing a reasonable time to cure failure to serve both. He urges deletion from § 742 of the two sentences on service.

Judge Higginbotham has asked Mark Kasanin to review this question for the committee.

RULE 37(b)(2)

Professor Florence Wagman Roisman has pointed out an ambiguity created in Rule 37(b)(2) by the 1993 amendment of Rule 26(f). Rule 37(b)(2) lists sanctions that a court may impose on various grounds, including "if a party fails to obey an order entered under Rule 26(f)." Before the 1993 amendment, Rule 26(f) clearly provided for entry of an order after a discovery conference. New Rule 26(f) provides for a meeting of the parties and preparation of a discovery plan. It does not directly refer to entry of an order embodying the plan. The plan, however, includes a variety of matters that could be embodied in an order and some matters – such as changes in the limitations on discovery imposed by rule – that should be embodied in an order. Paragraph (4), indeed, refers to "any other orders that should be entered * * * under subdivision (c) or under Rule 16(b) and (c)."

One response to this ambiguity is that on a fair reading of Rule 26(f), there is no ambiguity. It is contemplated that the submission of a discovery plan often will lead to adoption of an order enforcing the plan. The order is one "entered under Rule 26(f)" within the meaning of Rule 37(b)(2). Often the order will include terms that might be disobeyed. Disobedience is properly subject to sanctions under Rule 37(b)(2). There is no reason to require a second round of Rule 37(a) motion to compel compliance and renewed disobedience. The separate Rule 37(g) sanction for failing to participate in Rule 26(f) efforts does not imply a contrary conclusion; it relates to matters distinct from failure to obey a discovery-plan order once entered.

A second response might be that sanctions should be available directly under Rule 37(b)(2), but that the rules should be made clearer. Rule 26(f) could be amended by adding an explicit provision for entry of an order embodying the discovery plan. One easy change would be adoption of a new paragraph between present paragraphs (3) and (4):

> (f) * * * The plan shall indicate the parties' views and proposals concerning:
>
> > <u>(4) any orders that should be entered by the court to implement the discovery plan; and</u>
> >
> > (45) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

A different change would be to add a new final sentence to Rule 26(f), explicitly providing that the court may enter orders appropriate to implementing the discovery plan:

> (f) * * * The court may enter an order implementing the discovery plan.

Professsor Roisman suggests that the ambiguity should be fixed by amending Rule 37(b)(2) to refer to an order entered under Rule 16. It is difficult to find a reason to extend the discovery-enforcement mechanism of Rule 37 to pretrial orders.

Although the Rule 37(b)(2) reference to an order entered under Rule 26(f) seems to have meaning, the rules would be clearer if Rule 26(f) made explicit reference to entry of an order implementing the discovery plan. This is the sort of change that, if found desirable, can be made when it seems to fit with a package of other rule amendments.

PRE-FILING CONFERENCE AND DISCLOSURE

William F. Raisch, Esq., has written to urge adoption of a Rule or Rules that would require two things before any claim is filed, whether as complaint, counterclaim, cross-claim, or third-party claim. First, the claimant must certify that before filing it had conferred or attempted to confer with the defending parties in an effort to settle or invoke alternate dispute resolution mechanisms. Second, the pleading must be disclosed to the defending parties before filing; exceptions would be made to accommodate problems with the statute of limitations or evasion of effective remedies. The hope is that these devices would reduce the volume of litigation, and also would enhance cooperation among the parties in litigation that is not resolved by these means.

It is not clear where these provisions would fit best in the structure of the rules. If they were limited to the initial complaint, they might fit with the provisions of Rule 3 on commencing an action. The most obvious place, however, is with Rule 8, which governs any pleading that sets forth a claim for relief.

This proposal tracks closely Recommendation 3 in *Agenda for Civil Justice Reform in America, Report from the President's Council on Competitiveness,* 15-16 (August, 1991):

> In most cases, the right to sue should be conditioned on a showing that the parties have attempted, and failed, to resolve their dispute. The party alleging harm would be required to prove that it gave timely notice of the grievance prior to filing the suit, except where emergency or other circumstances require immediate resort to the courts without prior notice to the opposing party.

The ABA has found this recommendation "worthy of consideration," but concluded that study of implementation proposals is necessary. The ABA caution was based on the belief that alternate dispute resolution techniques work best when undertaken voluntarily, and on concern that "ADR should not be used to close access to the courts." *ABA Blueprint for Improving the Civil Justice System,* 40-41, 66 (February, 1992).

The Reporter believes that this topic cannot be dismissed from the Committee agenda, but that the ABA probably is right in believing that further experience and study are needed. It may be unwise to attempt development of a uniform national rule before experience can be had with state or local federal court practices. New Rule 26(f), finally, includes discussion of the possibilities of settlement or prompt resolution as one of the topics for the discovery planning meeting. This conference occurs after filing, not before, but may go part way toward the objects of the present proposal.

RULE 4(C)

Jos eph W. Skupniewitz, Clerk for the Western District of Wisconsin, has written that the new provisions of Rule 4 have added cost and delay. He raises separate questions as to Rule 4(c)(1) and Rule 4(c)(2).

Rule 4(c)(1)

Former Rule 4(a) made the plaintiff "responsible for prompt service of the summons and a copy of the complaint." New Rule 4(c)(1) makes the plaintiff responsible for service "within the time allowed under subdivision (m)." Mr. Skupniewitz says that before the change, his court "enforced upon litigants the requirement for prompt action, even if this meant quicker action than 120 days." Now, plaintiffs can take the full 120 days, and this opportunity "is producing delays in the early stages of case processing in this district."

The change from the prompt service requirement of former Rule 4(a) is due, at least in part, to the change in nomenclature for service by mail. The provisions of former Rule 4(c)(2)(C) and (D) for "serving" a complaint by mail have become the waiver-of-service provisions of new Rule 4(d). A provision for promptness would have to require prompt effort to serve or seek a waiver of service.

The 120-day time limit of Rule 4(m) was considered at the October, 1993 meeting of this Committee. It was decided that there was no sufficient justification for changing the period.

On balance, it seems premature to revisit the details of the 120-day service provision and its relation to the prompt service requirement of former Rule 4(a).

Rule 4(c)(2)

Former Rule 4(c)(2)(B)(i) required that, at the request of a party authorized to proceed in forma pauperis, service be made by a marshal or other person specially appointed. New Rule 4(c)(2) carries forward this provision, although it is ambiguous on the question whether the plaintiff must request such service. The source of the apparent difficulty is that former Rule 4(c)(2)(C)(ii) allowed summons and complaint to be "served" by mail. New Rule 4(d) transforms this practice into a new procedure for winning waiver of service. Mr. Skupniewitz assumes that the Marshal is not authorized by new Rule 4(c)(2) to seek waiver of service. Wisconsin does not provide for service by mail, so there is no opportunity to rely on the incorporation of state practice in Rules 4(e)(1), (g), and (h)(1).

It is not clear from the face of the rules whether a marshal responsible for making service under Rule 4(c)(2) can first seek a waiver of service under Rule 4(d). The Committee Note does not dispel the uncertainty. There is room, however, to construe the

rules so as to allow the Marshal to seek waiver before effecting service. There is no indication that the Rule 4 revisions were intended to end the former practice. To the contrary, the purpose of the revisions was to make clear the nature and effects of a desirable procedure. Allowing the Marshal to seek waiver would help fulfill the purpose of avoiding unnecessary service costs.

At least two contrary arguments may be made, each of which could be addressed to the former Rule as well. A request for waiver may not be effective to toll state statutes of limitations that require actual service. New Rule 4(d)(4) addresses this question in part by providing that when service is waived, the action proceeds as if service had been made at the time the plaintiff filed the waiver. The Marshal may not be in a position to determine whether a request for waiver will generate limitations problems. A request for waiver, moreover, will delay the moment at which the Marshal attempts to make actual service; this makes the Marshal responsible for determining, for the party, whether to bypass the waiver process because of possible difficulties in making service within the 120-day period of Rule 4(m).

The Committee is not in a position to answer this question by an advisory opinion. It seems too early, however, to undertake amendments of Rule 4. Sweeping revisions in Rule 4 were made after a period of several years of study and comment. Before undertaking new amendments, a reasonable period should be allowed for accumulating experience to show what changes — if any — are needed.

Rule 26

Interviewing Former Employees of a Party

John E. Iole and John D. Goetz have urged that the Committee consider a proposal advanced in their article, *Ethics or Procedure? A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary*, 1992, 68 Notre Dame L.Rev. 81-132. The title virtually describes the proposal that Rule 26 be amended to add a provision governing interviews with former employees of a party.

The article was stimulated by Formal Opinion 91-359 of the American Bar Association, interpreting Model Rule of Professional Conduct 4.2. Rule 4.2 regulates communication with a party represented by another lawyer. Opinion 91-359 concludes that the Rule does not apply to communications with former employees of a party. The article explores a number of court decisions that have taken various approaches to the question. In the end, it urges that the question should be regulated not by rules of professional responsibility but by rules of procedure. Under the proposed rule, a party may not, without written consent of the former employer, contact a former employee of another party until 45 days after service of the complaint. If contact is made after 45 days without consent of the former employer, notice must be given within 11 days after the contact. If the contact results in discussion of a pending action, all communications must be recorded verbatim. A record must be filed with the court under seal, but need not be transcribed or produced to another party unless ordered by the court.

The most important question is whether rules of procedure should begin to address nondiscovery means of gathering information. Many will find it difficult to be enthusiastic about the prospect. The discovery rules have not proved entirely successful. Regulation of less formal activities is likely to generate new opportunities for dispute and to make litigation still more costly and prolonged. If nondiscovery activities are to be regulated, the next question will be whether it is appropriate to limit the rule to former employees of present parties. There may be some modest distinctions – the authors make much of the risk that former employees will inadevertently divulge privileged information – but any attempt to generate a rule must consider the cogency of the distinctions and the possibility of acting in more general terms. The details of any attempted rule of course will present many additional questions.

There also may be some special sensitivity arising from the relation to state regulation of professional responsibility.

RULE 62

Deputy Associate Attorney General Tim Murphy has written that the Department of Justice "is forced to relitigate the claim and spend additional time enforcing the judgment" because judgment debtors fail to understand that absent a stay, the judgment becomes enforceable upon expiration of the automatic ten-day stay built into Rule 62(a). Indeed, he asserts that some defendants assert that because the judgment does not contain a due date, payment is not immediately due. It is not clear whether he is suggesting a rule amendment or some other means of addressing the problem.

The procedures suggested by General Murphy can be implemented without rule changes. He believes that a judgment – or some other final order – should include "specific time frames within which defendants are to pay their penalties or other debts." In addition, there should be specific instructions on the means of effecting payment to the United States.

It is difficult to conclude that these questions should be addressed by amendment of the rules. Rule 58 now provides that a judgment "is effective only when" set forth in a separate document and entered under Rule 79(a). Rule 62(a) provides for issuance of execution after the expiration of ten days, subject to stays. A provision requiring that a date for payment be set in reference to this automatic stay would add no new meaning, and indeed might seem inconsistent with the terms of Rule 58. The provision might complicate the process of issuing stays. Nor does it seem likely that a formal statement in the judgment will affect the behavior of many defendants.

No new and formal procedure is needed to enable the United States Attorney to notify the defendant of the means for making payment to the United States.

Payment terms would become important if structured judgments were to be entered after litigation as well as upon settlement. Providing for structured judgments by rule may run outside the limits of the Rules Enabling Act, however, and raises questions far different from those raised by General Murphy.

If a change were to be made, it might best be done by adding a new subdivision (a) to Rule 62, relettering the present subdivisions:

> **(a) Effective date.** Subject to the provisions of this rule, a judgment is effective on the date it is entered under Rule 58.

This provision would be less redundant if – as suggested by the current Style Draft of Rule 58 – the "effective only when" language were deleted from Rule 58.

SECTION XI
CIVIL AGENDA
494

Rule 31. Depositions Upon Written Questions	RULE 31. DEPOSITIONS UPON WRITTEN QUESTIONS
(a) Serving Questions; Notice. (1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants; (B) the person to be examined has already been deposed in the case; or (C) a party seeks to take a deposition before the time specified in Rule 26(d). (3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6). (4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.	(a) Serving Questions; Notice. (1) A party may, upon written questions, depose any person, including a party, without leave of court except as provided in (2). The witness's attendance may be compelled by subpoena under Rule 45. (2) A party must obtain leave of court, which must be granted to the extent consistent with Rule 26(b)(2): (A) if the person to be examined is confined in prison; or (B) if, unless the parties consent in writing to the deposition: (i) the proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants; (ii) the person to be deposed has already been deposed in the case; or (iii) the party seeks to take a deposition before permitted to do so under Rule 26(d). (3) A party wanting to depose a person upon written questions must serve the questions on every other party, with a notice stating, if known, the deponent's name and address. If the deponent's name is unknown, the notice must generally describe the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and address of the officer before whom the deposition will be taken. (4) A public or private corporation, partnership, association, or governmental agency may be deposed by written questions to persons designated as under Rule 30(b)(6). (5) Additional questions to the deponent must be served on all parties as follows: cross questions, within 14 days after being served with the notice and initial questions; redirect questions, within 7 days after being served with cross questions; and recross questions, within 7 days after being served redirect questions. The court may, for cause shown, extend or shorten these times.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.	**(b) Officer to Take Responses and Prepare Record.** The party noticing the deposition must deliver to the officer a copy of the notice and of all questions served. The officer must proceed promptly in the manner provided by Rule 30(c), (e), and (f) to record the deponent's testimony in response to the questions and to prepare, certify, and, under Rule 30(f)(1), file or send the deposition, attaching a copy of the notice and the questions received by the officer.
(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.	**(c) Notice of Filing.** The party arranging for the transcript or recording of a deposition must promptly notify all other parties when it is filed.

Rule 32. Use of Depositions in Court Proceedings	RULE 32. USING DEPOSITIONS IN COURT PROCEEDINGS
(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:	(a) Using Depositions. At any trial or hearing, part or all of a deposition — to the extent otherwise admissible under evidentiary rules applied as though the deponent were present and testifying — may be used as specified in (1) - (4). Substituting parties under Rule 25 does not affect the right to use depositions previously taken. A deposition, if properly taken and filed in any federal or state action that has been dismissed, may be used in a later action involving the same subject matter between the same parties or their representatives or successors in interest to the same extent as if taken in the later action.

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(1) Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness or for any other purpose permitted by the Federal Rules of Evidence.

(2) A party may, for any purpose, use against an adverse party a deposition of:

(A) the adverse party, or

(B) anyone who, when deposed, was the adverse party's officer, director, managing agent, or designee under Rule 30(b)(6) or Rule 31(a)(4).

(3) (A) Subject to subparagraph (B), a party may, for any purpose, use a deposition against any party that attended the deposition or had reasonable notice of it if the court finds:

(i) that the deponent is dead;

(ii) that the deponent is more than 100 miles from the place of trial or hearing, or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(iii) that the deponent cannot attend the trial or hearing because of age, illness, infirmity, or imprisonment;

(iv) that the party offering the deposition could not procure the deponent's attendance by subpoena; or

(v) upon application and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to allow the deposition to be used.

(B) Subparagraph (A) does not authorize use of a deposition:

(i) against a party that, having received less than 11 days notice of a deposition, promptly moved for a protective order under Rule 26(c)(1) — requesting that the deposition not be held or be held at a different time or place — and this motion was still pending when the deposition was held; or

(ii) taken without leave of court under the special provisions of Rule 30(a)(2)(B)(iii), when offered against a party demonstrating that, when served with the notice, it could not, despite diligent efforts, obtain counsel to represent it at the deposition.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition taken may also be used as permitted by the Federal Rules of Evidence.	(4) If a party introduces in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part offered, and any party may itself introduce any parts that would be admissible if the deponent were present and testifying.[1]
(b) **Objections to Admissibility.** Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.	(b) **Objections to Admissibility.** Subject to Rule 28(b)(4) and Rule 32(d)(3), a party may object at a trial or hearing to the introduction of any deposition testimony that would be inadmissible if the witness were present and testifying.
(c) **Form of Presentation.** Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.	(c) **Form of Presentation.** Except as the court directs otherwise, a party offering deposition testimony under this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party must also provide the court with a transcript of the portions offered. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must, unless the court for good cause orders otherwise, be presented in nonstenographic form, if available.

1. The conditional language "that would be admissible if . . ." may be viewed as substantive, though in accord with existing practice.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written notice is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral deposition in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(d) Objections.

(1) To Notice. An objection to a deposition notice is precluded unless promptly served in writing on the party giving the notice.

(2) To Officer's Disqualification. An objection based on disqualification of the officer before whom a deposition is to be taken, if not made before the deposition begins, is precluded unless made promptly after the basis for disqualification becomes known or, with due diligence, could have been known.

(3) To Taking of Deposition.

(A) An objection to a deponent's competency or to the competency, relevancy, or materiality of testimony is precluded unless made before or during the deposition, when the ground of the objection might have been obviated, removed, or cured if made at the time.

(B) An objection at an oral deposition is precluded unless timely made during the deposition, when the objection relates to the manner of taking the deposition, the form of questions or answers, the oath or affirmation, a party's conduct, or other matters that might have been obviated, removed, or cured if presented at the time.

(C) An objection to the form of a written question under Rule 31 is precluded unless served in writing on the party submitting it within the time for serving additional questions or within 5 days after being served with a recross question.

(4) To Completing and Returning Deposition. An objection to how the testimony has been transcribed or how the deposition has been prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise handled by the officer is precluded unless a motion to suppress is made promptly after the defect or irregularity becomes known or, with due diligence, could have been known.

Rule 33. Interrogatories to Parties	RULE 33. INTERROGATORIES TO PARTIES
(a) **Availability.** Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	(a) **Availability.** Without leave of court or written stipulation, any party may, when permitted under Rule 26(d), serve on any other party written interrogatories — not exceeding 25 in number, including all discrete subparts — to be answered by the party served or, if that party is a public or private corporation, partnership, association, or governmental agency, by any officer or agent, who must furnish the information that is available to the party. Leave to serve additional interrogatories, or to serve interrogatories at an earlier time, must be granted to the extent consistent with Rule 26(b)(2).
(b) **Answers and Objections.** (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. (2) The answers are to be signed by the person making them, and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	(b) **Answers and Objections.** (1) Within 30 days after being served with interrogatories, a party must serve a copy of its answers and any objections. A shorter or longer time may be directed by the court or, absent an order, agreed to in writing by the parties subject to Rule 29. (A) Each interrogatory must, unless objected to, be answered separately and fully in writing under oath or affirmation. The responding party must answer each interrogatory to the extent not objectionable. (B) All grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is precluded unless the court, for good cause shown, excuses the failure. (C) The responding party must sign the answers, and its attorney must sign any objections. (2) The party submitting interrogatories may move for an order under Rule 37(a) with respect to any objection to, or other failure to answer, an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.	(c) Scope; Use at Trial. (1) Interrogatories may relate to any matter that can be inquired into under Rule 26(b)(1). Answers may be used as permitted by the Federal Rules of Evidence. (2) An otherwise proper interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until designated discovery is complete or until a pretrial conference or some other time.
(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained.	(d) Option to Produce Business Records. If answering an interrogatory will require a party to examine, audit, inspect, compile, abstract, or summarize its records, and the burden of ascertaining the answer will be substantially the same whether this review is done by it or by the interrogating party, it may answer by: (1) specifying the records that must be reviewed, in sufficient detail to permit the interrogating party to locate them as readily it could; and (2) giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries.

SECTION XII
CIVIL AGENDA
4/94

FILE NOTE

January 16, 1994

Re: Filing by Facsimile Transmission

This note summarizes the action of the Standing Committee at its January 13 and 14 meeting with respect to proposed Judicial Conference standards for filing by facsimile transmission under Civil Rule 5(e) and Appellate Rule 25(a). A separate memorandum addresses the general question of implementing such delegations of rulemaking authority to the Judicial Conference.

Discussion was focused by drafts prepared by the Appellate Rules Committee. The drafts began as Guidelines suggested by the Court Administration and Case Management Committee. Those Guidelines were extensively revised at the Standing Committee meeting in June, 1993. The Standing Committee urged the Judicial Conference not to adopt the revised Guidelines, in part because they might trespass on other rules. The Judicial Conference responded by asking the Standing Committee to coordinate efforts with the Court Administration and Case Management Committee and the Committee on Automation and Technology, and to report back to the September, 1994 Judicial Conference. The Appellate Rules Committee met immediately after, and substantially revised the proposed guidelines. Many elements of the guidelines were separated out and put into a model local rule. This format was preferred because of the belief that Judicial Conference Guidelines will not be readily found by practicing lawyers, who will look instead to local court rules for guidance.

The Civil Rules Committee considered the Appellate Rules Committee draft in October, 1993. It urged that the "guidelines" should be called "standards," adhering to the term used in Civil Rule 5(e) and Appellate Rule 25(a). It also urged that the model local rule should be incorporated into the standards, so that any court that chooses to permit filing by facsimile transmission must adopt all of these terms. This recommendation rested on the belief that national uniformity is important.

The Standing Committee accepted the recommendation that the Judicial Conference directions be referred to as Standards. It approved recommendation of the model rule simply as a model, however, not as a set of binding terms that must be adopted into any local rule authorizing filing by facsimile transmission.

The first step of the Standing Committee deliberations led to a recommendation that filing by facsimile transmission to the clerk not be allowed on a routine basis. Most committee members believed that clerks offices simply cannot handle any significant regular volume of facsimile filings. At least five additional concerns were added. Two seemed particularly important. The first of these

was that some litigants who do not have access to facsimile equipment – including state and local government agencies as well as small firms – would be placed at an unfair disadvantage. The other was that routine filing rules would prove a trap for the unwary as many would try to reach the court's facsimile equipment at the same last minute, freezing some out entirely. Other reasons included the frequently poor quality of facsimile printing, the burden of assembling transmitted documents, and the belief that facsimile transmission is an obsolescent technology that soon will be replaced by more direct electronic filing.

The Standing Committee then recommended Standards and a Model Local Rule to govern filing by fax agencies, and to govern filing by transmission to the court on order of the court or on authorization by the clerk in emergency or other appropriate circumstances. The standards note the value of national uniformity, and urge adoption of the model local rule. Apparently experience has shown a high rate of success in recommending uniform adoption of proposed model local rules.

The details of the standards and model rule will be summarized when they become reasonably fixed.

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

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PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

February 9, 1994

Honorable Ann C. Williams
Chair, Committee on Court Administration
and Case Management
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Honorable Rya W. Zobel
Chair, Committee on
Automation and Technology
John W. McCormack Post Office and
Courthouse, Room 1802
90 Devonshire Street
Boston, Massachusetts 02109

Dear Judges Williams and Zobel:

On behalf of the Committee on Rules of Practice and Procedure, I am sending to you the enclosed draft of "Standards for Facsimile Transmission." The standards were reviewed and revised by the five advisory rules committees and were discussed at length and approved by the Standing Committee at its January meeting. I am also sending to you a two-page excerpt of an informational item in the Committee's report to the Judicial Conference explaining its views on fax filing.

Please call me at (202) 273-1800 if you have any questions on these materials.

Sincerely,

Peter G. McCabe
Secretary

Enclosures

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

JUDICIAL CONFERENCE of the UNITED STATES

Honorable Ann C. Williams
Chair

March 22, 1994

Honorable Alicemarie H. Stotler
United States District Court
Post Office Box 12339
Santa Ana, California 92712

Dear Judge Stotler:

Thank you for forwarding the draft of "Standards for Facsimile Transmission." I appreciate the opportunity to comment on the changes proposed by the Standing Committee on Rules of Practice and Procedure.

In consideration of the comments and proposals of the Standing Committee on Rules of Practice and Procedure, the Committee on Court Administration and Case Management will revisit whether or not to continue to support the routine filing of papers by facsimile transmission as a local option, at our next Committee meeting in June. I anticipate that, given the concerns of your Committee as well as the Committee on Automation and Technology, this Committee may well withdraw its recommendation regarding routine filing by facsimile transmission.

