Advisory Committee on Civil Rules
Tuscaloosa, Alabama
November 9-11, 1995

I. Opening Remarks of Chairman. (Oral report.)

II. Approval of Minutes of April 1995 Meeting.

III. Report on September Judicial Conference Session. (Oral report.)

IV. Report on Pending Legislation Affecting Civil Rules.

V. Self-Study Report of the Standing Rules Committee.

VI. Proposed Amendments to Rule 23.

- A. Multiple Choices.
- B. Partial Annotations.
- C. Background Materials.

VII. Report on State Class Action Experiences. (Oral report.)

VIII. Miscellaneous Rules Amendments.

- A. Proposed Amendments to Admiralty Rule B.
- B. Continuing Agenda Regarding Previously Proposed Amendments.

IX. Protective Orders and Business Week.

X. Next Meeting.

ADVISORY COMMITTEE ON CIVIL RULES

Chair:

Honorable Patrick E. Higginbotham
United States Circuit Judge
13E1 United States Courthouse
1100 Commerce Street
Dallas, Texas 75242

Area Code 214
767-0793

FAX-214-767-2727

Members:

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

Area Code 215
597-0859

FAX-215-597-7373

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

Area Code 410
962-4210

FAX-410-962-2277

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

Area Code 612
348-1929

FAX-612-348-1820

Honorable C. Roger Vinson
United States District Judge
United States Courthouse
100 North Palafox Street
Pensacola, Florida 32501

Area Code 904
435-8444

FAX-904-435-8489

Honorable David F. Levi
United States District Judge
2546 United States Courthouse
650 Capitol Mall
Sacramento, California 95814

Area Code 916
498-5725

FAX-916-498-5469

Honorable Christine M. Durham
Justice of the Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Area Code 801
538-1044

FAX-801-538-1020

Professor Thomas D. Rowe, Jr.
Duke University School of Law
Box 90360
Durham, North Carolina 27708

Area Code 919
613-7099

FAX-919-613-7231

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Carol J. Hansen Posegate, Esquire Giffin, Winning, Cohen & Bodewes, P.C. One West Old State Capitol Plaza Suite 600 P.O. Box 2117 Springfield, Illinois 62705	Area Code 217 525-1571 FAX-217-525-1710
Mark O. Kasanin, Esquire McCutchen, Doyle, Brown & Enersen Three Embarcadero Center San Francisco, California 94111	Area Code 415 393-2144 FAX-415-393-2286
Francis H. Fox, Esquire Bingham, Dana & Gould 150 Federal Street Boston, Massachusetts 02110	Area Code 617 951-8000 FAX-617-951-8736
Phillip A. Wittmann, Esquire Stone, Pigman, Walther, Wittmann & Hutchinson 546 Carondelet Street New Orleans, Louisiana 70130-3588	Area Code 504 581-3200 FAX-504-581-3361
Assistant Attorney General for the Civil Division (ex officio) Honorable Frank W. Hunger U.S. Department of Justice, Room 3143 Washington, D.C. 20530	Area Code 202 514-3301 FAX-202-514-8071

Liaison Members:

Honorable William O. Bertelsman Chief Judge United States District Court P.O. Box 1012 Covington, Kentucky 41012	Area Code 606 655-3800 FAX-606-431-0296
Honorable Jane A. Restani United States Court of International Trade One Federal Plaza New York, New York 10007	Area Code 212 264-3668 FAX-212-264-8543

Reporter:

Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, Michigan 48109-1215	Area Code 313 764-4347 FAX-313-763-9375

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Secretary:

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

Area Code 202
273-1820

FAX-202-273-1826

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701
Area Code 714-836-2055
FAX 714-836-2062

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061
Area Code 913-782-9293
FAX 913-782-9855

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
6500 Cherrywood Lane, Rm. 385A
Greenbelt, Maryland 20770
Area Code 301-344-8047
FAX 301-344-0385

Hon. Patrick E. Higginbotham
United States Circuit Judge
13E1 United States Courthouse
1100 Commerce Street
Dallas, Texas 75242
Area Code 214-767-0793
FAX 214-767-2727

Honorable D. Lowell Jensen
United States District Judge
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612
Area Code 510-637-3550
FAX 510-637-3555

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511
Area Code 203-782-3682
FAX 203-782-3686

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Area Code 617-552-8650,4393
FAX-617-576-1933

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556
Area Code 219-631-5866
FAX 219-631-6371

Professor Alan N. Resnick
Hofstra University
School of Law
Hempstead, New York 11550
Area Code 516-463-5930
FAX 516-481-8509

Professor Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 313-764-4347
FAX 313-763-9375

Prof. David A. Schlueter
St. Mary's University of
San Antonio School of Law
One Camino Santa Maria
San Antonio, Texas 78284
Area Code 210-431-2212
FAX 210-436-3717

Prof. Margaret A. Berger
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
Area Code 718-780-7941
FAX 718-780-0375

DRAFT MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

APRIL 20, 1995

The Advisory Committee on Civil Rules met on April 20, 1995, at New York University School of Law. The meeting was held in conjunction with the April 21 and 22 Research Conference on Class Actions and Related Issues in Complex Litigation, held by the Institute of Judicial Administration at New York University School of Law. Members of the Advisory Committee also attended the Conference. The Advisory Committee meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, and Judge C. Roger Vinson. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. John K. Rabiej and Mark D. Shapiro represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Observers included Professor Linda Silberman and Professor Samuel Estreicher, Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., Fred S. Souk, Esq., Laura S. Unger, Esq., and H. Thomas Wells, Jr., Esq.

Professor Silberman welcomed the Committee to the NYU School of Law and to the Conference; the welcome was later repeated by Professor Estreicher.

The Committee approved the draft Minutes for the meetings of October 20 and 21, 1994, and February 16 and 17, 1995.

Judge Higginbotham opened the meeting by noting that this is the last in a series of meetings designed to increase the Committee's knowledge of class actions. The history of the 1993 draft was recalled: the Committee had approved it with a recommendation that the Standing Committee approve publication for public comment. During the meeting of the Standing Committee, however, it was decided that the public agenda of civil rules was so full that it might be better to defer action on Rule 23 for a while; particular concern was felt about the impact of the discovery and disclosure amendments then awaiting study and approval by Congress. Since then, rapid developments in the use of Rule 23 to address dispersed mass tort litigation have provided the occasion for further consideration of Rule 23. The settlement plans worked out in different asbestos actions and the silicone gel breast implant action are examples of these developments that have not yet fully played out. Rule 23 was the subject of active study at the Advisory Committee meetings in April, 1994, and February, 1995. Many members of the Committee also attended the March, 1995

Conference on the Federal Rules of Civil Procedure sponsored by Southern Methodist University School of Law and the Southwestern Legal Foundation in Dallas. Research help has been sought from the Federal Judicial Center.

Congress has been examining the large social problems that give rise to a substantial share of the litigation brought as class actions. Although the Committee hopes to be able to coordinate with Congress, and to inform its work just as the work of Congress informs the Committee's efforts, Congress operates on a different time line than the Committee. The Committee, moreover, must maintain its independence and credibility — work on Rule 23 might easily be perceived as arising from particular positions or viewpoints on the larger substantive and social problems, and everything possible must be done to defuse any such perceptions. It is also important to continue to find ways to defeat the common perception that Committee processes are closed to the public; the widespread circulation of the current Rule 23 draft and the efforts to bring experienced class action lawyers into Committee deliberations have provided a beginning. The repeated focus on the current draft at the Institute of Judicial Administration conference also should help.

A report also was provided on the Dallas Conference on the Federal Rules of Civil Procedure. It was observed that the academicians were not much interested in the discussion of pleading and discovery. They tended to assume the continuing wisdom of the 1938 decision to subordinate pleading to discovery. The lawyers who participated in the second day of the conference, however, were more interested in seeing what might be done. Possible means of controlling discovery were discussed, including work underway in Texas to substantially curtail the amount of time that can be spent on depositions, with particularly dramatic limits for cases that involve only damages in small amounts. The possibility of imposing responsibilities on counsel for supervising and certifying the completion of a party's document production also was discussed. Pleading devices that may deserve further study include development of the reply. The Fifth Circuit has found the requirement of a reply helpful in shaping the pleadings with respect to defenses of official immunity, in the wake of tightening restrictions on heightened pleading requirements, and the device might be useful in more general ways. A specific suggestion at the Dallas conference was that some form of statement be required as a supplement to pleadings. The central idea seems to be a statement of position and summary of evidence that does not carry the consequences of pleading but that does illuminate the case in the way that might be expected of a well-conducted Rule 26(f) discovery planning conference. As to a plaintiff, for example, the requirement might be a form of disclosure that requires a statement of the facts the plaintiff expects to prove at trial and summaries of the testimony

that will be used for proof. Defendants would have similar obligations.

This summary developed into discussion of the relationships between pleading, discovery, and judicial management. It was observed by several Committee members that pleading is not very helpful — and at times useless — and discovery at times seems unmanageable, but that increased involvement by a judge can help a great deal. If a judge takes charge of a suit at the very beginning, great benefits follow not only with respect to pleading and discovery but also in the general behavior of the lawyers. Questions of judicial management were viewed from many perspectives, with a common thread in the observation that there are enough formal court rules to support effective management. The problems seem to be not so much a lack of rules as docket pressures, and at times the views of some judges that active management is not desirable. Docket pressures were repeatedly noted; one member judge noted that he once went for three years without a civil trial, and during the same period had a criminal trial on almost every working day. This discussion included accounts of experience with the "rocket docket" system in Virginia, which includes an assumption that each case is an institutional responsibility of the full court. A firm trial date is set for 6 to 8 months after filing. The process can be rushed; it is difficult to get an extension of time, and perhaps occasionally the denials are unwise in relation to the needs of case preparation. The system can be implemented — as it has been — without the need to amend any of the Civil Rules. Experience with a somewhat similar fast track system in California state courts also was noted, with the observation that it seems to work well. It was suggested that perhaps similar docket systems should be tried in half a dozen pilot districts to learn whether they can be successful in other courts that face different circumstances.

The discussion continued along tracks that moved among the three topics of pleading, discovery, and judicial management. The system is built on the assumption of open discovery, ideally managed by lawyers rather than the courts. Lawyers can be made to behave in disciplined ways by setting and adhering to a firm trial date. But some courts are not in a position to be able to enforce firm trial dates. Case loads continue to shift, and will continue to shift in ways that cannot be fully predicted. For the time being, there seems to be a flattening of general civil cases, a slight reduction in the number of criminal prosecutions, and rapid growth in the number of civil actions filed by prisoners that do not challenge the conviction or sentence. Measured by numbers of cases, such prisoner cases account for startling portions of many appellate dockets, and seem to continue to grow as the numbers of prisoners grow.

An observer suggested that the Dallas conference showed that

really experienced lawyers divide on the question whether the problem lies in pleading, discovery, or judicial management, and that the problem probably lies in all three. The relationship among all three should be examined further. The "rocket docket" works beautifully in the Eastern District of Virginia, but it is unique to that court. The rules must be rewritten.

The recurrent suggestion that the rules must be rewritten was recurrently met by the suggestion that the discovery rules have been amended recently, and that it is too early to amend them yet again. One Committee member who expressed a preference for a return to some measure of fact pleading agreed that it is even more important not to change the rules too often. Another member echoed the view that many judges and lawyers agree that we should not change Rule 26 again so soon. This may be true whether the changes involve minor tinkering or fundamental revision.

Robert Campbell stated that the Federal Rules Committee of the American College of Trial Lawyers likely would agree that "the rules aren't broke." They will operate if the courts will enforce them. Lawyers need initial rulings; a Rule 16(b) conference early in the litigation; and a follow-up conference. It helps if the judge is willing to express a view on the nature of the case — whether, for example, it really presents a viable claim under an oft-overused statute.

Another observer noted that the CJRA advisory group in the District of Columbia had studied all these issues, and had not proposed any radical changes. Other districts have developed more dramatic local rules. Much will be learned as information is gathered about experience with the different CJRA plans. Perhaps the most radical suggestion, not implemented anywhere, has been that discovery should be eliminated. On this view, "the system <u>is</u> broke." Massive resources are poured down the drain of civil discovery. Fact pleading, no discovery, and speedy trials may be the better way.

It was suggested again that if the judge has the time and uses it to manage litigation, the problems are controllable. But the problem of judge time must be dealt with. Without sufficient judge time, other reforms are simply spinning the wheels. If indeed it is true — as judges have been taught for years — that the one fair and effective control is setting a firm trial date, why doesn't this happen? If it does not happen because it cannot happen, because judges cannot effectively meet firm trial dates, solutions may lie outside the rules of procedure.

In a more optimistic vein, it was noted that empirical studies of discovery show that in most cases, discovery is not a problem. There is no discovery at all in many cases, and only limited resort to discovery in many more. We must be careful to avoid disrupting a system that works well most of the time in the process of

attempting to cure the problems that arise in a small proportion of all cases.

In a more cautious vein, it was noted that bar associations everywhere are now addressing the problem of lawyer behavior. There is unacceptable behavior by too many lawyers — including a handful who always cause problems, particularly when matched up against each other.

One of the perennial proposals for reform was again advanced, cutting back from the Rule 26(b)(1) permission for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The reference to subject matter would be replaced by limiting discovery to matters relevant to the issues framed by the pleadings. It was recognized that the pleading issues standard would be difficult in cases in which the pleadings do not frame issues — in such cases, discovery would continue to be about whatever discovery comes to be about. One way out of this interdependence with notice pleading might be to define the scope of issues by other means, most likely through Rule 16(b). Rule 16(b) indeed is used to affect and even control the scope of discovery. Initial scheduling orders, combined with Rule 26(f) discovery conferences, may be able to accomplish significant definition of issues and thereby support limitations on discovery.

The argument for narrowing the broad Rule 26(b)(1) scope of discovery was related to the ongoing debates about the scope of discovery protective orders. The availability of effective protection is an essential counterbalance for the broad scope of discovery, particularly as discovery is pushed beyond matters plainly relevant to issues clearly framed in the action. This connection exists not alone as a matter of the quid pro quo considerations that have shaped development of the rules as they stand, but also as an essential protection of privacy. Should ongoing efforts to reduce the effective operation of protective orders succeed in some measure, the need to protect against unwarranted invasions of privacy will substantially strengthen the case for curtailing the scope of discovery.

H. Thomas Wells stated that similar debates are occurring in the ABA Litigation Section. Attention has focused not only on specific pleading, but also on the question whether disclosure might be broadened to include more information about a party's own case. From his experience with three different disclosure rules in the three districts of Alabama, the Rule 26(f) discovery meeting is a good device if there is a good complaint. If the complaint is not well drawn, the meeting is not effective. But it is possible to link the scope of discovery to the pleadings.

This discussion of disclosure prompted the suggestion that perhaps the general scope of discovery should be narrowed to the present scope of Rule 26(a)(1) disclosure.

A desire was expressed to find out more general information about what is happening, particularly with early experience on disclosure. The Rand study of CJRA plans should help. The Federal Judicial Center is evaluating experience in five "demonstration" districts that include at least one — the Northern District of California — that has adhered to disclosure requirements essentially the same as Rule 26(a)(1). Once these studies are done, it will be time to reexamine the provisions of Rule 26(a)(1) that permit local options on disclosure.

This discussion concluded with the observation the Committee would welcome any study and expression views that might be undertaken by the Federal Rules Committee of the American College of Trial Lawyers or the Litigation Section of the ABA.

Rule 5(e)

A draft amendment of Rule 5(e) was published for comment on September 1, 1994. The Committee agreed on changes to the published draft at the October, 1994 meeting, as described in the minutes for that meeting.

Discussion began by observing that a change should be made in the third sentence of the first paragraph of the published Committee Note. The statement that "the local rule" must be authorized by the Judicial Conference is a misleading summary of the present rule. The Note should say instead that "Use of this means of filing" must be authorized by the Judicial Conference. The reference to "three conditions" also will be changed to "two conditions" rather than worry overmuch about the number of conditions that must be met to permit electronic filing under present Rule 5(e).

Comments on the published draft by the Association of the Bar of the City of New York led to discussion of the availability to the public of papers filed by electronic means. The Committee recognized two quite distinct issues. One issue is whether the right of public access is in any way affected by electronic filing. The Committee agreed clearly and emphatically that electronic filing does not in any way affect the right of public access. This answer is so plain that there is no need to provide any statement in the text of the rule, just as the rules have not had to spell out the right of public access to documents initially filed in tangible form. The other issue is the means of accomplishing actual exercise of the right of public access, recognizing that the public includes people without computer skills and that simply providing a public terminal in the clerk's office will not respond to all needs. It was concluded that this problem is one that should be addressed by a combination of the Judicial Conference standards process and by local rules. The means of access issue is obviously tied to the technical standards for filing, and is as obviously tied to such provisions as local rules

may make for requiring supplemental filings in tangible form.

The Committee was advised that the Administrative Office will attempt to help the Judicial Conference and its committees to draft technical standards quickly. Although it is clear that the amendments would authorize local rules that permit electronic filing before Judicial Conference Standards are adopted, it is possible that the standards will be available soon after the amended Rule 5(e) could take effect, and possibly even by the effective date.

There was renewed discussion of the October decision to delete from the published draft the sentence stating: "An electronic filing under this rule has the same effect as a written filing." The version published by the Appellate Rules Committee provides: "A paper filed by electronic means in accordance with this rule constitues a written paper for the purpose of applying these rules." Concern was expressed that the reference to "this rule" might invalidate filings authorized by local rule, even though filing in compliance with a valid local rule would seem to be authorized by the rule. It was suggested that it would be better to refer to a filing "in accordance with," or "under," a local rule. The belief that the entire sentence is unnecessary was again expressed, in light of the fundamental authorization to file, sign, or verify documents by electronic means. The conclusion of this discussion was that the Chair and Reporter were authorized to coordinate language under the auspices of the Standing Committee to achieve uniform provisions in the Appellate, Bankruptcy, and Civil Rules.

It was agreed that the final two sentences of the published Committee Note should be deleted. These sentences disparaged filing by facsimile means, an enterprise that may be unnecessary if it is right that routine facsimile filing will prove attractive to few courts, but may prove wrong if facsimile filing proves more attractive to many courts than more advanced means of electronic filing.

The suggestion was made by the Eastern District of Pennsylvania, through the court clerk, several judges, and many lawyers, that Rule 5(b) should be amended to permit service by electronic means. The Committee has considered this question recently. Discussion confirmed the earlier conclusion: it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service.

The Eastern District of Pennsylvania also suggested that Rule 77(d) should be amended to permit a court clerk to effect service by electronic means. Although this question has not been considered by the Committee, and seems to pose fewer potential problems than electronic service among the parties, the conclusion

was the same. Greater experience is needed before it will be time to move in this direction.

Rule 9(h)

The final sentence of Rule 9(h) provides: "The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)." It is not clear what is meant by the statement that "cases" means "claims." The ambiguity arises in cases that include both admiralty claims and nonadmiralty claims. The Rule may mean that only the admiralty claims qualify for appeal under § 1292(a)(3). But it also may mean that if the case includes an admiralty claim, an order that disposes of any claim in the case and that meets the terms of § 1292(a)(3) can be appealed, even though the claim is not an admiralty claim. The only known case to address the issue squarely is Roco carriers, Ltd. v. M/V Nurnberg Express, 2d Cir.1990, 899 F.2d 1292. The court in that case allowed a § 1292(a)(3) appeal by a party who was not involved with any of the admiralty claims in the case, concluding that a pendent party should be able to appeal an order that could be appealed by another party. It found that the order establishing the appellant's liability was "integrally linked with the determination of non-liability" of the party to the admiralty claim.

The prospect of amending Rule 9(h) was discussed extensively at the October, 1994 meeting. Further discussion focused on the desirability of interlocutory appeals. Opinion was divided on the need for § 1292(a)(3), a matter beyond the Committee's authority. Some members believe that interlocutory appeal is a good thing, and that statutory opportunities should be developed in ways that maximize the ability to appeal. Others believe that admiralty cases do not involve any special justification for interlocutory appeal that distinguishes them from other complex litigation. Even some of those who doubted the wisdom of § 1292(a)(3) believed that so long as it is available, it should be made as sensible as possible. They found persuasive the concern expressed in the Roco case that interlocutory appeal opportunities that are available to some parties or as to some claims should be equally extended to all.

By vote of 7 to 3, the Committee approved a motion to strike the present final sentence of Rule 9(h) and substitute a new final sentence as follows:

> ~~The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).~~ A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

A Committee Note will be drafted by the Reporter and circulated to members of the Committee for comment.

Rule 26(c)

On recommendation of this Committee, the Standing Committee recommended to the Judicial Conference that it send to the Supreme Court an amended Rule 26(c) that grew out of discussions at this Committee's meeting in October, 1994, and an ensuing mail vote. The Judicial Conference first voted to delete the reference to stipulated discovery protective orders in the proposed Rule 26(c)(1), and then voted to recommit the proposed rule to the Advisory Committee.

Discussion of the apparent reasons for the remand began with the observation that a concerted lobbying effort was directed at the Judicial Conference in the last few days before its meeting. The lobbying addressed only the stipulation aspect of the proposed rule. This viewpoint ran parallel to the aspect of recent legislative proposals that would require specific findings by the court to support every protective order.

It was suggested that in the flurry of last-minute representations, the Conference was not able to fully understand the nature of the proposed rule. This Committee sought a balanced rule that recognizes the present important practice of stipulated protective orders, but that recognizes the interests of nonparties by making clear the right to intervene to seek modification or dissolution. The draft does not require a judge to accept a stipulated order. Among the many analogies to other established practices, Rule 35 physical examinations provide an easy illustration. A court must find good cause before ordering a party to submit to a physical examination. The parties, however, can agree that a party will submit to a physical examination without a court order. In the same way, the parties can agree to exchange information entirely outside the channels of formal discovery. If they choose instead to proceed through discovery, they may agree to submit a stipulated protective order. The court, however, "may" — but also may not — enter the order. In this form, the rule not only recognizes well established current practice. It also recognizes the need to honor the balance struck by the central role of protective order practice in the overall plan of discovery. Discovery has been made very broad, permitting inquiry into vast private areas that would be protected against any other mode of inquiry, public or private. This sweeping reach is tolerable only if means exist for limiting the invasion of privacy to the needs of the litigation. The Committee requested the Federal Judicial Center to study the actual use of protective orders. This study, now nearly complete, shows that stipulated protective orders are common, as are orders based on unopposed motions. Defective products — the focus of much of the current debate — are involved

only in a small minority of protective orders. Civil rights cases are the single most common category of cases involving protective orders, protecting against general access to highly personal information that may relate to nonparties as well as parties.

Discussion of the appropriate next step opened with the reminder that many observers have doubted the need for any amendment of Rule 26(c), and that the Committee has shared these doubts. There is much to be said for the conclusion that it would be better not to pursue amendment further than to risk eventual adoption of amendments that would upset the sensitive balance established by present practice.