At the same time, I must express some concern related to the proposed guidelines. The purpose of the proposed guidelines for filing by facsimile, as presented by the Committee on Court Administration and Case Management, was to provide guidance to those courts which elected to enact local rules to allow for the acceptance of filings by facsimile transmission on a routine basis. Thus, the guidelines were designed specifically to apply to a more expansive policy on the acceptance of papers than presently is authorized under Judicial Conference policy.[1] Indeed, if these restrictive guidelines were to apply to current policy, they would greatly increase any burdens on the clerks of court. It is important to maintain maximum flexibility for emergency situations, especially for the appellate courts and for last minute filings in death penalty cases. Although the guidelines clearly would serve a purpose if routine facsimile transmission were allowed, our Committee does not want these restrictions to hamper the clerks' ability to accept emergency filings.

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[1] Currently, the Judicial Conference allows the acceptance of papers transmitted by facsimile transmission in narrow circumstances: (a) in compelling circumstances or (b) under a practice which was established prior to May 1, 1991.

Moreover, our Committee recognized both the complexity and lengthy duration of the local rules enactment process, and it was never our purpose to complicate a court's ability to accept papers by facsimile transmission, as allowed by Judicial Conference policy, by imposing the mechanics of local rulemaking procedures for a policy that would serve merely as an interim measure. If the Judicial Conference were to adopt the view that the present policy should remain in place until such time as a more advanced technology were commonly available (e.g., electronic filing), then we should not burden the legal community with a rulemaking process that would result in a rule outmoded by the time of its enactment.

In addition, we are providing the draft of "Standards for Facsimile Transmission" prepared by your Committee to the Appellate, District, and Bankruptcy Clerks' Advisory Groups for their comment.

Again, I want to thank you for the opportunity to review and comment on the proposals of your Committee.

Sincerely,

Ann C. Williams

Ann C. Williams

STANDARDS FOR FACSIMILE TRANSMISSION

I. General Purpose and Scope:

(1) Purpose of the Standards: The Standards for Facsimile Transmission are established by the Judicial Conference of the United States and apply in those courts that permit their clerks, under the Federal Rules of Appellate, Civil, and Criminal Procedure, to receive documents for filing by means of facsimile transmission.

(2) Compliance with Rules of Procedure: These Standards for Facsimile Transmission are designed to guide the activities of litigants and court personnel relating to facsimile transmission consistent with, and where authorized by, all applicable rules of procedure adopted under 28 U.S.C. § 2072. They do not amend, modify, or excuse noncompliance with, any applicable rules.

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 so a duplicate of the original document can be printed at the receiving end.

(2) "Receive by facsimile" means a clerk's receiving by a facsimile machine in the clerk's office a facsimile transmission of a document.

(3) "Facsimile machine" means a machine, used to transmit or receive documents, that meets the requirements stated in part III of these standards.

(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 standards, in order for courts to 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 standards 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 produce a permanent image on plain paper. Thermal and chemical images are not allowed.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must satisfy or exceed the following equipment standards:

(i) CCITT Compatibility - Group 3[2]

(ii) Model Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - standard 203 x 98.

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[1] The Administrative Office will monitor technological advances and will recommend modifications to these standards 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.

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

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, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax[3]

(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

For each page of any necessary copies to be reproduced by the court[4] . . . . .$ .50

(b) No fees are to be charged for services rendered on behalf of the United States or any agency or any official of the United States acting in his or her official capacity.

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[3] 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.

[4] See Miscellaneous Fee Schedule.

V. **Fax Filing.** The procedures and requirements imposed upon facsimile filings should be in rules readily available to parties and their attorneys. Because current fax transmissions are relatively slow and produce less than desirable images, transmissions directly to the clerk should be permitted only in emergencies or by permission of the court. Also, because electronic transmission is evolving and fax appears to be an interim technology to be replaced eventually by more sophisticated systems, difficult-to-change national rules seem undesirable. Nevertheless, uniformity is desirable since fax filing is most likely from remote locations and across jurisdictional boundaries. For these reasons uniform local rules in the following form are suggested as appropriate for both district and circuit courts:

MODEL LOCAL RULES

Loc. R.( ).1 **Facsimile Filing.** The court will accept for filing a single copy of a paper transmitted directly to the clerk by facsimile (fax) if authorized by the court in a particular case or by the clerk in an emergency or other appropriate circumstance. The fax transmission must comply with the Judicial Conference Standards For Facsimile Transmission, which (are attached or can be obtained from the clerk's office on request).

Loc. R.( ).2 **When Filing is Complete.** Mere fax transmission does not constitute filing. The paper actually must be received by the clerk. Filing is accomplished as of the time the sending machine completes transmission if the fax is directly to the clerk and is printed out in the clerk's office from the same transmission.

Loc. R.( ).3 **Signature.** The image of an original signature on a fax paper is an original signature for filing purposes.

Loc. R.( ).4 **Cover Sheet.** A paper faxed directly to the clerk must 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; and
f. whether acknowledgment of receipt is requested.

This cover sheet does not count against page limitations otherwise applicable to the document.

Loc. R.( ).5 **Acknowledgment of Receipt.** If the sender so requests in writing on the cover sheet required by Local R.( ).4, the clerk will acknowledge receipt of papers faxed directly to the clerk by faxing to the sender a copy of the cover sheet. The clerk also will note any transmission defect on the copy of the cover sheet before faxing it to the sender.

Loc. R.( ).6 **Additional Copies.** Documents filed by fax transmission to the clerk must be followed by additional copies with a print resolution of at least 300 dots per inch and which comply in all respects, including number of copies, with federal rules applicable to nonfax filings, unless excused by the court. The additional copies must be mailed or delivered to the clerk before the end of the next business day. When circumstances require, the clerk may make copies of faxed papers for use by the court and charge the filing party for these copies. All applicable filing fees must accompany the additional copies.

Loc. R.( ).7 **Facsimile Transmission to a Fax Filing Agent.** A paper may be transmitted to a person or entity (fax filing agent) who undertakes to present the paper to the clerk for filing. The paper presented must have a permanent image on plain paper. The fax filing agent must pay all applicable fees at the time the agent presents the paper for filing. The filing is governed by all applicable filing rules, except that Loc. R.( ).4 governs signatures, and a single copy may be filed if additional copies are mailed or delivered to the clerk in compliance with Loc. R.( ).6.

Agenda F-19
Rules
March 1994

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 Tucson, Arizona, on January 12-14, 1994. All members of the Committee attended the meeting, except Judge George C. Pratt and Alan C. Sundberg, Esquire. The immediate past chair, Judge Robert E. Keeton, and former member, Professor Charles Alan Wright, also attended. Representing the advisory committees were: Judge James K. Logan, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Paul Mannes, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Patrick E. Higginbotham, Chair, and Dean Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

II. Information Items

A. Facsimile Filing Standards

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 chair of your Committee has kept the chairs of the two other respective Committees informed of the action taken by the Advisory Committees and your Committee on this matter.

The Advisory Committee on Appellate Rules devoted a substantial portion of their September 1993 meeting reviewing and revising a draft of the facsimile filing guidelines immediately following the Conference session. Extensive redrafting was later added by the Reporter and individual members of that Committee. The revised draft reorganized the guidelines into: (1) a national set of technical guidelines on equipment, and (2) a set of model local rules governing attorney responsibilities regarding facsimile filing.

The Advisory Committee on Civil Rules later carefully studied the redrafted guidelines. It generally approved the revisions, but favored a more uniform national approach on the procedures to assist members of the bar who practice nationally. The Advisory

Committee on Bankruptcy Rules has continued to oppose unanimously the application of the facsimile guidelines to bankruptcy proceedings for a variety of reasons, particularly the practical consequences on bankruptcy clerks' offices and its outmoded technology. The Advisory Committees on Criminal and Evidence Rules expressed no objections to the facsimile guidelines.

Your Committee considered at length views of the various committees on and the several versions of the guidelines, and it concluded unanimously that facsimile filing should not be permitted on a routine basis. Among the principal problems with routine facsimile filing are the following: (1) the procedures would impose great burdens on clerks' offices; (2) the technical equipment requirements would not be honored by those members of the bar who have obsolete equipment, and it would be difficult to police compliance effectively; and (3) the guidelines may create a trap for members of the bar who rely on last minute filings but are frustrated because others are using the same transmission line.

Your Committee, however, agreed that facsimile filing should be permitted on a non-routine and locally approved basis to reflect actual practices in the courts. Accordingly, it revised the latest draft of the facsimile filing guidelines to facilitate such an approach, and it will furnish the Committees on Automation and Technology and Court Administration and Case Management with copies for their consideration. A report on the results of the coordinated effort will be given to the Conference at its September 1994 session.

MEMORANDUM

January 16, 1994

To: Civil Rules Committee Files – Judicial Conference "Standards" under Civil Rule 5(e): National Uniformity and Control of Local Rules

From: Edward H. Cooper

Civil Rule 5(e) and Appellate Rule 25(a) authorize filing by facsimile or electronic transmission if permitted by local court rules that conform to standards adopted by the Judicial Conference. These rules were first suggested in June, 1989, by the former Judicial Conference Committee on Judicial Improvements. The history of these Rules in Committee records is scanty, reflecting little thought about the nature of the standards process delegated to the Judicial Conference. Such history as can be reconstructed was not before the Standing Committee on Rules of Practice and Procedure in June, 1993, and January, 1994, when it considered proposed Judicial Conference standards for facsimile filing. The efforts of the Standing Committee to construct an appropriate procedure illuminate the uncertainties of the process better than the history. After summarizing the history, this note explores the deliberations of the Standing Committee. This experience suggests that the standards process requires more thought.

History of Rules 5(e) and 25(a)

The first documents in the history are from the June, 1989 agenda of the Committee on Judicial Improvements and an August 31, 1989 letter from Judge Richard M. Bilby, chair of that Committee, to Judge Joseph F. Weis, Jr., as chair of the Committee on Rules of Practice and Procedure. The agenda item shows that the question of facsimile filing was referred to the Rules Committee in December, 1988, because of doubts about the impact of Civil Rules 5(e) and 11. Court clerks began to express doubts about the problems that might arise from facsimile filing and the question was withdrawn from the rules committees and referred to the Committee on Judicial Improvements. The Judicial Improvements Committee concluded that facsimile filing confers no benefits on the courts, would impose significant financial and administrative burdens, and was not yet sufficiently reliable to be adopted. "To prepare for future technology, however," the agenda suggested that perhaps the Rules Committee could fashion a rule that would permit electronic filing methods "by local rules of court, promulgated in accordance with Judicial Conference standards." Judge Bilby, in recommending slightly revised rule language, observed that this approach would "permit the Judicial Conference to restrain implementation of this type of technology until it can be determined that they [sic] may be used without an undue strain on judicial resources." He also noted that he had appointed a committee to begin drafting guidelines.

The next item in the history is the September, 1989 Report of the Committee on Judicial Improvements to the Judicial Conference. The proposal is said to reflect "the Committee's determination that use of such methods should be a matter of local option, so long as certain fundamental requirements (e.g., minimum equipment standards) are met."

The October 26, 1989 minutes of the Advisory Committee on Appellate Rules come next. The Committee thought it prudent to move slowly, but approved the recommended Rule 25(a) change "recognizing that the amendment would authorize experimentation in selected courts and would require establishment of standards by the Administrative Office."

The July 12 and 13, 1990 minutes of the Committee on Rules of Practice and Procedure simply note unanimous passage of a motion that "the language regarding filing by facsimile upon approval by the Judicial Conference of the United States be added to Rule 5."

The September, 1990 report of the Committee on Rules of Practice and Procedure to the Judicial Conference describes the proposed amendments to Civil Rule 5(e) and Appellate Rule 25(a) as "a reaction to the recommendation of the Judicial Improvements Committee." The report then explains that since the proposed amendment "would not be effective until and unless the Judicial Conference first acts, your Committee approved this amendment even though it has not been submitted for public comment." Similar language was used separately with respect to Appellate Rule 25(a).

These bare bones of recorded history are tantalizing. They suggest that responsibility was placed in the Judicial Conference for two reasons. First, concern with the burdens placed on courts by facsimile filings cautioned that facsimile filing be allowed only on an experimental basis, and only when the experiment was approved by the Judicial Conference. Second, concern with rapid technology changes that could not be accommodated in the ordinary pace of the rulemaking process led to substitution of a more expeditious process for adjusting standards. It may be revealing that the October, 1989 Appellate Rules Committee minutes refer to standards developed by the Administrative Office as the obvious source of Judicial Conference support. There is no indication of consideration of any need for national uniformity in practice. Nor is there any indication of thought about the relationship between the process for developing Judicial Conference standards and the formal Enabling Act process. If anything, some uncertainty may be shown by the Standing Committee statement that there was no need for public comment since the amendment "would not be effective until and unless the Judicial Conference first acts." Of course Rules 5(e) and 25(a) became effective in a technical sense on

completion of the Enabling Act process, both as limits on local court authority and as delegations of power to the Judicial Conference. They did not become effective as an immediate source of authority for facsimile filing. There was no description of the steps that might be taken by the Judicial Conference to substitute for the lack of publication and comment on the initial proposals.

1993-1994 Proposals

In September, 1991, following initial adoption of Rule 5(e), the Judicial Conference adopted a standard that authorizes local rules for facsimile filing. This standard, effective December 1, 1991, permits facsimile filing "only (a) in compelling circumstances or (b) under a practice which was established by the court prior to May 1, 1991." The Committee on Court Administration and Case Management undertook to draft "guidelines" that would permit routine filing by facsimile transmission. A draft of these guidelines was presented to the Standing Committee on Rules of Practice and Procedure in time for hurried consideration at its June, 1993 meeting. Extensive changes were recommended to, and adopted by, the Committee on Court Administration and Case Management. At the September, 1993 meeting of the Judicial Conference, Judge Keeton as chair of the Standing Committee urged that the guidelines not be adopted because they might intrude on the regular Rules Enabling Act process. The Judicial Conference referred the question to the Standing Committee, in coordination with the Committee on Court Administration and Case Management and the Committee on Automation and Technology, for report to the September, 1994 Judicial Conference meeting.

The Appellate Rules Committee met immediately after the Judicial Conference action and further revised the proposed Guidelines. Perhaps the most important change was to divide the topics covered by the Guidelines into two parts. The first part was a general statement about technological requirements and the like. The second part was a proposed model local rule that covered the issues that must be addressed by a lawyer seeking to make a filing by facsimile transmission. These issues include such matters as signature requirements, cover sheets, supplementation of the facsimile filing by the appropriate number of clear copies, acknowledgment, and the like. The change reflected the conviction that lawyers should be able to rely on local rules without also having to know of, and seek out, a Judicial Conference document. The Civil Rules Committee considered the questions presented by the proposed guidelines at the October, 1993 meeting. There was little advance notice and no time to prepare to work on the details of the Appellate Committee draft. The Civil Rules Committee, however, strongly supported two principles. One was that the Judicial Conference action should be in the form of "standards," the word

used in Civil Rule 5(e) and Appellate Rule 25(a), not "guidelines." The second was that national uniformity is very important. It was recommended that the standards authorize adoption of local rules only if the local rules include the precise terms of a uniform rule incorporated in the standards.

Professor Mooney, reporter of the Appellate Rules Committee, prepared a memorandum raising the question whether Judicial Conference standards can limit the local rulemaking authority established by 28 U.S.C. § 2071. A copy is attached.

It was against this background that the Standing Committee considered filing by facsimile transmission on January 13 and 14, 1994. Three different modes of proceeding were discussed. One alternative was adherence to the full-blown Rules Enabling Act process. Facsimile filing rules would be published for comment, the advisory committees would consider comments and perhaps recommend changes, and the Standing Committee would transmit a proposed rule to the Judicial Conference for submission to the Supreme Court and report to Congress. The apparent outcome would be uniform national rules. [This process would seem to leave little purpose for adopting rules providing for Judicial Conference standards.] A second alternative was to keep the process within the Judicial Conference structure, but to publish proposed rules for comment. The third alternative was to keep the process within the Judicial Conference committee structure without publication for comment.

The outcome was adoption of proposed standards and a model local rule to be presented to the Judicial Conference, in coordination with the other committees, without publication for comment. The tacit expectation seemed to be that the Judicial Conference would act without submission to the Supreme Court. There was no explicit consideration of the reasons for choosing this mode of proceeding. Neither was there any explicit formulation of reasons for recommending promulgation of a model uniform rule that could be modified or ignored by local rules authorizing facsimile filing. It seems fair to say that the only precedent is an implicit conclusion. The Judicial Conference need not adhere to Enabling Act procedures when a rule adopted according to Enabling Act procedures authorizes Judicial Conference action on a matter of practice or procedure. Judicial Conference action in this manner can at least circumscribe the scope of local rulemaking: the Standing Committee recommended standards that would prohibit local rules authorizing routine facsimile filing. But nothing was done that necessarily resolves the question whether Judicial Conference action can dictate the precise terms of local rules.

The Civil Advisory Committee interpretation of Civil Rule 5(e) is spelled out in the minutes of the October, 1993 meeting. The interpretation was not based on institutional memory of the purposes of drafting this provision. Instead it was an effort to make sense of the language and the purposes that might explain the language. The basic notions are clear enough. Section 2071 requires that local rules conform to national rules adopted pursuant to § 2072. Rule 5(e) was adopted pursuant to § 2072. Rule 5(e) says that a local rule can permit facsimile or electronic filing "if such means are authorized by and consistent with standards established by the Judicial Conference of the United States." A local rule that is not authorized by or consistent with the standards is in conflict with Rule 5(e) and is invalid under § 2071.

This beginning, however, may meet resistance on the ground that "standards" are not the same as local rules. An intention to authorize Judicial Conference establishment of a nationally uniform rule would have been stated directly. A district court, for example, might wish to authorize facsimile filing but only if it can impose terms different than those set out in a Judicial Conference rule. Standards can set outer limits, but detailed implementation must be left to local rules.

The argument for Judicial Conference power to establish binding local rule terms begins with attributing a set of purposes to Rules 5(e) and 25(a). One clear purpose is to retain some degree of local freedom – no district will be required to permit facsimile filing. This purpose reflects the fact that the capacity to accept facsimile filing may vary from district to district. Most district court clerks, indeed, believe that routine facsimile filing with present technology and resources would be disastrous for their offices. Another clear purpose is to constrain the degree of local freedom – no local facsimile filing rule can be adopted until the Judicial Conference adopts standards, and then the local rule must conform to the standards. Beyond these clear purposes may lie other reasons for delegating control to the Judicial Conference. The most likely general purpose draws from recognition that technology is continually changing and that there is little experience with routine use of facsimile or electronic transmission for court filings. Enabling Act procedures take time. Once a uniform national rule is adopted by Enabling Act procedures, only legislation or new Enabling Act procedures can amend it. Judicial Conference procedures can be quicker, and may be able to combine the talents of different committees and administative offices in ways that are more difficult to accomplish under normal Enabling Act procedures. Once the basic principles are established by a rule adopted under the Enabling Act, delegation of the details to the Judicial Conference and local option can facilitate adoption

and regular adjustment of sophisticated standards.

Given these purposes, there is little doubt that the Judicial Conference could adopt standards that leave great room for variations in local rules. If it seems best simply to recommend a uniform rule, urging the values of uniformity and expressing the hope that district courts will adhere to the uniform rule, Rules 5(e) and 25(a) clearly permit that course. Should various courts choose to experiment with different local rules, the result may be useful comparisons that help generate a better and uniform rule in the future.

If the need for uniformity seems great, however, it also seems proper to adopt Judicial Conference standards that require adherence to a uniform local rule. This choice would not defeat the apparent purposes of Rules 5(e) and 25(a). First, each district would remain free to determine whether to permit facsimile filing at all. This freedom seems important; many courts believe that they lack the capacity to permit routine filing by facsimile transmission. Second, adoption of a uniform national rule through standards adopted outside the Enabling Act process would reflect a judgment that for the time being, uniformity is important. Rules 5(e) and 25(a) need not be read to reflect a determination that uniformity is inappropriate. Instead, they can be read to leave determination of the need for uniformity to the Judicial Conference. This determination can be changed at any time when experience or changing technology show that change is desirable. Interactive electronic communication, for example, could easily develop to the point at which anyone undertaking electronic filing could be instructed to follow any local requirements in the very process of filing.

For the moment, the important point is that the Standing Committee did not resolve these questions. Nor was there any general discussion of the usefulness or wisdom of acting through the Enabling Act to delegate some portion of rulemaking to the Judicial Conference. The potential advantages of speed and flexibility are apparent. The disadvantages are equally apparent. There is a fair argument that uniform national practices should be established only through the deliberate, participatory, and multistaged Enabling Act process. The manifold uncertainties encountered in contending with the proposed facsimile filing standards illuminate the great risks of a process that does not include publication for widespread public comment. There also are risks in a process that seeks to coordinate the activities of different Judicial Conference committees that have different histories and agendas. The opportunity for fusing different strengths may be offset by diffused responsibility and attention.

Perhaps the role of Judicial Conference standards should be limited to matters that have clearly identified characteristics. One appropriate category may be rules that involve no important policy, but that do require technical knowledge and perhaps uniformity. The technical standards for facsimile or electronic transmission for filing seem to fit comfortably in this category. The provision in Civil Rule 79(a) for Judicial Conference approval of the form and style of civil docket books seems similar. Another appropriate category may be rules that are not particularly procedural. The use of cameras at trial may be an illustration of this category; see proposed Criminal Rule 53.

The practice of using the Enabling Act process to delegate some part of Enabling Act authority to the Judicial Conference remains new, untried, and essentially unexplored. It may be desirable to think about it coherently before it is exercised further.

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

ALICEMARIE H. STOTLER
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PETER G. McCABE
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CHAIRS OF ADVISORY COMMITTEES

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D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

January 9, 1993

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
P.O. Box 12339
Santa Ana, California 92701

Dear Judge Stotler:

I am not certain whether I am making a mountain out of a molehill but I thought I would set my thoughts down on paper about the fax filing questions.

The Guidelines for Facsimile Filing that were submitted to the Judicial Conference last fall were problematic because they included many provisions that should be the subject of rules -- such as when and how a paper is filed -- rather than of standards prescribed by the Judicial Conference. Judge Keeton, therefore, persuaded the Conference to delay action on the facsimile filing question.

The Appellate Rules Advisory Committee recommended a significant paring of the guidelines and that most of the items originally contained in the guidelines should become the subject of local rules in those courts choosing to permit facsimile filing. The Civil Rules Committee seems to agree that local rules should govern but in order to maintain uniformity the Committee recommends that the guidelines (standards) should mandate inclusion of certain "terms" in the local rules.

Fed. R. Civ. P. 5(e) and Fed. R. App. P. 25(a) both authorize local rules that permit "fil[ing] by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States." The existence of that language authorizes the Judicial Conference to establish standards governing electronic filing. The only point of disagreement between the Civil and Appellate Advisory Committees seems to be the advisability of broadly construing that authority.

The Civil Rules Committee's minutes reflect its strong belief that national uniformity is important with regard to certain fax filing procedures and that mandating such uniformity via the standards does not create any Rules Enabling Act problems. If the Judicial Conference adopts standards that require uniform procedures governing such matters as signatures, transmissions records, cover sheets, and time of filing, which must be incorporated in local rules, such action is certainly a politically sensitive step if only arguably a violation of the Rules Enabling Act procedures.

Rules Enabling Act Questions

The Rules Enabling Act requires that any rules prescribed by a court other than the Supreme Court must "be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(a). There is no requirement that local rules be consistent with procedures mandated by the Judicial Conference.

The Civil Rules Committee appears to believe that because the national rules, Fed. R. Civ. P. 5(e) and Fed. R. App. P. 25(a), authorize local rules only if they are consistent with standards established by the Judicial Conference, the Judicial Conference is authorized to detail the procedures that must be incorporated in local rules if a court decides to permit facsimile filing. That may be correct. The provisions in Rules 5(e) and 25(a) were adopted using the Rules Enabling Act procedures and thus the delegation of authority to the Judicial Conference is presumably legitimate. The full import of such a delegation, however, may not have been appreciated by either the public or the Congress. It means that the Judicial Conference can dictate the contents of local rules without the publication and comment period required for all other rules, national or local.

Ironically, given the differing positions of the Appellate and Civil Advisory Committees, the Conference apparently has more authority over circuit court rules than over district court rules. Section 2071(c) provides:

> (1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.
>
> (2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.
>
> (Emphasis added.)

The Judicial Conference may modify or abrogate a rule promulgated by a court of appeals but the judicial council of the relevant circuit has that authority as to district court rules. Given Judicial Conference's power to modify circuit rules, the power to dictate their content is not so great a stretch; but note the Conference does not have such power over district court rules.

Local rules are adopted by a process analogous to the national rules. Each court has an advisory committee, 28 U.S.C. § 2077(b), and local rules may "be prescribed only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b). If the standards prescribed by the Judicial Conference specify the filing procedures as well as the technical equipment standards, the only decision left to the local courts is whether to permit facsimile filing. To the extent that the language of the local rules is dictated by the Judicial Conference the local rules will not be the product of the usual local deliberative process. Local rulemaking is constrained in a similar manner, however, whenever an Act of Congress or a national rule promulgated under § 2072 requires some procedure. Constraint by the Judicial Conference, however, is not authorized by the Rules Enabling Act. Again, that may not be problematic under the delegation argument. Note however, that both of the statutorily recognized constraints on local rulemaking -- Acts of Congress and national rules -- are preceded by public deliberative processes; that would not be true of constraints imposed by the Judicial Conference. (It is true, however, of modifications of local rules made by either the Judicial Conference [with regard to circuit rules] or the judicial council of a circuit [with regard to district court rules].)

My point is that the provisions in Rules 5(e) and 25(a) delegated authority to the Judicial Conference. Use of that authority to establish equipment standards is appropriate because of the technical nature of such standards and because they are likely to change so frequently that the usual rulemaking procedures would be unable to keep pace with the technological changes. Using the authority more broadly, to dictate the content of local rules on matters that are ordinarily the subject of rules of procedure, such as the timing of a filing, involves more sensitive questions of by-passing the usual public participation in the rulemaking process. If uniformity is very important, then perhaps adoption of national rules should be considered.

Political Sensitivity

Over the last several years there have been repeated instances in which the Congress has passed legislation, or introduced legislation, that would directly amend rules of practice and procedure. The Judicial Conference has urged the Congress to refrain from intervening because of a perceived need to act quickly and to permit the normal rulemaking procedures, involving study by the advisory committees and public comment, to work.

To maintain credibility in that dialogue with Congress, the question of how to proceed with this fax filing issue should be carefully considered. Judge Keeton objected to the fax filing guidelines before the Judicial Conference last September because the guidelines, in effect, would have made rules and totally by-

passed the rules enabling act procedures -- the Judicial Conference would have done what it has urged the Congress not to do.

The approach urged by the Civil Rules Committee is different. Under the Civil Committee's approach, the Judicial Conference would not actually establish the fax filing procedures. Instead, the Conference would mandate the procedures which must be included in any local rules that authorize fax filing. The local rules would still need to be promulgated in the usual way, even though many of their terms would be predatermined by the Judicial Conference. My fear is that is a subtle distinction that may not be sufficiently evident to avoid confusion or sufficiently justified to by-pass the usual procedures.

None of these questions would arise, if national rules were used to establish the procedures rather than standards prescribed by the Judicial Conference. The Advisory Committee on Appellate Rules did not recommend national rules for a variety of reasons among which is the fact that it is common for new rules to arise from the circuits and to have some time to develop there before incorporation in the national rules. Given that Rule 25(a) requires those courts that wish to permit fax filing to have a local rule authorizing it and that the Committee resolved to develop model local rules for use by those circuits deciding to permit fax filing, the Committee was not troubled by the uniformity questions.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Carol Ann Mooney, Reporter

cc: Judge Logan

Rule 31. Depositions Upon Written Questions	RULE 31. DEPOSITIONS UPON WRITTEN QUESTIONS

(a) Serving Questions; Notice.

(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined has already been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer th

(a) Serving Questions; Notice.

(1) A party may, upon written questions, depose any person, including a party, without leave of court except as provided in (2). The witness's attendance may be compelled by subpoena under Rule 45.

(2) A party must obtain leave of court, which must be granted to the extent consistent with Rule 26(b)(2):

(A) if the person to be examined is confined in prison; or

(B) if, unless the parties consent in writing to the deposition:

(i) the proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

(ii) the person to be deposed has already been deposed in the case; or

(iii) the party seeks to take a deposition before ~~permitted to~~ it may do so under Rule 26(d).

(3) A party wanting to depose a person upon written questions must serve the questions on every other party, with a notice stating, if known, the deponent's

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.	**(b) Officer to Take Responses and Prepare Record.** The party noticing the deposition must deliver to the officer a copy of the notice and of all questions served. The officer must proceed promptly in the manner provided by Rule 30(c), (e), and (f) to record the deponent's testimony in response to the questions and to prepare, certify, and, under Rule 30(f)(1), file or send the deposition, attaching a copy of the notice and the questions received by the officer.
(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.	**(c) Notice of Filing.** ~~The party arranging for the transcript or recording of a deposition~~ A party must promptly notify all other parties when it ~~is~~ has filed a deposition.

Rule 32. Use of Depositions in Court Proceedings	RULE 32. USING DEPOSITIONS IN COURT PROCEEDINGS
(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:	**(a) Using Depositions.** At any trial or hearing, part or all of a deposition — to the extent permitted by the Federal Rules of Evidence or otherwise admissible under evidentiary rules applied as though the deponent were present and testifying — may be used as specified in (1) - (4). Substituting parties under Rule 25 does not affect the right to use depositions previously taken. A deposition, if properly taken and filed in any federal or state action that has been dismissed, may be used in a later action involving the same subject matter between the same parties or their representatives or successors in interest to the same extent as if taken in the later action.

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances

(1) Any party may use a deposition

(A) to contradict or impeach the testimony given by the deponent as a witness, or

(B) for any other purpose permitted by the Federal Rules of Evidence.

(2) An adverse party may, for any purpose, use against ~~an adverse~~ party a deposition of:

(A) the ~~adverse~~ party, or

(B) anyone who, when deposed, was the ~~adverse~~ party's officer, director, managing agent, or designee under Rule 30(b)(6) or Rule 31(a)(4).

(3) (A) Subject to subparagraph (B), a party may, for any purpose, use a deposition against any party that attended the deposition or had reasonable notice of it if the court finds:

(i) that the deponent is dead;

(ii) that the deponent is more than 100 miles from the place of trial or hearing, or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(iii) that the deponent cannot attend the trial

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition taken may also be used as permitted by the Federal Rules of Evidence.	**(4)** If a party introduces in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part ~~offered~~ introduced, and any party may itself introduce any parts that would be admissible if the deponent were present and testifying.[1]
(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.	**(b) Objections to Admissibility.** Subject to Rule 28(b)(4) and Rule 32(d)(3), a party may object at a trial or hearing to the introduction of any deposition testimony that would be inadmissible if the witness were present and testifying.

1. The conditional language "that would be admissible if . . ." may be viewed as substantive, though in accord with existing practice.

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.	**(c) Form of Presentation.** Except as the court directs otherwise, a party offering deposition testimony under this rule may offer it in stenographic or nonstenographic form, but~~, if in nonstenographic form, the party must also provide the court with a transcript of the portions offered~~ must provide the court with a transcript of portions offered in nonstenographic form. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must, unless the court for good cause orders otherwise, be presented in nonstenographic form, if available.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written notice is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral deposition in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(d) Objections.

(1) To Notice. An objection to a deposition notice is precluded unless promptly served in writing on the party giving the notice.

(2) To Officer's Disqualification. An objection based on disqualification of the officer before whom a deposition is to be taken, if not made before the deposition begins, is precluded unless made promptly after the basis for disqualification becomes known or, with due diligence, could have been known.

(3) To Taking of Deposition.

(A) An objection to a deponent's competency or to the competency, relevancy, or materiality of testimony is precluded unless made before or during the deposition, when the ground of the objection might have been obviated, removed, or cured if made at the time.

(B) An objection to matters occurring at an oral deposition is precluded unless timely made during the deposition, when the objection relates to the manner of taking the deposition, the form of questions or answers, the oath or affirmation, a party's conduct, or other matters that might have been

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

obviated, removed, or cured if presented at the time.

(C) An objection to the form of a written question under Rule 31 is precluded unless served in writing on the party submitting it within the time for serving additional questions or within 5 days after being served with a recross question.

(4) **To Completing and Returning Deposition.** An objection to how the testimony has been transcribed or how the deposition has been prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise handled by the officer is precluded unless a motion to suppress is made promptly after the defect or irregularity becomes known or, with due diligence, could have been known.

Rule 33. Interrogatories to Parties	RULE 33. INTERROGATORIES TO PARTIES
(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	**(a) Availability.** Without leave of court or written stipulation, any party may, ~~when~~ at a time permitted under Rule 26(d), serve on any other party written interrogatories – not exceeding 25 in number, including all discrete subparts – to be answered by the party served or, if that party is a public or private corporation, partnership, association, or governmental agency, by any officer or agent, who must furnish the information that is available to the party. Leave to serve additional interrogatories, ~~or to serve interrogatories at an earlier time,~~ must be granted to the extent consistent with Rule 26(b)(2).

(b) Answers and Objections.	**(b) Answers and Objections.**
(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.	**(1)** Within 30 days after being served with interrogatories, a party must serve a copy of its answers and any objections. A shorter or longer time may be directed by the court or, absent an order, agreed to in writing by the parties subject to Rule 29.
(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.	**(A)** Each interrogatory must, ~~unless~~ except to the extent objected to, be answered separately and fully in writing under oath or affirmation. ~~The responding party must answer each interrogatory to the extent not objectionable.~~
(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.	**(B)** All grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is precluded unless the court, for good cause shown, excuses the failure.
(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.	**(C)** The responding ~~party~~ person must sign the answers, and its attorney must sign any objections.
(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	**(2)** The party submitting interrogatories may move for an order under Rule 37(a) with respect to any objection to, or other failure to answer, an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.	**(c) Scope; Use at Trial.** **(1)** Interrogatories may relate to any matter that can be inquired into under Rule 26(b)(1). Answers may be used as permitted by the Federal Rules of Evidence. **(2)** An otherwise proper interrogatory is not necessarily objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that ~~such an~~ the interrogatory need not be answered until designated discovery is complete or until a pretrial conference or some other time.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained.	**(d) Option to Produce Business Records.** If answering an interrogatory will require a party to examine, audit, inspect, compile, abstract, or summarize its business records, and the burden of ascertaining the answer will be substantially the same whether this review is done by it or by the interrogating party, it may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to permit the interrogating party to locate and identify them as readily it could; and **(2)** giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries.

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

April 21, 1994

MEMORANDUM TO MEMBERS OF THE ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: Supplemental Materials for the April 28-30, 1994 Meeting

For your review, I have attached the following:

(1) statements of the two witnesses who are scheduled to testify on the proposed amendments;
(2) correspondence relating to Item X-A. of the agenda, which addresses possible conflict between provisions of Civil Rule 4(i)(3) and Admiralty Rules;
(3) four recent comments on proposed amendments;
(4) Dean Cooper's summary of recent comments on proposed amendments (three of the comments referred to in (3) above were faxed to Dean Cooper on April 21, 1994, and are not included in this summary); and
(5) material on Item IX of the agenda regarding access to court records.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

REPORTER'S NOTE

April 20, 1994

The attached sketch on sealing orders is exactly that – a sketch. It is intended as a succinct, indeed dense, summary of the questions raised by reviewing a dozen articles and annotations. At best, it will serve as the foundation for discussion that may provide more definite directions for the next step.

The sketch of a supposed Rule 77.1 is even less than a sketch. It is a skeletal model of the most salient points that must be covered in a rule if one is to be drafted. Subdivision (b) illustrates the structure that might be adopted if different standards are adopted for different categories of materials. The choice not to attempt to define any of the standards, apart from the stab at settlement agreements in paragraph (4), is deliberate. The number of categories can be reduced according to the number of standards found appropriate.

Of course there is no magic in placing a sealing order after Rule 77. This implicit suggestion follows the lead of Rule 77(b), which provides that all trials on the merits are conducted in open court. Rule 77(b) seems more general than the Rule 43(a) provision for taking trial witness testimony orally in open court.

None of the models proposes appeal provisions. Creating a general right of appeal from orders granting or denying sealing would be costly. If the idea seems attractive nonetheless, that sort of provision is easy to draft.

Rule 77.1. Sealing Records

(a) **Open Records.** All materials on file with the court and the transcripts of proceedings conducted in open court are open to the public unless sealed under paragraph (b).

(b) **Sealing Records.** The court may seal an open record only after making specific findings appropriate to support sealing under (1), (2), (3), (4), (5), or (6).

(1) Pleadings and materials submitted on consideration of a motion [or application] may be sealed * * *

(2) Discovery materials that have been filed with the court but not used on consideration of a motion [or application] may be sealed * * *

(3) The transcript of a proceeding conducted in open court may be sealed * * *

(4) A settlement agreement filed with the court may be sealed with the consent of all parties to the agreement. If the court is asked to take any action to approve or enforce the agreement, the court may maintain the seal only under the standards of paragraph (1).

(5) A judgment may be sealed under paragraph (4) or * * *

(6) Other materials may be sealed * * *

(c) **Unsealing Records.** A sealed record must be unsealed:

(1) to the extent that the court finds that the requirements of paragraph (b) are no longer satisfied; or

(2) twenty-five years after the sealing order was made, unless the original order specifies a different period or the court at any time orders that the seal be extended for a definite period.

(d) **Sealing procedure.** A court may order records sealed, or may modify or vacate a seal order, after:

consideration of this first question. What standards for sealing are announced, and what standards might be revealed by the actual facts of current practice, remain obscure. The actual effects of sealing also are obscure; widespread sealing, indeed, may thwart efforts to learn about the potential benefits of open access to sealed records. If much useful information is sealed, leaving open only less useful information, there is little basis for comparative study.

Drafting a rule that will improve matters remains a challenge even if it is concluded that improvement is needed. The existence of several state models — most of them relatively new — can provide a good start. Beyond that point, the most important choice is between a rule that leaves much to open-ended discretion and a rule that seeks to provide detailed standards and procedures adapted to differences in the materials to be sealed and the reasons for sealing. Each additional point of detail increases the need for clear understanding of complicated issues that may be difficult to foresee.

Two additional limits on the rulemaking process must be confronted. The First Amendment is the first limit. It clearly gives a right of access to criminal proceedings. Several courts have concluded that there also is a First Amendment right of access to civil proceedings, including not only trial but documents filed before trial. The relationship between the First Amendment right of access and the common law right of access remains obscure. The First Amendment tests are likely to be expressed in terms that limit sealing to narrow limits carefully tailored to serve overriding interests. First Amendment tests also are likely to insist on protection of the public interest by procedures that include some form of public notice and opportunity for hearing, and also include specific findings of the factors that support sealing. A Civil Rule must find some way to avoid any attempt to circumvent First Amendment requirements. The procedure-only character of the Enabling Act is the second limit. One common suggestion, for example, is that access should be allowed to private or government settlement agreements. Rules that would limit the power to agree to confidential settlements that are not filed with the court likely are sufficiently substantive to be beyond the scope of the Enabling Act.

Wise rulemaking requires solid foundations. It is easiest to draft good rules when there is a clearly identified problem in a current rule or when there is a well-understood body of contemporary practice that can be

absorbed in rule form. The first step must be to assess the foundations for a sealing rule.

Basic Blocks

At least four basic sets of concerns must be addressed once the decision is made to draft a new rule.

(1) Present Public Access: What materials and events now fall within a right of public access? How far is access a matter of common-law principle, how far a matter of First Amendment Protection?

(2) Changing Present Access: Is the need for a rule simply to foster uniform adherence to the mainstream of general present practice? Or are there reasons to expand or contract presently recognized rights of access?

(3) Relation to Nonsealed Information: If court information is sealed, what effect does the seal have on dissemination of information from other sources? How far, for example, should an order sealing a complaint limit the right of the plaintiff to discuss the filing of the suit or information that bears on the dispute but is not described as drawn from or reflected in the complaint?

(4) Procedural Requirements: What provisions should be made for temporary sealing orders? Notice to nonparties? Description of the matters to be sealed that facilitates opposition but does not defeat effective sealing? Hearing? Findings as to factors that control the decision? Duration? Vacating or terminating?

Interests That Favor Access

The interests that favor access have supported a commonlaw presumption that there is a right of public access to civil trials, pleadings, judgments, and to any material submitted for consideration by the court in deciding a motion. The First Amendment right of access may start at a quite similar point. Discovery materials occupy a less certain position. Rule 26(c) specifically covers protective orders. Beyond that point, it seems to be generally assumed that there is no right of access to the discovery process itself -- that the conduct of a deposition, for example, is not a public event. This assumption may lead to the conclusion that access to the fruits of discovery depends on filing, with a presumptive right of access to anything filed with the court but not to unfiled materials. This conclusion in turn would place

special pressure on Rule 5(d), which allows a court to order that discovery materials generally not be filed. It seems strange to turn the right of access on such matters as the filing storage capacity of a particular district court.

The nature of the interests favoring access generally has been explored in cases dealing with access to criminal trials. Some of these interests bear directly on the quality of factfinding, while others rise to very abstract judgments about the role of courts in a democratic society.

The most case-specific interests in access stress the possibility that access will produce better testimony. Public knowledge of a trial may lead unknown witnesses to present themselves. And, as a far more common occurrence in an increasingly anonymous society, the knowledge that proceedings are open and the presence of bystanders may encourage the parties and witnesses to remain honest.

Other concrete interests in access are familiar from discussion of discovery protective orders. Litigation may involve products, persons, or circumstances that pose a threat of injury to nonparties. Publication of the facts of a lawsuit may help others protect themselves. Publication also may facilitate sharing of information among litigants in separate actions, reducing the costs, accelerating the speed, and improving the results. At the extremes of conduct, openness may deter evasion of discovery or even destruction of evidence useful for other cases.

More abstract interests begin with fostering public confidence in the judicial process. Citizens who know the process is open and accessible will trust it better than a secret process. The open process, moreover, is likely to deserve greater confidence. Public exposure is a shield against judicial surrender to improper influences. It also is a shield against public oppression — if the risk of oppression is not often as great in civil actions as in criminal prosecutions brought by the very government that sponsors the court, the risk remains real both in government civil actions and in purely private litigation. Public participation in celebrated civil actions also may achieve something of the catharsis that comes from vicarious public participation in celebrated criminal trials. As the lawmaking component of civil adjudication continues to expand in scope and importance, moreover, public access may provide a strand of legitimizing support.

Right To Disseminate

Most discussion of the interests opposed to sealing focuses on the values of access by nonparties. A party, however, may claim an independent interest in disseminating information. This interest is subject to regulation if information is acquired with the help of the court, particularly if the help is discovery rather than a trial subpoena. A comprehensive sealing rule must deal with the question of prohibiting dissemination of information independently acquired.

Interests That Favor Sealing

Most discussion of the interests that favor sealing focuses on the risk of specific harm to specific parties in particular litigation. There are, however, clear analogues to the broad theoretical arguments that champion openness as a public value. These arguments are not often articulated because they are taken for granted. Reconsideration of things taken for granted is not unthinkable. The few illustrations provided below are intended to illustrate some unarticulated assumptions, however, not to invite reconsideration.

Jury deliberations constitute a vital part of the decision process. Jury secrecy undoubtedly masks occasional miscarriages of justice. Public access, however, is seldom suggested. The Seventh Amendment may well stand in the way. Consultations with each other by judges of a multi-judge panel, and conferences by judges with law clerks, likewise are vital parts of the decision process. So too are draft opinions. Article III may well protect against public intrusion in these processes. In camera consideration of material claimed to be privileged may affect vital public interests, particularly if some form of governmental privilege is claimed. Full protection of a privilege, however, probably demands that such proceedings remain closed.

Beyond this clear core of judicial privacy, other settings may present more difficult problems. Conferences in chambers, pretrial conferences in general, settlement conferences, and other events could be the occasion for judicial overreaching or for actions that shape ultimate decision more effectively than the trial itself. Public access, however, could stifle any hope for significant accomplishment.

The more common illustrations of privacy needs cover

a familiar range of values. Protection is sought for reasons of national security. Law-enforcement needs may be urged with respect to investigative techniques, identity of informants, or such devices as drug courier profiles. Commercial information is often protected, not only in the area of technical trade secrets but across much wider areas of information that could cause advantage or disadvantage in competitive struggle. Physical safety may be involved — crime informants again are an example, as are victims of some wrongs such as sexual violence or domestic abuse. Even witnesses may need to be protected against harassment or worse. A variety of personal privacy interests are asserted, ranging from such things as medical and employment records through personal financial information, or sexual habits. Interests of nonparties may be invoked in similar terms, including such matters as lists of organization members. Fears of exploitation or even harassment may arise from matters as simple as the amount of a settlement. In a small number of cases, there may be concerns that publicity will jeopardize the opportunity for a fair trial, just as may occur in criminal cases. Still other interests abound.

Materials and Events Covered

Protection may be sought for a wide variety of materials or events. For purposes of rulemaking, however, a relatively small set of categories can embrace almost all significant matters.

The presumption of access seems strongest with respect to pleadings, motions and material advanced in support or opposition, and trial. The presumption may be diluted slightly with respect to other materials filed with the court but not otherwise advanced as a basis for decision. Discovery materials, as noted above, generate more uncertain reactions, particularly as to materials not filed with the court and the conduct of depositions. Pretrial conferences may fall outside the presumption of access; certainly there is little discussion in the general literature.

Special problems arise from settlement and the events that surround it. No one argues that the public should have access to private settlement discussions. Settlement conferences under court auspices probably are viewed in the same way. A settlement agreement that is not filed with the court also is likely to remain outside the right of access. It seems common, however, for the parties to wish both to file a settlement agreement as an entrée for future

judicial enforcement and to maintain confidentiality. The presumption of access probably attaches if a party actually seeks judicial enforcement; the situation is less certain if the parties agree to maintain confidentiality and no judicial action is sought.

Disciplinary proceedings for a judge or member of the bar also present distinctive problems. These problems likely can be omitted from any rule that may be drafted. Court administrative records likewise may be safely omitted.

Sealing Standards

The task of setting standards requires bringing together the categorical nature of the materials offered for sealing — pleadings, motions, discovery, settlement, trial, or other; the specific nature of the information involved; the nature of the injury that might be forestalled by sealing; and the nature of the private and public interests harmed by sealing. This task can be captured in a terse "good cause" formula, a more pointed balancing formula that directs attention to the factors to be considered, a series of different formulas tied to the categories of materials involved, or possibly even a set of more definite rules.

The standards also might differentiate between sealing by agreement of all parties and sealing opposed by one or more parties. The distinction is likely to make more sense in some settings than in others. Consent of the parties to seal the dollar amount of a settlement may deserve great deference. Consent to seal the other terms of a settlement agreement may deserve some deference, but the choice to file the agreement clearly puts the parties beyond full control, and the seal wears thin once any party asks the court to take action enforcing the agreement. In another dimension, a rule that requires sweeping public access should address private agreements designed to subvert the rule. The Texas rule, for example, treats unfiled discovery material as public records. A private sealing agreement probably cannot defeat the rule; return of discovery materials to the producing party probably carries an obligation to maintain the materials as public records.

It is easier to draft an open-ended rule. Even with more specific guidance in a Committee Note, it may be wondered whether an open-ended rule would do much to increase uniformity or improve results.