Further discussion of the next step noted that concern had been expressed in the Judicial Conference that the proposed amendments varied to some extent from the draft that had been published for public comment. Republication of the proposal in the form submitted to the Judicial Conference may elicit additional comments that can further inform the Committee, either supporting present views or stimulating reconsideration and changes of position. Public comment may illuminate the decision whether to pursue the proposed amendment at all, as well as the more specific issues that surround stipulated protective orders.

It was noted that the Rule 26(c) proposal does not affect access to materials that are used as part of a judicial proceeding. Discovery information submitted at trial, for example, becomes part of the public trial record, subject to sealing only under the quite different standards that apply to trial records. Materials submitted to the court for consideration in connection with any other order likewise become part of the public record, moving free of the scope of a discovery protective order; if use of the materials violates a protective order, that fact may be considered in determining what to do about access, but cannot be controlling.

The Committee unanimously approved a motion to recommend to the Standing Committee republication of the version of Rule 26(c) that was transmitted to the March, 1995 meeting of the Judicial Conference.

At the end of this discussion, it was voted to carry forward for further consideration a draft Rule 5(d) that would regulate agreements to return or destroy discovery materials that are not filed with the court.

Rule 47(a)

The Committee agreed at the October, 1994 meeting to submit to the Standing Committee for publication amendments to Rule 47(a) that would establish the parties' right to participate in voir dire examination of prospective jurors to supplement the initial examination by the court. The Standing Committee discussed the

proposal at its January, 1995 meeting, but deferred action pending deliberation by the Criminal Rules Advisory Committee on parallel changes to Criminal Rule 24(a)(2). Early in April, 1995, the Criminal Rules Advisory Committee approved, by vote of 9 to 2, a draft Criminal Rule 24(a)(2) that – like the proposed version of Civil Rule 47(a) – would require the trial court to permit the parties to supplement the court's examination. There are many drafting differences between the two proposals. Discussion of the drafting differences, and of initial reactions from judges who have seen the Rule 47(a) proposal, led to extended further discussion of the initial proposal.

The Rule 47(a) proposal is seen as part of a package with the proposal, approved by the Standing Committee, to publish for comment a revision of Rule 48 that would restore the 12-person jury. The combined effect of the two proposals could go far toward restoring civil jury trial as a fair and rational means of resolving disputes.

Much discussion was devoted to early reactions from judges who have seen the Rule 47(a) proposal. There is widespread concern that lawyers will take control of the jury selection process, converting it into an opportunity to influence the jury and distort the impartiality that the selection process is supposed to foster. Written response has come especially from judges in the Fourth Circuit, and most particularly from judges in Virginia, but has come from other quarters as well. One committee member reported attending a meeting of chief judges in the Ninth Circuit who, on hearing a description of the proposal, were unanimously opposed. Another reported that several members of the Fourth Circuit had, within the first week after the meeting of the Criminal Rules Advisory Committee, commented negatively on the draft Criminal Rule 24(a).

It was agreed that the early response from judges is likely to be borne out as additional comments come in. Even though the Federal Judicial Center survey in 1994 showed that approximately 60% of federal judges permit direct lawyer participation in voir dire – a sharp increase from the number found in an earlier survey – they are opposed to requiring that participation be permitted. There is not yet, however, any evidence that judges who do not permit lawyer participation have reached this position because of bad experiences with their own initial efforts to permit and control lawyer participation. The opposition may rest in part on concern about interfering with the autonomy of individual judges to adhere to traditional local practices and to methods that work well in their own courts. It also surely rests on concern that lawyers will be difficult to control. The motives of lawyers are to act as advocates, and the impulse to bring advocacy into the voir dire process will have to be cabined by the trial judge.

The opposition of many federal judges will ensure that the Rule 47(a) proposal is controversial. One committee member suggested that if there are problems with present practice, they do not involve a system that is "broke," but only one that is "broke at the edges." Opening the topic is sure to bring controversy. If, as many expect, members of the bar will strongly support the proposed amendment, there is a chance that whatever is done in the Enabling Act process will be taken to Congress. Perhaps the time is not ripe for taking on a controversial topic without demonstrated need.

The concern about controversy was met by the observation that we have not yet heard from the practicing bar. The Committee should not shy away from controversy when there is a real need to be addressed. Many experienced lawyers have told the Committee, directly and indirectly, that there is a serious problem. Voir dire conducted by some judges is simply not adequate to support informed efforts to select an impartial jury. The Committee was unanimous in making the proposal. The Criminal Rules Advisory Committee divided 9 to 2 in favor of the parallel proposal. If the Committee hesitates, the lawyers who have addressed the Committee will return to Congress to renew longstanding efforts to secure legislation. Concerns about expending political capital must recognize that the proposal has been launched, and launched for good reasons.

The need to revise Rule 47(a) was revisited in more general terms as well. The central theme was that the parties have a right to the fairest jury possible. Many lawyers reject the view that court-conducted voir dire is adequate to the task. Particularly on the criminal side, there are many cases in which judges have refused to ask questions that are very basic. Challenges for cause require careful examination that is well-informed by knowledge of the case. We are, moreover, still in the early stages of experience with the new rules that prohibit discriminatory exercise of peremptory challenges. Courts are likely to require articulation of nondiscriminatory reasons to support a peremptory challenge that in turn require support in voir dire examination. There is little reason to fear that party participation will unduly lengthen voir dire if courts conduct effective initial examinations and make it clear that misuse of party examination will be quickly corrected. The FJC study in 1994 shows no more than de minimis variations in the time required for voir dire no matter how examining responsibility is allocated between court and parties. A Committee member reported that a similar conclusion was reached by the National Center for State Courts in an earlier survey. The views of the Criminal Rules Advisory Committee bolster this Committee's original conclusion that there is a real need for reform, and particularly that there is a need to hear reactions to a published proposal.

Discussion of the differences between the Rule 47(a) draft and the Criminal Rule 24(a) draft turned first to the provision in Criminal Rule 24(a)(2) that: "The court may terminate supplemental examination if it finds that such examination may impair the jury's impartiality." This provision, and a parallel provision suggested by the Committee Reporter in earlier correspondence with members of the Standing Committee and the Chair and Reporter of the Criminal Rules Advisory Committee, are intended to make it clear that abusive questioning can be terminated. Some members of the Committee thought it would be desirable to add to Rule 47(a) a new final sentence: "The court may terminate further examination by a party whose examination may impair the jury's impartiality." The need for this provision, however, was questioned. The Rule 47(a) draft explicitly permits the trial court, in its discretion, to set reasonable limits of time, manner, and subject matter. These limits can be invoked as the need arises from misuse or abuse of the right of supplemental examination. This broad general power is more effective than the proposed Rule 47(a) addition or the Criminal Rule 24(a)(2) draft. The Rule 24(a)(2) draft, moreover, may imply undesirable limits on the right to terminate party examination. It seems to require a finding that the examination may impair the jury's impartiality, implying that examination may not be cut off for other reasons. On the other hand, it does not require that examination be cut off even when there is a threat to jury impartiality. It also could be read to provide for termination of examination by all parties, not the offending party alone. Although correspondence with the Criminal Rules Advisory Committee Reporter indicates that the draft was intended to ensure that all parties at least have the opportunity to begin examination, by referring to the power to "terminate," there also was some concern that termination might be ordered at the very outset before the finding of a threat to impartiality could be based on actual behavior rather than anticipated behavior. At the end of this discussion, it was concluded that the best course would be to adhere to the current Rule 47(a) draft. The Committee Note, however, should be fleshed out with an express statement that the power to establish reasonable limits includes the power to terminate further examination by a party who misuses or abuses the opportunity.

Another feature of the Criminal Rule 24(a) draft that drew active discussion was the requirement that a party make a "timely request" to enjoy the right to examine prospective jurors. This limitation was adopted in response to the concerns of a member of the Criminal Rules Advisory Committee who prepares a lengthy questionnaire for prospective jurors, tailored to each individual case, and who believes that in shaping the questionnaire it will be important to know whether the parties plan to examine the jurors. The thought also was expressed that timely advance request might enable the judge to anticipate more accurately the amount of time

that must be set aside for the jury selection process. One member of the Committee initially was attracted to this limitation, but at the conclusion of the discussion joined the unanimous consensus that the limitation is not desirable. In various ways, committee members observed that a timely request requirement will prove only a trap for the unwary. All lawyers will know that they cannot anticipate the need for examination until the court has concluded its own examination. All but the ill-advised or forgetful therefore will make automatic requests that they hope will be timely. The forgetful and the diligent alike, moreover, will be at risk that even an express pretrial request will be found not timely, particularly when there is no attempt to set a clear measure of timeliness. The actual decision whether to undertake supplemental examination, however, will be made only after completion of the court's examination shows whether there is a need for supplemental examination. The result will be that automatic advance requests do not provide any useful information to the court. For that matter, the court itself should be able to anticipate that the nature and extent of supplemental examination will be shaped by the results of its own examination.

The Committee expanded on the October, 1994 discussion of the use of questionnaires as part of the examination of prospective jurors. The values of questionnaires were noted. One committee member noted regular successful experience with questionnaires in state court practice. The answers generally support many challenges for cause. The process can save time; prevent contamination of a jury panel by answers openly given in the presence of other prospective jurors; avoid the embarrassment that can occur when a prospective juror is forced to answer questions in public; and encourage prospective jurors to provide honest answers that might be too embarrassing for public announcement.

Questionnaires, on the other hand, also have a potential for mischief. Just as voir dire examination, they can be used in attempts to select a favorable jury, not an impartial one. Several committee members have had experience with lengthy questionnaires that invade juror privacy across a wide range of topics, designed not to support challenges for cause or intelligent use of peremptory challenges but to support the efforts of "jury consultants" to gerrymander a favorable jury. Inquiries may be attempted into reading habits, religious preferences, political views, and other matters far afield from matters that are properly allowed on voir dire examination.

The discussion of questionnaires concluded with the direction that the Committee Note be expanded to reflect not only the virtues of questionnaires but also the potential dangers.

Robert Campbell stated that the Federal Rules Committee of the American College of Trial Lawyers thinks that the draft Rule 47(a)

properly controls the "tension between court and lawyer." The draft clearly establishes a right only to supplement the court's examination, within limits, not the right to take over. The lawyer will not be permitted to try the case at voir dire. The power to set reasonable limits includes the power to terminate, and need not be supplemented by a possibly limiting separate statement of the power to terminate examination upon demonstrated misuse. The Criminal Rule 24(a) requirement of "timely request" seems dangerous, because it may be used to defeat the right without achieving any significant benefit. The court knows that it has the power to limit, and does not need any advance notice of the intent to exercise the right.

Two changes in the language of the draft rule were then approved by consent. The statement that the parties are entitled to examine prospective jurors to supplement the court's examination was changed to a statement that the court must permit supplemental examination. The reference to reasonable limits "set" by the court was changed to "determined;" the Committee Note should be revised to state that the limits can be determined as examination by the parties progresses, including termination of examination by a party who misuses or abuses the right to examine. The power to terminate examination extends beyond abuses that threaten the ability to seat an impartial jury to include other misuses or abuses, such as unduly confusing, repetitious, or lengthy examination, or examination that threatens unwarranted invasion of privacy.

The Committee further concluded that every effort should be made to get responses to Rule 47(a) as broad and detailed as possible during the course of the public comment period if the draft rule is published.

The Committee was reminded that a recommendation to the Standing Committee for publication represents the Committee's judgment that there is a genuine need to correct present practice, and that the proposal is the Committee's best answer pending consideration of the information gained as the process moves forward. A motion to renew the recommendation of Rule 47(a) to the Standing Committee for publication passed unanimously.

The Reporter was directed to report to the Chair and Reporter of the Criminal Rules Advisory Committee the Committee's reasons for going forward the the language of Rule 47(a) rather than adopting the language of proposed Criminal Rule 24(a). In addition to the differences discussed in detail, several other matters were noted. Rule 24(a) refers to the "preliminary" voir dire, a word that may seem to subordinate the importance of the court's primary responsibility for effective voir dire examination; the Committee prefers to avoid this possible implication. Rule 24(a) speaks in the first sentence of "examination of the trial jurors," rather than prospective jurors; if this term is appropriate for some

reason of criminal practice, such as the need to distinguish grand jurors from trial jurors, there is no parallel need in civil practice. Rule 24(a) states that the court must permit the defendant or the defendant's attorney to examine prospective jurors, language that may create an impression that a defendant who is represented by an attorney nonetheless may conduct the examination in person. Rule 24(a)(1) omits reference to the court's discretion in describing the power to set reasonable limits on the supplemental examination; the explicit Rule 47(a) reference to limits set "by the court in its discretion" was adopted to assuage fears that efforts to control party behavior would become the occasion for intrusive appellate review and reversal. The appropriate course may be to publish both draft rules for comment in their present forms, facilitating public reaction to these and perhaps other differences of drafting.

Rule 23 Study

Thomas Willging provided a brief report on the progress of the Federal Judicial Center study of Rule 23 to supplement the partial draft report that was provided with the Committee materials and the presentation to be made at the IJA Conference the following day. He noted that data collection in the Northern District of Illinois and the Southern District of Florida will be completed in May and June. They hope to have a final report by the end of summer. Among the preliminary findings of experience in the Northern District of California and the Eastern District of Pennsylvania, he noted that class certification is granted in only about half of the cases brought on for certification, and that defendants often are successful in winning partial or complete dismissal under Rule 12(b)(6) or by summary judgment.

Legislative Activity

A report was provided by the subcommittee of Committee members Doty, Vinson, and Wittmann, chaired by Scirica and reported by Rowe, dealing with the procedural aspects of pending securities legislation. It was suggested that the central issue at the outset will be whether Congress shares the view of the SEC that private actions are essential to protect the integrity of the securities markets. If Congress disagrees with this view, it is likely to make many substantive changes and blend procedural changes in with them. If Congress shares this view, on the other hand, it may find less sweeping means of addressing any abuses that it may find in present patterns of private enforcement. At least some of the problems that Congress is addressing deal with matters within the reach of the Rules Enabling Act. The Committee can provide for such matters as a threshold showing on the merits as a prerequisite to class certification; permissive interlocutory appeal from certification rulings; means of regulating races to file class actions; and perhaps the specific pleading standards of Rule 9(b).

As to such matters, and others within the Committee's reach, it will be important to discover whether the Committee and Congress can and should find means of working together.

Laura S. Unger described several of the concerns of Congress, with particular emphasis on the perspectives of the Senate, where she works. It does not seem likely that Congress will want to defer to the SEC and the rules committees, but the committees of Congress would like to be able to gain the advantage of rules committee knowlege and experience just as they gain much advantage from working with the SEC. There is considerable frustration with lax pleading, races to the courthouse, and the cost of discovery while motions to dismiss remain pending unresolved. There is a desire to find a way to force institutional investors, who typically have the largest stakes, to opt in or out of securities class actions. Such a system likely would encourage the institutions to opt out of weak actions, greatly reducing the incentives to bring weak actions. At the same time, it would encourage the institutions to opt into strong actions, preventing them from getting a free ride on the efforts of others and perhaps contributing valuable information to the progress of the action.

This concern with weak actions was echoed in the Committee. It was noted that the problem is with actions that pass the hurdles of Rule 11 frivolousness, motions to dismiss for failure to state a claim, and motions for summary judgment, but that nonetheless are quite weak.

Miscellaneous Rules

Rule 4. Suggestions have been made from various sources for amendments of the 1993 version of Rule 4. In addition to earlier proposals, proposals this time suggested revision of Rule 4(d)(2) to provide for use of the waiver-of-service procedure against the United States as defendant; revisions of subdivisions (e) and (f) in some indeterminate manner to improve service on foreign governments; and amendment of Rule 4(m) to specify a clear error standard for reviewing the determination whether good cause has been shown for a failure to effect service in timely fashion. The Committee concluded that it is too early to consider further amendments of Rule 4. The various suggestions should be accumulated for joint consideration in a few years.

Rules 8, 9, 12: Particularized Pleading. It has been suggested that the rules be amended in some way to restore the "heightened pleading" requirement that was prohibited by the decision in Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 1993, 113 S.Ct. 1160. The Committee noted that it has considered this specific question and has concluded that it would be premature to address it before lower courts have had an opportunity to develop practice further in light of the Leatherman decision. It also noted that the combined topics of pleading and

discovery continue to occupy the Committee on an ongoing basis.

Rule 12. A suggestion has been made that a new rule be adopted that "would require that dispositive motions by defendants in civil rights cases on grounds of qualified immunity be filed and ruled upon prior to the commencement of trial." The Committee concluded that this suggestion is not sound. Other defenses may be raised for the first time at trial, under the liberal amendment policies of Rule 15, and there is little reason to distinguish official immunity defenses.

Rule 15(a). Rule 15(a) establishes the right to amend a pleading to which a responsive pleading is required that endures until the responsive pleading is served. The result is that a motion to dismiss does not terminate the right to amend as a matter of course, while an answer that includes grounds that might have been advanced by motion does terminate the right to amend. It has been suggested that it is not clear why a motion and an answer should have different consequences for this purpose. The suggestion was advanced from the perspective of urging that a responsive motion should cut off the right to amend just as an answer does. Brief discussion included the observation that leave to amend is almost never denied unless the underlying claim is patently frivolous. The Committee concluded that this topic should be carried on the agenda for further discussion, including consideration of alternatives that would expand the right to amend as a matter of course, treat responsive motions in the same way as responsive pleadings are now treated, establish tighter limits on the right to amend as a matter of course, or abolish the right to amend as a matter of course.

Rule 23(e). A suggestion that Rule 23(e) should be amended to develop further the court's responsibilities in approving class action settlements was met with the conclusion that this topic is one of the central matters being studied in the ongoing study of Rule 23. It will continue to be a major topic in developing possible revisions of Rule 23.

Rule 26(a). A plea has been received to repeal present Rule 26 in favor of the version that was replaced on December 1, 1993. The Committee concluded that it is too early to consider such proposals. Experience with Rule 26 and local variations will be a major focus of the ongoing study of local Civil Justice Reform Act plans. Further study will be undertaken on completion of the study.

Rule 39(c). The question has been raised whether a court should be required to state by the beginning of trial whether a jury will be treated as an advisory jury as to any matter that does not involve a constitutional or statutory right to jury trial. The Committee

concluded that no reason exists to undertake amendment of the rule at this time.

Rule 43(f). Rule 43(f) provides that a court may appoint an interpreter, but does not address the question whether there are circumstances in which a court should be required to appoint an interpreter. An interpreter may be necessary not only to enable the trier of fact to understand a witness, but also to enable a party to understand a witness. It has been suggested that appointment of an interpreter may be required by the Americans With Disabilities Act, the Rehabilitation Act of 1973, or more general principles of due process. The Committee concluded that before considering these questions further, an effort should be made to find out more about present practices that may supplement the bare text of Rule 43(f). The topic will remain on the agenda for consideration at a future meeting.

Rule 56(c). Rule 56(c), on its face, establishes implausible time periods for notice of a summary judgment and response to the motion. Many courts have adopted local rules establishing more sensible periods, and also providing procedures that require specification of the facts claimed to be established beyond genuine issue and identification of supporting materials. It may be time to adopt uniform national standards. The Committee concluded that this topic should be set for further discussion on the agenda for the fall meeting.

Rule 60(b). A plea was received to amend Rule 60(b) "to provide that where the prevailing party in a judgment, order or proceeding, cites that judgment in any other proceeding as evidence of its position, the parties to such other litigation shall be entitled to challenge the basis and result of such judgment, order or proceeding as if they had been parties thereto." The Committee was unable to discern the purpose or impact of the proposal, and concluded that it does not deserve further consideration.

Rule 81(c). It has been pointed out that Rule 81(c) continues to refer to the "petition" to remove an action from state court. The procedure for removal has been changed from a petition to a notice of removal. The Committee agreed that revision is appropriate, but also concluded that minor technical matters of this sort may better be accomplished by legislation than by the lengthy Rules Enabling Act process. It was concluded that the appropriate procedure is to accumulate proposals of this sort, to be submitted to the Standing Committee for recommendations to Congress.

Copyright Rules of Practice. The Copyright Rules of Practice have not been considered since 1966. In 1966, the Committee expressed doubts about "the desirability of retaining Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to

require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief." It refrained from acting at that time because Congress had begun the deliberative process that led to enactment of the 1976 Copyright Act. The 1976 act includes discretionary impoundment procedures, 17 U.S.C. §503(a), that seem to be inconsistent with the Rules of Practice. These Rules are unfamiliar territory to present members of the Committee. The topic will be carried forward on the agenda while additional means of information are sought.

Admiralty Rules B and C. It has been proposed that Admiralty Rule B should be amended to adopt the reduction of the requirement for service by a Marshal that was recently made in Rule C. This proposal will be set on the October agenda with specific language to show the change.

Next Meeting

Rule 23 revisions will form the major item for discussion at the fall meeting. The meeting probably will be set in October. The period from October 19 to 21 has been ruled out. Every effort will be made to select the dates that create as few conflicts as possible for presently known schedules of Committee members. The site will be Tuscaloosa, Alabama.

In preparing for discussion of Rule 23, the Committee should work throughout the summer in exchanges that focus on gradually more specific proposals. This process will help to decide whether any revision should be attempted, whether drastic changes are desirable, or whether modest reforms are worthwhile and the limit of prudent proposals. A docket of proposals will be prepared by the Reporter, beginning with lists of topics that seem certain to warrant further discussion and other topics that will warrant further discussion only if Committee members believe that is desirable. Some of the "no-discussion" items may include suggested amendments that can be considered at the October meeting without further correspondence over the summer. Once a list of topics for summer discussion is created, more specific questions will be framed for continued collegial exchange, for a self-study process that will not attempt to reach any specific decisions. The thought is that focusing for the first time on a detailed draft at a meeting, without advance preparation, will not provide a solid foundation for effective progress. Although it is hoped that a detailed draft rule can be provided for consideration, perhaps even for recommendation by the end of the meeting to the Standing Committee for publication, the draft itself will be intended to focus the results of the summer exchanges, not to preempt further

detailed discussion and revision. Detailed language will facilitate discussion, without freezing it.

Respectfully submitted,

Edward H. Cooper, Reporter

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

October 12, 1995

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Pending Legislation Affecting Civil Rules*

Private Securities Litigation Reform Act of 1995

The House of Representatives passed the *Private Securities Litigation Reform Act* on March 8, 1995 (H.R. 1058). The bill was part of the Republican's *Contract With America,* and it was passed expeditiously with little modification. On June 28, 1995, the Senate substituted and passed its version of a securities bill for H.R. 1058. Both bills contain many procedure-related provisions. No conference has yet been scheduled to resolve the major differences between the Senate and House versions.