A more specific rule would promise greater control. It also would require much more work to be sure it was wise. It is not possible to learn much about sealing practices simply by reading reported decisions and secondary literature. It seems likely that the vast majority of sealing orders remain effective, often without challenge. What kinds of showings are actually required to support sealing of what sorts of materials is largely unknown. The potential harm to private and public interests cannot even be guessed.

Procedural Requirements

Supreme Court decisions dealing with access to criminal proceedings emphasize the importance of procedure, a theme taken up in some of the state rules. In addition to setting out standards for sealing, a variety of procedural issues can be addressed.

Notice is an obvious starting point. The purpose of sealing is to prevent access by nonparties. The purpose of denying sealing is to serve public and private interests by allowing access. In all logic, some provision should be made for notice to nonparties. It is relatively easy to draft a general public notice provision. An attempt to sort out more limited notice provisions will be more difficult. It would be awkward, for instance, to provide notice to public media but only limited categories of other "interested" persons. Means of notice also must be resolved. The more effective the notice procedure, the more frequently will nonparties appear to resist sealing. More procedure will make sealing harder work for the courts. The added burden relates in part to the next point — to the extent that the procedure makes effective sealing possible, nonparties often enough will be forced to resist sealing of information that, were it available, would be of no use or interest.

Nonparty participation creates an unavoidable dilemma in facilitating intelligent participation and maintaining the possibility of effective sealing. Only full disclosure of the material can support fully effective participation, but that would be self-defeating. Limited access may be effective in some cases, but some of the most obvious restrictive devices carry their own problems. Limiting access to counsel for purposes of the sealing motion runs into the fact that counsel may be the person most feared; perhaps the fear exists only in cases in which it is desirable to stimulate additional litigation, but it is hard to be confident of that. This procedural dilemma will

require careful consideration. The common response of in camera inspection again imposes substantial burdens, even if it can be shared with magistrate judges or masters.

Provision also could be made for temporary sealing orders. The only question in this dimension, indeed, is whether it might be adequate to leave this obvious need to implication.

The standards for sealing might be supplemented by specific provisions for burdens of justification. A single burden of justification could be imposed on a party seeking to impose a seal or to oppose vacating. Or a burden of showing the need for sealing could be imposed on the party seeking the seal, while the burden of showing the need for access could be imposed on the party opposing the seal. Perhaps other variations could be imagined -- one example might be a distinction between prejudgment opposition to initial sealing and postjudgment requests to unseal.

Specific findings can be required as to the factors weighed in deciding whether to seal. The emphasis on the importance of specific findings with respect to access to criminal proceedings suggests that findings should be required at least when sealing is ordered.

Specificity requirements can be created for sealing orders along lines similar to the requirments for injunctions under Civil Rule 65(d). This provision could include specific recognition of partial sealing orders -- an order denying public access but allowing sharing among parties in related actions would be one important example. This provision also would be the place for any presumptive limits on duration; the twenty-five year limit discussed in October might be a sensible beginning.

Harrison's

FLORIDA STATUTES ANNOTATED

Official Classification

1993

Cumulative Pocket Part

Prepared by
The Editorial Staff
of The Harrison Company

Vol. 6, 6A — 1988 Revision
§§ 69 thru 89

Replacing all prior Supplementation to this Volume

THE HARRISON COMPANY, PUBLISHERS
3110 Crossing Park • Norcross, GA 30071-1367

TITLE VI
CIVIL PRACTICE AND PROCEDURE

CHAPTER 69 MISCELLANEOUS PROCEDURAL MATTERS

69.031 Designated financial institutions for assets in hands of guardians, curators, administrators, trustees, receivers, or other officers

In general: Perhaps it was error to place money in custodial, rather than guardianship, account; however, incorrect designation of account had no bearing on result sub judice; since trial court did not order appellee to supervise disbursements pursuant to § 69.031, money could have been withdrawn even if it had been more appropriately placed in guardianship account; § 744.444 contains no language which would restrict guardian from making withdrawals without court approval. Gale v. Harbor Federal Sav. and Loan, App., (4th) 571 So. 2d 114 (1990).

69.081 Sunshine in litigation; concealment of public hazards prohibited

(1) This section may be cited as the "Sunshine in Litigation Act."

(2) As used in this section, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.

(5) Trade secrets as defined in § 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard.

(8)(a) Any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced. Any person has standing to contest an order, judgment, agreement, or contract that violates this section. A person may contest an order, judgment, agreement, or contract that violates this subsection by motion in the court that entered such order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(b) Any person having custody of any document, record, contract, or agreement

relating to any settlement as set forth in this section shall maintain said public records in compliance with chapter 119.

(c) Failure of any custodian to disclose and provide any document, record, contract, or agreement as set forth in this section shall be subject to the sanctions as set forth in chapter 119.

This subsection does not apply to trade secrets protected pursuant to chapter 688, proprietary confidential business information, or other information that is confidential under state or federal law.

(9) A governmental entity which settles a claim in tort which requires the expenditure of public funds in excess of $5,000, shall provide notice, in accordance with the provisions of chapter 50, of such settlement, in the county in which the claim arose, within 60 days of entering into such settlement; provided that no notice shall be required if the settlement has been approved by a court of competent jurisdiction.

Derivation

Laws 1991, c. 91-85, § 1; Laws 1990, c. 90-20, § 1.

Construction and application: Subsection (4) provides that agreement or contract which has purpose of concealment is contrary to public policy and unenforceable; where petitioner argued that statute was inapplicable because public was well aware of dangerous nature of asbestos, petitioner failed to recognize that statute includes prohibition against court order which conceals any information concerning public hazard which would include these depositions; apparently deponents were either deceased or infirm and could not be called upon to testify at trial; trial court did not depart from essential requirements of law in denying petitioner's motion. ACandS, Inc. v. Askew, App., (1st) 597 So. 2d 895 (1992).

CHAPTER 71 REESTABLISHMENT OF DOCUMENTS

71.011 Reestablisment of papers, records, and files

Negotiable instruments: Owner of lost, destroyed or stolen negotiable instrument may proceed under § 673.804 by direct action against obligors (makers and endorsers) on instrument without first re-establishing lost, destroyed or stolen instrument in separate action under § 71.011. Dunn v. Willis, App., (5th) 599 So. 2d 271 (1992).

CHAPTER 72 TAX MATTERS

72.011 Jurisdiction of circuit courts in specific tax matters; administrative hearings and appeals; time for commencing action; parties; deposits

(1)(a) A taxpayer may contest the legality of any assessment or denial of refund of tax, fee, surcharge, permit, interest, or penalty provided for under § 125.0104, § 125.0108, chapter 198, chapter 199, chapter 201, chapter 203, chapter 206, chapter 207, chapter 211, chapter 212, chapter 213, chapter 220, chapter 221, § 336.021, § 336.025, § 336.026, § 370.07(3), chapter 376, § 403.717, § 403.718, § 403.7185, § 403.7195, § 403.7197, § 538.09, § 538.25, chapter 624, or § 681.117 by filing an action in circuit court; or, alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. However, once an action has been initiated under § 120.56, § 120.565, § 120.57, or § 120.575, no action relating to the same subject matter may be filed by the taxpayer in circuit court, and judicial review shall be exclusively limited to appellate review pursuant to § 120.68; and once an action has been initiated in circuit court, no action may be brought under chapter 120.

(b) A taxpayer may not file an action under paragraph (a) to contest an assessment or a denial of refund of any tax, fee, surcharge, permit, interest, or penalty relating to the statutes listed in paragraph (a) until the taxpayer complies with the applicable registration requirements contained in those statutes which apply to the tax for which the action is filed.

(2) No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final. No action may be brought to contest a denial of refund of any tax, interest, or penalty paid under a section or chapter specified in subsection (1) after 60 days from the date the denial becomes final. The Department of Revenue or, with respect to assessments or refund denials

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Derivation

Laws 1993,
1991, c. 91-112
89-171, § 10.

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GEORGIA COURT RULES AND PROCEDURE

STATE

1994

INCLUDING AMENDMENTS RECEIVED
THROUGH OCTOBER 1, 1993

WEST PUBLISHING COMPANY
SAINT PAUL, MINNESOTA

menced there; all items specified in subparagraph (H) of this rule shall be deemed amended accordingly. It shall not be necessary that service of process be perfected a second time upon parties defendant, except that any publication required to be made in a newspaper in the proper venue shall be republished. Any interlocutory or other order theretofore entered in the action, upon the motion of any party, shall be reviewed, and thereafter reissued or vacated by the court to which the action was transferred.

19.2 Criminal.

(A) When a criminal action is to be transferred to the superior court of a county different from that in which initially brought, the superior court judge granting the venue change, unless disqualified, shall continue as presiding judge in said action.

(B) When there has been an order granting change of venue to the superior court of a county other than that in which the action theretofore pended, the trial jury shall be selected from qualified jurors of the transferee county although trial of the action may, in the discretion of the presiding judge, take place in the transferor county.

19.3 Contested Election Results. In respect of actions contesting election results, venue change is not limited to the county adjoining that in which the action commenced, but may be made to an appropriate court in any county of the state; costs incident to the further handling and trial of such action shall be borne by the transferor county.

RULE 20. PEREMPTORY CALENDAR

Periodically the assigned judge may cause to be delivered to the clerk of the court and published a list of pending civil actions in which the discovery period has expired or criminal cases upon reasonable notice requiring the parties (including the state) or their attorneys to announce whether the actions or cases appearing thereon are ready for trial and when trial should be scheduled. Failure to appear at the calendar sounding or otherwise to advise the judge or appropriate calendar clerk may result in the following disposition:

(A) In civil actions, the dismissal without prejudice of plaintiff's action or defendant's answer, counterclaim, or cross-claim; and,

(B) In criminal cases, the acquitting of the accused defendant or the dead docketing of the case.

RULE 21. LIMITATION OF ACCESS TO COURT FILES

All court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below.

21.1 Motions and Orders. Upon motion by any party to any civil action, after hearing, the court may limit access to court files respecting that action. The order of limitation shall specify the part of the file to which access is limited, the nature and duration of the limitation, and the reason for limitation.

21.2 Finding of Harm. An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest.

21.3 Ex Parte Orders. Under compelling circumstances, a motion for temporary limitation of access, not to exceed 30 days, may be granted, ex parte, upon motion accompanied by supporting affidavit.

21.4 Review. A copy of an order limiting access shall be transmitted to and subject to review by the Supreme Court.

21.5 Amendments. Upon notice to all parties of record and after hearing, an order limiting access may be reviewed and amended by the court entering such order or by the Supreme Court at any time on its own motion or upon the motion of any person for good cause.

RULE 22. ELECTRONIC AND PHOTOGRAPHIC NEWS COVERAGE OF JUDICIAL PROCEEDINGS

Unless otherwise provided by rule of the Supreme Court or otherwise ordered by the assigned judge after appropriate hearing (conducted after notice to all parties and counsel of record) and findings, representatives of the print and electronic public media may be present at and unobtrusively make written notes and sketches pertaining to any judicial proceedings in the superior courts. However, due to the distractive nature of electronic or photographic equipment, representatives of the public media utilizing such equipment are subject to the following restrictions and conditions:

(A) Persons desiring to broadcast/record/photograph official court proceedings must file a timely written request (form attached as Exhibit "A") with the judge involved prior to the hearing or trial, specifying the particular calendar/case or proceedings for which such coverage is intended; the type equipment to be used in the courtroom; the trial, hearing or proceeding to be covered; and the person responsible for installation and operation of such equipment.

(B) Approval of the judge to broadcast/record/photograph a proceeding, if granted, shall be granted without partiality or preference to any person, news agency, or type of electronic or photographic coverage, who agrees to abide by and conform to these rules, up to the capacity of the space designated therefor in the courtroom. Violation of

ANNOTATED LAWS OF MASSACHUSETTS

with pocket upkeep service

DISTRICT/MUNICIPAL

AND OTHER

TRIAL COURT

RULES

By the Editorial Staff of the Publishers

1990

Lawyers Cooperative Publishing

Rochester, New York 14694

inapplicable to court papers, documents, exhibits, dockets, indices, and other records which are required to be impounded by statute, court rule, or standing order.

Where impoundment is sought in connection with discovery, these rules shall be applied in a manner consistent with the provisions of Rule 26(c) of the Massachusetts Rules of Civil Procedure, Rule 26(c) of the District/Municipal Courts Rules of Civil Procedure, and Rule 26(c) of the Massachusetts Rules of Domestic Relations Procedure.

These rules shall not be construed to deprive a person of any rights or remedies regarding impoundment which are otherwise available under law.

Rule 2

MOTION FOR IMPOUNDMENT

A request for impoundment shall be made by written motion which shall state the grounds therefor and shall include a written statement of reasons in support thereof. The motion shall describe with particularity the material sought to be impounded and the period of time for which impoundment is sought.

A motion for impoundment shall be accompanied by affidavit in support thereof. Unless otherwise provided herein, the rules governing motions and affidavits in civil proceedings generally shall apply to requests for impoundment.

An order of impoundment may be requested prior to the filing of the material sought to be impounded.

Rule 3

EX PARTE IMPOUNDMENT

An ex parte order of impoundment may be granted by the court without notice only upon written motion supported by affidavit in the manner provided in Rule 2 and only upon a showing that immediate and irreparable injury may result before a party or interested third person can be heard in opposition. An ex parte order of impoundment shall be endorsed with the date of issuance; shall be filed forthwith in the clerk's office and entered of record; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed, the court extends the order.

If an order of impoundment is granted without notice, the matter shall be set down for hearing at the earliest possible time, and in any event within ten days. On two days' notice to the party who obtained

the order of impoundment without notice or on such shorter notice as the court may prescribe, a party or interested third person may move for modification or termination.

An ex parte order of impoundment may be requested prior to the filing of the material sought to be impounded.

Rule 4

NOTICE

Service of the motion for impoundment and affidavit shall be made on all parties in accordance with Rule 5 of the Massachusetts Rules of Civil Procedure. In the event an order of impoundment is sought at the time of, or prior to, service of the original complaint, service shall be made in accordance with Rule 4 of the Massachusetts Rules of Civil Procedure. The time periods for hearing shall be as set forth in Rule 6 of the Massachusetts Rules of Civil Procedure.

The court may, prior to hearing, order notice to be given to interested third persons who may not be parties to the action, including persons named in the material sought to be impounded. Notice to such interested third persons shall be given in such manner as the court may direct.

Service shall be proved by affidavit containing a particular statement thereof, including the names and addresses of all parties and interested third persons who have been given notice.

Rule 5

OPPOSITION TO REQUEST FOR IMPOUNDMENT

Any party or interested third person who has been notified in accordance with Rule 4 of these rules may serve opposing affidavits not later than one day before the hearing, unless the court permits them to be served at some other time. Service of opposing affidavits shall be made in accordance with Rule 5 of the Massachusetts Rules of Civil Procedure.

Rule 6

MOTION BY THIRD PERSON TO BE HEARD

A person who has not been notified in accordance with Rule 4 of these rules and who desires to be heard in order to request or oppose impoundment may serve on all parties a written motion supported by affidavit. If impoundment is desired, the provisions of Rule 2 of these rules concerning motions and affidavits and Rule 4 of these rules concerning notice shall be applicable. The time periods for service of

the motion to be heard and for setting of a hearing date shall be as set forth in Rule 6 of the Massachusetts Rules of Civil Procedure.

Rule 7

HEARING

An order of impoundment may be entered by the court, after hearing, for good cause shown and in accordance with applicable law. In determining good cause, the court shall consider all relevant factors, including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason(s) for the request. Agreement of all parties or interested third persons in favor of impoundment shall not, in itself, be sufficient to constitute good cause.

Interested third persons who are notified in accordance with Rule 4 of these rules and those third persons who have filed motions to be heard in accordance with Rule 6 of these rules may, in the court's discretion, be given an opportunity to be heard.

Where a public hearing may risk disclosure of the information sought to be impounded, the court may close the hearing to the public. If a hearing is closed to the public, a record of the proceedings shall be preserved stenographically or by a recording device. Appropriate steps shall be taken to preserve the confidentiality of the record.

Rule 8

ORDER OF IMPOUNDMENT

An order of impoundment, whether ex parte or after notice, may be made only upon written findings. An order of impoundment shall specifically state what material is to be impounded, and, where appropriate, may specify how impoundment is to be implemented. An order of impoundment shall be endorsed with the date of issuance and shall specify the duration of the order.

In its order, the court may allow persons other than those described in Rule 9 of these rules to have access to impounded material, and may order that appropriate deletions or notations be made in the civil docket and indices kept by the clerk.

Rule 9

CLERK'S DUTIES

Upon entry of an order of impoundment, the clerk shall make a notation in the civil docket indicating what material has been im-

pounded. All impounded material shall be kept separate from other papers in the case and shall not be available for public inspection. Such impounded material shall be available to the court, the attorneys of record, the parties to the case, and the clerk, unless otherwise ordered by the court.

Upon expiration or other termination of the order of impoundment, the material shall be returned to the file, unless other arrangements have been made, and the docket marked accordingly.

Rule 10

MODIFICATION OR TERMINATION

A party or any interested third person, whether or not notified under Rule 4 of these rules, may, by motion supported by affidavit, seek to modify or terminate an order of impoundment. Such motion shall be served in accordance with the provisions of Rule 5 of the Massachusetts Rules of Civil Procedure upon all parties, all interested third persons who were notified pursuant to Rule 4 of these rules, and any other person as ordered by the court.

No order of impoundment may be modified or terminated, except upon order of the court and upon written findings in support thereof.

Rule 11

MATERIAL IMPOUNDED BY STATUTE OR RULE

This rule applies to requests for relief from impoundment in cases where material is required to be impounded by statute, court rule, or standing order, except where a different procedure is otherwise provided.

Relief from impoundment may be sought by motion supported by affidavit, and shall be granted by the court only upon written findings. The procedure otherwise set forth in these rules shall govern requests for relief from impoundment to the extent practicable.

Rule 12

REVIEW

An order impounding or refusing to impound material shall be subject to review by a single justice of an appellate court in accordance with provisions of law and consistent with the procedures established in Rule 1:15 of the Rules of the Supreme Judicial Court.

(Added, effective January 1, 1988.)

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1994 EDITION

STATE AND FEDERAL

Including Amendments Received through
December 1, 1993

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PART 216. SEALING OF COURT RECORDS IN CIVIL ACTIONS IN THE TRIAL COURTS

§ 216.1 Sealing of Court Records

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

Vernon's

TEXAS RULES ANNOTATED

CIVIL PROCEDURE

Volume 1

Rules 1 to 77

1994
Cumulative Annual Pocket Part

Replacing 1993 Pocket Part in back of volume

Includes Amendments received to January 1, 1994
Court Constructions through 864 S.W.2d 229

WEST PUBLISHING CO.
ST. PAUL, MINN.

Rule 75b. Filed Exhibits: Withdrawal

Notes of Decisions

In general 1

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1. In general

Improper retrieval of sheathed needle that had been admitted into evidence in medical malpractice action and then inserted into model arm during jury recess in order to support physician's claim that needle was not long enough to cause damage was waived where patient did not object as soon as he learned of impropriety; although patient could not have waived error by failing to object when needle was admitted into evidence, no objection or request to withdraw exhibit was raised when patient learned of tampering. Perez v. Bagous (App. 13 Dist.1992) 833 S.W.2d 671.

Request during deliberations that jury be instructed to disregard needle that had been introduced as exhibit and then retrieved by physician and inserted into model arm to create another exhibit came too late to prevent waiver of objection to impropriety of tampering with exhibit without notice to patient's counsel and trial court. Perez v. Bagous (App. 13 Dist.1992) 833 S.W.2d 671.

Once party has admitted exhibit into evidence, exhibit may not be retrieved and used to create another during a jury recess without notifying opposing counsel or trial court; newly created exhibit may not be entered into evidence without informing opposing counsel of use of entered exhibit. Perez v. Bagous (App. 13 Dist.1992) 833 S.W.2d 671.

Sheathed needle that had been admitted into evidence in medical malpractice action should not have been retrieved during jury recess and inserted into model arm to create new exhibit to support physician's claim that needle used during injection had not been long enough to reach and cause damage to posterior interosseous nerve. Perez v. Bagous (App. 13 Dist.1992) 833 S.W.2d 671.

Rule 76a. Sealing Court Records

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of

both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. **Hearing.** A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non–parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. **Order on Motion to Seal Court Records.** A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1, has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. **Continuing Jurisdiction.** Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1, shall always be on the party seeking to seal records.

8. **Appeal.** Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. **Application.** Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Added by order of April 24, 1990, eff. Sept. 1, 1990.

Comment—1990

New rule to establish guidelines for sealing certain court records in compliance with Government Code § 22.010.

10. Protective orders

Trial court committed reversible error in concluding, absent motion to seal court records, that there had to be compliance with rule governing sealing of court records before court could consider and rule on motion for protective order. Ford Motor Co. v. Benson (App. 14 Dist.1993) 846 S.W.2d 487, rehearing denied, application for writ of error filed.

When party moves for protective order, trial court should first determine whether there is good cause for protecting documents from distribution or disclosure; nonmovant in protective order proceeding has burden of showing court that there must first be compliance with rule providing for sealing of court records by establishing that some or all documents are court records. Ford Motor Co. v. Benson (App. 14 Dist.1993) 846 S.W.2d 487, rehearing denied, application for writ of error filed.

Rule 77. Lost Records and Papers

Notes of Decisions

Objection 2

2. Objection

Former husband waived objection to duplicate file after original had disappeared, where husband objected at trial that copies were uncertified, but argued on appeal that documents were not introduced in compliance with rule governing loss of records. Coke v. Coke (App. 5 Dist.1990) 802 S.W.2d 270, error denied.

INDEX

See Volume 6, Main Volume and Pocket Part

†

Texas Rule 166(b)(5)

Rule 166(b)(5) provides for discovery protective orders. Paragraph (c) authorizes orders ordering that the results of discovery be sealed, that disclosure be restricted, or the like, and concludes: "Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

CODE OF VIRGINIA

1950

With Provision for Subsequent Pocket Parts

ANNOTATED

Prepared under the Supervision of

The Virginia Code Commission

BY

The Editorial Staff of the Publishers

Under the Direction of

A. D. KOWALSKY, S. C. WILLARD, W. L. JACKSON,
S. C. GORMAN AND T. R. TROXELL

VOLUME 2

1992 REPLACEMENT VOLUME

(Including Acts of the 1992 Regular and Special Sessions and annotations taken from South Eastern Reporter, 2d series, through Volume 413, page 429.)

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CHARLOTTESVILLE, VIRGINIA

I. DECIDED UNDER CURRENT LAW.

A. General Consideration.

Wrongful death action. — The expectancy of continued life of the decedent is relevant and necessary to establish the extent of loss for the decedent's society, companionship, comfort, guidance, advice, services, protection, care, and assistance set out in § 8.01-52. The expectancy table in this section therefore, is admissible if such items of loss are supported by the evidence. Graddy v. Hatchett, 233 Va. 65, 353 S.E.2d 741 (1987).

Where injury permanent and reduces earning capacity, evidence of life expectancy permissible. — Where there was evidence that the injury to the plaintiff was not only permanent in nature, but was of a type and character from which the jury could have reasonably inferred the plaintiff would suffer a lessening of his earning capacity, it was proper for the court to have permitted evidence of plaintiff's life expectancy. Exxon Corp. v. Fulgham, 224 Va. 235, 294 S.E.2d 894 (1982).

Applied in Wingo v. Norfolk & W. Ry., 638 F. Supp. 107 (W.D. Va. 1986).

II. DECIDED UNDER PRIOR LAW.

The table is to be considered as evidence. Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

But it is not conclusive or binding. Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

And should be considered with other evidence. — It is the duty of the court, when so requested in an action for wrongful death, to tell the jury that a mortality table introduced into evidence is to be considered by them, but it is not conclusive or binding. It shall be considered along with all the other evidence relating to the health, habits, and other circumstances of the person which may tend to influence his life expectancy. Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

Reading section to jury. — The objection now made to the action of the trial court in permitting counsel for the plaintiff to read to the jury from this section, it being the table of life expectancy, does not appear to have been voiced in the court below. While this method of introducing the life expectancy table in evidence is unusual, and not an approved procedure, it does not here constitute reversible error. State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968).

Instruction in wrongful death action. — In a wrongful death action, the jury should be instructed, if requested, substantially as follows: "The court instructs the jury that the life expectancy table introduced in evidence is to be considered by you as an aid in determining life expectancy, but it is not in any way conclusive or binding. You should consider it along with all the other evidence relating to the health, constitution, and habits of the decedent in your determination of his life expectancy." Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

§ 8.01-420. Depositions as basis for motion for summary judgment or to strike evidence. — No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used. (Code 1950, § 8-315.1; 1973, c. 483; 1977, c. 617; 1978, c. 417.)

Law Review. — For survey of Virginia law on practice and pleading for the year 1974-1975, see 61 Va. L. Rev. 1799 (1975). For article on libel and slander in Virginia, see 17 U. Rich. L. Rev. 769 (1983).

I. DECISIONS UNDER PRIOR LAW.

Applied in O'Brien v. Snow, 215 Va. 403, 210 S.E.2d 165 (1974).

§ 8.01-420.01. Limiting further disclosure of discoverable materials and information; protective order. — A. A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.

B. The provisions of this section shall apply only to protective orders issued on or after July 1, 1989. (1989, c. 702.)

Law Review. — For essay on Protective Orders, see 24 U. Rich. L. Rev. 109 (1989). For essay "Protective Orders in Products Liability Litigation: Striking the Proper Balance," see 48 Wash. & Lee L. Rev. 1503 (1991).

§ 8.01-420.1. Abolition of common-law perpetuation of testimony. — The common-law proceeding to perpetuate testimony is abolished. (1977, c. 617.)

REVISERS' NOTE

This is a new section in Title 8.01, enacted in view of the revision of Part Four of the Rules of Court, to make the proceeding provided in Rule 4:2 the exclusive proceeding to perpetuate testimony.

§ 8.01-420.2. Limitation on use of recorded conversations as evidence. — No mechanical recording, electronic or otherwise, of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage. The parties' knowledge of the recording pursuant to clause (i) shall be demonstrated by a declaration at the beginning of the recorded portion of the conversation to be admitted into evidence that the conversation is being recorded. This section shall not apply to emergency reporting systems operated by police and fire departments and by rescue squads, nor to any communications common carrier utilizing service observing or random monitoring pursuant to § 19.2-62. (1983, c. 503; 1992, c. 567.)

The 1992 amendment, in the first sentence, added the clause designation (i), and added the language beginning "or (ii) the portion of the recording," and inserted "pursuant to clause (i)" in the second sentence.

I. Decisions Under Current Law.
A. General Consideration.

I. DECISIONS UNDER CURRENT LAW.

A. General Consideration.

A state evidentiary rule does not control admissibility of evidence in federal proceedings. Leitman v. McAusland, 934 F.2d 46 (4th Cir. 1991).

§ 8.01-420.3. Court reporters to provide transcripts; when recording may be stopped; use of transcript as evidence. — Upon the request of any counsel of record, or of any party not represented by counsel, and upon payment of the reasonable cost thereof, the court reporter covering any proceeding shall provide the requesting party with a copy of the transcript of such proceeding or any requested portion thereof.

The court shall not direct the court reporter to cease recording any portion of the proceeding without the consent of all parties or of their counsel of record.

Whenever a party seeks to introduce the transcript or record of the testimony of a witness at an earlier trial, hearing or deposition, it shall not be

Andrew D. Miller, "Federal Antisecrecy Legislation: A Model Act To Safeguard the Public from Court-Sanctioned Hidden Hazards," 1993 20 Environmental Affairs 370, 395 ff

business interests of corporate America, specifically the protection of the trade secret, and the public right of access to court records.[179]

V. The Model Act: A Federal Antisecrecy Law Establishing Judicial Guidelines For Limiting Access To Court Records In Civil Actions

1) **Public Hazard.** As used in this section a public hazard means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product, that has caused and is likely to cause injury.[180]

2) **Court Records.** The following information or documents are considered court records for the purposes of this statute:

A) all documents of any nature filed with, submitted to, or issued by the court, except:

1) documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents;[181]

2) documents in court files to which access is restricted by law;[182]

B) discovery, in any matter before the court, whether or not filed with, or submitted to the court, not including:

1) any information qualifying as a trade secret that does not conceal a public hazard, or information which may be useful to the public in protecting themselves from a public hazard.[183]

C) all settlement agreements, whether or not filed with the court, excluding all references to monetary considerations.[184]

3) **Balancing Test for Motion to Limit Access to Court Records.** All court records, as defined by this statute, are presumed open to the general public's inspection. A party seeking a protective order, the dismissal of a suit predicated on a confidential settlement, or a sealing order shall bear the burden for its justification.

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[179] *See supra* notes 33, 42–45 and accompanying text.

[180] Fla. Stat. Ann. § 69.081 (2) (West Supp. 1991).

[181] Tex. R. Civ. P. Ann. r. 76a(2)(a)(1) (West Supp. 1991).

[182] *Id.* at (2)(a)(2).

[183] *Cf. id.*(2)(c) (West Supp. 1991); *supra* notes 103–21 and accompanying text.

[184] *Cf.* Tex. R. Civ. P. Ann. r. 76a(2)(b) (West Supp. 1991). The provision includes within its' definition of court records "settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health and safety, or the administration of public office, or the operation of government." *Id.*

A) Upon motion to limit access, a court shall conduct an *in camera* examination of the materials in question. A court shall approve the release of notification for a pending public hearing upon a finding that:

1) there is a specific, serious and substantial interest in limiting access that clearly outweighs the public right to access;

2) the materials in question do not conceal a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the hazard;[185]

3) no less restrictive means than limiting access to the court records will protect the parties privacy rights.

Upon completion of a public hearing, a court may enter an order limiting access to any of the information or documents referred to in section (2) only upon finding, in light of information obtained through the hearing process, that the requirements of section (3)(A) have been met.[186]

4) Access by Government Officials.

A) No court may enter an order limiting access to information or documents referred to in section (2), to any federal or state government official with regulatory, investigative, administrative, legislative, judicial, law enforcement or other responsibility in regard to which the information or documents are relevant, even when the standards in section (3) have been met.

B) Any federal or state government official with regulatory, investigative, administrative, legislative, judicial, law enforcement or other responsibility shall comply with any order or agreement to limit access to the information or documentation in question, unless disclosure is necessary as part of a proceeding, undertaken by the federal or state governmental official against or involving the party that the information or documentation concerns, to protect the health and safety of the general public.[187]

5) Notice. Within 4 days of court approval of a public hearing, movant must post a notice in a location accessible to the public in

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[185] *Cf.* FLA. STAT. ANN. § 69.081 (3) (West Supp. 1991); *supra* note 148–49 and accompanying text.

[186] *Cf.* TEX. R. CIV. P. ANN. r. 76a(1) (West Supp. 1991); *supra* note 94 and accompanying text.

[187] *Cf.* WIS. S. 213, 90th Leg., § 3 (3) (1991); *supra* note 145 and accompanying text.

the federal courthouse in a place provided for that purpose by the court. Movant must also file notice with the United States Attorney General's Office assigned to the court. Movant must provide a copy of the notice, free of charge, to any person who requests a copy. The notice shall include all of the following:

A. The time and place the public hearing will be held.

B. The identity of the person who filed the motion, including names, addresses, and phone numbers of the attorneys for the parties in the civil action.

C. The caption and file number of the civil action.

D. A brief, specific description of the nature of the case and the information or documents that the person requests be withheld from access.

E. Notification that any person may intervene and be heard concerning the request to limit access.

Immediately after posting such notice the movant shall file a verified copy of the posted notice and an affidavit stating that the notice was posted and filed with the assigned United States Attorney General's Office with the clerk of the court in which the case is pending. The clerk of the court shall maintain a file of notices, filed under this subsection, and orders issued under section (3) that will be open to the public during regular business hours.[188]

6) **Hearing and Temporary Sealing or Protective Orders.**

A) A public hearing on the motion shall be held as soon as practicable, but not less then 14 days after the motion is filed and notice is posted. Any party may participate in the hearing. Non parties may go on record as intervening for the limited purpose of participating in the proceedings. If, upon the discretion of the court,

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[188] *See* TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991); *supra* note 123–24 and accompanying text; *cf.* Wis. S. 213, 90th Leg., § 3(5) (1991). The Wisconsin provision states that

> (a) [o]n the day on which a motion is filed requesting a court to issue an order limiting access to records in civil actions, the person who filed the motion shall post a notice in a location accessible to the public in the county courthouse in a place provided for that purpose by the county. The person who filed the motion shall provide a copy of the notice, free of charge, to any person who requests a copy. The notice shall include all of the following: 1. The identity of the person who filed the motion. 2. The names, addresses and phone numbers of the attorneys for the parties in the civil action. 3. The caption and file number of the civil action. 4. The time and place when a hearing will be held on the motion. 5. A brief, specific description of the nature of the case and the information or documents that the person requests be withheld from access. 6. A statement that any person, subject to 803.09, may intervene for the limited purpose of being heard on matters relevant to the motion.

Id. WIS. S. 213, 90th Leg., § 3 (5) (1991).

it is not feasible to conduct an open hearing, an *in camera* review may be undertaken with the aid of affidavits.

B) Upon motion and notice to all parties, the court, in its discretion, may issue a temporary sealing or protective order upon a showing of compelling need from specific facts demonstrated by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before a formal *in camera* review can be held. A temporary sealing or protective order may be modified or withdrawn by the court upon *in camera* review of the motion to limit access to court records as provided in section (3), and is automatically withdrawn upon commencement of the hearing as provided in part A of section (5).[189]

7) **Order on Motion to Limit Access.** A motion to limit access shall be decided by written order that rules solely on the motion and states the specific reasons for finding whether or not the standards required in section (3)(A) have been met. The written order shall state a) the style and number of the case, b) the time and place the public hearing was held, c) the identity of the movant including names, addresses, and phone numbers of the attorneys for the parties in the civil action, d) a brief, specific description of the nature of the case and the information or documents that movant requests be withheld from access, e) all parties and nonparties that participated in the hearing, f) the specific reasons for finding and concluding whether the showing required by section (3) has been made, g) and the information or documents to which an order limiting access applies, who is denied access, and the time period that access is denied. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, failure to comply with this requirement shall not affect its appealability. A copy of the order shall be filed with the clerk of the court for inclusion in the files created under section (5)(e), and with the applicable United States Attorney General's Office.[190]

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[189] *Cf.* TEX. R. CIV. P. ANN. r. 76a(4)–(5) (West Supp. 1991); *supra* notes 125–27 and accompanying text.

[190] *See* TEX. R. CIV. P. ANN. r. 76a(6) (West Supp. 1991); *supra* note 127 and accompanying text; *see also* Wis. S. 213, 90th Leg., § 3(8) (1991). The provision states that

> [a] motion to limit access shall be decided by a written order that rules solely on the motion and states the specific reasons for finding and concluding whether or not the standards required under sub. (2) have been met. If the court finds and concludes that the standards have been met, the court shall, except as provided in sub. (3), issue a written order limiting access. The written order shall specify the information or documents that the order applies to, who is denied access and the time period that

8) **Appeal of Order on Motion to Limit Access.** Any order or portion of an order ruling on a motion to limit access or any other request to limit access to information or documents referred to in section (3) shall be appealable by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may, in light of section (3) requirements, reverse the order, or abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.[191]

9) **Continuing Jurisdiction.** A court that enters an order under this section limiting access to court records retains continuing jurisdiction to enforce, alter, or vacate the order. Any person may bring a motion to enforce, alter, or vacate that order, subject to this section. An order shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, or who subsequently challenged the order, unless the party or intervenor shows that circumstances materially affecting the order have changed. Such circumstances need not be related to the case in which the order was issued. No order limiting access shall remain in effect unless the standards in section (3) are met at the time when the order is challenged or reconsidered.[192]

> access is denied. Any order limiting access shall ensure that access is denied only to information or documents in regard to which the standards required under sub. (2) have been met. A copy of the order shall be filed with the clerk of the supreme court and the clerk of circuit court for inclusion in the files created under sub. (5)(b).

Id. WIS. S. 213, 90th Leg., § 3(8) (1991).

[191] *See* TEX. R. CIV. P. ANN. r. 76a(8) (West Supp. 1991); *supra* notes 132–34 and accompanying text; *see also* WIS. S. 213, 90th Leg., § 3(9) (1991). The provision states that "[a]ny order or portion of an order ruling on a motion to limit access or any other request to limit access to information or documents referred to in sub. (1) shall be appealable pursuant to Section 808.03 (1) by any person who had the right to be heard in the hearing."
WIS. S. 213, 90th Leg., § 3(9) (1991).

[192] *See* TEX. R. CIV. P. ANN. r. 76a(7) (West Supp. 1991); *supra* notes 129–33 and accompanying text; *see also* WIS. S. 213, 90th Leg., § 3(10) (1991). The Wisconsin provision states that

> [a] court that enters an order under this section limiting access retains continuing jurisdiction to enforce, alter or vacate that order. Any person may bring a motion to enforce, alter or vacate that order, subject to this section. An order shall not be reconsidered at the request of a party or intervenor who had actual notice of the hearing preceding issuance of that order unless the party or intervenor shows that some relevant circumstances, not necessarily related to the case in which the order was entered, has changed. No order limiting access shall remain in effect unless the standards in sub. (2) are met at the time when the order is challenged or reconsidered.

WIS. S. 213, 90th Leg., § 3(10) (1991).

10) **Return and Destruction of Documents.** No court may enter an order requiring any litigant, attorney, government official, or member of the public to return or destroy any legally obtained information or document referred to in section (2).[193]

11) **Agreements and Orders to the Contrary are Void.** Any portion of any agreement, contract, stipulation, or court order that is contrary to the provisions of this section are void, contrary to public policy, and may not be enforced.[194]

VI. THE MODEL ACT: EXPLAINED

> 1) **Public Hazard.** As used in this section a public hazard means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product, that has caused and is likely to cause injury.

Paragraph 1 of the Model Act, defines "public hazard" as used in the Sunshine in Litigation Act.[195] This definition, in conjunction with the paragraph (3) balancing test of the Model Act, specifically targets environmental hazards, medical malpractice or misconduct, and defective products[196] as the most prominent and dangerous sources of public hazard. This broad definition would leave the classification of a public hazard open to judicial interpretation and provide for the adaptability of the Model Act to undiscovered future hazards.[197]

Critics have attacked this definition of "public hazard" as overbroad and dangerously inclusive.[198] Certainly this definition gives a judge discretion to determine what constitutes a public hazard.[199] "Device", "instrument", "person", "procedure" and "product" are

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[193] WIS. S. 213, 90th Leg., § 3(11) (1991).

[194] *See* FLA. STAT. ANN. § 69.081 (4) (West Supp. 1991); *supra* note 162–63; *see also* WIS. S. 213, 90th Leg., § 3(14) (1991). The provision states that "[a]ll provisions in contracts, agreements, stipulations and court orders that are contrary to the provisions of this section are void."
WIS. S. 213, 90th Leg., § 3(14) (1991).

[195] *See* FLA. STAT. ANN. § 69.081(2) (West Supp. 1991); *supra* note 158 and accompanying text.

[196] *See supra* notes 158–61 and accompanying text.

[197] *Id.*

[198] *See* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 482–83. Marcus argues that the Sunshine in Litigation Act is overinclusive. He states that even an individual who carries the AIDS virus can be classified under the Act as a "proven risk of injury to others" and thus a public hazard. *Id.*

[199] *See id.*

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APR 1 2 1994

Peter G. McCabe
Secretary
Committee on Rules of Practice
and Procedure of the Judicial
Conference of the United States
Washington, D.C. 20544

Dear Mr. McCabe:

Enclosed are the materials you requested in your April 8 letter. Presently, I am scheduled to undergo surgery to remove a herniated lumbar disc, in New York City on Tuesday, April 19, 1994. I am not yet certain I shall be able to attend the hearing in Washington on April 28. I shall attempt to telephone you to let you know with some certainty my availability on April 22. I can be reached at my home in New York beginning on April 16, at (212) 349-7517 should you need to contact me.

Sincerely,

Stephen Yagman

STEPHEN YAGMAN

Enclosure-testimony & vitae

TESTIMONY OF STEPHEN YAGMAN TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, WASHINGTON, APRIL 28, 1994

THE 1985 CHANGES TO RULE 83, F.R. CIV. P., THAT OSTENSIBLY PROHIBITED THE ISSUANCE OF STANDING ORDERS BY FEDERAL DISTRICT JUDGES WHOSE SUBSTANCE WAS IN CONFLICT WITH LOCAL COURT RULES, SHOULD NOT BE ALTERED, AND DISTRICT COURT JUDGES SHOULD NOT BE PERMITTED TO ISSUE STANDING ORDERS THAT ARE AT VARIANCE WITH LOCAL COURT RULES.

By Stephen Yagman

My name is Stephen Yagman, my practice is exclusively in the federal courts, and in the area of prosecuting cases under 42 U.S.C. 1983 against police for misconduct. I have provided a copy of my curriculum vitae for your convenience.

I give this testimony to oppose strongly any change in Rule 83 of the Federal Rules of Civil Procedure that would do away with, modify, or weaken the change in that Rule effected by its 1985 amendment, specifically the phrase in that Rule that provides as follows: "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with ... those [local rules] of the district in which they act."

The 1985 amendment to Rule 83 was enacted to confront "[t]he practice pursued by some judges of issuing standing orders [that] has been controversial, particularly among members of the practicing bar." And, "[t]he last sentence in Rule 83 [quoted just now] [was] amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules." Notes of Advisory Committee on the Rules, 1985 Amendment.

The Advisory Committee's precatory words at the end of its commentary on the 1985 Amendment that "[b]eyond that, it is hoped that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders," apparently have been ignored, and no attention whatever paid to this last sentence of the Committee's comments.

The reality is that, at least in the Central District of California, which I believe is either the largest, or the second largest federal district in the Nation, one is hard pressed to find but one judge who has not ignored completely the 1985 Amendment to Rule 83, and who does not have at least one standing order whose contents are at variance with some one of the court's local rules, and therefore is illegal under Rule 83.

Such standing orders that are at variance with the court's local rules cover topics from the form of early meeting reports, the manner of submitting and marking trial exhibits, and the manner of formulation and presentation of proposed jury instructions. While some say that variety is the spice of life, for small firm lawyers, sole practitioners, lawyers who regularly take cases on a contingency basis, and civil rights lawyers who usually fall into all of the other above categories, these one-judge standing orders are a miserable bane that retard the efficient practice of law. On the other hand, for large firm lawyers who bill by the hour to fee paying clients, these one-judge orders are yet an additional source of income.

The more Dickensian the practice, the more federal practice resembles medieval practice in which lawyers charged by the writ or by the word, the more money large firm lawyers make.

Thus, the practice of one-judge orders is a boon to that small part of the bar who sits atop the pyramid the bar is, and a big headache to the vast majority of the bar who are sole practitioners or small firm practitioners.

At bottom, the issue reduces to one of permitting individuality of judges against attempting to have uniform practice.

The balance weighs heavily against accommodating the urge of some judges to be complete masters in their own courtrooms, and in favor of rendering federal trial practice as uniform as is practicable, so as to invite access to the federal courts and as to make that practice as user-friendly as is possible.

Notwithstanding the recent historical trend to attempt to bar access to the doors of the federal courts, and to attempt to drive away litigants and lawyers who would bring their disputes to the federal courts, the office of the federal courts should be the opposite: to invite into an hospitable dispute resolution forum all those who wish to come there. Indeed, that must be the function of a system designed to replace forms of dispute resolution our society disfavors.

Consistency of practice, uniformity of practice, and ease of practice all are goals that should be had by our federal

court system. Indeed, I need not cite to you the many instances in which rules have been adopted to make uniform federal practice, and at the same time to do away with many forms of state law practice that make pleading, discovery, and trial practice cumbersome, unwieldy, and inhospitable to litigants and lawyers alike.

I know of not one judge in the Central District of California who had one-judge orders before the 1985 Amendment took effect, who changed his or her practice after the Amendment took effect. And, numerous judges who took office after that time simply have ignored the prohibition of one-judge orders.

These judges coerce compliance with these illegal orders by threatening or imposing sanctions, and by simply refusing to permit cases to come to trial unless and until lawyers cave in and obey patently illegal one-judge orders. In one such case, I sought mandamus, but it was refused because of the very stringent bases on which mandamus must be based. Such one-judge orders virtually defy appellate review, but I now have two such orders before the Ninth Circuit on direct appellate review. Thus, it is odd that the movement to get rid of the 1985 Amendment's provisions has emerged or has any steam.

Yet, the provisions of the Amendment should be strengthened, and should not be abolished.

There is no sound reason, except the desires of federal district judges to be the masters and mistresses of their own

domains, to do away with the provisions of the Amemdment. There is no sound reason why district judges who have good, workable ideas concerning practice cannot and should not get together and provide for uniform practice. Yet, apparently, they seem unable to do that, and then flood lawyers with endless, different one-judge orders as the result of their inability to formulate uniform rules of local practice. There just is no good reason for this practice, and it would be ill-advised to cater to the inability of judges to formulate uniform local rules by doing away with the 1985 Amendment to Rule 83.

What should be done, instead, is this. Rule 83 should be further amended to provide for challenges to one-judge orders that could be made to a committee of district judges who would be charged with invalidating any one-judge order that was inappropriate in light of the provisions of Rule 83. That is, teeth should be put in Rule 83. District courts should not be permitted to exist in any extent to cater to the personalities or idiosyncrancies of individual judges, but should be there and should be forced to be there to serve the "just, speedy, and inexpensive" resolution of disputes.

Since I have travelled here from Los Angeles, I think it appropriate to make two additional comments.

First, there is a lacuna in the Federal Rules to the extent that parties litigant are unable to compel appearance at trial of opposing parties. There is no reason for parties

to need to serve subpoenas on other parties to attend trial in the event such parties are subject to service of trial subpoenas. The practice of many states, including California, makes provision for serving a notice to appear on any party litigant to appear for trial, much as in federal practice, a party need not be subpoenaed for a deposition. This lacuna in federal practice places a large burden especially on civil rights plaintiffs, who often are unable to serve trial subpoenas on police, whose addresses are blocked in motor vehicle computers, whose addresses are not provided in discovery, and who cannot be served where they work because there is no cooperation in serving them there. Rule 45 should be amended to provide as follows: "Upon service of a notice to appear at trial on any party on whom service of a trial subpoena could be made pursuant to the provisions of this Rule, that party shall appear at trial as if he or she had been subpoenaed." There is no conceivable reason for this amendment not to be enacted.

Second, with the new availability of videotaping and audiotaping of depositions, there is no reason not to do away altogether with the expense of forcing a party who wishes to take a deposition to pay for an officer to take the deposition to be present simply to administer an oath. Therefore, Rule 30 ought to be amended to permit any lawyer who takes a deposition

in a federal proceeding to himself of herself administer the oath or affirmation to the deponent. That would make possible the taping of the deposition without the incurrence of the expense of a court reporter. Of course, under the newly-amended Rule, any other party would be free to have a court reporter present either to transcribe the deposition testimony and/or to administer an oath or affirmation if such is desired. Such a change would benefit civil rights plaintiffs who almost never have the financial means to pay for reporters who attend depositions and who are at a great disadvantage because of this factor.

In summary, the Balkanization, that is, the division of federal practice at the local level into smaller mutually different, if not hostile, bailywicks, is a very bad idea. It does not comport with the ideal of uniform practice. Teeth should be put in Rule 83, rather than sterilizing it. And, changes should be made to Rules 45 and 30 to make easier and less costly litigation in federal district courts.