Judge Patrick E. Higginbotham appointed a subcommittee to review the bills' rules-related implications. Judge Anthony J. Scirica chairs the subcommittee with members Judge C. Roger Vinson, Judge David S. Doty, Phillipp A. Wittmann, and Professor Thomas D. Rowe. The subcommittee, Professor Edward H. Cooper, and Judge Higginbotham met on several occasions with officials of the Securities and Exchange Commission and staffers of principal members of Congress. The meetings were productive, and several of the rules-related provisions in the bills were later revised.

Both bills, however, still retain specific sanction procedures that are inconsistent with Rule 11. The Senate bill would require a "court (to) include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure" in any private action arising under title 15. It later adopts "a presumption that the appropriate sanction for failure of the complaint or the responsive pleading or motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of all the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Whether the sanction provision, which seemingly applies only to the "complaint or the responsive pleading or motion," circumscribes the initial obligation of the court to review compliance with all requirements of Rule 11(b) is unclear. (A copy of the sanctions' provisions is included.) The House bill adopts a more straightforward fee-shifting mechanism with discretion vested in the court to impose sanctions for the filing of

abusive litigation.

Senator Arlen Specter attempted to insert an alternative sanction provision suggested by Judge Higginbotham. (See attached excerpts of *Congressional Record*, pp. S 9164- 9169, which also include copies of letters from several judges opposing the sanction provision.) The proposed substitute would retain the discretion of the court in reviewing and sanctioning the filing of abusive litigation, consistent with Rule 11. (See S 9164.) Consideration of Senator Specter's amendment was tabled by a vote of 57 - 38.

The differences between the House and Senate sanction provisions are marked. Efforts continue to be made to substitute Senator Specter's amendment as a substitute for both provisions during the to-be-scheduled conference. (See letter from Senator Specter to Senator Alphonse D'Amato.)

Civil Rule 30

Congressman Carlos J. Moorhead, chairman of the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, introduced H.R. 1445, which would require stenographic recording of all oral depositions unless otherwise ordered by the court or stipulated by the parties. It would undo amendments to Rule 30(b) that took effect on December 1, 1993. Stenographers and their association have steadfastly opposed the 1993 amendments. The House is likely to pass the bill.

The 1993 amendments allow the parties to decide which recording method will be used in a particular case and are designed to facilitate use of modern technology, while ensuring an accurate record. The amendments were prescribed only after extensive discussion, including two separate publications for comment, and despite strong opposition from stenographers.

Judge Higginbotham sent a letter to key Congressional leaders urging them to oppose the bill. (A copy of his letter and a strong dissenting statement are included in the Congressional Committee Report accompanying H.R. 1445, which is attached.) No similar bill has been introduced in the Senate.

Other Bills

On March 7, 1995, the House of Representatives passed the *Attorney Accountability Act of 1995* (H.R. 988). The bill would undo much of the 1993 amendments to Civil Rule 11 and would establish a modified "loser-pays" mechanism in diversity actions. Senator Orrin G. Hatch introduced the *Civil Justice Fairness Act of 1995* (S. 672) on April 4, 1995. It contains "loser-pays" and Rule 11 provisions similar to ones in the House-passed bill. No hearings have been held specifically on the bill.

On March 10, 1995, the House of Representatives passed the *Common Sense Product*

Liability and Legal Reform Act of 1995 (H.R. 956). The bill would limit the amount of punitive damages in all civil cases to the greater of $250,000 or three times the amount of economic damages. The Senate passed the *Product Liability Fairness Act of 1995* - as an amended H.R. 956. The bill included a cap on punitive damages, but the limit was set at the greater of $250,000 or two times compensatory damages, and it applied only to product liability suits. The Senate earlier had defeated an amendment that would have extended the limits on punitive damages to all civil actions.

John K. Rabiej

Attachments

Union Calendar No. 120

104TH CONGRESS
1ST SESSION

H. R. 1445

[Report No. 104–228]

To amend Rule 30 of the Federal Rules of Civil Procedure to restore the stenographic preference for depositions.

IN THE HOUSE OF REPRESENTATIVES

APRIL 6, 1995

Mr. MOORHEAD (for himself, Mrs. SCHROEDER, Mr. COBLE, and Mr. CANADY of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

AUGUST 2, 1995

Additional sponsors: Mr. BONO, Mr. BARR, Mr. FRANK of Massachusetts, and Mr. SENSENBRENNER

AUGUST 2, 1995

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

A BILL

To amend Rule 30 of the Federal Rules of Civil Procedure to restore the stenographic preference for depositions.

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

That paragraphs (2) and (3) of Rule 30(b) of the Federal Rules of Civil Procedure are amended to read as follows:

"(2) Unless the court upon motion orders, or the parties stipulate in writing, the deposition shall be recorded by stenographic means. The party taking the deposition shall bear the cost of the transcription. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

"(3) With prior notice to the deponent and other parties, any party may use another method to record the deponent's testimony in addition to the method used pursuant to paragraph (2). The additional record or transcript shall be made at the party's expense unless the court otherwise orders.".

104TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
104–228

AMENDMENT TO RULE 30 OF THE FEDERAL RULES OF CIVIL PROCEDURE

AUGUST 2, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. MOORHEAD, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1445]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1445) to amend Rule 30 of the Federal Rules of Civil Procedure to restore the stenographic preference for depositions, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

99–006

PURPOSE AND SUMMARY

H.R. 1445 will amend rule 30(b) of the Federal Rules of Civil Procedure to restore the stenographic preference for the taking of pretrial depositions.

BACKGROUND AND NEED FOR THE LEGISLATION

The present law took effect on December 1, 1993 over the objection of the Judiciary Committee and the House of Representatives. When the Judicial Conference testified in 1993 in favor of this change they could not provide the Subcommittee on Courts and Intellectual Property a single justification for the change in law. Legislation was introduced to try and stop the change from taking place. That bill passed the House but not the Other Body and the change of law took effect automatically through the Rules Enabling Act.

From 1970 to December 1993, Rule 30(b) of the Rules of Civil Procedure permitted depositions to be recorded by nonstenographic means but only upon court order or with the written stipulation of the parties. The change in Rule 30(b) that occurred in December 1993 altered that procedure by eliminating the requirement of a court order or stipulation, and afforded each party the right to arrange for recording of a deposition by nonstenographic means.

Depositions recorded stenographically historically have provided an accurate record of testimony which can conveniently be used by both trial and appellate courts. Under present law, video or audio recordings that are to be introduced at trial must be transcribed according to Rule 32(c). The cost of this duplicating process will outweigh any cost savings gained by using audio or video tapes. The Subcommittee also heard testimony regarding two studies undertaken by the Justice Research Institute which concluded that a stenographic court reporter is the qualitative standard for accuracy and clarity in depositions, and that a court reporter using a computer-aided transcription is the least costly method of making a deposition record.

The Committee believes that, at this time, the case has not been made to allow either party, without stipulation by the other party or leave of court, to take depositions exclusively by audio or video tape. The Committee is in receipt of a letter from Mr. Norman J. Chachkin, Director of Litigation of the NAACP Legal Defense and Education Fund, In. dated July 18, 1995 stating that the "Legal Defense Fund does not object to H.R. 1445 * * *".

HEARINGS

The Committee's Subcommittee on Courts and Intellectual Property held hearings on June 16, 1993 and May 11, 1995. On May 11, 1995 testimony was received from the following witnesses: The Honorable Ann Claire Williams, Judge, United States District Court for the Northern District of Illinois; the Honorable J. Phil Gilbert, Chief Judge, United States District Court for the Southern District of Illinois; Paul Friedman, Deputy Associate Attorney General, United States Department of Justice; William K. Slate II, President and Chief Executive Officer, American Arbitration Association; Gary M. Cramer, Registered Professional Reporter, National Court Reporters Association; Neal R. Gross, President and Chief Executive Officer, and Neal R. Gross & Company, Inc. on behalf of the American Association of Electronic Reporters and Transcribers (AAERT).

Testimony at the Subcommittee hearing both in 1993 and in May of this year raised concerns about the reliability and durability of video or audio tape alternatives to stenographic depositions. There also was information submitted suggesting that technological improvements in stenographic recording will make the stenographic method cost-effective for years to come.

COMMITTEE CONSIDERATION

On May 16, 1995, the Subcommittee on Courts and Intellectual Property met in open session and ordered reported the bill H.R. 1445, by a voice vote, a quorum being present. On July 12, 1995 the Committee met in open session and ordered reported the bill H.R. 1445 without amendment by a voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1445, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 18, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1445, a bill to amend Rule 30 of the Federal Rules of

Civil Procedure to restore the stenographic preference for depositions, as ordered reported by the House Committee on the Judiciary on July 12, 1995. CBO estimates that enacting H.R. 1445 would not result in any significant cost to the federal government. Because enactment of H.R. 1445 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

This bill would restore a requirement that depositions in federal civil cases must be recorded by stenographic means unless both parties to the case agree in writing to some other form of recording testimony or the court orders that such nonstenographic means be used. Based on information from the Administrative Office of the United States Courts, we expect that enacting H.R. 1445 would not necessarily result in fewer nonstenographic depositions being taken. Rather, it would create an additional procedural step that would have to be followed before using nonstenographic methods, such as audio tape or video tape. This bill would not affect the current requirement that all depositions be transcribed if they are to be introduced at trial.

Nonstenographic methods are generally less expensive than stenographic means for recording depositions. Because CBO expects that H.R. 1445 would not cause any significant change in the use of the various means of recording depositions, we estimate that enacting this bill would result in no significant cost to the federal government.

Because this bill would not apply to state law, enacting H.R. 1445 would have no impact on state court procedures.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JAMES J. BLUM
(For June E. O'Neill, *Director*).

AGENCY VIEWS

COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE,
JUDICIAL CONFERENCE OF THE UNITED STATES,
Washington, DC, April 28, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC

DEAR CHAIRMAN HYDE: I write to advise you of the concern of the Advisory Committee on Civil Rules of the Judicial Conference on the proposed amendments to Civil Rule 30(b) contained in H.R. 1445. The legislation would require stenographic recording of all oral depositions unless otherwise ordered by the court or stipulated by the parties. It would undo amendments to Rule 30(b) that took effect on December 1, 1993.

Present Rule 30(b) permits the party taking the deposition to record it by sound, sound-and-visual, or stenographic means. No court order or mutual consent is required. The rule, as amended, effectively removes impediments to parties who want to take advantage of newer, more efficient, and less-expensive recording technologies. It regulates only the recording of oral depositions, most of

which never are used at trial. It does not regulate the manner in which courtroom proceedings are recorded.

The 1993 amendments to Rule 30 were adopted by the Supreme Court and transmitted to Congress only after the completion of a careful deliberative process, which included substantial public input. The 1993 amendments were originally considered in 1988 by the Advisory Committee on Civil Rules. A draft rule was published for public comment in September 1989, followed by public hearings in early 1990.

The draft proposal was modified in light of the comments, which disclosed potential problems with reliance at trial on tape-recorded testimony absent a written transcript. Another draft was published for public comment in August 1991, which generally required a written transcript of any deposition that was used in court. That proposal received hundreds of comments and was discussed at public hearings held in late 1991 and early 1992.

After further consideration, the present amendments to Rule 30 were approved in turn by the Advisory Committee, the Standing Rules Committee, and the Judicial Conference. On April 22, 1993, the Supreme Court adopted the rule without further revision and transmitted it to Congress. It took effect seven months later when Congress took no action.

Many of the criticisms voiced against the 1993 amendments to Rule 30 came from court reporters urging that video and audio tape recordings were unreliable and difficult to use at trial. The Advisory Committee was unanimous that these concerns were adequately dealt with in the revised draft.

Rule 30, as amended, contains safeguards to assure the integrity and utility of any tape or other non-stenographic recording, including the following:

(1) the officer presiding at the deposition must retain a copy of the recording unless otherwise ordered by the court or provided for by stipulation;

(2) the presiding officer must state certain identification information at the beginning of each unit of recording tape or other medium;

(3) any distortion of the appearance or demeanor of deponents or counsel by camera or recording techniques is expressly prohibited; and

(4) the court retains the authority to require a different recording method if the circumstances warrant.

The rule also permits any other party to designate an additional method (including stenographic means) to record the deposition at their expense. Finally, the rule requires the parties to furnish a written transcript if they intend to use a deposition recorded by non-stenographic means for other than impeachment purposes at trial or in a motion hearing.

The changes to Rule 30 were developed after full consideration of competing interests and policies regarding use of stenographic versus non-stenographic methods of recording depositions. The amendments allow the parties to decide which recording method will be used in a particular case and are designed to facilitate use of modern technology, while ensuring an accurate evidentiary

record. The Advisory Committee is unaware of any problem with the operation of the rule as amended.

I urge you to consider opposing the undoing of the 1993 amendments to Civil Rule 30(b).

Sincerely yours,

PATRICK E. HIGGINBOTHAM,
U.S. Court of Appeals.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1445 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

H.R. 1445 would amend paragraphs (2) and (3) of Rule 30(b) of the Federal Rules of Civil Procedure.

Paragraph (2) restores a requirement that depositions in federal civil cases must be recorded by stenographic means unless both parties to the case agree in writing to some other form of recording or the court orders that such non stenographic means be used. The party taking the deposition shall bear the cost of the transcription. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

Paragraph (3) restates present law and contains conforming amendments.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

RULE 30 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 30. Depositions Upon Oral Examination

(a) * * *

(b) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; METHOD OF RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.

(1) * * *

[(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

[(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person

taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.]

(2) Unless the court upon motion orders, or the parties stipulate in writing, the deposition shall be recorded by stenographic means. The party taking the deposition shall bear the cost of the transcription. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may use another method to record the deponent's testimony in addition to the method used pursuant to paragraph (2). The additional record or transcript shall be made at the party's expense unless the court otherwise orders.

* * * * * * *

DISSENTING VIEWS

H.R. 1445 would overturn Rule 30(b) of the Federal Rules of Civil Procedure—which allows the party taking a deposition to determine whether to record by sound, sound and visual, or stenographic means—and restore pre-1993 procedure requiring the stenographic recording of depositions (in the absence of a stipulation or court order to the contrary). We oppose this legislation because it represents an unwarranted intrusion into the Judiciary's legitimate rulemaking authority and would unnecessarily increase legal costs and make it more difficult for the poorest members of our society to have access to justice.

As a general matter we, in Congress, should defer to the judicial branch regarding the promulgation of court rule. Pursuant to the Rules Enabling Act, court rules are developed and proposed according to a carefully considered set of procedures.[1] In a letter to the Committee, Judge Patrick Higgingbotham, Chair of the Civil Rules Committee of the Judicial Conference, described the process pursuant to which Rule 30(b) was approved:

> The 1993 amendments to Rule 30 were adopted by the Supreme Court and transmitted to Congress only after the completion of a careful deliberative process, which included substantial public input. The 1993 amendments were originally considered in 1988 by the Advisory Committee on Civil Rules. A draft rule was published for public comment in September 1989, followed by public hearings in early 1990. . . [The final] proposal received hundreds of comments and was discussed at public hearings held in late 1991 and 1992.[2]

By contrast, H.R. 1445 was considered pursuant to a far more abbreviated process, with only two witnesses testifying at the May 11, 1995 hearing.[3]

Moreover, in our view the Judiciary had good reason to adopt Rule 30(b) in 1993. By allowing the party noticing a deposition to choose from a variety of techniques, Rule 30 (b) permits the free market to decide which reporting method is the most desirable and cost effective. A number of studies have established that electronic court reporters and transcribers generally charge less for comparable services than stenographic reporters.[4] For example, a landmark study conducted by the Federal Judicial Center for the U.S. Judicial Conference concluded the audio-based recording method provides significant cost savings over stenographic recording:

> The average annual cost of one audio-based court reporting system in federal district court is $18,604, compared to $40,514 for a corresponding official stenographic court reporting system. Projecting those costs over six years, the average cost of an audio-based court reporting system is about $125,000, compared to about $275,000 for the official court reporting system.[5]

Since the United States Treasury funds the courts as well as the Department of Justice (the most frequent party to litigation), these savings can be expected to be passed on to taxpayers generally as well as parties to depositions.

Even more importantly, competition and free choice in the reporting market allow the poorest members of our society greater access to the court system. In a letter to Senators Biden and Heflin last Congress, a broad coalition of civil rights and liberties groups expressed support for Rule 30(b):

> [permitting taped depositions under Rule 30(b)] make[s] one of the most useful but most expensive forms of discovery accessible to litigants of modest means. Instead of paying $500 to $1,000 per day for the original and a copy of a court reporter's transcript of a deposition, they could pay a few dollars for a blank audio- or video-tape and arrange for a typist to make a written record at far less expense . . . [Proposals to overturn Rule 30(b) keep] the expense of litigation unnecessarily high . . . thereby limiting the number and nature of civil rights cases which can be brought and interfering with the policy of Congress in encouraging the private enforcement of the civil rights laws.[6]

Further, although supporters of H.R. 1445 assert that using video and audio tapes to record depositions is less accurate than traditional stenography, the weight of evidence is to the contrary. Of the 20-some studies conducted on this subject in the last twenty years, the vast majority have demonstrated that non-stenographic

[1] *See* 28 USC §§2071–77.

[2] Letter from the Honorable Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, Judicial Conference of the United States, to the Honorable Henry J. Hyde, Chairman, House Committee on the Judiciary (April 28, 1995) (on file with the House Committee on the Judiciary).

[3] The two witness testified concerning H.R. 1445 at the May 11, 1995 hearing were the National Court Reporters Association (who supported the bill) and the American Association of Electronic Reporters and Transcribers (who opposed the bill).

[4] Memorandum from National Center for State Courts regarding Literature Review of Electronic Court Reporting Methods (March 15, 1994) (on file with the House Committee on the Judiciary).

[5] J. Michael Greenwood, Julie Horney, M. Daniel Jacoubovitch, Frances D. Lowenstein, and Russell R. Wheeler, "A Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting", at xi (July 1983) (study performed on behalf of the Federal Judicial Center, on file with the House Committee on the Judiciary).

[6] Letter from Lawyers' Committee for Civil Rights Under Law, Women's Legal Defense Fund, American Civil Liberties Union, Puerto Rican Legal Defense and Education Fund, People for the American Way, NAACP Legal Defense and Educational Fund, and the National Association for the Advancement of Colored People to the Honorable Joseph R. Biden, Chairman Senate Judiciary Committee and the Honorable Howell Heflin, Chairman, Subcommittee on Courts and Administrative Practice (November 16, 1993) (on file with the Senate Judiciary Committee).

The NAACP Legal Defense Fund has subsequently withdrawn its opposition to overturning Rule 30(b) and indicated that the Lawyer's Committee for Civil Rights Under Law has done so also, however other civil rights' groups, such as the ACLU, have continued to express strong support for maintaining the rule. *See* letter from Norman J. Chachkin, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc. to George W. Koch (July 18, 1995); letter from Laura Murphy, Director and Diann Y. Rust-Tierney, Associate Director/Chief Legislative Counsel, American Civil Liberties Union to the Honorable John Conyers, Jr. (July 25, 1995) (on file with House Judiciary Committee, Minority).

sound and sound-and-visual methods were of equal or superior quality to stenographic recording.[7] Of particular significance is the Federal Judicial Center study which examined audio- and stenography-based systems in 82 civil and criminal cases, comparing transcripts from both methods and identifying discrepancies. This study found audio-based systems to be far more accurate than stenography-based systems:

> The overall accuracy evaluation showed that the audio-based transcript matched the audiotape in 56 percent of the 5,717 discrepancies that did not represent discretionary deviations under project transcription guidelines. The steno-based transcript matched the tape in 36 percent of such discrepancies and neither transcript matched the tape in 3 percent of the discrepancies. The audiotape could not resolve the remaining discrepancies.[8]

It is also important to note that Rule 30 itself contains a number of safeguards to assure the accuracy and reliability of non-stenographic recording, including:

> (i) The officer presiding at the deposition must retain a copy of the recording unless otherwise ordered by the court or provided by stipulation;
>
> (ii) The presiding officer must state certain identification information at the beginning of each unit of recording tape or other medium;
>
> (iii) Any distortion of the appearance or demeanor of deponents or counsel by camera or recording techniques is expressly prohibited; and
>
> (iv) The court retains the authority to require a different method of recording if the circumstances warrant; and
>
> (iv) Any other party is permitted to designate an additional method (including stenographic means) to record the deposition at their expense; and
>
> (v) The parties are required to furnish a written transcript if they intend to use a deposition recorded by non-stenographic means for other than impeachment purposes at trial or in a motion hearing.[9]

Significantly, in this letter on behalf of the Judicial Conference concerning H.R. 1445, Judge Higginbotham notes that "[t]he Advisory Committee [on Civil Rules] is unaware of any problem with the operation of . . . rule [30(b)] as amended."[10]

[7] See Memorandum from National Center for State Courts regarding Literature Review of Electronic Court Reporting Methods, supra note 4 (15 reports found that electronic court reporting provided either cost benefits, quality benefits or both compared to stenographic recording [all but one of the reports were prepared by or for federal or state judiciaries and one was prepared on behalf of a private vendor of video court reporting systems]; 5 reports drew contrary conclusions [4 of these were commissioned and paid for by the National Court Reporters Association and one was prepared on behalf of the State of Hawaii Judiciary]).

[8] "A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting", supra note 5, at xiv.