COMMENTS ON THE NEED FOR AMENDMENT OF FEDERAL RULE OF CIVIL PROCEDURE 26(c)

SUBMITTED BY

LAWYERS FOR CIVIL JUSTICE AND

THE NATIONAL CHAMBER LITIGATION CENTER

SUBMITTED TO
THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUDICIAL CONFERENCE OF THE UNITED STATES

April 18, 1994

COMMENTS ON THE NEED FOR AMENDMENT OF FEDERAL RULE OF CIVIL PROCEDURE 26(c)

SUBMITTED BY
LAWYERS FOR CIVIL JUSTICE,[1] AND
THE NATIONAL CHAMBER LITIGATION CENTER
TO
THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUDICIAL CONFERENCE OF THE UNITED STATES

April 18, 1994

1. SUMMARY

We commend the Committee for its neutrality and restraint in drafting the proposed amendment to Federal Rule of Civil Procedure ("FRCP") 26(c), adding a standard to govern the modification of protective orders, while leaving intact the provisions regarding the initial issuance of such orders. The accompanying Committee Note also reflects careful research and a delicate balancing of interests.

The need for effective means to protect confidential information and a sensitive approach to the competing interests at play in litigation may be greater today than at any time in the past. As the world becomes an "information superhighway," legal protection for information as the new currency and property is vital. Civil litigation is information intensive. The procedural rules are highly invasive, compelling far-reaching production of information. The level of protection courts provide for proprietary or

[1] Lawyers for Civil Justice (LCJ) is national organization comprised of the three leading defense bar organizations, the Defense Research Institute, the International Association of Defense Counsel, and the Federation of Insurance and Corporate Counsel, corporations in the Fortune 500, and individual defense practitioners from around the country. LCJ's mission is to restore and maintain balance in the civil justice system for the benefit of the public.

personal information becomes of critical interest to society when the information itself is a commodity or possession. The proposed amendment to Rule 26(c) recognizes these realities and properly preserves the inherent authority of courts to protect information and control court records.

The Committee's research confirmed that there was no need to change the standards for issuing protective orders, and we believe the Committee reached the right conclusion on that issue. However, although we maintain that no amendment to Rule 26(c) was necessary in any respect, the proposed amendment serves a useful purpose by setting out standards for modification of protective orders.

Our experience was and is that the present system for issuing protective orders, with its good cause balancing of competing interests, has worked very well. Further, courts willingly have exercised their inherent authority to correct imbalances in the information flow, often *sua sponte*, providing crucial information to governmental offices or making it public when necessary. Courts were modifying and dissolving protective orders with alacrity, notwithstanding the absence of a unified standard. Allegations that the courts' authority to issue protective orders has been subverted to conceal information about hazards from the public just does not withstand scrutiny.

While we endorse the text of the proposed amendment as fair, we are concerned that it may lend itself to misinterpretation due to the political nature of the issue. To prevent such mischief, we recommend adding a sentence or two to the Committee Note to the effect that the amendment does not change the substantive law of access to information produced in litigation, nor does it affect the existing state of the law regarding intervention for purposes of modifying or dissolving a protective order.

With that minimal change, we support the amendment, although a strong case can be made for leaving matters as they are.

2. BACKGROUND

The movement to restrict the issuance of protective orders has its origins in efforts to gain greater access to information produced in litigation, particularly to unfiled discovery and settlement documents, information to which the Supreme Court had found no First Amendment right of access, and as to which no common law right of access ever existed.[2] The primary rationale for greater public access was that information produced in litigation revealed serious defects in consumer products or public exposures to toxic materials -- information that was being concealed from the public behind protective orders. It was said that cases involving such information were settled quickly in secrecy, and the public was never apprised about the underlying danger that led to the lawsuit in the first place. Without public disclosure of the alleged harm or defect, more injuries purportedly followed. Having issued the protective orders, the courts were said to be unwitting co-conspirators.

This image of lady justice gagged by court "secrecy" orders touched off a national campaign for "sunshine in litigation." The proponents sought enactment of state legislation and changes to state court rules. The campaign was supported by emotion-filled anecdotes regarding a number of consumer products, and the injuries that occurred because of the risks hidden from the public behind protective orders.

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[2] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

Some of the allegations lacked credibility on their face. For example, the Pinto was identified as a dangerous product whose dangers the public never learned about because of protective orders. But the initial Pinto cases were tried in open court under the eyes of a cadre of journalists. The breast implant cases also are cited, but they too were tried to a jury and no protective orders were ever entered in the initial cases. In fact, a quick search of Nexis reveals that media coverage of these defect allegations occurred when the lawsuits were first filed, long before any protective orders could have been issued in those cases.

A distinguished commentator searched for a cause and effect relationship between protective orders and subsequent injury to members of the public as alleged regarding a host of other products, but found none.[3] In every case, it was found that information about the alleged defect or harm was either erroneous, or there was already a public source of information to which the public had access. Protective orders, invariably issued long after any potential harm from a product would manifest itself, were made the scapegoat for flaws in the flow of information from the manufacturer or the press to the public. The commentator concluded that, "[n]one of these anecdotes reveals a cause and effect relationship between sealed court records and harm to public health or safety."[4]

Nonetheless, the false anecdotes were frightening. Even the idea that the courts were unknowingly acting contrary to the public weal was intolerable. As a result,

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[3] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991).

[4] *Id.* at 482.

93 separate proposals to restrict the use of protective orders and confidentiality in litigation were introduced over the last four years, primarily in state legislatures but also in state rulemaking bodies.[5] Legislation to modify Rule 26(c) or otherwise restrict the use of confidentiality in litigation in the federal courts was the subject of congressional hearings in the Senate in 1990 and in the House of Representatives in 1992.[6] Senator Herb Kohl of Wisconsin introduced similar legislation again in 1993, and has scheduled a hearing for April 20, 1994. None of the federal bills ever left the committee of origin.[7]

Whether by coincidence or design, most of the proposals put forth took one of two approaches: the first was to prohibit and nullify any court order, agreement, or contract that would "conceal a public hazard."[8] Public hazard was defined broadly to include any "product, instrument, person, activity, or entity" that "has caused or is likely to cause injury." The second most common approach was to restrict courts' authority to issue protective orders or sealing orders that would prohibit public disclosure of information concerning a "probable adverse effect on public health or safety, or the

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[5] See attached legislative activity report.

[6] *See Examining the Use of Secrecy and Confidentiality of Documents By Courts in Civil Litigation, Hearing before the Subcomm. on Courts and Administration Practice of the Senate Judiciary Comm., 101st Cong., 2d Sess.* (May 17, 1990); H.R. 2017, H.R. 3803, 102d Cong., 1st Sess.; *Hearing on H.R. 2017, Federal Sunshine in Litigation Act and H.R. 3803, Federal Court Settlements Sunshine Act, Before the Subcomm. on Intellectual Property and Judicial Administration of the House Judiciary Comm., 102d Cong., 1st Sess.* (Sept. 10, 1992).

[7] "Open Court Records Act of 1993," S. 1404, 103d Cong., 1st Sess. (1993).

[8] Fla. Stat. § 69.081 (1993); *see, e.g.*, Hawaii S.B. No. 671, 17th Legis. (1993); Massachusetts H.B. 3608 (1993); *cf.* "Sunshine in Litigation Act," Colo. S.B. 94-173 (replacing term "public hazard" with term "injury source").

administration of government."[9] Neither provision explained how, or when, or where, or by whom it was to be determined that these standards had been met. Both courts and litigants complained that the standards were unworkable, and in fact, required the court to prejudge the merits of the case simply to determine whether a blanket protective order should issue to manage discovery.[10] As time went on, several variations of these themes appeared. In every case the proposals drastically limited trial court discretion to make decisions regarding confidentiality on a case-by-case basis.

It is quite striking that, notwithstanding the broad media coverage and legislative fervor used to promote such legislation and rules, only three such restrictive proposals out of 93 were ever adopted.[11] One of the more restrictive laws, from Washington, was repealed this year and replaced by a more moderate provision in response to concerns about the harsh effects of the original law on proprietary information and trade secrets produced in litigation.[12] Five other states felt moved to

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[9] Texas Rule of Civil Procedure 76a (West 1993); *see, e.g.*, Maine S.P. 439, 116th Legis. (1993).

[10] *See, e.g.*, Judge J. Michael Bradford, *Rule 76a*, Jeff. Cty. Bar J. (Spring 1991); *see also* Chuck Herring, *Sealing Court Records: Unanswered Questions and Unsolved Problems*, Tex. Law., May 21, 1990 at 24; *cf.* Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643 (1991) (author of Rule 76a concedes rule will require adjustment).

[11] "Sunshine in Litigation Act," Fla. Stat. § 69.081 (1993); Tex. R. Civ. P. 76a (1993); Washington Engrossed Substitute Senate Bill 6484, signed by the Governor on March 21, 1994, to be codified at ch. 4.24, Rev. C. Wash.

[12] As Governor Mike Lowry of Washington stated on signing S.B. 6484 repealing more restrictive legislation from 1992, "This measure recognizes that advancing the public's right to know and protecting confidential proprietary information are equally essential to a flourishing society." Statement for Governor's Signing of SSB 6484, Mar. 21, 1994.

take some action, and they adopted rules or laws that essentially codified existing practice.[13]

Thus, the movement to enact legislation or promulgate rules sharply restricting protective orders has been largely unsuccessful. Nonetheless, as one commentator observed, it has sensitized members of both state and federal benches to the tension between a potential public interest in the substance of civil litigation between private litigants and the needs of the litigants for confidentiality during the litigation process.[14] It is, perhaps, that sensitivity that justifies promulgation of the proposed revisions to Rule 26(c), since most commentators agree that there is no demonstrated need for such revisions.[15]

3. THE SCOPE OF PUBLIC ACCESS IS NOT CHANGED

Since national attention has been focused on the issue of public access and confidentiality, any discussion of protective orders automatically triggers discussion about the extent to which non-parties to litigation are entitled to access to the private information produced therein. Although debate continues, the scope of public access to judicial proceedings and the information produced throughout the litigation process is

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[13] *See, e.g.,* "Sealing of Court Records," Delaware Superior Court Civil Rule 5(g) (added May 31, 1991); "Sealing of Court Records in Civil Actions in the Trial Courts," 22 NYCRR Part 216, New York Uniform Rules of Trial Courts (added Mar. 1, 1991); Va. Code ch. 16, Title 8.01-425.1 (1993).

[14] *See* Miller, *supra* note 2, at 502.

[15] Miller, *supra* note 2; Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. Ill. L. Rev. 457.

relatively well-defined by common law tradition and Supreme Court decisions.[16] Nothing in the proposed amendments to Rule 26(c) should be understood to modify the existing substantive law of public access in any way. Indeed, such modifications would be beyond the scope of the Committee's rulemaking authority.

Thus, establishing a standard to modify or dissolve a protective order, as provided in the proposed amendment, does not authorize a court to now grant access to any information to which access could not have been granted prior to the amendments, such as unfiled discovery. To illustrate, it is clear that at present no right of public access exists to unfiled discovery.[17] However, non-party litigants in other cases against the same defendant have been given access to unfiled discovery, solely for efficiency purposes, to use in their own litigation. When that is done, the information is provided subject to any protective order or other safeguards applicable in the original case.[18] In theory, the non-party litigant is only being given what he would be entitled to in the other litigation anyway, so such disclosure does not enlarge the scope of access rights. Furthermore, courts have refused such requests for access when the request for access

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[16] Generally, public access is permitted to information presented in open court, to information contained in court files, and to information used in dispositive motions, such as summary judgment. *See* Miller, *supra* note 2, at 439-41, nn. 57-58 (explaining leading Supreme Court decisions).

[17] *Seattle Times*, 467 U.S. at 34-35; *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1334-35 n.7 (D.C. Cir. 1985) (Scalia, J.).

[18] Manual for Complex Litigation (Second) § 21.431; *see also Report of the Federal Courts Study Committee*, pp. 102-03 (April 3, 1990).

has been denied during discovery in other litigation, and access would circumvent that denial.[19]

When litigation is settled without a trial, it follows that there still is no right of public access to the information that was produced, because it is still unfiled discovery. The fact of settlement does not transform the status of the unfiled discovery materials, nor does it create any new or different right in the public that did not exist prior to settlement. Consequently, members of the public or media seeking access to information from a settled case have no different right to access than if they had requested access during the active discovery process. To be sure, it can be argued that there is no right of access at all once a case is settled, because there is no case or controversy left for the court to preside over.[20] Lacking jurisdiction, the court is powerless to compel former parties to produce otherwise confidential information.

Equally important, the proposed amendments should not be understood as implicitly authorizing intervention for purposes of modifying or dissolving a protective order, in situations or to entities, which would not have qualified for intervention prior to the amendment. The law on intervention for purposes of modifying or dissolving a protective order is unsettled. It varies based on the entity or person seeking intervention, the point in the litigation at which intervention is requested, and the

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[19] *See, e.g., In re Eli Lilly & Co., Prozac Products Liability Lit.*, 142 F.R.D. 454 (S.D. Ind. 1992); *Stack v. Gamill*, 796 F.2d 65 (5th Cir. 1986).

[20] *See Poliquin v. Garden Way*, 989 F.2d. 527 (1st Cir. 1993) (Keeton, J., dissenting) (arguing that a district court altogether lacks jurisdiction to modify a protective order after the parties voluntarily dismiss a case and incorporate the terms of the protective order in the settlement agreement).

purpose for which intervention is sought.[21] Consequently, the amendment is properly understood as only establishing a standard for modification or dissolution once a court has affirmatively answered the threshold question of whether intervention is proper.

Given the heated nature of the debate on access and protective orders, it is not far-fetched to expect counsel or litigants with strong feelings about these issues to seek judicial interpretations of the Rule 26(c) changes that are consistent with their vision of what the law should be. To prevent over-reaching or misconstruction of the proposed amendments, it is essential to include a sentence or two in the Committee Notes cautioning that the amendments do not resolve these conflicting visions. Neither the law of access nor the law of intervention is changed -- only the standard for modifying a protective order is addressed. Absent such a clarifying statement, we are concerned that the proposed amendments could lend themselves to considerable misunderstanding and be used to undermine the confidentiality needs of litigants.

4. CONCLUSION

Perhaps the greatest single flaw in the legislative and rulemaking proposals put forth in the "sunshine in litigation" campaigns was replacing judicial discretion with arbitrary rules that predetermined the outcome without regard for the facts. The

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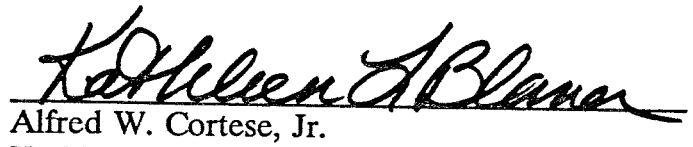
[21] *See, e.g., Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227 (1st Cir. 1992) (intervention to seek access to documents subject to protective order three months after judgment denied as not timely); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3rd Cir. 1988) (court lacked authority to require parties to concluded action to return documents subject to protective order to court for inspection and copying by third party intervenors); *Palmieri v. State of New York*, 779 F.2d 861, 864-65 (2d Cir. 1985) (protective order should not be modified post-judgment absent most compelling circumstances).

proposed amendment's virtue is that it directs courts to three relevant factors to consider, but it permits them to consider other factors as well, does not give any single factor greater importance, nor does it prescribe a hierarchy of preferences. Instead, courts are given broad latitude to use the prescribed factors to arrive at results that are just for the unique facts involved.

Our preference would be for no substantive changes to Rule 26(c) at all. However, the Committee's careful review of the issues involved and its restraint in dealing with them have resulted in modest changes that do not detract from the ability or discretion of district courts to protect confidentiality as fully as ever. The changes made aim to clarify an area where some uncertainty now prevails, and we believe a clarifying sentence in the Committee Note will prevent any over-reaching interpretations of the amendments. Consequently, we have no basis for objection to the proposal, and we reiterate our respect and support for the Committee's work.

Respectfully submitted,



Alfred W. Cortese, Jr.
Kathleen L. Blaner
KIRKLAND & ELLIS

Attachment

STATE PROTECTIVE ORD

States Where Bills Introduced in 1990	States Where Bills Introduced in 1991	States Where Bills Intro 1992
ALASKA - defeated	**ALABAMA** - adjourned without action 7/29/91	**ALASKA** - HB 171, SB 411: he
FLORIDA - leg. passed	**ALASKA** - carried over to 1992	**CALIFORNIA** - SB 711: veto
GEORGIA - defeated	**ARKANSAS** - defeated 3/22/91	**CONNECTICUT** - HB 582
HAWAII - defeated	**CALIFORNIA** - carried over to 1992	**FLORIDA** - const. amend
MARYLAND - defeated	**COLORADO** - defeated 2/14/91	**GEORGIA** - SB 610: held
MISSOURI - defeated	**CONNECTICUT** - defeated 4/29/91	**HAWAII** - HB 2019, HB 20 action
NEW YORK - rule adopted, see 1991	**DELAWARE** - rule adopted 6/1/91	**ILLINOIS** - HB 276, SB 245: adjour
PENNSYLVANIA - defeated	**FLORIDA** - rule rejected 3/15/91	**IOWA** - HF 2423, SF 2317: adjourned w
RHODE ISLAND - vetoed	**HAWAII** - carried over to 1992	**LOUISIANA** - HB 916: defeated in House 6
TEXAS - rule passed	**IDAHO** - draft not introduced	**MASSACHUSETTS** - H 3202, S 850: held in cm
VIRGINIA - leg. passed	**ILLINOIS** - carried over to 1992	**MICHIGAN** - HB 5644: held in cmte.
	IOWA - carried over to 1992	**MINNESOTA** - SF 1228, HF 1434: failed to meet cmte. reporting deadline
	KANSAS - defeated 2/18/91	**MISSISSIPPI** - HB 1240: held in cmte. 3/10
	LOUISIANA - vetoed 7/26/91	**NEW JERSEY** - Rule 1:2-1 adopted by Supreme Court 7/1
	MAINE - defeated 5/7/91	**NEW YORK** - AB 8347: adjourned without action 7/30
	MASSACHUSETTS - defeated 4/23/91	**OHIO** - Rule 43 pending
	MINNESOTA - carried over to 1992	**OREGON** - Amendment to ORCP Rule 36c.(2) dropped
	MISSISSIPPI - defeated 2/5/91	**PENNSYLVANIA** - SB 656, HB 751, HB 752: adjourned without passage
	MONTANA - defeated 2/26/91	**RHODE ISLAND** - H 8736; S 2456 adjourned without action 7/14
	NEVADA - adjourned without action 6/30/91	**WASHINGTON** - HB 1320: adjourned 2/12 without passage: State Bar Rule Proposal pending
	NEW HAMPSHIRE - defeated 5/1/91	**WISCONSIN** - SB 213: adjourned without passage 3/27
	NEW JERSEY - adjourned without action	
	NEW MEXICO - defeated 3/7/91	**FEDERAL** - H 2017, H 3803 held in House Judiciary Subcommittee on Intellectual Property
	NEW YORK - rule adopted 2/4/91; legislation carried over to 1992	
	OREGON - adjourned without action 6/30/91	
	RHODE ISLAND - defeated 6/6/91	
	SOUTH DAKOTA - defeated 2/20/91	
	VIRGINIA - defeated 2/4/91	
	WASHINGTON - carried over to 1992	

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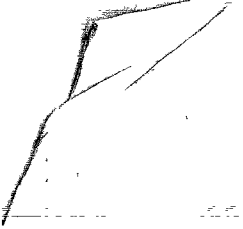

Research Division
202-273-4070

memorandum

DATE: April 15, 1994
TO: Advisory Committee on Civil Rules
FROM: John Shapard
SUBJECT: Survey of counsel regarding possible amendments to Rule 68.

This is a preliminary report of the responses received in our questionnaire survey of counsel regarding possible amendments to Rule 68. It is based on responses received from about 35% of those to which the survey was sent. A follow-up mailing will be done soon, which we expect will produce a final response rate of roughly 50%.

Although survey researchers can in some instances offer useful insight about how non-respondents might compare to respondents, this is not one of those instances. It is a subject best suited to speculation. My speculation is that the majority of non-respondents didn't respond because they simply didn't care to be bothered with the survey (and hence that their responses would not likely differ much from those who did respond). Some of them, however, probably didn't respond because they have strong feelings of animosity--whether to Rule 68 in particular or to the Rules or rule changes in general--and did not respond because doing so might lend support to an effort of which they disapprove.

Sample of Cases

The questionnaires for the survey were sent to counsel in a sample of cases drawn from the population of all federal district court civil cases terminated in the first six months of 1993 (the most recent six months for which we had the relevant data at the time the case sample was selected). Because the objective of the survey was to obtain information relative to cases of a type that might be influenced by amendment to or abolition of Rule 68, a number of categories of cases were excluded from the population. Of the 114248 cases in the population, fully 79763 were eliminated for at least one of the following reasons:

- Termination of the case was not an actual disposition of the litigation (cases terminated by transfer to another district or remanded to state court or to an administrative agency)

- Cases disposed of in a manner suggesting little likelihood that there was reason or opportunity to consider a decision whether to go to trial or instead to settle the case (cases disposed of by default judgment, dismissal for want of prosecution, lack of jurisdiction, or by other pretrial motion to dismiss, and cases dismissed voluntarily by plaintiff before defendant filed an answer in the case)[1]
- Cases whose subject matter is such that "trial" and "settlement" are often inapposite (appeals from decisions denying social security benefits or from bankruptcy court decisions, petitions for writs of habeas corpus or for writs of mandamus by prisoners, motions to vacate sentence, deportation cases, and actions for mortgage foreclosure)
- Cases of a type in which settlement is otherwise thought very unlikely or problematic for reasons unrelated to the incentive rationale of Rule 68 (asbestos product liability cases and prisoner civil rights cases)

The remaining cases were divided into four categories: contracts, torts, civil rights (about half being employment discrimination cases), and all others. 200 cases were selected from each category, 100 chosen at random from among those that had been disposed of by trial, and 100 chosen at random from among those that had not reached trial. This produced a total of 800 cases.

We then requested from the clerks of court the docket cover sheets for these cases, and from these obtained the names and addresses of counsel of record (approximately 2000 attorneys) in these cases. The questionnaire that is the subject of this memorandum was sent to counsel in all but the civil rights cases. A different questionnaire was sent to counsel in the civil rights cases (owing to the very different influence of rule 68 in these cases). A preliminary report of the responses obtained for the civil rights questionnaire will be provided at the Advisory Committee meeting.

RESULTS

The very brief bottom line is that a significant majority of counsel--both plaintiffs' and defendants' counsel--support the idea of making Rule 68 a "two-way" device with significant post-offer attorney fee compensation for the offeror whose offer is refused and not bettered at trial. There is also a notable minority of counsel who believe such a rule would have negative consequences.

The responses are tabulated in some detail in the attachment, which is a copy of the questionnaire with result tabulations substituted for answer spaces. Most tabulations reflect the

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[1] Some of the cases excluded might well have been appropriate for inclusion (e.g., a case dismissed voluntarily by plaintiff before an answer is filed might have been dismissed because of a prompt settlement). Because we cannot discern whether a case settled based on the data available to us about the population of federal civil cases, we chose to eliminate all cases in any category that we judged to include only a small proportion of cases actually suitable for the survey. To do otherwise would have posed increased risk that we would solicit the assistance of counsel in answering our questionnaire, only to learn that the question we asked had no relevance in the circumstances of the specified case.

percentage of respondents that selected the indicated answer (as a percentage of those who gave some answer to the question). The percentages should sum to 100 for those questions that instruct the respondent to "check one" answer, but may sum to more than 100 for questions that invited the respondent to "check each" answer that applies or with which they agree. Questions for which there may be interest in comparing the responses of plaintiffs' and defendants' counsel include breakdowns of all responses, "ptf" responses, and "def" responses. Note that many respondents do not fall cleanly into either plaintiff or defendant categories (e.g. where a counterclaim was filed). They are included among all responses but not in either the plaintiff or defendant groups.