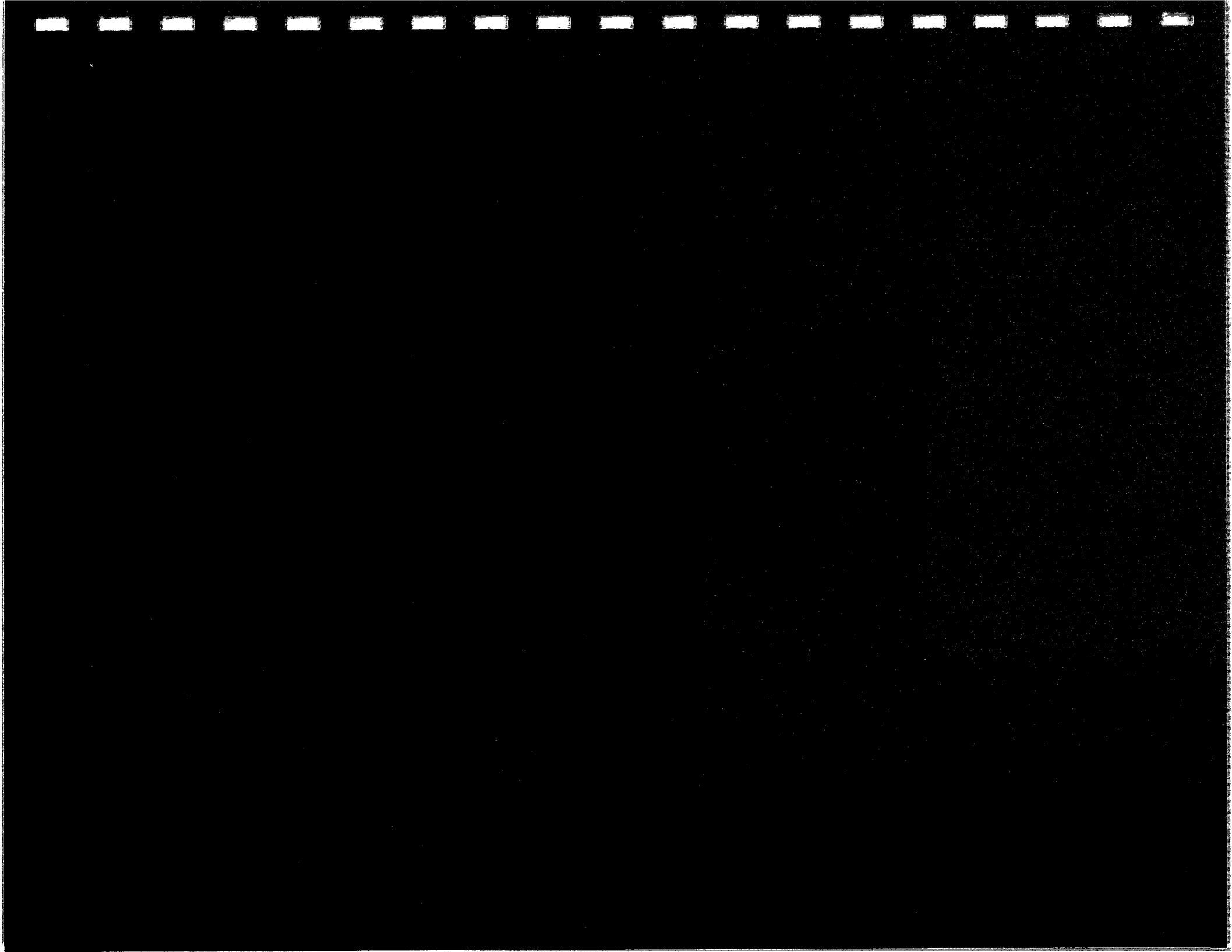
[9] *See* letter from the Honorable Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, Judicial Conference of the United States, *supra* note 2.

[10] Id.

Based on the foregoing, we must oppose H.R. 1445. Congress should not involve itself in rewriting the judicial rules, particularly when doing so will increase court costs and diminish access to justice.

JOHN CONYERS, JR.
ROBERT C. SCOTT.
MELVIN L. WATT.
JOSÉ E. SERRANO.
ZOE LOFGREN.

○



July 24, 1995

Honorable Alfonse M. D'Amato
Chairman
Committee on Banking, Housing
and Urban Affairs
United States Senate
534 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Alfonse:

As you prepare for conference on H.R. 1058, the securities litigation reform bill, I write to urge you to drop the Rule 11 provisions of the bill. These provisions are unworkable and will have the opposite effect that you intend, only adding to the burdens and costs of litigating securities cases.

By requiring federal judges to review all the pleadings in a case at its conclusion and make a decision on whether Rule 11 was violated, the bill imposes an immense burden on the courts. That review is not likely to accomplish anything, because it is almost impossible for a judge to decide, several years after the fact, whether Rule 11 was violated.

As you know, Rule 11 requires a representation by counsel that a factual or legal claim is not objectively frivolous. Such an inquiry is best made at the time the pleading is filed when such an allegation may be brought to the court's attention by any party. To expect a judge to decide years after the fact what the state of the law was when a pleading was filed or what a party ought to have been able to know at the time a factual representation was made is unreasonable.

Because of the difficulty in conducting the review required by the bill and because of the normal adversarial nature of our system of justice, the impact of the provision is likely to be directly contrary to what is intended. Judges are likely to respond by requiring the parties themselves to go through the pleadings and submit briefs on the issue of whether either side violated Rule 11. Such a process will result only in additional cost to the litigants, including defendants, at the conclusion of the case, while it is unlikely to yield many violations, which typically would have been identified and pursued at the time the offending pleading was filed. I believe that the Senate would have been best served by allowing the Judiciary Committee to review this and other procedural reforms in the bill.

Therefore, I believe you should delete the Rule 11 provisions from any conference report, despite the Senate's vote to table my amendment on Rule 11.

Thank you for your consideration.

My best.

Sincerely,

Arlen Specter

AS/rah

cc: Honorable Paul S. Sarbanes
Honorable Pete V. Domenici
Honorable Christopher J. Dodd
Honorable Gilbert S. Merritt
Honorable Patrick H. Higginbotham
Honorable Anthony J. Scirica

PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

(H.R. 1058 -- as amended and passed by the Senate on June 28, 1995)

* * * * *

SEC. 103. SANCTIONS FOR ABUSIVE LITIGATION.

(a) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(j) SANCTIONS FOR ABUSIVE LITIGATION.—

"(1) MANDATORY REVIEW BY COURT.—In any private action arising under this title, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure.

"(2) MANDATORY SANCTIONS.—If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure.

"(3) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

"(A) IN GENERAL.—Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction for failure of the complaint or the responsive pleading or motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

"(B) REBUTTAL EVIDENCE.—The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

"(i) the award of attorneys' fees and other expenses will impose an undue burden on that party or attorney; or

"(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

"(C) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.".

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended by adding at the end the following new subsection:

"(l) SANCTIONS FOR ABUSIVE LITIGATION.—

"(1) MANDATORY REVIEW BY COURT.—In any private action arising under this title, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure.

"(2) MANDATORY SANCTIONS.—If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure, the court shall impose sanctions in accordance with Rule 11 of the Federal Rules of Civil Procedure on such party or attorney.

"(3) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

"(A) IN GENERAL.—Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction for failure of the complaint or the responsive pleading or motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

"(B) REBUTTAL EVIDENCE.—The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

"(i) the award of attorneys' fees and other expenses will impose an undue burden on that party or attorney; or

"(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

"(C) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.".

of the votes on those amendments will take place tomorrow, or tonight by voice. So what I am saying is there will be no further rollcall votes. And all of the debate, with the exception of, I believe, 7 minutes for one Member, and the intervening times, will take place this evening. I am going to propound that request.

UNANIMOUS-CONSENT AGREEMENT

Mr. D'AMATO. Mr. President, I ask unanimous consent that the following amendments be the only remaining first degree amendments in order, other than the committee-reported substitute, that no second-degree amendments be in order and that all amendments must be offered and debated this evening: The Biden amendment; the Bingaman amendment; the D'Amato-Sarbanes managers amendment; the Boxer amendment, re: insider trading; the Specter amendment, re: fraudulent intent; the Specter amendment, re: rule 11B; the Specter amendment, re: stay of discovery.

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

Mr. D'AMATO. I further ask that when the Senate completes its business today, it stand in recess until 8:40 a.m., and at 8:45 a.m. the Senate proceed to vote on or in relation to the first Specter amendment, and that following the conclusion of that vote, there be 4 minutes for debate, to be equally divided on the second Specter amendment, to be followed by a vote on or in relation to the second Specter amendment.

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

Mr. D'AMATO. I further ask that following the vote on the second Specter amendment, there be 4 minutes for debate, to be equally divided, on the third Specter amendment, to be followed by a vote on or in relation to the Specter amendment.

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

Mr. D'AMATO. I further ask that following the vote on the third Specter amendment, there be 7 minutes for debate, to be divided under the previous order, to be followed by a vote on or in relation to the Boxer amendment.

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

Mr. D'AMATO. I further ask that following the disposition of the Boxer amendment, the committee substitute, as amended, be agreed to and S. 240 be advanced to third reading, and the Banking Committee be discharged from further consideration of H.R. 1058, the House companion bill, and the Senate proceed to its immediate consideration; that all after the enacting clause be stricken and the text of S. 240, as amended, be inserted in lieu thereof, and H.R. 1058 be considered read the third time.

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

Mr. D'AMATO. I further ask unanimous consent that at that point there be 30 minutes for closing remarks, to be equally divided in the usual form, to be followed by a vote on H.R. 1058.

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

Mr. D'AMATO. Mr. President, I further ask unanimous consent that all of the votes after the first vote in the voting sequence be limited to 10 minutes each, except for final passage.

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

Mr. D'AMATO. Mr. President, there will be no further rollcall votes this evening, and the first vote tomorrow is at 8:45 a.m. The first amendment to be in order will be the Biden amendment, which will be kept under 5 minutes. Thereafter, the Bingaman amendment will follow, which will also be limited to 5 minutes, to be followed by Senator Specter's three amendments.

Mr. SARBANES. The first vote in the morning will be at 8:45. I remind my colleagues, that is a vote at 8:45.

The PRESIDING OFFICER. The first vote will be 8:45.

Mr. D'AMATO. Mr. President, I ask unanimous consent that the pending amendment be set aside so the Senator from Delaware can offer his amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. The pending amendment is set aside.

AMENDMENT NO. 1481

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

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Delaware [Mr. BIDEN] proposes an amendment numbered 1481.

Mr. BIDEN. 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 appropriate place insert:

SEC. . AMENDMENT TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

Section 1964(c) of title 18, United States Code, is amended by inserting before the period ", except that no person may rely upon conduct that would have been actionable as fraud in the purchase of sale of securities to establish a violation of section 1962", provided however that this exception shall not apply if any participant in the fraud is criminally convicted in connection therewith, in which case the statute of limitations shall start to run on the date that the conviction becomes final.

Mr. BIDEN. Mr. President, I have been here a while. When I first got here 23 years ago, I learned a lesson from Russell Long.

I went up to him on a Finance Committee day and asked to have an amendment accepted, and he said yes. I proceeded to speak on it half an hour and say why it was a good amendment. And he said, "I changed my mind. Rollcall vote." I lost. He came later and he said, "When I accept an amendment, accept the amendment and sit down."

I will take 30 seconds to explain my amendment because it is about to be accepted. I thank my friend from Pennsylvania for allowing me to move ahead. He is always gracious to me and I appreciate it.

There is a carve-out in this legislation, carving out securities fraud from the application of the civil RICO statutes. I think that is a bad idea. But I will not debate that issue tonight.

I have an amendment that is before the body that says such a carve-out exists, except that it shall not apply if any participant in fraud is criminally convicted; then RICO can apply, and the statute does not begin to toll until the day of the conviction becomes final.

Keeping with the admonition of Russell Long, I have no further comment on the amendment.

Mr. D'AMATO. Mr. President, we have no objection. We accept that amendment.

The PRESIDING OFFICER. If there is no further debate, the question is on agreeing to the amendment.

The amendment (No. 1481) was agreed to.

Mr. BIDEN. I move to reconsider the vote.

Mr. SARBANES. I move to table the motion.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1482

(Purpose: To clarify the application of sanctions under rule 11 of the Federal Rules of Civil Procedure in private securities litigation)

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

The PRESIDING OFFICER. The pending amendment is set aside. The clerk will report.

The legislative clerk read as follows:

The Senator from New Mexico [Mr. BINGAMAN], for himself and Mr. BRYAN, proposes an amendment numbered 1482.

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

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

The amendment is as follows:

On page 105, line 25, insert ", or the responsive pleading or motion" after "complaint".

On page 107, line 20, insert ", or the responsive pleading or motion" after "complaint".

Mr. BINGAMAN. Mr. President, I send this amendment on behalf of myself and Mr. BRYAN. It is a very simple amendment.

The present bill, as it is pending before the Senate, calls for a mandatory review by the court in any private action arising under the legislation. It says that the court shall establish a record with specific findings regarding compliance by each party, and each attorney representing any party with the requirements of rule 11 of the Federal Rules of Civil Procedure, prohibiting frivolous pleading or frivolous activity by counsel.

The difficulty is that later in the bill where it specifies presumption, that we call for on page 105 and 107 of the bill,

we only specify that the appropriate sanction apply to pleadings filed by the plaintiffs.

Our amendment would change that and make it more balanced, in that it would specify that the sanctions could apply either to pleadings filed by the plaintiff or to responsive pleadings or motions filed by defense.

I think this is acceptable to the managers of the bill. I think it is only reasonable that if we are going to have this provision in the bill—which is a provision, quite frankly, I do not agree with—I think that singling out these securities cases as the only cases in our court system where we require a mandatory review by the court, and the finding and imposition of specific findings, is a mistake. If we are going to have it, we should make it balanced between plaintiff and defendant.

I know the Senator from Nevada wishes to speak. I yield the floor.

Mr. BRYAN. Mr. President, first let me commend my colleague from New Mexico. I think his amendment is well-constructed. We have used the word often in the course of the debate—balanced. This is balanced. What is sauce for the goose is sauce for the gander.

Those lawyers, whether they be plaintiff's lawyers or defendant's lawyers who are involved in frivolous conduct, now feel the full effect of sanctioned rule 11 under the Federal Rules of Civil Procedure.

Much has been said about the frivolous nature of this lawsuit correction act. I must say this is one of the few amendments that actually deals with this issue. I am pleased to support my colleague and friend from New Mexico, and I am pleased that the managers have agreed to accept the amendment. I urge its adoption.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 1482) was agreed to.

Mr. SARBANES. I move to reconsider the vote.

Mr. D'AMATO. I move to table the motion.

The motion to lay on the table was agreed to.

Mr. SPECTER. Mr. President, I have sought recognition to offer three amendments which I think will provide some balance to the legislation that is now pending before the Senate.

I believe that there is a need for some modification of our securities acts, but I think it has to be very, very carefully crafted.

As I take a look at what is occurring in the courts, compared to what happens in our legislative process, I think that the very deliberative rule in the courts, case by case, with very, very careful analysis, has to take precedence over the procedures which we use in the Congress where hearings are attended, sometimes by only one or two Senators, and then provisions are added in markup very late in the process. Legislation does not receive the kind of very thoughtful encrustation that comes through common law development and interpretation of the securities acts.

I have represented both sides in securities litigation before coming to the U.S. Senate in the private practice of law. I would remind my colleagues that before we proceed to make such enormous changes by this legislation, we need to recall the importance of protecting investors, especially small investors, small unsophisticated investors, in some cases, who put a substantial part of their savings, perhaps all of their life savings, into securities, and how much is involved in the accretion of capital through corporations, through common stock, compared to what is the thrust of this legislation, really looking to curb some lawsuits which should not be brought, some frivolous lawsuits which ought not to have been filed, and perhaps some of the excesses in the plaintiffs' bar, as there may be excesses in any group.

What we are looking at is the value of shares traded in 1993 on the stock exchanges, the most recent year available for analysis. Mr. President, the $6.63 trillion traded on the stock exchanges in 1993 is more than half of the gross national product of the United States in 1963. The value of initial public offerings in 1993, was $57.444 billion.

If we take a look at the comparison as to how much is spent on attorney's fees, according to a 1990 article in the Class Action Reports, a review of some 334 securities class action cases decided between 1980 and 1990, a group of cases in which there was a recovery of $4.281 billion, only some 15.2 percent of that recovery went to fees and costs, a total of some $630 million.

In those cases, according to the court records, the attorneys for the plaintiffs spent 1,691,642 hours.

Statistics have already been presented on the floor of the Senate which show a decrease in securities litigation. I submit that it is very important to be able to continue to protect investors—especially small investors—from stock fraud.

We know that in the crash of the Depression, 1929 and thereafter, tremendous savings were lost at that time. These losses gave rise to the legislation in 1933 and 1934 to protect investors and the securities markets.

Without speaking at length on the subject, I would point to a few cases where there were very substantial losses to the public and in which private actions were brought to enforce the securities laws. For example, the ongoing Prudential Securities litigation, with over $1 billion in losses, perhaps as much as double that; the Michael Milken cases, where there were recoveries in the range of $1.3 billion, involving Drexel, Burnham & Lambert, recovered by the Federal Deposit Insurance Corporation under the securities laws; we all know the famous Charles Keating case, involving his former company, Lincoln Savings & Loan, involving some $262 million recovered and some $288 million lost; the $2 billion lost in the Washington Public Power Supply System case—mentioning only a few.

The concern that I have on the legislation as it is currently pending is that there is an imbalance which will discourage this very important litigation to protect the shareholders. I have supported the managers of the bill on a number of the amendments which have been filed, but I am going to submit a series of three amendments which, I submit, will make the bill more balanced.

The PRESIDING OFFICER. Without objection the pending amendment will be set aside.

AMENDMENT NO. 1483

(Purpose: To provide for sanctions for abusive litigation)

Mr. SPECTER. At this time, Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1483.

Mr. SPECTER. 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:

Beginning on page 105, strike line 1 and all that follows through page 108, line 17, and insert the following:

SEC. 103. SANCTIONS FOR ABUSIVE LITIGATION.

(a) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(j) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination.".

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended by adding at the end the following new subsection:

"(l) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination.".

Mr. SPECTER. Mr. President, this amendment is designed to leave discretion with the trial judge in place of the very onerous provisions of the pending

bill which require a mandatory review by the court after each securities case is concluded and then a requirement that the court impose sanctions on a party if the court finds that the party violated any requirement of rule 11(b) with the presumption being that attorney's fees will be awarded to the losing party.

I submit that this is a very harsh rule which will have a profoundly chilling effect on litigation brought under the securities acts, and will in addition spawn an enormous amount of additional work for the Federal courts by causing what is called satellite litigation.

That means that in any case where the litigation is concluded under the securities acts, the judge will be compelled, under the mandatory review provision, to review all the pleadings filed in the case to determine whether rule 11 was violated, whether or not either party chooses to have that review made, and then will be compelled to impose the sanction with the presumption being payment of attorney's fees, which is really the British system, not the United States' system, where we have had open courts. This provision risks causing a tremendous imbalance between plaintiffs and defendants in these cases because the defendants are characteristically major corporations with much greater resources to defend, contrasted with the plaintiffs who do not have those resources, or their lawyers who bring the suits on their behalf.

I have surveyed the Federal bench, the judges in the U.S. district courts and in the courts of appeals, to see how the judges respond to changes in rule 11 to take away the discretion of the trial judges and have what is, in effect, micromanagement of the judiciary by the Congress of the United States. I have done this to try to get a sense as to what is going on in the courts. It has been some time since I practiced there.

I submit that the views of a few Senators, the authors of this bill and the Senators who are voting on this legislation, are a great deal more limited than the insights of the Federal judges who preside in the administration of these cases day in and day out. The procedures which are being followed in this legislation are not those customarily followed where the rules of civil procedure are formulated by the Federal courts under the Rules Enabling Act—the Supreme Court which has the authority to do so, and the delegation of that authority to committees where the judges work with it all the time, and representatives of the bar, as opposed to the Members of Congress, who have very, very limited experience in this field and, in this particular case, had this provision added very late in the process, late in May, a few days before there was final markup of the bill in the Banking Committee, which does not normally deal with issues of the Federal Rules of Civil Procedure.

Earlier in the consideration of this bill I made an effort to have these issues on procedure referred to the Judiciary Committee, on which I serve, which has the most experience of any committee in the Congress—certainly more than the Banking Committee, which has jurisdiction over this bill—because hearings were not held and consideration was not given to this rule 11 provision.

Among the responses which I received, some 164 responses from Federal judges, there was a general sense that the trial judges ought to have the discretion and were in the best position to make a determination as to whether sanctions ought to be imposed without having a mandate from the Congress, the micromanagement from the Congress, saying you must make this determination. Even though the winning party did not ask for it, even though there are not procedures for one party to say to the other, "You are undertaking something which our side considers frivolous and, if you do not cease and desist, we will bring an action to impose sanctions," to have a chance to correct it.

A very lucid statement of the problem was made by a very distinguished judge for the Court of Appeals for the Third Circuit, Judge Edward R. Becker, who had this to say.

> The mandatory sanctions are a mistake and will only generate satellite litigation.

By satellite litigation, Judge Becker is referring to the situation where another lawsuit, another issue has to be litigated as to whether a rule 11 sanction should be instituted. Again, not at the request of the losing party. Judge Becker continues to this effect:

> The flexibility afforded by the current regime enables judges to use the threat of sanctions to manage cases effectively. Well-managed cases almost never result in sanctions. Moreover, the provisions for mandatory review, presumably without prompting by the parties, will impose a substantial burden on the courts and prove completely useless in the vast majority of cases. Requiring courts to impose sanctions without a motion of a party also places the judge in an inquisitorial role, which is foreign to our legal culture, which is based on the judge as a neutral arbiter model.

A very cogent reply was made by Judge James A. Parker, of the United States District Court for the District of New Mexico, who had this to say:

> As a member of the judiciary, I implore members of the legislative branch of government to follow the Rules Enabling Act procedures for amending rules of evidence and procedure that the courts must apply. Congress demonstrated great wisdom in passing the Rules Enabling Act which defines the appropriate roles of the legislative and judicial branches of government in adopting new rules or amending existing rules. Those who hold the strong and sincere belief that changes should be made to the current formulation of Rule 11 should present their views and proposals in accordance with the procedures set forth in the Rules Enabling Act.

Judge Parker further writes that "Rule 11 * * * gives federal judges adequate authority to impose appropriate sanctions for conduct that violates Rule 11."

Mr. President, a number of the judicial comments which I am about to read apply to my second amendment as well. That second amendment relates to a provision in the bill which requires that the court not allow discovery after a motion to dismiss is filed. On that particular line, the rule is that discovery may proceed unless the judge eliminates discovery. Under the pending legislation, there would be no discovery as a matter of mandate unless under very extraordinary circumstances, but the mandatory rule applies. And the comments of Judge Parker would apply to the second amendment as well, the second amendment which I propose to bring.

Mr. President, the statement by Judge Bill Wilson of the Eastern District of Arkansas, in a letter dated April 27, is to the same effect, as follows:

> Federal Rule . . . 11, as it now reads, gives a judge all he or she needs to handle improper conduct. And I think we should all keep in mind that we can't promulgate rules good enough to make a good judge out of a bad one.

On that point, Mr. President, I think it is fair and appropriate to note that we have a very able Federal judiciary which can administer justice if left to do so with appropriate discretion.

Judge Prentice H. Marshall of the Northern District of Illinois said this in a May 5 letter:

> Rule 11 . . . gives the judge greater flexibility in the imposition of sanctions; it affords the offending party the opportunity to correct his or her misdeed.

A letter from Martin F. Loughlin of the District of New Hampshire, dated May 2 reads:

> Federal Rule of Civil Procedure 11 is working well. It gives the judge adequate discretion to deal with frivolous litigation and untoward conduct by attorneys.

A letter from Federal Judge Miriam Goldman Cedarbaum from the Southern District of New York, dated May 10, 1995, says in part:

> I have found the general supervisory power of the court as well as 28 U.S.C., Section 1927, and Rule 11 adequate sources of judicial authority to discourage frivolous litigation.

A letter from Federal Judge J. Frederick Motz from the District of Maryland, dated May 9, 1995, referring to the mandatory rules said that they are:

> . . . counterproductive in that it increased judges' workloads and contributed to litigation cost and delay by requiring judges to impose sanctions whenever a Rule 11 violation was found. Satellite litigation in which one lawyer or party sought fees from another became commonplace.

Continuing to quote:

> I oppose any amendment to the Rule that would make imposition of sanctions mandatory.