The remainder of this memorandum provides a brief tour of the questionnaire, explaining the purpose of certain questions and offering some thoughts about the implication of the results. These are merely "some thoughts," and are probably best treated as useful for provoking the reader's own analyses rather than as definitive statements of what the survey proves.

1. The cover page's explanation of Rule 68 and the first two questions serve in part merely to get the respondent thinking about the topic. The respondent was invited at the end of the questionnaire to revisit questions 1 and 2 and select new answers if they so chose. Few did, but the tabulations provided reflect respondent's "final" answers. The results show that a majority of respondents favor at least some enhancement of the incentives aspects of Rule 68. A small but significant minority (about 20%) favor abolishing the rule. The first three answers (chosen by 60% of respondents) would make Rule 68 available to both plaintiffs and defendants, and provide for some attorney fee-shifting. Unfortunately (and to the author's excruciating embarrassment), answer "c" was misstated in such a way that it is unclear precisely what those who chose that answer had in mind.[2] Clearly they support some form of fee-shifting as an incentive for making and accepting reasonable offers, but it is otherwise unclear what the answer means.

2. Question 3 was intended partly just to verify the accuracy of the information I had used to identify tried and non-tried cases, and also to provide a valid estimate of the proportion of cases that are settled rather than tried. The accuracy of the tried/not tried distinction was verified (the tried cases include those disposed of by trial, those settled after trial, and those now on appeal). The estimate of proportion of cases settling is not yet complete, but it is clear that it is much lower than often supposed. Of the 114,000 district court cases counted as "closed" in the first half of 1993, only 2.9% reached trial, and at most 38% could possibly have settled.

3. Question 4 was intended to help distinguish between tried cases that might have settled and tried cases in which trial was unavoidable. It achieves that objective only to a limited extent. Responses a, b and c, at least, may identify cases that could not have settled. At least one of these responses was chosen by 39% of respondents. Response e may identify cases that could

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[2] The figures "$120,000" and "$80,000" were transposed in the illustration, leading to the possible inference that an *offeror* might have to pay *offeree's* post-offer attorney fees if the offer did not prove superior to the judgment. I am extremely grateful to the respondent who telephoned me to point out the error.

have settled. It was selected by 55% of respondents. In general it appears that about half of the cases that go to trial might have been settled.

The difference between plaintiffs' and defendants' counsels' views of the likely outcome of cases is reinforced by the answers to question 6, which suggests that on average, defendants would have been willing to pay in settlement only about half of what plaintiff's demanded, with the discrepancy being notably greater in cases that were tried than in those that were settled or otherwise disposed of short of trial.

Question 12 may provide particularly noteworthy insights when we compare answers from plaintiffs and defendants in the same case. With the current response rate, we have just 63 cases in which questionnaires were received from both plaintiffs' and defendants' counsel (that number should at least double if the final response rate is 50%). Among these 63 cases are 38 that went to trial, but only 22 for which attorneys from both sides answered question 12. Of these 22, plaintiff's demand significantly exceeded defendant's bottom-line offer in 18 cases, but the reverse was true in 3 cases, and the difference was very small ($35,000 demand versus $30,000 offer) in one case. These four cases went to trial but apparently would not have if the two sides' "bottom-line" positions were known to each other. The sample of 22 cases is too small to permit reasonable generalizations, but it does appear that some non-trivial proportion of tried cases could have settled simply through more effective communication, which might be facilitated by an amended Rule 68.

4. Question 5 helps to assess the proportion of settled cases in which settlement might have occurred earlier than it did and at less cost, and question 8 helps to gauge how much expense is saved by settlements. The responses suggest that about 70% of cases settle about as fast (or at least as cheaply) as they can, and a faster cheaper settlement might have occurred in about 30%, with an average savings of about 50% of litigation costs. Question 8 indicates that the average litigation expense saved by settlement is about $30,000 (median $12,500). Among those who said that the case could have settled earlier and with significant savings, that average expense incurred (question 8a) was $132,000, and the average expected cost to proceed through trial would have been $50,000 more.

Response d to question 5 is actually a different question, which along with question 15 was designed to obtain information about the significance of "risk aversion" as a factor influencing settlement decisions.[3] 9% of respondents checked answer 5d, which is one was of

[3] Risk aversion can be understood in the context of a defendant facing a 10% chance of a $1,000,000 judgment, which is in simple economic terms equivalent to a certain loss of $100,000. If a $1,000,000 judgment would mean bankruptcy but $100,000 would not, then I would likely be risk averse, and so be willing to pay somewhat more than $100,000 to settle the case. To elaborate the concept a bit, suppose I would be bankrupt either way. $1,000,000 won't make me *more* bankrupt than $100,000, so I would be risk-prone, having no alternative but to gamble on the 10% chance of winning and having no loss. Risk aversion can also work in the context of possible gains. A plaintiff with a 50% chance of winning a $1,000,000 verdict might well settle for less than $500,000, being averse to the 50% risk of winning nothing, and given that even $300,000 is a large increase in plaintiff's wealth. In contrast, it makes no sense to trade

saying that the client was risk averse. The answers to question 15 indicate that counsel generally see risk-aversion as playing a role in settlement decisions, especially in regard to the risk of a financially ruinous loss (answer b), but a minority--albeit a large minority--agreed that risk aversion disadvantages a party who is at risk of failing to win a large increase in wealth. Notably, a majority also indicated that the wealthier party has the advantage in litigation, regardless of the range of possible outcomes in the case, a view which tends to imply the existence of financially irrational behavior among litigants (e.g., a willingness to pay my lawyer $10,000 to avoid having to pay the plaintiff $5,000--or to force the defendant to pay me $5,000).

5. Question 6 helps quantify the proportion of cases in which Rule 68 might be employed without potential difficulties in determining whether a judgment was more or less favorable than an offer. About 85% of the cases involved requests for either monetary relief alone or monetary and comparatively insignificant non-monetary relief. The other 15% involved requests for significant non-monetary relief, and so might be problematic for application of the rule in some forms. Apparent differences between plaintiffs' and defendants' counsel might be due to either of two causes. First, it might simply be that defense counsel are more likely to see a request for non-monetary relief as frivolous or inconsequential than are plaintiffs' counsel. Instead, however, the differences may be a product of the fact that I have tabulated answers by respondent, not by case. We do not in most instances have a response from one side whenever we have a response from the other side (that is true for 139 of the responses, concerning 63 cases). Some of the cases for which defendants' counsel responded have (so far) no response from plaintiff's counsel, and vice-versa. Hence comparison of the two groups' responses will not necessarily yield identical tabulations even for such a non-subjective question as "was this case closed by jury verdict."

6. Question 7 addresses the nature of the "real" dispute in the case. Some proposed modifications to Rule 68 can be expected to work most satisfactorily in cases where only damages are at issue, and to be less effective in cases where only liability is seriously at issue. The responses indicate that damages were unclear in about half of the cases, liability only was uncertain in about 30%, and there was little uncertainty in about 20%. Comparison of the tabulations for all cases with those for settled cases suggests that cases are more likely to be tried when liability is at issue, and more likely to settle when liability is clear. This question is also one of the few in which apparent differences appear between the responses of plaintiffs' and defendants' counsel. In general, defendants' counsel seem more likely to perceive uncertainty in a case (whether concerning damages or liability) than are plaintiffs' counsel. Caution is needed at this stage of the analysis, however, for the reasons explained under 5, above.

7. Question 9 attempts to measure the extent of perceived "abuses" of pretrial process (e.g., abuse of discovery), on the thought that the risk of post-offer fee-shifting under an amended Rule 68 might inhibit such abuses. Parts a and b of the question address what I'll call "intentional "

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a 50% chance of winning $10 for less than $5, since $10 is not a significant increase in wealth. Finally, it might be noted that playing the lottery is an example of risk-prone behavior, at least for those who recognize that what one buys for $1.00 is a lottery ticket typically worth around $0.50 (e.g., equivalent to a one percent chance of winning $50--or a one in ten million chance of winning $5,000,000).

and "unintentional" abuses. Parts c, d and f (sic - there is no e), related to litigation expenses arising from appropriate use of process. Overall, 57% of respondents identified some portion of their own litigation expenses as caused by abuses. Again on an overall basis, abuses account for about 20% of litigation expense,[4] divided about equally between intentional and unintentional. It is worth noting that on average, the answers attribute about 60% of all litigation expenses as being "caused" by the opponent. This is not anomalous; there is no reason to suppose that the figure should ideally be 50%. Certain discovery requests, for instance, may often entail more work for the requestee than for the requestor.

8. Question 13 is perhaps the most significant question in the questionnaire. It provides a somewhat more objective measure of how Rule 68 might affect cases if made "two-way" and given more "teeth." Unsurprisingly, the majority indicated that such a rule would have made no difference in the specific case (unsurprising since a fair proportion of cases were either destined to be tried or were settled without much difficulty). 26% indicated that such a rule would likely have led to an earlier settlement and reduced expenses (5% said the opposite); 13% said such a rule would have resulted in a more favorable result for his or her client (2% said the opposite). Although it is risky to express much confidence in the significance of comparisons at this stage, there is also the suggestion that plaintiffs' counsel are more likely than defendants' counsel to expect that such a rule would have had beneficial effects and less likely to expect it to have made no difference (but there is no apparent difference between groups in expectation of negative consequences).

Question 14 is similar to 13, except that it solicits the respondent's opinion about the potential consequences in general--rather than in application to a particular case--of an amended Rule 68. The responses to question 14 indicate that a significant majority or plurality of respondents anticipate that such a rule would have [presumably] positive consequences, such as resulting in more settlements (75%), earlier settlements (63%), and reduced litigation expenses (43%). Notable minorities, however, anticipate at least some negative consequences, such as inhibiting reasonable steps in litigation out of fear that a party may have to pay the opponents costs of responding to such steps (24%).

Please telephone me at 202-273-4070 if questions occur to you that I might address through further tabulations of the responses. I will endeavor to provide relevant tabulations at the Advisory Committee meeting.

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[4] This needs to be taken with a grain of salt at this point, since in the sample as a whole, tried cases are represented in a much larger proportion than they occur in the starting case population. Among settled cases, the relevant mean is 12% of litigation expenses (rather than 20%).

[Attachment]

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 case. The rule may be significant 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 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 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. Several ideas have been proposed for amending Rule 68 to increase the incentive to make and accept early and reasonable settlement offers. Another idea, advocated in the belief that the current rule is unfair or pointless, is simply to abolish Rule 68. Which of the following options for amending Rule 68 do you believe would generally lead to the fairest outcomes for all parties in civil litigation? (Please check **one**)

Percentages (Ptf/Def)[1]

36 (25/41) a. Allow recovery of the reasonable attorney fees incurred by the offeror after making the offer.

8 (8/7) b. Same as a, above, but allow recovery of some percentage of reasonable post-offer attorney's fees (which could be more or less than 100%). What percentage?: _____% of reasonable fees.

16 (17/14) c. 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 than plaintiff's offer to accept $120,000 (or defendant's offer to pay $80,000). In either case, if offeror's reasonable post-offer attorney fees were $30,000, the offeree would be obliged to pay only $10,000 in compensation for those fees.

0 (1/0) d. Allow recovery of some multiple of statutory costs. What multiple? ___ times costs.

10 (11/12) e. Allow recovery of post-offer costs plus expert witness fees or other expenses not ordinarily taxable as costs (what other expenses?: _____).

3 (2/2) f. Allow recovery of a percentage of the amount of the judgment. What percentage?: _____%

18 (28/13) g. Abolish Rule 68 altogether.

9 (9/11) h. Leave Rule 68 as it is.

(N=431)

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 of post-offer fees or other expenses recoverable by either party could not exceed $10,000. Hence a plaintiff could lose the entire amount of the judgment, but not more. Do you favor or oppose this provision?

34 (34/35) a. Favor

47 (42/52) b. Oppose

19 (25/13) c. Unsure or inapplicable (e.g., because I support abolition of Rule 68)

(N=432)

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[1] The overall percentages represent responses provided by counsel for parties of all types, while the plaintiff and defendant percentages include only counsel who indicated that the party represented was exclusively in plaintiff or defendant status. Other types of parties are both (e.g. where a counterclaim is filed), third party defendants and the like.

PART II. NOTE: 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 your memory concerning its litigation and the associated expenses. Please understand that our motive in asking these questions is not to pry about details of your case, but rather to provide systematic information—which does not now exist—about factors that may influence the effectiveness of Rule 68.

3. How was this case resolved? (please check only **one** answer)

8 a. It has not been resolved (Please indicate "NA" next to any subsequent questions that you are unable to answer because the case has not been concluded).
24 b. By verdict after a jury trial
14 c. By verdict after a bench trial
2 d. By summary judgment
2 e. By dismissal with prejudice
1 f. By voluntary dismissal without prejudice
4 g. By a stipulated disposition that amounted to capitulation by plaintiff or defendant
32 h. By a compromise settlement or consent judgment entered into before the case reached judgment in the district court.
4 i. By a settlement entered into after verdict or other final judgment (e.g., pending appeal)
9 j. Other. Please explain: _____

(N=431)

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.)

11 (8/12) a. The matters at stake 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).
23 (17/21) b. One or both parties were more concerned about matters of principle or were too emotionally invested in the case to accept a compromise resolution.
14 (12/13) c. The stakes in the case were so great that the costs of litigation were relatively insignificant, so that there was little incentive for settlement on the part of at least one party.
13 (16/11) d. The outcome of the case was so highly unpredictable that there really was no way to find a satisfactory compromise.
55 (43/57) 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.
5 (2/4) 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.
12 (19/7) g. No serious settlement offers were made. I don't understand why.
2 (2/2) h. Serious settlement negotiations occurred, but failed. I don't understand why they failed.
23 (25/21) i. Other. Please explain: _____

N=243 (95/98)

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

35 (34/38) 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.

35 (37/35) b. This case could have settled earlier than it did, although not at significant savings in litigation expenses.

27 (25/27) c. This case could have settled earlier than it did, with significant savings in litigation expenses. About what percentage of total litigation expenses could have been saved?: **mean 50%**

9 (6/7) 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.

N=186 (83/71)

6. What remedy or remedies were sought in this case? (please check only **one**)

77 (78/88) a. monetary relief only

3 (3/2) b. non-monetary relief only

7 (8/5) c. both monetary and non-monetary relief, with the monetary relief much more significant than the non-monetary relief

5 (8/2) d. both monetary and non-monetary relief, with the non-monetary relief much more significant than the monetary relief

7 (3/3) e. both monetary and non-monetary relief, with both being of considerable significance (i.e., not c or d)

N=431 (173/174)

7. When the outcome of a case is a matter of significant uncertainty, the uncertainty may be due mainly to: (1) uncertainty about damages (with liability fairly clear), (2) uncertainty about liability--or at least about liability for some significant component of alleged damages (with the measure of damages relatively clear), or (3) both of these. Please select **one** of the following statements to indicate the nature of the uncertainties in this case.

All (ptf/def) Settled Cases

29 (35/31) 22 a. liability was seriously at issue, but damages were fairly clear

14 (16/12) 22 b. liability was fairly clear, but damages were uncertain

37 (25/40) 32 c. both liability and damages were uncertain

20 (24/16) 24 d. there was not much uncertainty about either damages or liability

N=428 (171/154) 156

8. 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 arrangement 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 litigation expense for your client in this case?
mean (median) Tried cases: $192,000 (48,000); non-tried cases: $57,000 ($12,000)

b. About what percentage of total litigation expenses was attributable to attorney fees? 79 (80)%

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 likely would have been decided by summary judgment or have been appealed). $33,500 (12,500)

9. 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%.)

63% zero, median of non-zero=20	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.
52% zero, median of non-zero=20	Expenses incurred in necessary response to actions of an opponent that were unreasonable or ill-considered, although probably not undertaken primarily to increase my client's expenses or to delay or complicate the litigation.
mean 41%	Expenses incurred in necessary response to actions of an opponent that were reasonable in light of the circumstances of the case.
mean 18%	Expenses incurred at the initiative of me or my client, and which did not necessarily require that opponent incur expense in response.
mean 22%	Expenses incurred at the initiative of me or my client, and which probably or clearly required that opponent incur expense in response.
57% non-zero, mean overall (including 0s)= 18% (N=384)	*Sum of first two above (needless expense) No significant differences when broken down by plaintiffs' and defendants' counsel.*

10. What was the nature of the fee arrangement with your client in this case?

61 (32/86) a. Hourly fee (exclusively or primarily)
25 (55/1) b. Contingent fee
7 (6/9) c. In-house counsel or other compensation unrelated to time spent or result achieved
1 (1/1) d. Flat fee
6 (6/3) e. Other. Please explain: _____

_____

N=428 (171/175)

11. What type of party was your client in this case?

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

_____

(N=431)

12. 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 due to an interest in establishing precedent, vindicating principles, or the like. (Place answer in the appropriate space to indicate whether the final offer would have involved paying or accepting a sum in settlement.)

ALL CASES	Plaintiffs (N=124)	Defendants (N=116)
Mean	230,000	116,000
Median	100,000	30,000
Tried Cases		
Mean	268,000	102,000
Median	100,000	35,000
Non-Tried Cases		
Mean	173,000	137,000
Median	50,000	25,000

13. 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 **each** of the following statements that is applicable to this case (whether or not it settled).

Such an amended Rule 68 probably would have:

60 (51/64) a. made no difference in this case

26 (34/22) b. made settlement more likely or led to an earlier settlement, and thus probably resulted in significant savings in litigation expenses

3 (2/4) c. delayed settlement, and probably led to greater litigation expenses.

2 (2/2) d. made settlement less likely

7 (8/6) e. resulted in a less favorable result for my client

13 (13/12) f. resulted in a more favorable result for my client

2 (5/1) g. caused my client never to have brought or defended the case, or led me to refuse to accept the case

N=429 (172/173)

PART III. The questions in this part pertain to your general experience, practice, or opinions concerning civil litigation.

14. Again suppose that Rule 68 were amended as explained in the previous question. Please check **each** of the following statements with which you agree concerning the likely effects of the rule, in civil cases generally. **The amended rule probably would:**

Percentages

All	Ptfs	Defs		
75	76	71	a.	result in more cases reaching settlement
3	3	3	b.	result in fewer cases reaching settlement
62	67	59	c.	lead cases to settle earlier than they would in the absence of the rule
4	4	3	d.	delay settlement
24	23	23	e.	lead to case outcomes (net outcome from settlement or trial) that are more fair
9	5	13	f.	lead to case outcomes that are unduly generous to plaintiffs
9	17	3	g.	lead to case outcomes that are unduly generous to defendants
18	27	9	h.	lead to case outcomes that are unduly generous to wealthier litigants
5	2	6	i.	lead to case outcomes that are unduly generous to poorer litigants
13	15	11	j.	lead to case outcomes that are less fair, although not necessarily to the advantage or disadvantage of any particular class of litigants
10	10	11	k.	increase the expenses of litigation
43	47	41	l.	decrease the expenses of litigation
34	32	34	m.	inhibit actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation
9	10	10	n.	increase the frequency of actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation
24	27	21	o.	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
17	18	6	p.	encourage taking reasonable and/or necessary steps in litigation, owing to the possibility that those expenses will be compensated by opponent
5	4	6	q.	make no difference

N=428 (168/175)

15. 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.

17 (10/25) a. Financially weaker parties are generally at no disadvantage compared to wealthier parties.

61 (70/53) 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.

32 (44/25) 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.

62 (70/54) d. Financially weaker parties are generally at a disadvantage compared to wealthier parties, regardless of the range of possible outcomes in the case.

21 (11/29) e. Financially weaker parties generally have an advantage, or at least an offset to other disadvantages, because juries are inclined to render generous verdicts against wealthier parties and/or inadequate verdicts against poorer parties.

N=414 (165/166)

16. Please check the statement that best describes how you generally arrive at a final, 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: _____

NOTE: The most commonly offered answer to this question was "a," but the second-most common was "e (other." In most instances the "other" answer was explained as a combination of two or more of the canned answers (e.g., "a and c"). The results do not appear at first blush to tell us much more than that most counsel do engage in some form of more- or less-sophisticated "risk analysis" when considering settlement.

17. 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?

4 a. 3 or fewer
6 b. between 4 and 10
9 c. between 11 and 25
82 d. more than 25

18. Approximately what percentage of the civil cases that you handle or work on are cases in federal district court.

	All	Ptf	Def
Mean%	41	38	42
Median%	20	25	30

19. 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.

20. Please provide on the back of this page any additional comments or suggestions you may have concerning Rule 68.

☐ 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, Ext. 357.

APRIL 22 SUMMARY OF STILL-MORE-RECENT COMMENTS ON PROPOSED RULES

Rule 26(c)(3)

ABCNY provides a 21-page comment that is difficult to abbreviate. The conclusion is that present practice achieves all the good things hoped for proposed Rule 26(c)(3), and it is likely to work mischief.

One major theme is that different modification standards should apply to "blanket protective orders." If a protective order results from actual court consideration of specific discovery materials, a high burden should be imposed on the person seeking modification. The rule should specify that the burden is high. If instead the parties have agreed to a blanket order that wins unreflected judicial endorsement and that relies on unilateral designation of protected materials, a demand for release of protection should impose the burden of justifying protection on the party who seeks protection. This approach accomplishes the result that now follows from well-drafted blanket orders: a producing party who wishes protection must move for a material-specific protective order if another party challenges a designation of confidentiality. Although reliance on the blanket order can be considered, the party seeking protection should demonstrate good cause.

A second major theme is that the draft does not list all the factors that bear on modification or dissolution. It is doubtful whether any rule can capture all the relevant factors. One omitted factor is whether the party seeking modification "has subpoena powers" – if so, there is less need for modification. Another factor is whether the material has become a "judicial record" by actual use in a judicial proceeding that implicates the right of public access.

A third major theme is that the draft may result in a less stringent test than current practice. Only compelling public needs should warrant modification, not a mere curiosity "interest." Discovery is designed to resolve private disputes, not to serve the public welfare. And there is no showing that the public welfare would be advanced by relaxing protective orders. The need to avoid duplicating discovery burdens should be recognized only for "similar," "related," or "collateral" litigation. If discovery protective orders are not reliable, potential litigants may refrain from bringing good claims or resisting bad claims.

ATLA "recommend[s] minor additions to the proposed rule to further advance the provision's laudable objectives. (1) Language should be added "which dispels any doubt that there is a presumption against court-imposed secrecy." (2) The right of third parties to intervene to seek dissolution or modification should be expressly recognized. (3) The amendment should apply to secrecy provisions in final judgments. (4) The Committee Note reference to studies finding no public harm should be deleted, because other studies find that protective orders do cause public harm. (5) The Note should not refer to the usefulness of blanket protective orders; they are contrary to case law and there is no support for the view that they facilitate discovery.

Rule 43(a)

ABCNY agrees with deleting the requirement that in-court testimony be presented "orally." It urges that transmission from another place should be permitted only in "exceptional circumstances," borrowing the test of Rule 32(a)(3)(E); if the "good cause" standard is retained, the Committee Note at least should make clear that "mere convenience of the witness" is not good cause. This recommendation rests on the multiple advantages of in-court testimony and disadvantages of transmitted testimony: (1) The witness may be less willing to lie in sight of counsel, court, parties, and jury; demeanor supports better evaluation of credibility, and may provide clues for effective cross-examination; (2) A witness presented on a monitor may be distorted, "body language may be lost," and this testimony – being different in mode of presentation – may be singled out for special attention; (3) The court has less control over an absent witness, and cannot control the transmission process; (4) In an extreme case, there may be collusion by such means as off-camera signals to coach the witness, and sending a representative to the transmission site as protection will prove costly.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

April 26, 1994

MEMORANDUM TO MEMBERS OF THE CIVIL RULES COMMITTEE

Attached is a cover memorandum from Professor Howard M. Downs, University of California, Hastings College of the Law. It is to accompany the material he had sent to you on April 21, 1994. The memorandum you had received previously from him was intended for law reviews.