A similar view was expressed by Judge Ilana Diamond Rovner of the Court of Appeals for the Seventh Circuit in a letter dated April 1995:

The current Rule 11 gives the District Court ample discretion to address frivolous litigation.

A letter from Senior Judge Floyd R. Gibson from the U.S. Court of Appeals for the Eighth Circuit, dated April 20, 1995:

I believe more discretion should be given to the district judge in the how and when to apply the sanctions under Rule 11(c) on sanctions.

Similarly, Judge Avern Cohn from the Eastern District of Michigan, dated May 5, 1995, says, in part:

I firmly believe that Congress involves itself too deeply in the procedural aspects of the litigation process.

A letter from Martin Feldman from the Eastern District of Louisiana, says, in part:

I believe that giving district courts more discretion in applying the Rule was good thinking.

And Judge Jimm Larry Hendren of the Western District of Arkansas, writes, in part:

I am not sure the Congress needs to pass any legislation. I think the courts, themselves, can handle this matter with the rules already in place and their inherent powers.

And a letter from Judge Leonard I. Garth, a distinguished member of the Court of Appeals for the Third Circuit, says:

In my opinion, abandoning mandatory sanctions and permitting district court judges to exercise their judicial discretion was a welcome measure.

A good many of these comments apply to the change in rule 11, which had been mandatory from 1983 to 1993. It would apply equally well to the kind of a rule which is in effect here.

The letter from Senior Judge William Schwarzer from San Francisco says that the sanctions ought to be discretionary.

Mr. President, I ask unanimous consent that these letters, which represent only a small sample of the responses I received supporting discretionary imposition of sanctions, appear in the RECORD at the conclusion of my statement, with the exception of the letter from Judge Becker.

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

(See exhibit 1.)

Mr. SPECTER. Mr. President, I now refer again to the letter from Judge Becker citing the draft of a rule from Circuit Judge Patrick Higginbotham, who is chairman of the Judicial Conference Advisory Committee on Civil Rules, which sets out the amendment which I have submitted, and it is to this effect: that the sanction for abusive litigation would arise in any private action when the abusive litigation practice is brought to the district court's attention by motion or otherwise. The court shall promptly decide with written findings of fact and conclusions of law whether to impose sanctions under rule 11, and upon the adjudication, the district court shall include the conclusions and shall impose the sanctions which the court in the court's discretion finds appropriate.

Mr. President, I submit to my colleagues that leaving the discretion to the judge really is the right way to handle these matters. These judges sit on these cases, know the cases, and have ample authority as a discretionary matter to impose the sanction. As one judge said, all these rules cannot make a bad judge do the right thing. But I think we can rely upon the discretion of the judges without tying their hands.

Mr. President, I would be glad to yield the floor at this time to argument by the managers if they would care to do so. We can then proceed to conclude the argument on this amendment.

EXHIBIT 1

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW MEXICO,
Albuquerque, New Mexico, May 2, 1995.

Hon. ARLEN SPECTOR,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTOR: Thank you for your letter of April 24, 1995 and the opportunity to express comments on issues involving Rule 11 of the Federal Rules of Civil Procedure.

For purposes of clarity, I have restated each question posed in your April 24, 1995 letter followed by my response.

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify "loser pays" and strengthening of FRCP 11?

Response: Rule 11, as amended effective December 1, 1993, gives federal judges adequate authority to impose appropriate sanctions for conduct that violates Rule 11. Rule 11(c) states that if Rule 11 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 subdivision (b) or are responsible for the violation." Rule 11(c)(2) describes the sanctions that may be imposed for a violation. These include directives of a non-monetary nature, an order to pay a penalty into Court, or an Order directing that an unsuccessful movant who has violated Rule 11 pay "some or all the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." At this point there appears to be no need to change Rule 11, or to pass legislation, to introduce a more stringent "loser pays" sanction.

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

Response: In this judicial district, considerable satellite litigation developed under Rule 11 after the 1983 amendment. This required judges to devote significant time to resolving squabbles among counsel unrelated to the merits of the case. The 1993 amendment of Rule 11 has dramatically reduced the number of motions alleging Rule 11 violations. This I attribute directly to the "safe harbor" provision found in Rule 11(c)(1)(A). The "safe harbor" provision has forced lawyers to communicate and to resolve their disputes in most instances without the need for Court intervention. My personal opinion is that this feature of the 1993 amendment of Rule 11 strengthened instead of weakened Rule 11. It has made the lawyers talk to each other about claims or defenses perceived by their opponents to be frivolous and this has resulted in most disputes being resolved without extensive briefing and devotion of valuable court time. Removal of the "safe harbor" provision from Rule 11 would be extremely detrimental to the orderly functioning of the courts.

(3) What suggestions, if any, do you have in relation to this issue?

Response: As a member of the judiciary I implore members of the legislative branch of government to follow the Rules Enabling Act procedures for amending rules of evidence and procedure that the courts must apply. Congress demonstrated great wisdom in passing the Rules Enabling Act which defines the appropriate roles of the legislative and judicial branches of government in adopting new rules or amending existing rules. Those who hold a strong and sincere belief that changes should be made to the current formulation of Rule 11 should present their views and proposals in accordance with the procedures set forth in the Rules Enabling Act.

If you wish, I will be happy to provide additional information on this subject either orally or in writing.

Sincerely,

JAMES A. PARKER.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF ARKANSAS,
Little Rock, AR, April 27, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you very much for your letter of April 6, 1995.

In the year and a half that I have been on the bench I have had no problem with frivolous litigation. I have sanctioned two lawyers for engaging in what I thought to be inappropriate discovery procedures, but have had no experience with FRCP 11 as a trial judge.

I am strongly opposed to the "loser pays" proposal. I am told by my scholarly friends that this is a British rule. With all due respect for our kinfolks across the Atlantic, many of our ancestors got on a ship and came to the United States because they were not particularly fond of the justice system in Britain. In all seriousness, I do have a lot of respect for some aspects of the system in England, but, in my opinion, ours is much superior.

The "loser pays" will obviously slam the courthouse door shut in the face of deserving citizens who are not well heeled financially.

It appears to me that the 1993 Amendment to FRCP 11 was much needed. The rule, before these changes, tended to be too rigid, at least on the surface. It encouraged satellite litigation. FRCP 11, as it now reads, gives a judge all she or he needs to handle improper conduct. And I think we should all keep in mind that we can't promulgate rules good enough to make a good judge out of a bad one.

Finally, I would like to comment on the "crisis" claims that are being made about the case load in federal district courts. I quote from Judge G. Thomas Eisele: *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. Rev. 1935 (1993):

. . . In 1985 the total case filings in all U.S. District Courts came to 299,164; in 1986, 282,074; in 1987, 268,023; in 1988, 269,174; in 1989, 263,896; in 1990, 251,113; in 1991, 241,420; and in 1992, 261,698. So in a period of seven years the total filings have fallen from 299,164 to 261,698. The number of civil filings per judgeship fell from 476 in 1985 to 379 in 1990—a period when the number of judgeships remained constant at 575. In 1991 the number of judgeships increased to 649 and the number of civil cases per judgeship fell to 320. For 1992 the figure is 350.

"We are frequently told that our criminal dockets are interfering with our civil dockets, and this has certainly been true in a few

of our federal districts. But the number of felony filings per judgeship only increased from forty-four in 1985 to fifty-eight in 1990. In 1992, that number fell to fifty-three. The total filings per judgeship, criminal and civil, have been lower than they were in 1991 (372) in only two years since 1975. And the weighted filings per judgeship have likewise fallen in the past five years from 461 in 1986 to 405 in 1992.

"So there is not much support for the oft-repeated assertions that 'federal court system has entered a period of crisis;' that our courts are 'on the verge of buckling under the strain;' that 'our courts are swamped and unmanageable'. . . . The actual figures and trends simply do not support such doomsday hyperbole.

"On the issue of delay we find, as always, that a few district courts are having considerable trouble moving their dockets, but overall we find the same median time from filing to disposition in civil cases (nine months) for each year from 1985 until 1992. And the period between issue and trial in 1992 (fourteen months) is the same as it was in 1985. A Rand Corporation study confirms that the rhetoric about unconscionable and escalating delays in processing and trying cases in the federal district court system is nothing more than myth. . . ."

In other words, the sky is not falling down.

Again, thank you very much for permitting me to comment on these questions.

Cordially,

WM. R. WILSON, JR.

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
Chicago, Illinois, May 5, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: I respond to yours of April 19 inquiring about the need to strengthen Rule 11 of the Federal Rules of Civil Procedure.

1. In my 22 years on the federal trial bench I state unequivocally that there is not a significant problem with frivolous litigation in the federal courts warranting a "loser pays" sanction. I have encountered two or three repetitious/abusive plaintiffs. But their first complaints were not frivolous. They just had difficulty taking "No" for an answer.

Of course, in all litigation which is tried, somebody wins and somebody loses. But the losers are not frivolous complainers.

2. The 1993 amendment to Rule 11 of the Federal Rules of Civil Procedure did not "weaken" it. Quite the contrary: it made the Rule bilateral, i.e., it applies to unfounded denials as well as unfounded contentions; it gives the judge greater flexibility in the imposition of sanctions; it affords the offending party the opportunity to correct his or her misdeed. The rule should not revert to 1983.

3. I suggest that Rule 11 be left just the way it is. It is working well. The collateral litigation provoked by the 1983 version has diminished.

Respectfully yours,

PRENTICE H. MARSHALL.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW HAMPSHIRE,
Concord, NH, May 2, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This is to acknowledge receipt of your letter dated April 24, 1995 with respect to the recently passed United States House of Representatives legislation providing for a form of "loser pays."

In response to question #1, I do not believe there is a significant problem with frivolous litigation in the Federal Courts to justify "loser pays."

With respect to question #2 FRCP 11 is working well. It gives the judge adequate discretion to deal with frivolous litigation and untoward conduct by attorneys.

Candidly, I hope that the Senate does not pass the "loser pays" legislation. I have one comment related to strengthening of FRCP 11. Although there may be and there is some justification for losers pay, I do not believe it is necessary. There are many cases where an indigent, well-intentioned litigant may be penalized by strict adherence to a rule that losers pay. I have been a New Hampshire Superior Court judge for sixteen years and a Federal Judge for an equal amount of time. While not strictly restricted to the Federal Courts, we are being inundated with paper, usually by the party who is well-off financially. This unfortunately sometimes puts pressure on the non-affluent litigant to settle or withdraw his or her claim.

Sincerely,

MARTIN F. LOUGHLIN.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK,
New York, NY, May 10, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter dated April 24 inquiring about frivolous litigation in the federal courts. I have been a federal trial judge for nine and one-half years in one of the busiest districts in the country. During that period, Fed.R.Civ.P. 11 has been both strengthened and weakened. I have not observed a significant problem that requires a legislative remedy.

The only noticeable effect of the weakening of FED.R.Civ.P. 11 has been a welcome diminution in the number of Rule 11 motions. With respect to "loser pays," it is my strongly-held view that the founders of this Republic wisely chose to eliminate certain aspects of the English legal system as contrary to the egalitarian ideals of American democracy. Two of the most important of these reforms were the abolition of the distinction between barristers and solicitors and the elimination of the British practice of requiring the losing party in civil litigation to pay the lawyers fees of the winning party. Indeed, the system of having each party bear its own legal fees has come to be known as the American Rule. It is based on the belief that people of limited means would be deterred from suing on meritorious claims by the fear that if they were not successful, the costs would ruin them.

I have found the general supervisory power of the court as well as 38 U.S.C. §1927 and Rule 11 adequate sources of judicial authority to discourage frivolous litigation, and do not believe that the American Rule should be abolished.

Sincerely,

MIRIAM GOLDMAN CEDERBAUM.

UNITED STATES DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, Maryland, May 9, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter of April 19, 1995, in which you solicit my views on a "loser pays" rule and the possible strengthening of FRCP 11.

There is, of course, a fair amount of frivolous litigation in the federal courts. However, the bulk of that litigation is conducted by impecunious litigants as to whom a "loser pay" rule would have no effect. Accordingly, I do not support the adoption of such a rule. I particularly oppose the rule in diversity cases since it would provide in such cases a significant incentive for attorneys to forum shop.

Similarly, I oppose any amendments to strengthen FRCP 11. I believe that as a general matter, Rule 11 is a valuable tool for judges to use, and I have occasionally imposed Rule 11 sanctions myself to punish or deter inappropriate behavior. However, I further believe that Rule 11, as it existed prior to the 1993 amendments, had a deleterious effect upon the professional relationships of members of the bar. Furthermore, I think that in its pre-1993 form the Rule was counterproductive in that it increased judges' workloads and contributed to litigation cost and delay by requiring judges to impose sanctions whenever a Rule 11 violation was found. Satellite litigation in which one lawyer or party sought fees from another became commonplace.

For these reasons I oppose any amendment to the Rule that would make imposition of sanctions mandatory; to a somewhat lesser extent, I also oppose elimination of the Rule's "safe harbor" provision provided in the 1993 amendments.

I hope that these comments are helpful to you. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

J. FREDERICK MOTZ,
United States District Judge.

U.S. COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,
Chicago, IL, April 19, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter requesting my views on the "loser pays" and Rule 11 issues. I very much appreciate being given an opportunity to comment. My thoughts on the specific questions you pose are as follows:

(1) In my judgment, there is no significant problem with frivolous litigation in the federal courts such as would justify "loser pays" legislation or strengthening FRCP 11. The current Rule 11 gives the district court ample discretion to address frivolous litigation. If a given case is sufficiently frivolous, a court is not hampered from invoking Rule 11 to shift the entire cost of the case to the loser. Rule 11 also grants the district court discretion to impose more modest penalties or to refrain from a penalty, depending on what is appropriate in a given case.

(2) After the 1983 amendment, FRCP 11 created a cottage industry of satellite litigation which consumed an enormous amount of court time and did not succeed in improving the overall quality of litigation. The fact that penalties were mandatory if a violation was found simply raised the stakes of Rule 11 litigation and encouraged the filing of requests for sanctions, even if the breach was slight and the damage minimal. In many cases, it turned a dispute between the litigants into a dispute between the lawyers, and hampered or prevented altogether the pre-trial settlement of cases. The 1993 amendment has improved matters greatly by making sanctions discretionary. This permits much greater flexibility and has removed the incentive to file Rule 11 motions when the case for sanctions is weak.

(3) I strongly recommend that Congress leave Rule 11 as is and not adopt the "loser pays" rule. A "loser pays" provision will not add anything substantive to the district court's arsenal of tools to deal with frivolous litigation. It is likely merely to discourage litigants with limited resources to pursue their cases, particularly when the litigant seeks a change in the law. The ability to pursue such cases seems to me one of the fundamental protections of individual rights in

this country, and I believe if we want to reduce litigation, rather than disincentives for pursuing novel theories we ought to introduce incentives for settlement. "Loser pays" would act as a disincentive to settlement by introducing the question of fees and costs into settlement discussions. It would also generate an enormous amount of fees litigation. The net effect would thus be deleterious to individual liberties without significantly reducing the amount of litigation, and would in my judgment merely exacerbate the core problem—the amount of time that judges are increasingly required to devote to non-substantive matters.

Thank you again for inviting me to comment. I hope that my thoughts will be of aid to you in your deliberations, and I send, as always, warmest good wishes and my thanks for your many kindnesses through the years.

With best regards,

ILANA DIAMOND ROVNER.

U.S. COURT OF APPEALS,
EIGHTH CIRCUIT,
Kansas City, MO, April 20, 1995.

Re FRCP 11.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: In reply to your letter of April 6, positing inquiry on three issues related to FRCP 11, I would like to respond as follows:

1. There is a significant problem with frivolous litigation in the Federal Courts. I think a trial run with "loser pays" proposal would be in order provided the district judge would have the discretion to apply or not to apply such sanction in any given case.

2. I think FRCP 11 worked better after the 1983 Amendment; and, has some difficulty since the 1993 Amendment.

3. I believe more discretion should be given to the district judge in the how and when to apply the sanctions authorized under FRCP 11(c) on sanction. Also, some revisions of subsection (d) might be in order relating to discovery as there has been many abuses reported of extensive, unnecessary and costly discovery procedures which makes the whole legal system too expensive for many citizens to handle or even participate in the legal process.

I have been sitting with the Ninth Circuit in San Francisco since the receipt of your letter, hence my slight delay in reply.

Sincerely,

FLOYD R. GIBSON.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF MICHIGAN,
Detroit, MI, May 5, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for asking my views on pending "loser pays" legislation.

I firmly believe the Congress involves itself too deeply in the procedural aspects of the litigation process. Federal judges are capable of dealing with abusive lawyering. Legislation is not needed. I handle my docket just fine. I control abusive lawyering within the existing rules. Giving me more authority to deal with abusive lawyering is likely to make me more abusive.

Specifically,

1. There is no problem with frivolous litigation in the federal courts. FRCP 11 does not need to be strengthened and "loser pays" is not justified. We have gotten along very well for 220 years without much fee shifting and there is no need for it now.

2. FRCP 11 worked less well after the 1983 Amendment than it has since the 1993 Amendment. After the 1983 Amendment there were frequent occasions of overuse. That overuse to longer appears. Rarely is there a need for Rule 11 sanctions of any significant amount.

3. I suggest that Congress stay out of this area. What is pushing the Congress now is the better heeled part of society. More defendants win in court than plaintiffs. "Loser pays" and a stricter FRCP 11 would discourage otherwise potentially meritorious cases from coming to federal courts.

Lastly, published statistics show a 14% drop in the number of civil filings in federal courts between 1985 and 1994. Why all the excitement?

Sincerely yours,

AVERN COHN.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
New Orleans, LA, May 1, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This is in response to your letter of April 19th, which I assume went to all members of the judiciary (unless our mutual good friend, Ed Becker, suggested that you write to me).

Let me say at the outset that after having been a lawyer who practiced principally in federal courts for some 26 years and a United States District Judge for nearly 12 years, I support some form of "loser pay" legislation.

There is indeed a problem with frivolous litigation in the Federal Courts which, in my view, justifies some form of "loser pay" rule. "Loser pay" legislation would serve as a deterrent to many lawsuits that ought not be filed, including suits by lawyers and pro se litigants. Moreover, "loser pay" legislation would also deter frivolous defenses in the early stages of the litigation. That, to me, is the main difference between "loser pay" and Rule 11.

I believe Rule 11 has worked after the 1983 Amendment, but its weakness is that Rule 11 addresses matters that might have occurred at the outset of litigation but that usually occur as an abuse of the adversary process in a later stage of the litigation. On the other hand, "loser pay" would serve as a deterrent from the very beginning of the litigation. I haven't had much involvement with Rule 11 since the 1983 Amendment, but I believe that giving district courts more discretion in applying the Rule was a good thing and I would not consider the 1993 Amendment to have been a weakening of the Rule.

As to specific suggestions, "loser pay" comes in many forms as you no doubt are aware. I don't have a specific model in mind, only a concept. I like the English rule but they have a much more sophisticated Legal Aid system. The question of whether or not pro se litigants should be dealt with the same way as lawyers and other litigants is a close call. I guess what I am saying is that there are several models of "loser pay" and your Committee would no doubt want to consider many of them and, perhaps, even a refinement of them that would accommodate the Federal system. But some form of "loser pay" is most appropriate now and I would be pleased to work with any group who was interested in drafting such legislation.

Thank you very much for writing me. You may also be interested to know that one of my present law clerks is Marc DuBois, whose father I understand is also a close friend of yours.

Sincerely,

MARTIN L.C. FELDMAN.

U.S. DISTRICT COURT,
WESTERN DISTRICT OF ARKANSAS,
Fort Smith, AR, April 20, 1995.

Re: Your Letter of April 6, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: With respect to your request for comment, I would make the following observations:

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify "loser pays" and strengthening of FRCP 11?

Response: I cannot speak for all federal courts but, with respect to those with which I am involved, the answer is "no."

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

Response: I did not commence my duties as a federal district judge until April 15, 1992. Accordingly, I don't feel qualified to make an appropriate comment on this issue.

(3) What suggestions, if any, do you have in relation to this issue?

Response: I am not sure the Congress needs to pass any legislation. I think courts, themselves, can handle this matter with the rules already in place and their inherent powers.

Respectfully,

JIMM LARRY HENDREN.

U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT,
Newark, NJ, April 24, 1995.

Hon. ARLEN SPECTER,
U.S. Senator, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Your letter of April 6th asks for my comments respecting congressional proposals to strengthen Rule 11 and to enact "loser pays" legislation. I am pleased to respond to your inquiries as best I can.

The 1983 amendment to Rule 11 generated a rash of Rule 11 motions, which themselves often generated responding Rule 11 motions. These motions were frequently groundless. According to a 1989 Federal Judicial Center (FJC) survey, approximately 31 percent of judges believed that many or most Rule 11 motions for sanctions are themselves frivolous. Federal Judicial Center, Rule 11: Final Report of the Advisory Committee on Civil Rules §2A at 7 (1990). Indeed, the post-1983 Rule 11 jurisprudence gave rise, in my opinion, to tangential "satellite" proceedings which, in many instances, not only delayed but appeared to dwarf the controversy on the merits.

I make special reference here to the practice of counsel who file a Rule 11 motion in an attempt to recover fees, which is met with a Rule 11 motion by adversary counsel, claiming that the initial Rule 11 motion was itself frivolous. According to the Judicial Center, the majority of judges (and I count myself among them) believe that the possibility of "dueling" Rule 11 motions can make litigation even more contentious if the threat of cost shifting materializes. *Id.* §2A at 10. Further, judicial time spent defining what is "frivolous" and resolving arguments over the appropriate fee award, allowable costs, and the like deprives judges of time which they could otherwise devote to the merits of other matters.

Additionally, about 65 percent of judges believe that frivolous litigation represents a small or very small problem, accounting for only 1–10 cases per judge in a year. *Id.* §2A at page 2–3. In combination, these statistics suggest to me that the 1983 version of Rule 11 itself may have contributed to needless proceedings in the courts.

The 1993 Amendment, of course, altered Rule 11 so that district court judges may exercise their discretion over whether to impose sanctions. Further, it explicitly provides for the option of penalties (fines) paid to the court in lieu of attorney's fees, and incorporates a 21 day "safe harbor" provision. Each provision reduces the likelihood that attorneys will fine Rule 11 motions to shift costs while still permitting judges to target violators with appropriate sanctions aimed at deterring future frivolous proceedings.

In my opinion, abandoning mandatory sanctions and permitting district court judges to exercises their judicial discretion was a welcome measure. Some frivolous litigation will always exist, and judges should have the power and discretion to address such behavior. After experience on the district court and more than twenty years examining district court records on appeal, I am confident that district court judges through the exercise of their discretion can control the evil that Rule 11 was originally promulgated to cure. This is the same power and discretion which we in the Courts of Appeal exercise over litigants through Federal Rule of Appellate Procedure 38.

I am also of the opinion that there has not been sufficient time since the 1993 Amendment has gone into effect to assess the institutional and judicial problems that may have arisen. I think that before further amendment to Rule 11 is sought, or further legislation in this area is contemplated, there should be a period for judicial maturation, study and evaluation.

In this regard, let me state a final concern that I have with the proposed congressional changes to the Federal Rules. The procedure for Rule amendments provided in the Rules Enabling Act—consideration by committees, the Judicial Conference, and the Supreme Court followed by submission to Congress—represents a prudent and conservative allocation of rulemaking authority between the judiciary and Congress. I am concerned that the initiation of rule changes by Congress without study and input from the judiciary, and without a developmental process involving the bench and bar, risks overlooking relevant considerations. Moreover, the ever-present separation of powers problems which lurk in the background of congressional attempts to fashion procedural rules for the Federal Courts suggests that Rules such as Rule 11 should be processed through traditional judicial channels before congressional action is taken.

As for my thoughts on the "loser pays" aspect of the Attorneys Accountability Act, I will be brief. It is clear to me that the primary results of such legislation can only be to (1) reduce the number of cases that go to trial, and (2) spur plaintiffs to take lower settlements than they would otherwise have accepted. However, this is just my opinion and it is not based on empirical data.

I note, for instance, that the Proposed Long Range Plan for the Federal Courts, in its March 1995 publication, recognizes that "appropriate data are needed to assess the potential impact of fee and cost shifting on users of the Federal Courts." *Id.* at 61. The Plan rejects the "English" rule but recommends continuing a study of the problem of fee shifting to decrease frivolous or abusive litigational conduct. I share those views.

I am generally of the opinion that the American Rule is consonant with our tradition of liberal access to the courts. I have always taken great pride in the fact that in our country, plaintiffs with legitimate claims may have their "day in court" without fear of sanctions should their suits prove unsuccessful. I am also concerned that public interest groups and civil rights claimants may be discouraged from filing meritorious complaints due to fears that they will be assessed "shifted" fees in excess of their ability to pay.

You have asked what suggestions I have with respect to these issues. I would retain the 1993 Amendment to Rule 11 in its present form and revisit the effect of the Amendment at some future time, perhaps in another five years. Because Federal Rule of Civil Procedure 11 and Federal Rule of Appellate Procedure 38 give the courts power to sanction frivolous actions when necessary, my inclination is not to remove that discretion, but to encourage it.

I am similarly conservative as to "loser pays." I note that even in Great Britain there has been recent criticism, both in the press and among scholars, of the English Rule. My experience tells me that "each side pays" has resulted in a just balance of interests. I am also a firm believer in the old adage. "if it ain't broke, don't fix it." I therefore recommend against abandoning our present system until such time as studies of the two system reveal the desirability of change.

I am certain that you and your office have considered all of the matters that I have written about before receiving this note, but I did want to respond and explain to you why I entertain the views that I have advanced with respect to Rule 11 and "loser pays" legislation. Certainly, I would be pleased to respond to any inquires you may have.

Thank you writing to me in this regard.

Sincerely,

LEONARD I. GARTH.

San Francisco, CA, May 1, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This letter responds to yours of April 19 posing the following questions relating to legislation that would amend Rule 11 of the Federal Rules of Civil Procedure.

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify "loser pays" and strengthening of FRCP 11?

The short answer is that there is no significant problem with frivolous litigation in the federal courts. To the extent there is frivolous litigation, it consists mostly of cases brought by prisoners. Existing law adequately enables judges to dismiss those cases summarily with a minimum of work. And neither Rule 11 nor fee shifting would have any impact on prisoners filing cases.

More generally, it is a misconception to look at Rule 11 or fee shifting as a way to deter frivolous litigation. On the whole, Rule 11 has had a beneficial impact in making lawyers more careful about the pleadings they file, i.e. encouraging them to take a closer look to see whether a particular pleading is justified. Most frequently its application has been to motions and other procedural activities rather than to complaints or answers. But if it has been a deterrent at all, its impact has been mostly on persons who are risk averse-persons who may not want to take a chance that a borderline case will be found to be in violation of Rule 11 leading to possible sanctions. In this way, it functions not so much as a filter based on frivolity but as a gauge of risk averseness. I believe that it has functioned in this way in very few cases but the civil rights bar believes that it has deterred filing of some civil rights cases.

On the question of whether there is a justification for what you call a "loser pays" rule, in my view fee shifting has little to do with control of frivolous litigation. There are of course various ways in which to approach fee shifting. The so-called English rule is not practical for the United States for several reasons: (1) it impacts everyone, plaintiff and defendant alike, on the basis of risk averseness, not frivolity, i.e. perfectly non-frivolous cases are lost every day and it makes no sense to punish defendants or plaintiffs for losing a case; (2) a loser-pays rule, unless carefully drafted, would undermine contingent fee practice and over 100 federal fee-shifting statutes, and (3) to the extent it works in England, it is made possible by legal aid which pays attorneys fees for lower income litigants and exempts them from the rule.

A more constructive approach is to amend FRCP 68 to provide for fee-shifting offers of judgment but in a way that will make the rule serve as an incentive, not as a sanction. If you are interested in this, I refer you to the enclosed copies of an article I published on the subject and of a letter I wrote recently to Senator Hatch.

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

The Federal Judicial Center undertook a study of the operation of the 1983 amendment. It showed, among other things, that Rule 11 activity occurred only rarely (in 2 percent of the cases) and that sanctions were imposed in only about a quarter of the affected cases, that eighty percent of the judges thought that its overall effect was positive but also that it had a potential for causing satellite litigation and exacerbating relations among lawyers, and that the rule probably had a disparate impact on plaintiffs, particularly in civil rights cases. This is discussed in some detail in the enclosed article.

While I believe that on the whole the 1983 rule worked well, there is wide agreement among bench and bar that the 1993 amendment is an improvement and ought to be given a chance to operate before further changes are considered. The rule, as amended, will preserve the incentive for lawyers to use care in filing pleadings while minimizing costly and unproductive satellite litigation over sanctions by making sanctions discretionary (which in practical effect they are anyway), by providing a safe harbor, and by lessening the emphasis on the rule as a fee shifting device. The amendment will moderate what on occasion had become excessive reliance on the rule. The amendment now pending in Congress will inevitably result in more expense and delay by stimulating Rule 11 litigation without giving any assurance that the people who are prone to file frivolous cases will be deterred from doing so. I believe that the amendment will be counterproductive and self-defeating and therefore recommend that Congress leave the rule alone and observe its operation for a few years.

Sincerely,

WILLIAM W. SCHWARZER.

Mr. BENNETT. Mr. President, as I have said earlier in this debate, I am unburdened with the blessing of having been to law school, and as a consequence feel myself inadequate to respond to the learned legal arguments of one of the Senate's best lawyers. As a consequence, Mr. President, I will leave that argument to be made by the chairman of the committee at some future point. I have no response at this time.

Mr. SPECTER. Mr. President, I ask unanimous consent that the amendment be set aside so that I may proceed to offer my second amendment.

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

AMENDMENT NO. 1484

(Purpose: To provide for a stay of discovery in certain circumstances, and for other purposes)

Mr. SPECTER. 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 Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1484.

Beginning on page 108, strike line 24 and all that follows through page 109, line 4, and insert the following:

"(k) STAY OF DISCOVERY.—

"(1) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(A) would avoid waste, delay, duplication, or unnecessary expense; and

"(B) would not prejudice any plaintiff.

"(2) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(A) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(B) except as provided in subparagraphs (A) and (B), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.".

On page 111, strike lines 1 through 7, and insert the following:

"(2) STAY OF DISCOVERY.—

"(A) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(i) would avoid waste, delay, duplication, or unnecessary expense; and

"(ii) would not prejudice any plaintiff.

"(B) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(i) notwithstanding any stay of discovery issued in accordance with subparagraph (A), the court may permit such discovery as may be necessary to permit a plaintiff to prepare an amended complaint in order to meet the pleading requirements of this section;

"(ii) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(iii) except as provided in clauses (i) and (ii), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.

Mr. SPECTER. Mr. President, this is the amendment which I referred to earlier dealing with a provision of the bill in its current form which prohibits any discovery after a motion to dismiss has been filed, except under very limited circumstances.

The general rule of Federal procedure is that discovery may proceed after a complaint has been filed and a motion to dismiss has been filed unless on application by the defendant the judge stays the discovery.

The current bill provides as follows:

In any private action arising under this title during the pendency of any motion to dismiss, all discovery proceedings shall be stayed unless the Court finds, upon the motion of any party, that a particularized discovery is necessary to preserve evidence or prevent undue prejudice to that party.

It is more than a little surprising, Mr. President, to find securities litigation separated out from all of the other litigation in the Federal courts. And for those who may be watching this matter on C–SPAN, while this may be viewed as somewhat esoteric, somewhat hypertechnical, it will not be hypertechnical if you are a stockholder and the stock goes down and you find you have been misled and defrauded by people who have made misrepresentations.

What this means in common parlance, common English, is that a lawsuit is started. It is a class action started, and this private right of action has been developed in order to protect shareholders, especially small shareholders who band together in a class, and after the complaint is filed the plaintiffs' attorney seeks to find out the details as to what happened with the defendant; the plaintiff does not know all the details of the facts at the time of filing suit. The corporation or the officers may have made some very fine promises which sounded very good when the promises were made but no one can tell about the details of the facts unless you go into the records of that party because those facts are not generally known.

In lawsuits, discovery is permitted where one party seeks to take the deposition, that is, to ask the other party questions, or propounds interrogatories, that is, submits written questions, or makes a motion for the discovery of documents to take a look at records.

In discussing this issue with the proponents of the legislation, I was given a response—it is a little disappointing not to find somebody to argue against here. It is not easy to make an argument when there is nobody to disagree. Perhaps my distinguished colleague from Iowa wishes to disagree with me. My distinguished colleague from Utah chooses not to.

The response I got was that it changes the mindset of the litigation, and I would say that the trial judge who is sitting on the spot has ample discretion, if it is inappropriate discovery, to say the discovery is not going to go on, instead of having a mandatory change singling out this legislation from all other legislation.

Well, may I defer to my distinguished colleague from Utah, who I know, having warning in advance, now has had ample opportunity to muster the legal arguments, or am I to infer that the managers of the bill have fled the scene because there is nothing to be said in response to the overwhelming arguments I have presented?

Mr. BENNETT. I would not concede that there is nothing to be said in response to the overwhelming arguments.

Mr. SPECTER. Good. Will the Senator yield for a question or two?

Mr. BENNETT. I will concede that this Senator is not prepared to mount that response. I suggest, Mr. President, that the Senator proceed in his scholarly and learned way.

Mr. SPECTER. It is a little difficult to proceed, Mr. President, without opposition. But permit me at this time, Mr. President—and may I note ascension to power of my distinguished colleague from Pennsylvania, Senator SANTORUM.

Mr. President, in the absence of a reply, I would ask unanimous consent to proceed with the third amendment which I propose to offer.

The PRESIDING OFFICER (Mr. SANTORUM). Without objection, the pending amendment is set aside.

AMENDMENT NO. 1485

(Purpose: To clarify the standard plaintiffs must meet in specifying the defendant's state of mind in private securities litigation)

Mr. SPECTER. Mr. President, I now send a third amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The bill clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1485:

On page 110, strike lines 12 through 19, and insert the following:

"(b) REQUIRED STATE OF MIND.—

"(1) IN GENERAL.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.

"(2) STRONG INFERENCE OF FRAUDULENT INTENT.—For purposes of paragraph (1), a strong inference that the defendant acted with the required state of mind may be established either—

"(A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or

"(B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

Mr. SPECTER. Mr. President, I thank the clerk. I sense that the clerk was surprised I had not asked unanimous consent and permitted the clerk to read the amendment. But I did so just for a change of scene on C–SPAN2. Since there is nobody here to argue with me, at least let there be some break in the action. The formulation of the amendment by my distinguished chief counsel, Richard Hertling, was as clear and succinct as I could have articulated it.

Mr. President, this again involves a question which might be viewed as being esoteric and legalistic unless you are someone who has lost money in the stock market and seek to make a recovery, unless you are one of the people who has participated in the stock transactions in excess of $3.5 trillion or have been among those who have bought stock in the market, more than

$54 billion worth in 1993, the most recent year available for statistical summary. And what this amendment seeks to do, Mr. President, is to amplify the language of the bill which imposes a very difficult pleading burden on the plaintiff. Let me take just a moment or two to say what goes on in a lawsuit.

When somebody loses money because they bought stock where there has been a misrepresentation, and that person goes to a lawyer, they may have a relatively small amount of stock, say $1,000 worth, or $10,000 worth, or even $100,000 worth. That is not a sufficient sum to be able to carry forward litigation which is very, very costly on all sides, so class actions are authorized under the rules of civil procedure where many plaintiffs can join together and there is a sufficient sum so that the lawsuit can be brought forward.

Then the lawyer—and I have been on both sides, filing complaints and filing motions to dismiss—has to prepare a complaint, and the complaint involves allegations. An allegation is a statement of what the party represents happened. And then there is an answer filed by the defendant or the defendant may file what is called a motion to dismiss, if the defendant makes the representation that even assuming everything in the complaint is true, there is not a sufficient statement to constitute a claim for relief under the Federal rules, to warrant a recovery.

When these rules of civil procedure were formulated back in the 1930's, and I had the good fortune in law school to have the distinguished author of the Federal Rules of Civil Procedure, Charles E. Clark, the former dean of Yale Law School who was then a judge on the Court of Appeals for the Second Circuit and came to the law school to instruct us law students—there was done what was called notice pleading so that there did not have to be any elaborate statement as to what the case was about. It could be very simple. There was a case called Jabari versus Durning, if my recollection is correct, where a person just scribbled some notes on a piece of paper, went to the clerk's office and filed it.

And the effort was made at that time to have a notice pleading, contrasted with a common law pleading under Chitty where the averments had to be very, very specific. If he did not say it exactly right, you were thrown out of court. It was very complicated. And I can recall the early days practicing, going to the prothonotary in the Philadelphia Court of Common Pleas, which draws a smile from my learned colleague who is also a lawyer. There was no way that I could draw the complaint with sufficient specificity to satisfy the clerks, who would take some delight in rejecting legal papers filed by young lawyers. So at any rate, this bill seeks to have a very tough standard for pleading. And I think that it is a good point.

And what the draftsmen have done is gone to the Court of Appeals for the second circuit, and they have drafted a type of pleading requirement which was articulated by the chief judge of the court of appeals by the name of John Newman, who was a classmate of mine in law school and studied at the same one as the distinguished jurist, Charles Clark, the chief judge. And now Judge Newman is chief judge in his place. And this required state of mind provides that:

> In any private action arising under this title, the plaintiff's complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.

Now, that is the toughest standard around. And that is fine. We ought to move away from notice pleading and really make the plaintiff state with specificity the state of mind. But when the Court of Appeals for the second circuit handed down this very tough rule, they went just a little farther and said what would give rise to an inference so that there would not be guessing on the part of the plaintiffs. And this is what Judge John Newman, who established this standard in the case of Beck versus Manufacturers Hanover Trust Co., said:

> These factual allegations must give rise to a "strong inference" that the defendants possessed the requisite fraudulent intent.
>
> A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.

Now, what my amendment seeks to do, Mr. President, is to put into the statute the same things that Judge Newman was citing when he posed this very tough standard pleading. Judge Newman and the court said that the strong inference that the defendant acted with the required state of mind may be established either:

> (a) alleging facts to show the defendant had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

Now, in the committee report, which accompanies this bill, the committee says this:

> The Committee does not adopt a new and untested pleading standard that would generate additional litigation. Instead, the committee chose a uniform standard modeled upon the pleading standard of the second circuit. Regarded as the most stringent pleading standard, the second circuit requires that the plaintiff plead facts that give rise to a "strong inference" of the defendant's fraudulent intent. The committee does not intend to codify the second circuit's caselaw interpreting this pleading standard, although courts may find this body of law instructive.

Now, I am a little bit at a loss—and I know that the distinguished Senator from Utah will have a response at this time, or Senator GRASSLEY will, or the Chair will—as to why the—I am just joking about that because there is nobody here to argue with me about this. And it may create some change in my agreeing to the unanimous consent for 2 minutes tomorrow to discuss this with the managers of the bill.

But the committee does say here that they are not adopting a new and untested pleading standard. They are correct. This is tested by the second circuit. But the second circuit in the whole series of cases has found that the way to make this determination is through these inferences which I have added in this amendment. And the committee does say accurately that this is the most stringent pleading standard around. And then the committee says that it does not intend to "codify the second circuit's caselaw interpreting this pleading standard, although the courts may find this body of law instructive."

Well, if we do not have it the way the second circuit says you plead it, but only saying this is instructive, then this bill allows courts to interpret this tougher pleading standard anyway they choose, and courts may impose some standards which go far beyond what the second circuit and Judge Newman had in mind in imposing this tough pleading standard. And it is one thing for the committee to say that they are not adopting a new and untested pleading standard, but it is only halfway if it does not put into the statute but leaves open the question of how you meet this standard.

I do wish I had the managers here to question them about precisely what they have in mind. And I am going to have to figure out some way, Mr. President, to raise this issue. Maybe I will offer this amendment in another form later so we can have some discussion and debate on it, because there is not really any explanation or any way to respond to or to understand what the committee has done here, because what they have done in essence is say the second circuit has a tough pleading standard; let us take it. But when the second circuit amplifies and says how you meet that standard, the committee says no, no, we are not going to adopt that.

What I am trying the do in this amendment is simply complete the picture and have in the statute this standard so that people know what they are to do on the pleading. Now, I know my colleague from Utah will have a comprehensive reply on this substantive issue.

Mr. BENNETT. Comprehensive is in the eye of the beholder, Mr. President.

Mr. SPECTER. If the Senator will yield for a question?

Can you give me in a beholder's eye what you are about to say is comprehensive?

Mr. BENNETT. I would say—

Mr. SPECTER. I think that question may be even understandable on C-SPAN2.

Mr. BENNETT addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. The issue did come up. We did discuss it in the committee at some length. And even though I am not a lawyer, I think I did follow the conversation on this one. My understanding —which I think is what the Senator has said, but I will repeat it so that we have a common basis here—my understanding is that there was concern about different standards and different circumstances. And the committee decided they wanted to codify the standard from the second circuit. Now, the committee intentionally did not provide language to give guidance on exactly what evidence would be sufficient to prove facts giving rise to a strong inference of fraud. They felt that adopting the standard would be sufficient.

Obviously, the Senator from Pennsylvania disagrees with that decision. But the decision was intentional. This is not an inadvertent thing that the committee did. And they felt that with the second circuit standard being written into the bill, it was best to stop at that point and allow the courts then the latitude that would come beyond that point.

Beyond assuring the Senator that this was a deliberate decision within the committee by the drafters of the bill, both staff and members, I probably cannot give him any further enlightened knowledge on this particular subject.

Mr. SPECTER. Mr. President, I thank my distinguished colleague for that response.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. But I must say, I do not understand the logic of what the committee has done when they utilize the second circuit standard which they say is the most stringent standard, and the second circuit is given a road map as to how you meet it.

The legislation might not say this is the only way to meet it, but this is one of the ways to meet it so that when somebody is drafting a pleading, a party has knowledge and notice as to how to go about it. When the committee takes credit here for not adopting a new and untested pleading standard, I give them credit, because it is something which has already been tested. It is not new, but is incomplete if it does not have the second part of what the second circuit said as to how you meet the standard. It simply to me does not follow.

I shall not pursue it because I understand the distinguished Senator from Utah is not the draftsman.

Mr. President, that concludes the argument, and I do not think there is any point at this late hour in keeping the staff here if we are not going to have any reply. So, Mr. President, I yield the floor. If my colleagues are here and intend to make some reply, if they are on the premises, I will wait a reasonable period of time, but only that, in view of the lateness of the hour.

Mr. DORGAN. Mr. President, I rise today to discuss briefly my thoughts about the securities litigation reform bill, S. 240 sponsored by Senators DODD and DOMENICI that is being considered on the Senate floor.

No one disagrees with the goals of S. 240, which are to help pull the plug on frivolous and unmeritorious securities fraud lawsuits and to secure greater protections for those innocent victims in fraud litigation. But regrettably this bill, as it is currently drafted, will make it more difficult for innocent fraud victims to bring legitimate fraud cases. It also limits their ability to recover all of their losses from fraud perpetrators in those cases that they win. For these reasons, I intend to vote no.

Some of the provisions in the bill are long overdue. The bill would limit unreasonable attorney's fees in securities fraud cases. It also prohibits bonus payments and referral fees which may create an incentive to file frivolous cases. Moreover, it requires lawyers to provide all plaintiffs with more information about the nature of a proposed settlement in class action cases—including a statement about the reasons for settlement, about an investor's average share of the award and the amount of the attorney's fees and costs. I support all of these provisions.

But other provisions in the bill could effectively shield from liability those perpetrators who knowingly mislead or defraud investors. And if there is one thing that the investors of this country have a right to expect, it is that those who commit fraud or those who substantially assist in fraud get punished and that they are forced to return their ill-gotten gains to honest victims of their misdeeds.

In the 1980's, a flood of S&L executives openly flouted the law and the trust of their investors and depositors. Some of them lived like maharajahs while building monuments of worthless paper. This charade perpetrated by these swindlers contributed to a bail-out of the industry that is costing the taxpayers of America as much as $500 billion to clean up. Innocent investors were bilked out of tens of billions of dollars and their ability to recover their losses has been limited.

Congress enacted tough legislation to ensure that this debacle will not happen again. I recall legislation that I offered, which passed Congress, prohibiting S&L's from investing in risky junk bonds and requiring them to divest the ones they already own. Some S&L's were actually selling worthless junk bonds to investors out of their lobbies. It never should have happened. But still many unwary investors lost a bundle on junk bonds offered by these deceptive fast-buck artists before Congress acted to stop this activity.

We ought to pass tough, reformed-minded securities legislation that stops the abusive legal cases that are filed to simply line the financial pockets of unscrupulous lawyers and professional plaintiffs. The companies that are the targets of such lawsuits are rightfully concerned about frivolous lawsuits. Meritless cases unnecessarily divert the much-needed resources and attention of firm personnel to defending these cases rather than allowing the companies to focus on product improvement and on their global competitors.

But I think that S. 240 as drafted goes too far toward immunizing those who are guilty of securities violations from liability. The provisions that shield these wrongdoers in securities fraud cases from liability are unfair to the innocent victims of fraud. And it sends the wrong message to our securities market that fraudulent behavior will be tolerated, if not sanctioned.

We must not insulate the white collar crowd who would exploit unwary investors for their own personal gains. Those responsible for the S&L scandal and those responsible for fraud in the future should pay. That's why I will vote against S. 240, unless it is substantially improved before the Senate votes on final passage.