Judy Krivit

Judy Krivit
Staff Assistant

Attachment

MEMORANDUM

TO: Advisory Committee on Civil Rules

FROM: Professor Howard M. Downs
University of California, Hastings

DATE: April 20, 1994

RE: Rule 23 Proposed Revisions

* *

After conversation with Professor Edward H. Cooper concerning your meeting on April 28, I have decided to forward immediately two recent articles studying Rule 23. The articles are, in general, self-explanatory and contain a number of suggestions for consideration by the committee, but three preliminary observations are in order relating to the current proposed revisions:

1. In 23 (a)(3) the change from typical claims or defenses of the representative to "positions" which are typical may be read as an attempt to modify General Telephone v. Falcon. A vital historical protection of the class is that the representative is asserting the same or similar claims as the class, a protection which was reaffirmed in General Telephone. See Downs, Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims); The Impact of General Telephone v. Falcon, 54 Ohio State Law Journal 607 (1993), which is enclosed. The

committee comments on Subdivision (a) add to this uncertainty by stating that 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." This may be read as dispensing with a rigorous analysis of representative claims compared with class claims and does not reflect multiple issues to be analyzed and compared in a securities action such as the same misrepresentations and nondisclosures, curative statements, and as to pendent claims, choice of law and reliance issues. See Downs, supra, 54 Ohio State Law Journal 690-698 and Appendix A, Chart C to the enclosed Case for Reform article.

2. The decision to combine the categories and to facilitate discretionary notice is well justified by these studies. With approximately fifty percent of all class cases involving combined certification and settlement, the settlement notice has become more crucial and the inadequate content of the settlement notice is not addressed by the committee. See Downs, Federal Class Actions: ... The Case for Reform which is enclosed.

3. The committee revisions authorizing use of a magistrate judge or master are appropriate but do not go far enough in requiring greater judicial scrutiny of settlement processes.

I am deeply appreciative of the effort and difficulties facing the committee in revising Rule 23 and trust that this input will be helpful.

HMD:edd

REPORTER'S SUMMARY

Comments on Proposed Amendments:
Civil Rules 26, 43, 50, 52, 59, 83, and 84

On October 15, 1993, the Committee on Rules of Practice and Procedure published for public comment proposed amendments to Civil Rules 26, 43, 50, 52, 59, 83, and 84. The public comment period closes on April 15, 1994. A public hearing on the proposals is scheduled for April 28, 1994, to coincide with the first day of the Civil Rules Advisory Committee meeting in Washington, D.C.

This note summarizes the three written comments that have been transmitted by the Administrative Office to the Reporter as of April 1, 1994.

General

John L.A. Lyddane finds "these amendments are essentially non-controversial" and sees "no reason why they should not be implemented."

Rule 50

Judge Cornelia G. Kennedy is concerned that Rule 50(b) continues to be ambiguous on the question whether a motion for judgment as a matter of law must be renewed after verdict "where the court simply fails to rule on the motion made at the close of the evidence rather than denies it." Her court – the Sixth Circuit – does not require renewal "if the trial court reserved its decision on the motion to see if the jury verdict would make the issue moot. If the motion must be renewed under all circumstances, perhaps it would be better to say so."

Rule 83

Stephen Yagman expresses concern that the proposal "do[es] away with" the final sentence of Rule 83, which now requires that procedural orders by individual judges be "not inconsistent with these rules or those of the district in which they act." Since the proposal requires that procedural orders by individual judges be "consistent with federal law, rules adopted under * * * §§ 2072 and 2075, and local rules of the district," the concern must reflect the change from "not inconsistent with" to "consistent with." He extols the virtues of uniformity in local practice.

ADDITIONAL COMMENTS: 1993 PROPOSED AMENDMENTS

Public Citizen Litigation Group

All of the following comments were set out in a single submission by the Public Citizen Litigation Group.

Rule 26(c)(3)

Generally support the proposal. But suggests: (1) "Return or destroy" orders should be permitted only if the party providing discovery responses retains both the request and responding materials in readily accessible form for the benefit of future litigants. (2) It should be made clear that a protective order can be amended after judgment. (3) Iy may be intended to suggest, by way of an allusion to the last sentence of the Note, that Rule 26 should be amended to provide for amendment of protective provisions included in a judgment. (4) The Rule or Note should state that a court may require that unfiled materials be filed, even after the case has concluded. (5) It should be provided that a nonparty can move for modification without intervening. (6) The list of factors to be considered should be deleted in favor of a "good cause" standard. Considering the extent of reliance may too often defeat modification. Courts seem to have balanced the appropriate factors reasonably well under a general good cause standard.

Rules 50, 52, and 59

The comment reflects the belief that Rule 6(a) permits filing by mail without actual receipt by the court. If a change is intended, it should be made clear. (The source of this belief is uncertain. Rule 5(e) provides for filing with the clerk or a judge. The cases and treatises say that filing requires actual receipt by the clerk or judge; filing by mail occurs at the time of receipt, not at the time of mailing. Cooper v. City of Ashland, C.A.9th, 1989, 871 F.2d 104; Torras Herreria y Construcciones, S.A. v. M/V Timur Star, 6th Cir.1986, 803 F.2d 215, 216; Lee v. Dallas Cty. Bd. of Educ., C.A.5th, 1978, 578 F.2d 1177, 1178 n. 1, 1179; 4A C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d, § 1153.) It also is suggested that provision should be made for filing by private courier services. Local rules have conflicting provisions for filing by means other than United States mail, and should be replaced by a uniform national practice.

Rule 84(b)

This is a good idea, but it is not clear that it is authorized by 28 U.S.C. § 2072. Congress should be asked to amend the statute to confer this authority on the Judicial Conference. The procedure should include provision for notice and comment, and for transmittal to the Supreme Court and Congress at least 30 days before technical changes become effective.

APRIL 22 SUMMARY OF STILL-MORE-RECENT
COMMENTS ON PROPOSED RULES

Rule 26(c)(3)

ABCNY provides a 21-page comment that is difficult to abbreviate. The conclusion is that present practice achieves all the good things hoped for proposed Rule 26(c)(3), and it is likely to work mischief.

One major theme is that different modification standards should apply to "blanket protective orders." If a protective order results from actual court consideration of specific discovery materials, a high burden should be imposed on the person seeking modification. The rule should specify that the burden is high. If instead the parties have agreed to a blanket order that wins unreflected judicial endorsement and that relies on unilateral designation of protected materials, a demand for release of protection should impose the burden of justifying protection on the party who seeks protection. This approach accomplishes the result that now follows from well-drafted blanket orders: a producing party who wishes protection must move for a material-specific protective order if another party challenges a designation of confidentiality. Although reliance on the blanket order can be considered, the party seeking protection should demonstrate good cause.

A second major theme is that the draft does not list all the factors that bear on modification or dissolution. It is doubtful whether any rule can capture all the relevant factors. One omitted factor is whether the party seeking modification "has subpoena powers" – if so, there is less need for modification. Another factor is whether the material has become a "judicial record" by actual use in a judicial proceeding that implicates the right of public access.

A third major theme is that the draft may result in a less stringent test than current practice. Only compelling public needs should warrant modification, not a mere curiosity "interest." Discovery is designed to resolve private disputes, not to serve the public welfare. And there is no showing that the public welfare would be advanced by relaxing protective orders. The need to avoid duplicating discovery burdens should be recognized only for "similar," "related," or "collateral" litigation. If discovery protective orders are not reliable, potential litigants may refrain from bringing good claims or resisting bad claims.

ATLA "recommend[s] minor additions to the proposed rule to further advance the provision's laudable objectives. (1) Language should be added "which dispels any doubt that there is a presumption against court-imposed secrecy." (2) The right of third parties to intervene to seek dissolution or modification should be expressly recognized. (3) The amendment should apply to secrecy provisions in final judgments. (4) The Committee Note reference to studies finding no public harm should be deleted, because other studies find that protective orders do cause public harm. (5) The Note should not refer to the usefulness of blanket protective orders; they are contrary to case law and there is no support for the view that they facilitate discovery.

Rule 43(a)

ABCNY agrees with deleting the requirement that in-court testimony be presented "orally." It urges that transmission from another place should be permitted only in "exceptional circumstances," borrowing the test of Rule 32(a)(3)(E); if the "good cause" standard is retained, the Committee Note at least should make clear that "mere convenience of the witness" is not good cause. This recommendation rests on the multiple advantages of in-court testimony and disadvantages of transmitted testimony: (1) The witness may be less willing to lie in sight of counsel, court, parties, and jury; demeanor supports better evaluation of credibility, and may provide clues for effective cross-examination; (2) A witness presented on a monitor may be distorted, "body language may be lost," and this testimony – being different in mode of presentation – may be singled out for special attention; (3) The court has less control over an absent witness, and cannot control the transmission process; (4) In an extreme case, there may be collusion by such means as off-camera signals to coach the witness, and sending a representative to the transmission site as protection will prove costly.

SUMMARY OF MAIL-DELAYED COMMENTS ON PROPOSED RULES

April 22, 1994

Rule 26(c)

The Reporters Committee for Freedom of the Press believes the proposal "could * * * be improved still further" by: (1) An explicit statement that the public interest should be considered in the initial determination whether to enter a protective order; and (2) Stating in the Committee Note that the examples of public interest "are illustrative, not exhaustive."

Trial Lawyers for Public Justice, based on experience with their "Project ACCESS," decries the "disastrous" results of "unnecessary secrecy" under present practices. They believe that the proposal is a step backward. Only the first sentence should be retained, explicitly recognizing the power to dissolve or modify a protective order. If anything more is to be done, it should be to state that on motion to dissolve or modify, a party seeking to maintain protection must bear the burden of showing "good cause" for continued protection. Without an explicit good cause standard, courts will feel invited to backslide into some more open-ended approach.

The additional factors listed in the proposal are nefarious. The reference to "reliance" is irrelevant; the only question is whether there is continuing good cause for protection – if the court would order production now, that is all that counts. The reference to "public interest" should be moved up to subdivision (a) as a factor that can override a valid private interest and prevent initial issuance of a protective order. The reference to persons seeking information for other litigation is undesirable because not even initial protective orders should bar access by litigants in other actions – it is enough to condition access on agreement to be bound by the protective order and consent to jursdiction of the court that issued the protective order.

Rule 83

The Federal Magistrate Judges Association would reject three features of the proposal. (1) There is no compelling reason to require that local rules adhere to a national numbering system. (2) The 83(a)(2) restriction on enforcing local rules is vague – what is a matter of form? a negligent failure to comply? – and will undercut local rules, encouraging careless practices. (3) The new final sentence of 83(b) would forbid enforcement of widely accepted norms, including those not codified in any form of order, and is unwise.

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

April 27, 1994

Senator Herb Kohl
United States Senator
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Kohl:

Peter McCabe has forwarded your letter of April 25, 1994 submitting comments to the Advisory Committee regarding proposed changes to Federal Rule of Civil Procedure 26(c). I have asked Peter McCabe to furnish a copy of your letter to each member of the committee. Its incisive and candid grasp of this difficult problem is welcome.

With your indulgence, I will delay the detailed response your letter deserves until I have the benefit of the full Advisory Committee discussion later this week. We are pleased that counsel Jack Chorowsky, and perhaps others, will attend our session.

We appreciate the opportunity to present testimony to your committee. I see the beginning of a promising dialogue.

Sincerely yours,

Patrick E. Higginbotham

cc: The Honorable Howell Heflin
The Honorable Charles E. Grassley
The Honorable Joseph R. Biden
The Honorable Orrin G. Hatch
The Honorable Janet Reno
The Honorable L. Ralph Meacham
The Honorable Frank Hunger
The Honorable Alicemarie H. Stotler
Dean Edward H. Cooper
Mr. Peter G. McCabe

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 26, 1994

Mr. John K. Rabiej
Rules Committee Support Office
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear John:

Per our discussion last week, find enclosed Senator Kohl's comments on the Committee's proposed modification to Rule 26(c). Thanks so much for keeping the comment period open, and please call if you have any questions about the enclosed submission. I look forward to Thursday's session.

Sincerely,

Jack Chorowsky
Counsel

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

April 25, 1994

Peter G. McCabe, Esq.
Secretary
Advisory Committee on Civil Rules
Judicial Conference of the United States
Room 4-170
1 Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing in response to Judge Higgenbotham's kind invitation to submit comments regarding proposed changes to Federal Rule of Civil Procedure 26(c) now under consideration by the Advisory Committee on Civil Rules ("Advisory Committee").

At the outset, allow me to commend the Advisory Committee for taking a studied look at whether the Civil Rules, in their current form, allow for the proper balance to be struck between openness and confidentiality in the issuance of protective orders, and relatedly, whether existing protective order practice has adversely affected public health and safety.

Before turning to the specifics of the proposed modification to Rule 26, I would like to comment briefly on some of the views, assumptions, and conclusions that appear to have informed the Committee's decision-making process to date with respect to this issue. I draw my characterization of the Committee's sentiments from the draft Commentary accompanying the proposed rule, from Judge Higgenbotham's April 20, 1994 testimony before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee on this subject, and from a Memorandum on Protective Orders prepared by Dean Edward Cooper in 1993 which was submitted by Judge Higgenbotham with his congressional testimony ("Cooper Memorandum").

1. <u>The Need for Change</u>

Perhaps most troubling, in my view, is the conclusion which appears to premise the Advisory Committee's efforts with regard to Rule 26(c), namely 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 paragraph 3 of the proposed Committee Note to the Rule 26(c) amendment; Cooper Memorandum at 1. Both references are supported by citations to 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).

As an initial matter, it would seem that the Advisory Committee's decision to propose a modification to Rule 26 undermines the proposition that there is no problem worth addressing; for absent a problem, why suggest a modification at all? More importantly, however, experience and "actual practice" suggest that the quoted statement is simply inaccurate and off-base.

As Judge Higgenbotham is well aware, the $4 billion mass tort settlement in the consolidated breast implant litigation might well have been substantially smaller had a protective order not been issued by a federal court in the now-famous Stern v. Dow Corning case. The plaintiff in Stern had discovered documents fairly characterized, in my view, as "smoking guns" strongly indicating the dangers of implants in 1984. These documents were kept from the public and, equally importantly, from the FDA as a result of a protective order gagging the plaintiff, her attorneys, and her expert scientific witnesses. It took regulators and the public another seven years following Stern to learn about the dangers of silicon breast implants. During that seven year period, almost one million uninformed American women chose to receive implants. Thus, the largest mass tort settlement in American history also comprises a chapter in the story of how protective orders have adversely affected American public health and safety.[1]

As serious and troubling as it is, the case of silicon breast implants is not the only example in this regard. Since 1990, we have engaged in extensive discussions about this matter with government regulators, attorneys, public health and safety

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[1] The role that court secrecy played in the silicon breast implant saga is documented, among other places, in a memorandum that was submitted to me on April 18, 1994 by Dr. Norman Anderson, Professor of Medicine at Johns Hopkins Medical School and former chairman of the Food and Drug Administration's Advisory Panel on Breast Implants. I would be pleased to provide the Committee with a copy of Dr. Anderson's memorandum upon request.

experts, and consumer advocates. These discussions have uniformly led to the conclusion that the fields of food and drug litigation more generally, as well as vehicle safety litigation, are both replete with examples of the use of protective orders to shield important information bearing on health safety from the public.[2] Perhaps even more importantly, there are very strong indications that protective orders have had the effect of keeping important information from the agencies Congress has charged with protecting the public health and safety.

Let me clarify the proposition that I believe the collective weight of the anecdotal evidence supports. It does not support the position that "court secrecy" is the only factor at play in denying the public and regulators information; nor does it prove the point that court secrecy in all or even most cases

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[2] See, e.g., Testimony of Benjamin Kelley, President, Institute for Injury Reduction, Hearing of the Senate Judiciary Subcommittee on Courts and Administrative Practice, April 20, 1994; Testimony of Professor Charles Clausen, Director of Clinical Education, Marquette University Law School and Principal Drafter of the Wisconsin Rules of Civil Procedure, Hearing of the Senate Judiciary Subcommittee on Courts and Administrative Practice, April 20, 1994; Testimony of Arthur Bryant, Executive Director, Trial Lawyers for Public Justice, Hearing of the Senate Judiciary Subcommittee on Courts and Administrative Practice, May 17, 1990; Testimony of Dianne Weaver, Esq., Hearing of the Senate Judiciary Subcommittee on Courts and Administrative Practice, May 17, 1990; Walsh & Weiser, "Public Courts, Private Justice," The Washington Post, October 23-26 (1988) (four-part series); McGonigle, "Secret Lawsuits," Dallas Morning News, Nov. 22, 1987 at 1A; McGonigle, "Sealed Lawsuits," Dallas Morning News, Nov. 23, 1987 at 1A; see generally, F. Hare, J. Gilbert & W. ReMine, Confidentiality Orders (1988).

See also J. Graham, "Product Liability and Motor Vehicle Safety," in The Liability Maze (P. Huber and R. Litan, eds.) (1991). In this well-received compendium published by the Brookings Institution, Professor Graham of Harvard writes that with regard to improving motor vehicle safety, "two strategies are particularly promising: provision of better safety information to consumers and a revitalized regulatory process." Graham notes that "the power of judges to insist on confidentiality" in litigation "has had the potentially perverse effect of limiting the amount of publicity directed at vehicles and manufacturers" in cases where sufficient efforts have not been made to enhance vehicle safety.

constitutes an absolute bar to the dissemination of information. (These, I should note, are the arguments that supporters of the status quo typically make in taking issue with the evidence.) But the research does suggest that court secrecy is a serious, and substantial factor contributing to the ignorance of the public and often regulatory agencies.

Finally, I urge the Committee to scrutinize more carefully the authorities upon which it appears to base its conclusion that there is no problem with the current use of protective orders. Neither Professor Marcus nor Professor Miller purport to engage in an empirical (or even a looser, anecdotal) review of the use of protective orders.[3] Their scholarship is, in the main, theoretical and impressionistic, discussing in general terms the values implicated by the debate over confidentiality in the court system. Though unquestionably eminent and distinguished scholars, neither Professor Miller nor Professor Marcus, I believe, is or recently has been involved in substantial litigation affecting public health or safety. That is not to say that their articles do not contain thoughtful observations; but to allow such works to form the basis for the Advisory Committee's conclusion that a problem does not "in practice" exist is, respectfully, less than sound. Indeed, until I became involved in this issue, it had always been my perception that the Advisory Committee typically based its actions on credible empirical and experiential evidence, rather than the kind of generalized, conceptual discussions found in the Miller and Marcus articles.

2. Countervailing Considerations

The broader public interest in health and safety must, of course, be weighed against legitimate interests that litigants may have in confidentiality. In balancing these interests, I would urge the Advisory Committee to scrutinize carefully not only the arguments of advocates for additional openness as it seems to have already done, but the arguments in favor of confidentiality as well. The legitimacy of these arguments appear to be taken as true almost reflexively; but how they play

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[3] Professor Miller does engage in a brief critique of a handful of cases that have been discussed in the debate over confidentiality in the courts (at pp. 481-482). I dispute his characterization of some of these cases, as well as the lessons to be drawn from them and would be happy to supply the Advisory Committee with additional information in this regard upon request.

out in practice is often neglected. Most judges and attorneys will readily recognize that the use of protective orders is not limited to those cases where litigants have proven with any degree of rigor the existence of legitimate trade secrets or other truly sensitive competitive information.[4] While the text of Rule 26(c) reflects a presumption in favor of openness (i.e., protective orders are only to be authorized upon showing of "good cause") and a burden on the party seeking a protective order, in practice, both the presumption and burden often mean little when a party with substantial resources threatens to fight discovery tooth and nail unless the opposition stipulates to a wide-ranging protective order -- irrespective of the actual merits of such claims as a matter of law.

And, of course, when opposing parties agree to confidentiality, courts have little reason or incentive under the current system to question its propriety. All this is not to say that confidentiality is never appropriate; but my discussions with members of both the plaintiffs and defense bars, and the judiciary suggest that claims of confidentiality are not infrequently unsupported or unduly sweeping. These claims therefore ought to be discounted appropriately when the Committee considers how best to strike the balance between the public and private interests enmeshed in civil litigation. My concern is that, to date, the Advisory Committee has been far more eager to question and discount the claims of those who advocate openness than the claims of those who advocate privacy and confidentiality.

This, in turn, suggests to me that the Committee may not be putting sufficient stock in the notion that the courts are charged with doing the public's business and pursuing the public interest -- not just the interests of individual litigants before the courts. While the so-called "public law" model of civil litigation may not find favor in the eyes of some judges and academics, *I can assure the Advisory Committee that the democratic constituency which ultimately lends the courts their legitimacy is, without exaggeration, shocked at how little consideration the public interest and public health and safety*

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[4] Literature published by the defense bar illustrates this point: "Even where defense counsel can make no special claim of confidentiality, he or she should routinely seek a protective order limiting the dissemination of discovery material." See Kearney and Tracy, "Preventing Non-Party Access to Discovery Materials in Product Liability Actions: A Defendant's Primer," 1987 Defense Res. Inst. Monograph 40-41.

concerns receive as the courts mete out civil justice. In my view, the extent to which the courts ought to be responsive to such public concerns is no small issue; and it is not necessarily the type of technical legal question that belongs in the exclusive province of the judicial conference to address.

3. The Proposed Rule 26(c) Modification

By its terms, the Advisory Committee's proposed modification to Rule 26(c) merely clarifies the authority judges already possess to modify or entirely dissolve protective orders. Therefore, I do not see the proposed modification as striking a more appropriate and reasoned balance between openness and confidentiality. To be sure, such a clarification does send a message to district judges that they ought to be more solicitous of the public interest in the issuance of protective orders. But the message is decidedly weak: it does not direct district judges to consider the public interest in the first instance, when making the original decision to issue a protective order. I fail to grasp why the public interest -- specifically public health and safety concerns -- should be relevant to a decision to modify or dissolve a protective order, but not relevant to a decision to issue such an order in the first place.

Moreover, even if the proposed modification expressly applied to the decision to issue an order, the current text only suggests that the court "consider" the public interest. That is, of course, what courts are supposed to do today, even in the absence of such clarifying language. My deep concern is that if past practice is any indicator, a mandate to "consider" public health and safety imperatives would be largely inadequate. In my view, and that of many others, there should be a category of cases in which, at a minimum, a presumption against the issuance of protective orders exists.

Reasonable people can disagree as to how to best define such a category and under what circumstances the presumption could be rebutted. I would begin, however, with the proposition that an appropriate formulation would only encompass cases implicating public health and safety concerns (a discrete subset of lawsuits filed in federal court), and that any presumption against secrecy in such cases could, at the very least, be rebutted where legitimate trade secrets were at stake. To this I would add language clarifying that no protective order may be construed as preventing parties or their attorneys from making post-settlement disclosures to regulatory authorities.

In sum, it does not appear likely, in my view, that the proposed modification will work a significant change in protective order practice. Indeed, I am unconvinced that as a result of this change the courts will scrutinize with considerably more care requests for protective orders (especially those made by both parties) in cases affecting public health and safety. As Judge Higgenbotham knows, I have introduced legislation (S. 1404) that would, in fact, work a significant change in current practice. I would be equally happy, however, to forego my legislative efforts if the Advisory Committee were to revise its proposed modification to respond to the many critics of current practice (including those who have testified at our 1990 and 1994 hearings) and the brief comments set forth above.

Allow me to thank the Advisory Committee in advance for considering these comments. I look forward to a productive dialogue on this issue between the Judicial Conference and the Congress.

Sincerely,

Herb Kohl

Herb Kohl, U.S.S.

cc: The Honorable Howell Heflin
The Honorable Charles E. Grassley
The Honorable Joseph R. Biden
The Honorable Orrin G. Hatch
The Honorable Janet Reno
The Honorable L. Ralph Meacham
The Honorable Frank Hunger