Mr. HATFIELD. Mr. President, the Private Securities Litigation Reform Act of 1995, of which I am a cosponsor, is not about aiding perpetrators of fraud in the financial markets or hurting small investors. This legislation is about curtailing the abuses in this country's securities litigation system and empowering defrauded investors with greater control over the class action process. This legislation would restore fairness and integrity to our securities litigation system.

This legislation assists small investors by requiring lawyers to provide greater disclosure of settlement terms, including reasons why plaintiffs should accept a settlement. This is a common sense approach which is often lacking under the current system. This legislation also incorporates public auditor disclosure language. S. 240 requires that independent public accountants report to their client's management any illegal act found during the course of an audit. If the management of the company or the board of directors fail to notify the Securities and Exchange Committee of the illegal act, the auditor is required to inform the SEC or face civil penalties. This is needed reform which assists all investors who rely on accountants to act in an independent manner on their behalf.

I would like to close my statement on the Private Securities Litigation Reform Act of 1995 by highlighting some statistics from an article in today's issue of the Wall Street Journal. The article notes that the net legal costs of accounting firms has increased from 8 percent of their total revenue in 1990 to 12 percent of revenue in 1993. That is a 50 percent increase in net legal costs in just 3 years. In one of the cases cited in the article, it notes that an accounting firm spent $7 million defending itself in a case where the jury

ruled in the accounting firms favor. That is $7 million spent just to prove that the firm was innocent. As these statistics show, common sense should be reintroduced to our securities litigation system, and this legislation does just that. Common sense benefits all parties in the securities litigation system, especially investors, which is fundamental to this legislation.

Ms. MIKULSKI. Mr. President, I rise today to speak in support of the Securities Litigation Reform Act. I like this bill for three reasons: It stops the bounty hunters, it puts people who have lost money in charge, and it penalizes people who commit fraud.

Mr. President, we are finally moving on this issue. We've moved beyond discussing whether or not there is a problem—to discussing exactly what reforms are needed.

Here is what I think. First, let us stop the bounty hunters. This bill says that lawyers can't shop around for clients. I mean—a lawyer will not be able to pay a commission to someone else to find them a client.

I have heard of instances where lawyers seek out clients just so they can have cases to litigate.

Second, I think the people who lose the most money should have the most to say. By that I mean—with this bill the court will be able to pick one person—who has lost a lot of money in a class action suit—to be the leader. This way the system works for investors instead of against them.

Third, Mr. President, I am all for ending fraud and protecting businesses that are just trying to create jobs. This bill will not apply to people who knowingly cheat investors.

I have talked to several investors and I have heard from the people of Maryland on this issue. Accountants tell me that some attorneys pay stockbrokers, and others, in return for information about possible lawsuits and possible clients. That is unacceptable. Courts are for protecting the rights of people and promoting fairness, not for frivolous lawsuits.

Companies are hit with higher insurance costs, time in court and are generally distracted from the mission of creating jobs. Lawsuits mean that companies are reluctant to provide the kind of public information that can benefit investors.

In Maryland, high-technology companies are hit the most by this problem. That means these unnecessary lawsuits are costing Maryland citizens—lost jobs and lost opportunities.

Mr. President, this is not about protecting some "savings and loan con artist" as the ads say. This bill is about saving jobs and keeping the courthouse doors open to those who really need to get inside.

I support this bill because I believe it will create jobs. We needs investors. We need new companies. We need new jobs. But we will not have any new jobs if companies cannot invest or ask people to invest in their future.

Mr. President, this legislation is long overdue. I am pleased this day has come, and I am pleased that this reform has overwhelming bipartisan support.

It is time we look at liability issues and liability reform not on a partisan basis but on an American basis. It is in the best interest of business and it is in the best interest of the consumers. We can do both, because this bill does both.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I ask unanimous consent to speak for 6 minutes as in morning business.

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

Mr. GRASSLEY. I thank the Chair.

(The remarks of Mr. GRASSLEY pertaining to the introduction of S. 974 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. GRASSLEY. 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. BENNETT. 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. BENNETT. Mr. President, I ask unanimous consent that the pending amendment be set aside.

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

AMENDMENT NO. 1486

(Purpose: To make certain technical amendments, and for other purposes)

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

The PRESIDING OFFICER. The clerk will report.

The assistant clerk read as follows:

The Senator from Utah [Mr. BENNETT], for Mr. D'AMATO, for himself and Mr. SARBANES, proposes an amendment numbered 1486.

Mr. BENNETT. 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:

On page 84, line 11, strike ", if" and insert "in which".

On page 111, beginning on line 2, strike "during the pendency of any motion to dismiss,".

On page 111, line 4, insert "during the pendency of any motion to dismiss," after "stayed".

On page 114, line 13, strike "has been,".

On page 114, strike line 15 and insert the following: "made—

"(i) was convicted of any felony or misdemeanor".

On page 114, strike line 17 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-".

On page 114, line 20, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 115, line 1, strike "(ii) requires" and insert the following:

"(II) requires".

On page 115, line 4, strike "(iii) determines" and insert the following:

"(III) determines".

On page 116, between lines 11 and 12, insert the following:

"(D) made in connection with an initial public offering;

On page 116, line 12, strike "(D)" and insert "(E)".

On page 116, line 17, strike "(E)" and insert "(F)".

On page 118, line 13, before the period insert "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 121, line 7, strike "has been,".

On page 121, strike line 9, and insert the following: "made—

"(i) was convicted of any felony or misdemeanor".

On page 121, strike line 11 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-".

On page 121, line 14, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 121, line 16, strike "(ii) requires" and insert the following:

"(II) requires".

On page 121, line 19, strike "(iii) determines" and insert the following:

"(III) determines".

On page 122, between lines 20 and 21, insert the following:

"(D) made in connection with an initial public offering;

On page 122, line 21, strike "(D)" and insert "(E)".

On page 123, line 1, strike "(E)" and insert "(F)".

On page 124, line 21, insert before the period "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 128, line 25, strike "the liability of" and insert "if".

On page 128, line 25, strike "offers or sells" and insert "offered or sold".

On page 129, line 1, strike "shall be limited to damages if that person".

On page 129, line 9, strike "and such portion or all of such amount" and insert "then such portion or amount, as the case may be,".

On page 131, lines 19 and 20, strike "that person's degree" and insert "the percentage".

On page 131, line 20, insert "of that person" before the comma.

Mr. BENNETT. Mr. President, I ask unanimous consent that the amendment be agreed to and that the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

So the amendment (No. 1486) was agreed to.

MORNING BUSINESS

Mr. BENNETT. Mr. President, I ask unanimous consent that there now be a period for the transaction of routine morning business, with Senators permitted to speak therein for up to 5 minutes each.

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

IS CONGRESS IRRESPONSIBLE? THE VOTERS HAVE SAID YES

Mr. HELMS. Mr. President, the impression simply will not go away: The

Self-Study

The July, 1995 Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States is attached. A set of Notes on the Report is attached as a preface. the Notes simply reflect one set of first reactions to the Report. They are designed to stimulate thought, not to suggest all of the questions that may be raised by the Report.

A separate note seems appropriate as to one aspect of the Report that is not reflected in any of the formal recommendations. The discussion of Standing Committee membership at pages 17 to 18 raises the question whether there should be some overlap between membership on the Advisory Committees and membership on the Standing Committee. This discussion may reflect the advice of Judge Joseph F. Weis, Jr., a former chair of the Standing Committee. Judge Weis wrote to the Subcommittee to express concern about delay in the rulemaking process and the lack of uniformity between different sets of rules. He suggested that the Standing Committee should be reconstituted by appointing two members from each Advisory Committee, and designating the chair of the Standing Committee as an ex officio member of each Advisory Committee. Uniformity would be further promoted by having all Advisory Committees meet at the same time and place, to be followed immediately by the meeting of the Standing Committee. There are some obvious difficulties with this proposal – the Standing Committee Chair, as ex officio member, could not simultaneously attend all five Advisory Committee meetings; there would be no time to rethink, revise, and reconsider Advisory Committee work before consideration by the Standing Committee (or too much time, if the Standing Committee met only to consider the results of earlier Advisory Committee meetings); there would be a real risk that the independent role of the Standing Committee would be compromised.

If there are difficulties with Judge Weis' proposal as framed, variations may deserve study. One, noted in the Self-Study, would be to appoint each of the Advisory Committee chairs as voting members of the Standing Committee. Since the chairs commonly attend and frequently participate generally in Standing Committee deliberations, this change could be implemented without reducing the numbers or independent role of other Standing Committee members. To ask the chair of each Advisory Committee to become familiar with the detailed work of each other Advisory Committee as well as prepare presentation of the Committee's own work is to ask a lot. Nonetheless the shared experience of those most immediately involved in the initiating stages of the rulemaking process might contribute importantly to the overall work of the Standing Committee.

Notes on Self-Study of Federal Judicial Rulemaking

The Standing Committee has requested that each Advisory Committee review the Self-Study of Federal Judicial Rulemaking prepared by the Subcommittee on Long Range Planning. The Standing Committee intends to take the Self-Study seriously as a program to guide future work. If our Committee believes that some aspects of the program could be improved, now is the time to make constructive suggestions. We should take the task seriously, just as the Standing Committee does.

Each of us is likely to have distinctive reactions to the Self-Study. These notes are intended to provide an example of the kinds of questions that should be asked independently by each Committee member. All but the first go to the "Issues and Recommendations" section that begins on page 12.

Evaluative Norms: Pages 11 to 12 discuss "consensus" as an evaluative norm. It is stated in the sentence that begins on the last two lines of page 11 that "a lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo." And so on. These seem to be words that could be used again and again by opponents of change to argue against changes that are "problematic" only because they seek to correct rules that give undue advantage to one interest or another. Better language should be found. Some help is found on page 13, where the discussion of the composition of advisory committees recognizes that "Rulemaking ought not follow public opinion or bar polls." But this is not enough.

Issues and Recommendations

A. Advisory Committees

The second full paragraph on page 13 suggests that in making appointments to the advisory committees, the Chief Justice should consider seeking suggestions from the ABA and other similar organizations. Is a formal role really a good idea?

Recommendation 4, p. 14, goes to "Resources and support." Do the members of the Committee really want to receive regular circulations of law journal articles, social-science publications, and other pertinent articles? Should "in-house seminars" be encouraged apart from consideration of specific rules proposals?

Recommendation 5, p. 15, on outreach and intake, suggests on-line communications in various forms. If direct email links are established within the committee, what should be done about public access to the committee "conference"?

Recommendation 6, summarizing pp. 15-16, suggests that

proposals should be grounded on available data, and that mechanisms should be developed for gathering and evaluating data not otherwise available. Does this recommendation create a risk that sound proposals will be opposed because of the want of empirical support? We have devoted a lot of time to attempting to learn about Rule 23, and the Federal Judicial Center Study has been helpful even in its initial stages. But my guess is that in the end, the Rule 23 experience will show that there are many questions that cannot be answered in ways that meet the standards of rigorous empirical investigation. The nonrigorous evidence of shared experience and anecdote, however, has supported much wise rulemaking in the past. How far should we submit to stagnation when social science — or our powers of budget and persuasion — are not equal to the task of generating rigorous evidence? How long should seemingly important rule changes be postponed while an attempt is made to gather evidence?

Recommendation 7, based on the pp. 16-17 discussion, is that the Civil Rules Advisory Committee report on the ways in which experience with the Civil Justice Reform Act of 1990 might effectively be used in rulemaking. This task has been on our agenda from the beginning. The most serious questions are likely to be those of time and coordination with the Committee on Court Adminstration and Case Management. Should we speak to those questions now?

Recommendation 8, p. 17, urges that the Civil Rules Advisory Committee assess the effects of creating local options in the national rules. The immediate focus is disclosure under Rule 26(a)(1). The discussion states that the inquiry should proceed without any bias in favor of nationally uniform rules. Recommendation 10 on page 18, however, states that there should be a strong but rebuttable presumption against local options in national rules. These two statements should be harmonized. And it should be recognized that Rule 26(a)(1) is not the only "local rule" option provision. There are several in the balance of the discovery rules. Rule 16(b) has another. I am not at all sure how to arrange a study of the effects of creating local options. Before agreeing to be asked to do this, we may want to ponder a bit on the probable nature of the task.

Standing Committee

The discussion of recommendation 10, p. 18, again notes local rules problems and attributes to the new version of Civil Rule 83 the command that local rules be consistent with, and not duplicate, national rules. The command of consistency with national rules in fact reflects adoption into Rule 83 of the language of 28 U.S.C. § 2071(a). The discussion leads to recommendation 10, already noted, that there be "a strong but rebuttable presumption against local options in national rules."

Recommendation 11, pp. 18-19, recognizes that primary drafting responsibility is assigned to the Advisory Committees. The

Standing Committee should "facilitate careful changes in language," but remand to the Advisory Committee if substantial changes are necessary. This recommendation does not deal adequately with the problems that arise when two or more advisory committees are dealing with a common question. Our most recent experience has come with reconciliation of the proposals to publish for comment amendments of Criminal Rule 24(a) and Civil Rule 47(a). Substantial changes of style were made by advisory committee representatives because it seemed unlikely that either the Criminal Rules Advisory Committee or the Civil Rules Advisory Committee would recede from positions deliberately taken with full knowledge of the differences in the drafts. Thought must be given to the alternatives of scheduling advisory committee meetings at the same time and place to permit joint consideration of common topics, or of assigning greater responsibility — and corresponding greater work — to the Standing Committee.

Recommendation 13, p. 20, suggests that thought should be given to developing a more definite role for the Standing Committee members who serve as liaisons to the advisory committees. We may want to offer advice.

Recommendation 14, p. 20, is that the Standing Committee should decide what is to become of the restyled sets of federal rules. We have considerable experience, and no small investment, in the restyling project. Before the experience stales, and as part of deciding whether to increase the investment by pursuing the project toward completion, we may want to offer advice to the Standing Committee.

Recommendation 15, pp. 20-21, includes discussion of a one-time recommendation that each Advisory Committee study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. There was a moment when we flirted with the question whether the time has come to start over with the Civil Rules, but that topic is not likely to be approached seriously. Short of that, there are many projects on the horizon. Apart from the style project, the need to respond to the RAND study of CJRA experience is noted with Recommendation 7 above. We have put off serious topics, such as the pretrial and post-judgment use of masters, because our agenda is full and because of a feeling that a process of continuing rule changes is very costly. The actual recommendation seems to put aside any responsibility for sweeping reconsideration of vast subgroups of rules or the entire set of rules. It may not be necessary to comment on the suggestion that comprehensive packages of reforms be studied, but it might be wise to note the possible difficulties. This topic may tie in to the proposal for a biennial cycle of rulemaking noted below.

D. Supreme Court

Recommendation 16, pp. 21-22, raises the question whether it

is necessary to have both the Judicial Conference and the Supreme Court involved in the Enabling Act process. The actual recommendation raises the question whether a period of public notice and written comment should be established during the time of Supreme Court consideration. We should consider this recommendation carefully. It might add still greater delay to the process. In any event, it focuses attention on the need for response by the advisory committees and Standing Committee. Public comment to the Court on the 1993 amendments of Civil Rule 26(a)(1), for example, cried out for response lest the Court be misled.

F. Miscellaneous

Recommendation 18, pp. 23-25, is that a biennial schedule be adopted for publishing proposed rule changes. This is tied to a change in the calendar of the Standing Committee, with meetings in the summer to consider recommendations to the Judicial Conference and in the fall to consider recommendations for publication. Again, these changes deserve serious thought. Adoption of a biennial publication program could stretch out still further the time needed to effect rules changes; adjusting for this risk by adapting the cycle of advisory and Standing Committee meetings brings its own cost. Scheduling advisory committee meetings for the summer, to enable presentation of recommendations to the Standing Committee in the fall, may prove difficult. There may be other costs. This is not as simple as it may appear.

— E.H. Cooper

A Self-Study of Federal Judicial Rulemaking

A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States

July 1995

Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was deferred in anticipation of the January 1994 Executive Session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. **Appendix A** to this Report contains a Summary of the Comments Received. In addition, the Subcommittee canvassed the secondary literature. **Appendix B** to this Report is an Annotated Bibliography. An Interim Report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The Interim Report raised several issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. A draft was circulated to the Standing Committee in January 1995, and now this semi-final draft has been completed. The Chair of the Standing Committee wants to solicit comments from the Advisory Committees, so the Subcommittee's work will be back on the agenda for the winter 1995–96 meeting of the Standing Committee.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a **History** of the origins of modern rulemaking; a description of **Current Procedures**; a discussion of **Evaluative Norms**; the **Issues and Recommendations** for reforms; and a brief **Conclusion**.

History[1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.[2] A lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts.[3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law; the procedure for actions at law remained the same while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828 when a statute required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures.[4] This unsatisfactory system prevented the federal courts from following state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading.[5]

The next legislative change came in 1872 when Congress withdrew rulemaking authority from the federal courts and required that all actions in law conform to the corresponding state forum's rules and procedures.[6] Under the Conformity Act there were as many different sets of federal rules and procedures as there were states.[7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure, a story "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."[8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity decision of *Erie Railroad Co. v. Tompkins*,[9] overruling *Swift v. Tyson*, which had stood since

---

1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech L. Rev. 323, 324-28 (1991).

2 Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, §2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197 (repealed 1934).

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.' " Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure §1002 at 14 (2d ed. 1987).

8 Id. §1004 at 21.

9 304 U.S. 64 (1938).

1842.[10] And in the same year, after more than two decades of effort, national rules of procedure were drafted by an ad hoc Advisory Committee appointed by the Supreme Court under the provision of the Rules Enabling Act of 1934.[11] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—still recognizable today despite numerous amendments—established a nationally-uniform set of federal procedures, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee was comprised of distinguished lawyers and law professors. While the ad hoc Committee members have been lionized for their accomplishment of drafting the rules themselves, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments, evincing willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee recommended to the Supreme Court what it considered the best and most workable rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these two traditions have endured.

This positive experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process took a few more years to evolve. A year after the new rules went into effect, the Supreme Court called upon the ad hoc Advisory Committee to submit amendments, which the Court accepted and sent to Congress, and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the 1940s and early 1950s.[15] In 1955 the continuing Advisory Committee submitted an extensive report to the Supreme Court with numerous suggested amendments. The Court neither acted on the Report nor explained its inaction. Instead, the Justices ordered the Committee "discharged with thanks" and revoked the Committee's authority as a continuing body.[16]

The resulting void in rulemaking procedure was an object of concern expressed by the American Bar Association, the Judicial Conference, and other groups.[17] At the time, there was no small controversy over whether the Court should designate a new continuing committee and

---

10 44 U.S. (16 Pet.) 11 (1842).

11 Act of June 19, 1934, ch. 651, §§1-2, 48 Stat. 1064; Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

12 Wright & Miller, supra note 7, §1005.

13 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L. J. 241 (1953).

16 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

17 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42 (1958) (panel discussion).

how the members might be selected. Dissatisfaction was expressed that the Supreme Court was merely rubber-stamping the recommendations from the previous Advisory Committee, and several of the Justices were heard to agree with that criticism, dissenting from orders, from time to time, to complain that the proposals were not actually the work of the Court.[18] Apparently, there were misgivings expressed behind the scenes about the tenure and influence of the members of the continuing Advisory Committee, who served indeterminate terms, remaining until resignation or death. This discrete Third Branch discussion took place alongside the perennial separation-of-powers debate between the Judiciary and Congress over which institution should make rules and how.

A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Justice Clark recalled, "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.' "[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the rules dealing with evidentiary privileges. Congress ended up mandating, by statute, that the evidence rules not take effect until approved by legislation. Then Congress reviewed the proposed rules and made substantial revisions before enacting rules of evidence into law, effective in 1975.[22] The legislative veto provision that attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved

---

18 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978).

by Congress.[23] After a 20-year hiatus the Chief Justice reestablished an Advisory Committee on the Rules of Evidence in 1993. This committee has embarked on a comprehensive review.

Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice and longer periods for public commentary on proposed rules.[24] These amendments were designed to increase attention to rules initiatives and public participation. Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States (Chair), the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference holds plenary meetings twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

---

23 28 U.S.C. §2074(b).

24 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31, and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure—A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar). Thomas E. Baker, Recent Developments in the Federal Rules of Procedure: The 1993 Changes and Beyond, 11 Fifth Cir. Reptr. 531 (June 1994).

26 28 U.S.C. §§2071-2077.

27 Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. §331.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and additions in the federal rules "from time to time" to the Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interest of justice."[32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees.[33]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted.[34]

By delegation from the Judicial Conference, authorized by the relevant statute, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of

---

29 Ibid.

30 Ibid.

31 28 U.S.C. §2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

32 8 U.S.C. §2073(b).

33 "Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office." A Summary for Bench and Bar, supra note 25.

34 A Summary for Bench and Bar, supra note 25.

the general rules of practice and procedure" in its particular field.[35] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and other relevant legal commentary. In fact, "[p]roposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations."[36] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the *Federal Register*, and meetings are open to the public.[37] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment.[38]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Consultant, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list.[39] A notice is published in the *Federal Register* and the proposed rules changes also are reproduced with explanatory committee notes and supporting documents in the West Publishing Company's advance sheets of *Supreme Court Reporter*, *Federal Reporter–Third Series*, and *Federal Supplement*.[40] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

---

35 See 28 U.S.C. §2073(b).

36 A Summary for Bench and Bar, supra note 25.

37 Notice of Public Meeting, 59 Fed. Reg. 59,793 (Nov. 18, 1994).

38 A Summary for Bench and Bar, supra note 25.

39 A Summary for Bench and Bar, supra note 25.

40 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

The comment period runs six months from the *Federal Register* notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are open to the public and are preceded by public notice in the *Federal Register*.[41] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of each Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record their separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court.[42] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules.[43] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the

---

41 Notice of Meeting, 55 Fed. Reg. 25,384 (1990).

42 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R. Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 (1993).

43 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§2 n.8 & 1004 n.18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J. Am. Jud. Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990); Order of April 27, 1995 (not yet reported).

enabling statutes,[44] amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no adverse action.[45]

Since 1958 this rulemaking procedure has been followed regularly.[46] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the last package of wholesale changes to the discovery provisions in the Civil Rules drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House, but did not reach the floor of the Senate. Controversy akin to the separation of powers doctrine often surrounds exercises of the legislative prerogative to pass a statute to effectuate a change in the federal rules of procedure. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994.[47] But over the years judges and the judiciary regularly have been heard to urge that Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms[48]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court proce-

---

44 28 U.S.C. §§2071-77.

45 But see Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

46 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

47 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995).

48 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont. L. Rev. 435 (1994).

dures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in *every* case, not only the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures

themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces. A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. §331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom

of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts. Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations. The organization to be followed will take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress.[49]

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the diversity of the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and

---

49 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be much larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of the Third Branch. They are not "bar" committees. The notion of representativeness, i.e., that there ought to be a seat on the Advisory Committee for each identifiable faction of the bar, contravenes the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or bar polls.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with substantial experience on both sides of the bench. The ability to compare these two experiences (not to mention the diverse backgrounds that brought still others to the bench) makes judges especially appropriate rulemakers. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention within the present appointment process and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in each district.[50]

To help achieve these goals, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well.[51]

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The present practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a complex process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in

---

50 28 U.S.C. §478(b).

51 See also Proposed Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

[2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees should schedule orientation meetings with new members.

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve indefinitely. Making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings are routine steps; proposed rules changes are widely published and distributed;[52] and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* is a good example of the ongoing effort to correct misconceptions about federal rulemaking. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far more than half of the state bars have done this.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, now appearing in print media and on commercial services, can be made available electronically on the Internet promptly. The judiciary could maintain a World Wide Web server at minimal cost.[53] If the committees operate their own server, persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. E-mail availability networked internally within the Advisory Committee might be feasible, once the judiciary-wide network is operational.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals and receipt of comments.

The need for research: It is frequently asserted, most often by academic critics,[54] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this

---

52 The memorandum from John K. Rabiej to the Standing Committee, dated December 6, 1994, details these procedures. The mailing list contains 2,500 names. Any given recipient who does not respond over the course of three years will be replaced with a new name.

53 The Administrative Office has established a home page at http://www.uscourts.gov, but the page is still "under construction," meaning that comprehensive links to major data sources have not been established. Other institutions have taken the lead. Cornell has put several sets of rules online at http://www.law.cornell.edu, and Professor Theodore Eisenberg has made the AO's entire database available, with search and computation abilities added, at http://teddy.law.cornell.edu:8090/questata.htm. Undoubtedly there are other sites.

54 Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L. Rev. 841 (1993).

argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research.[55] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from demonstration projects rather than controlled experiments—which are rare indeed—or sophisticated econometric analysis of variation (the subject of the next section below).

We cannot expect members of the rules committees to be experts in empirical research techniques, although over the years a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and studies in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should be expected to notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field studies and pilot programs—although, as we have observed, these are not a source of reliable data. Advisory Committees must take advantage of these possibilities. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available.

An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990.[56] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996.[57]

---

55 Baker, supra note 1, at 335.

56 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

57 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving then *de jure* the roles that many have assumed *de facto* in recent years, participating in the

discussion of subjects of Advisory Committees other than their own and exercising substantial influence (but not voting). We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonates more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is altogether fitting and proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[58] that present choices of different resolution procedures for different kinds of disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed. R. Civ. P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule. But the new Fed. R. Civ. P. 83, to become effective on December 1, 1995, unless legislation intervenes, insists that local rules be consistent with, and not duplicate, national rules.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee of the Standing Committee to recommend a once-and-for-all "solution" to these variables—though we have already suggested taking a good hard look at the consequences. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution.[59] Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.

---

58 Baker, supra note 1, at 334.

59 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

Redrafting proposals. The main task of drafting proposed rules belongs to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Meetings of the Standing Committee then can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the considered opinion of the Standing Committee a proposal requires substantial changes for either style or substance, the proposal ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the opinion of the Standing Committee a proposal requires substantial changes, the Standing Committee should return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs outreach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the "scholar-in-residence" of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair and Liaison Members: The Standing Committee recommends the continuation of the practice of appointing liaison members from the Standing Committee to the various Advisory Committees.

Subcommittee on Style. The immediate past Chair of the Standing Committee established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. That Subcommittee appointed a Reporter who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules. The Supreme Court has shown some unease with this process, which produces differences in style across rules; the "restyled" rules use terminology in a different way from the older rules, and when sending a package to Congress on April 27, 1995, the Supreme Court changed "must" to "shall" to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling creates risks of accidental change in meaning (even as other unintended implications in the existing rules are caught and squelched). The Federal Rules of Civil Procedure have gone through several drafts of complete restyling; the Appellate Rules are halfway through. What remains undetermined, however, is how to proceed with the sets of restyled rules. The Long Range Planning Subcommittee has no special perspective on this frequent topic of discussion.

[14] Recommendation to the Standing Committee: The Standing Committee should decide what is to become of the restyled sets of federal rules.

Subcommittee on Numerical and Substantive Integration: In 1992 the Standing Committee created a Subcommittee on Numerical and Substantive Integration. As its name suggests, the Subcommittee is charged with two tasks: (1) explore the feasibility of integrating subjects common to the different sets of rules and dealing with them in a single rule that would then be considered part of all the other sets of rules and (2) develop a single numbering system that includes all the different sets of federal rules. This Subcommittee has lapsed into desuetude. We do not make a recommendation concerning it—beyond wishing that our own Subcommittee suffer the same fate (on which see the next recommendation).

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In the 2½ years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.)

The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It recommended and performed this self-study of rulemaking procedures.

The term of one member of the Subcommittee as a member of the Standing Committee expired; his vacancy on the Subcommittee has not been filled. The two remaining members unanimously and enthusiastically recommend that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Any issues regarding long range planning in the rules process ought to be reassigned to the individual member of the Standing Committee who serves as liaison to the Committee on Long Range Planning of the Judicial Conference and to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee—except for the obvious implication that a change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference, and vice versa.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the seven months between proposal and effective date.

Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends legitimacy and authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a "rubber stamp." Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[60] He concluded that the Supreme Court's "promulgation" of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are in place and operating properly and that the particular proposals before the Court are the careful products of that rulemaking process. The transmittal letters from the Chief Justice since then have made the same point. Admittedly, over the years different Justices have had different views of their role in judicial rulemaking, but a majority of the Court has never questioned the appropriateness of its participation. We accordingly leave to the Justices themselves the question whether there should be any change in their role—and, correspondingly, whether if it is best to maintain the Court's current role whether it would be appropriate to reduce the role of the Judicial Conference. Whether it is necessary for *both* of these bodies to pass on rules that have already been fully ventilated is doubtful.

There is one other possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries . The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may want to consider whether it wishes to invite public comments on the rules in the wake of these transmissions—for there is no other opportunity for public comment after the Advisory Committees hold hearings.

[16] Recommendation to the Judicial Conference and the Supreme Court: The Conference and the Justices should consider whether it is advisable to establish a procedure for a period of public notice and written comment during the Supreme Court's evaluation of proposed rules.

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a legislative power delegated to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights."[61] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[62] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice

---

60 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

61 28 U.S.C. §2072 (a) & (b).

62 U.S. Const. art. III, §1.

wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar. 1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

[17] Recommendation to the Standing Committee: The Standing Committee must be vigilant and alert to rulemaking initiatives in Congress and must be prepared to assist the Judicial Conference in the Conference's efforts to protect the integrity of the Rules Enabling Act procedures.

F. Miscellaneous

The rulemaking calendar/cycle: Three changes in the rulemaking environment have occurred at roughly the same time. The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. Simultaneously, the national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under consideration by an Advisory Committee. Meanwhile local rulemaking has burgeoned, in part at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—that is, that Congress is the source of the delay it bemoans—is no answer to those who seek prompt changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the

process of overlapping amendments in no uncertain terms.[63] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or two of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before sheparding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed. R. App. P. 3 and 4 that Prof. Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees always should choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve the points of stress.

One important step would be to establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-

---

63 Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litigation 1 (1994).

numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[64]

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought. We therefore make the following

[18] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

Conclusion

The Subcommittee's overall impression of federal rulemaking echoes the hackneyed phrase, "If it ain't broke, don't fix it." There is nothing "broken" about the procedures for amending the federal rules. Federal court practices and procedures "continue to be the outstanding system of

---

64 The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule wiold take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.

procedure in the world,"[65] admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

Thomas E. Baker
Alvin R. Allison Professor
Texas Tech University School of Law

Frank H. Easterbrook
Circuit Judge
Court of Appeals for the Seventh Circuit

65 Charles Alan Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand. L. Rev. 521, 555 (1954).

RULE 23: Multiple Choices

A set of questions about possible Civil Rule 23 revisions was sent to Committee members as a means of determining whether the next draft could be shaped to reflect any general consensus that might have grown up in the wake of the series of meetings and symposia that have been directed at Rule 23. The questionnaire and a summary of the responses are attached. The responses showed strong agreement on two things. The idea that the Rule should somehow encourage the view that a certified class becomes an independent entity was unanimously rejected. It is gone. On the other hand, the provision for permissive interlocutory appeal from certification decisions was left out of the questionnaire because it had gathered strong support. Without being asked, virtually every person who responded volunteered the view that a permissive interlocutory appeal provision should be included in the draft.

The responses, as expected, showed a wide range of views on other questions. The draft reflects this diversity. Many provisions are included to illustrate possible treatments of issues that may be dropped on further examination.

To complete the questionnaire, the "Rule 23 Challenge" draft that was attached to the questionnaire also is included. It may have some use as a reminder of earlier Committee discussions, but does not deserve earnest attention in preparing for the Rule 23 discussion.

The "annotations" to the Rule 23 draft reflect the view that a draft Advisory Committee Note would be premature. They suggest two stages of deliberation. Four big questions come first: (1) Interlocutory appeal, draft 23(f). (2) Changing the 23(b)(3) requirement that a class action be superior to a requirement that it be "necessary for the fair and efficient disposition of the controversy," draft lines 44 to 47. (3) Limiting Rule 23(b)(3) by requiring consideration of the probability and importance of success on the merits – item (ii) in the first paragraph of (3), lines 41 to 44, and subparagraphs (E) and (F), lines 66 to 71. (4) Recognition of "settlement classes" in (b)(3), but not elsewhere. The most explicit provision in the draft is subparagraph (G), lines 72 to 75. (Settlement is also covered directly in subdivision (e), and incidentally in other provisions). The decision whether to recommend any or all of these items is likely to have a strong influence on the decision whether to proceed with consideration of some or all of the many other draft revisions. The second stage of deliberation might well encompass those other matters, however far they are to be considered.

The Federal Judicial Center fieldwork has been completed. A near-final draft report will be circulated separately.

Rule 23. Class Actions

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

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

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

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

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

(b) ~~Class Actions Maintainable~~ When Class Actions May be Maintained. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

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

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that the probability of success on the merits of the claim [by or against members of the class] warrants the burdens of certification, and (iii) that a class action is ~~superior to other available methods~~ necessary for the fair and efficient ~~adjudication~~ disposition of the controversy. The matters pertinent to ~~the~~ these findings include:

(A) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ the practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

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

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

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

(E) the probable success on the merits of the class claims, issues, or defenses;

(F) the significance of the public and private values of the probable relief to individual class members in relation to the complexities of the issues and the burdens of the litigation; and

(G) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

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

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

(C) potential conflicts of interest among members;

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

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(5) the court finds that a class certified under subdivision

(b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

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

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how putative members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions putative members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before

~~the decision on the merits~~ final judgment.

(2) (A) When ordering that an action be certified as a class action under this rule, the court must direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims or issues with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [A defendant may be ordered to advance the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the plaintiff class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the

generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class,

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class~~.~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3)~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class~~.~~; and

(C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) When--appropriate--~~(A)~~ An action may be ~~brought--or~~ ~~maintained~~ certified as a class action =

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a--class--may-be-divided-into-subclasses-and--each subclass-treated-as-a-class,-and-the-provisions-of this--rule--shall--then--be--construed--and--applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In-the-conduct-of-actions to-which-this-rule-applies,-the-court-may-make-appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ presenting~~ation--of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for-the-protection-of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be-directed~~ to some or all ~~of-the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~,-or-of~~

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

(iv) the members' opportunity ~~of--the--members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

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

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

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

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1), the court must approve any dismissal, compromise, or amendment to delete class issues in an action in which persons sue [or are sued] as representatives of a class.

(2) An ~~class~~ action certified as a class action shall not be dismissed or compromised without the approval of the court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

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

Partial Annotations: November, 1995 Draft Rule 23

Introduction

A summary of the responses to the 1995 summer survey of Committee reactions to the ongoing study of Civil Rule 23 is provided separately. Most members of the Committee believe it useful to continue to study Rule 23. The survey did not attempt to elicit choices, and the responses suggest that most members remain rather tentative in most of their views. In a real way, all choices remain open. These annotations attempt to focus the choices in ways that will support orderly discussion.

The simplest choice would be to do nothing. The case for doing nothing is relatively straightforward. It has been put in various forms by many lawyers who have seen earlier draft revisions of Rule 23. After nearly 30 years of work, the bench and bar have hammered out workable answers for most of the problems that arise under the 1966 version of Rule 23. We do not know enough to justify major changes. Modest changes will disrupt working answers without sufficient offsetting benefits.

Before deciding whether to do nothing, it is important to consider the possibilities for revision. There are too many possibilities – many of them mutually contradictory – to permit coherent presentation in a single draft. The draft provided with these notes does not embrace all of the topics considered by the Committee. The most important of the deliberate omissions include these:

> Collapsing the (b)(1), (2), and (3) categories. The earlier draft transferred to a new (a)(5) the present (b)(3) requirement that a class action be superior. The present (b)(1), (2), and (3) categories were converted into factors bearing on the determination of superiority. The collapse of the categories was intended to channel disputes over notice and opt-out rights into direct arguments about notice and opting out or opting in. This restructuring is very attractive as an abstract concept. It has met substantial resistance as no more than an abstract concept that will engender much confusion, and perhaps undermine the legitimacy lent to Rule 23 by the strong history of the (b)(1) and (2) class categories. It also has lost most of one of the main supporting arguments – the FJC study suggests that in most class actions there is no dispute about the proper category, and experienced class-action lawyers confirm this finding.
>
> Addressing the problems of overlapping class actions. Of course a class certification determination can take account of the pendency of other actions that seek – or have won – certification of an overlapping class. And within the federal system, § 1407 transfer may be used to

meet some of the problems. But no attempt is made in this draft to make express provisions for overlapping actions within the federal system. It would be easy to draft some of the possible approaches, such as giving priority to the first action filed. Some guidance might be found in pending securities-law bills, at least one of which includes an inventive system requiring public notice of a class action that triggers a competition to represent the class. Nor is any attempt made to address the more challenging questions raised by state-court class actions. The Enabling Act may not provide adequate support for addressing the problems raised by overlapping state actions. The anti-injunction act, 28 U.S.C.A. § 2283, creates one difficulty. Current interpretations of the amount-in-controversy requirement create a second difficulty, although supplemental jurisdiction may provide an answer. Choice-of-law problems are particularly acute (and remain acute even for a federal court). We hope that Professor McGovern will be able to provide the Committee with a review of experience in state courts.

Settlement issues are addressed only in part. There is a start on "settlement classes," and a carry-over provision for more active review of proposed settlements. But there is no attempt to adopt or adapt the throughtful proposals advanced by Judge Schwarzer for providing more detailed guidance in Rule 23(e).

"Futures classes" — classes of those whose potential injuries have not yet matured into presently enforceable claims — are not touched directly. The settlement class provisions include a right to opt out at the time of settlement that could be expanded to include a right to opt out at the time individual claims first mature, but that is all.

"Mass torts" are approached indirectly, but only by means that support alternative methods of experimentation. The draft opt-in procedure is one such means.

"Fluid" or "cy pres" remedies are not touched.

Of course the draft is not all omissions. There are so many commissions, indeed, that some order must be imposed on discussion. The need for order, moreover, reflects a deeper set of questions. Even if a number of worthy improvements can be identified, it may overburden the Enabling Act process to undertake too much at one time. If any changes are to be proposed, the most important single decision will be whether to concentrate on a few fundamental changes or to attempt more.

To facilitate consideration of these choices, these notes separate the discussion into two blocks. The first block sets out "three plus one" fundamental changes. Three have been the subject of extensive discussion, direct or indirect: permissive interlocutory appeal of certification decisions, the "need" for class certification in comparison to alternative means of aggregation or individual litigation, and the probability of success on the merits and the value of success even if achieved. The fourth, whether to permit certification for settlement purposes of a class that would not be certified for litigation, has not been as much discussed by the Committee. The second block deals with myriad other proposed changes. It is put second for a purpose. If one or more of the fundamental changes is adopted, it may prove wise to forgo any consideration of the lesser — although often important — suggestions. Even if some are considered, the greater the number of fundamental changes to be advanced the greater may be the reticence about advancing others. Perhaps perversely, the notes on these changes will prove longer than the notes on the more fundamental proposals.

Finally, these notes are not an interim version of an Advisory Committee Note. But at times it will be helpful to point up an illustration of the recurring need to choose between more detailed Rule drafting and amplifying comments in the Committee Note.

I Fundamental Changes

These changes are presented here in forms designed to make the fewest revisions possible to implement each change. Apart from the appeal provision, each is set out by using present Rule 23 as a starting point. The incidental revisions suggested by the full draft Rule 23 are held back for Part II.

A. Appeal

Appeal comes first because there seems to be a strong consensus. The proposed all-new subdivision (f) would read:

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

This proposal had received such strong support in Committee discussions that it was not included in the summer survey. Almost all of the responding members confirmed the underlying prediction by volunteering that provision should be made for appeal.

B. (b)(3) Class Necessary

Much discussion has been directed to the choice between class

certification and alternative means of aggregation or individual pursuit of individual claims. In the earlier draft, this discussion was reflected in various provisions that were added to the factors bearing on superiority. Many of these provisions remain, in slightly altered form, in the present draft as (b)(3)(A), (B), (C), and (D). See lines 49 through 65, and the separate discussion in Part II. This draft, however, substitutes a stronger requirement that a class action be not merely superior but "necessary" for fair and efficient adjudication:

> (3) the court finds * * * that a class action is ~~superior to other available methods~~ necessary for the fair and efficient adjudication of the controversy.

The Committee has not yet directly discussed this suggestion. As drafted, it is limited to (b)(3) classes. It may seem startling. But necessity is used as a practical concept, not an absolute one. It is defined by the factors that bear on all the (b)(3) determinations, and particularly those enumerated in subparagraphs (A) through (D) – the practical ability and the interest of individual class members in pursuing individual actions, the extent and nature of related litigation, the desirability of concentrating litigation in the forum, and the difficulties of managing a class action in relation to the difficulties of other methods of litigation. It will be easy to conclude that class certification is necessary to enforce claims against defendants who have inflicted on many people injuries that do not warrant the cost of individual litigation – the now commonplace "consumer" class action. More careful attention must be paid to classes that seek to aggregate claims that often will support individual actions – the increasing attempts to use Rule 23 to administer vast aggregations of personal injury claims are an obvious example. At the same time, "necessity" may prove an uncertain test when confronting "futures" claimants who do not yet have an enforceable claim – in one sense, a class action may seem necessary if there is to be any present disposition, while in another sense it may seem not at all necessary since there are no claims yet to be enforced by any means. If a necessity test is adopted, it will be important to consider this and other possible problems, at least by way of advice in the Advisory Committee Note.

C. Probability and Importance of Success on the merits

Earlier discussions have focused on two distinct means of reining in class action phenomena that some see as excesses. One would require some showing of the prospects for success on the merits as part of the certification process. The other would permit refusal to certify a class because even a high probability of success on the merits does not justify the burdens of class litigation. Each is illustrated here solely in terms of (b)(3)

classes. If there is any sentiment that either should be extended to (b)(2) or even (b)(1) classes, that issue is better discussed after decisions are made as to (b)(3) classes.

Probable success on the merits. In *Eisen v. Carlisle & Jacquelin*, 1974, 417 U.S. 156, 167-168, 177-178, the district court directed the defendant to pay 90% of the cost of notifying the plaintiff class after finding, following a hearing, a strong likelihood that the plaintiff would prevail on the merits. The Supreme Court began its review of this order by ruling that Rule 23 does not authorize a preliminary hearing on the merits. Rule 23, indeed, requires a certification decision as soon as practicable, and thus forbids a preliminary inquiry into the merits. In addition, the Court noted that "a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant."

Rule 23 can be revised to eliminate the objection that draws from its structure. Concern with prejudice to the defendant may be met by the observation that ordinarily it is defendants who urge that the pressures arising from certification of a plaintiff class should require a preliminary look at the merits. The decision in the *Eisen* case, rendered while the 1966 revisions were just starting to take hold, need not stand in the way of further deliberation.

The argument for requiring a preliminary showing on the merits is intensely pragmatic. It rests on two related observations. One is that the cost of defending a class action is often far greater than the cost of defending an individual action, in part because the stakes are greater. The other is that certification creates an almost irresistible force for settlement. Many experienced lawyers say, with some weariness, that once certification is granted, "it's all over."

Drafting a probability of success factor would be relatively easy if the Committee were prepared to require more than a 50% probability of success on the merits. That threshold, however, may seem too high. So long as defendant classes remain, moreover, it is cumbersome to draft in terms of the probability that the class will prevail on the merits. And it clearly will not do to look to the probable success of the party requesting class certification — all parties may join in the request, a plaintiff may request certification of a defendant class, and perhaps a defendant may request certification of a plaintiff class. The phrase suggested here simply attempts to find a functional approach:

> (3) the court finds * * * that the probability of success on the merits of the claim [by or against members of the class]

> warrants the burdens of certification, and that a class action is superior * * *. The matters pertinent to the findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses.

This approach focuses directly on the question. The burdens of certification may vary from one case to another. Determination of the probability of success entails both prediction of the likely outcome and the importance of the stakes. A lower probability of success suffices as to a claim that — if established — involves important public or private interests. It even is possible to take account of the importance of success on the merits in a class action as compared to success on the merits in one or more individual actions.

(This approach is similar to the familiar preliminary injunction analogy, but is significantly different. Certification does not of itself control out-of-court primary conduct. The burden is not that a party is forced to shape its conduct on the basis of a partial review of the merits, but that a party may be forced to settle or spend large amounts on litigation. The dangers of mistakenly granting or refusing certification are different from the dangers of mistakenly granting or refusing an interim injunction. It will not do to attempt incorporation of the preliminary injunction formula.)

The addition of factor (E) is a redundancy that may not be desirable.

Is success worth the cost. This factor arises from concern that even assured success may not justify the costs of a class proceeding. The common illustrations arise from "consumer" class actions that aggregate large numbers of individually minuscule claims. One suggestion, for example, has been that a simple dollar threshold test should be adopted: a class should not include any member whose individual damages are less than some figure such as $100.

Models can be found for this approach. Section 3(a)(13) of the Model Class Actions Rule lists as a criterion for the certification decision "whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class." Michigan Court Rule 3.501(A)(2)(e) lists: "whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action." An April, 1993 draft circulated to the Advisory Committee included a proposed new Rule 23(b)(8), in either of two alternative forms: "whether the value of the probable relief to individual class members justifies the costs of administering a class action," or "whether the relief

likely to be afforded individual members of the class is significant in relation to the complexities of the issues and the expenses of the litigation."

The Committee has rejected this proposal in the past for fear that it might be seen as the occasion to discriminate between favored and disfavored substantive claims. A judge who is hostile to the policies pursued by an asserted legal claim could invoke this provision to refuse certification and thwart effective enforcement. An additional reason for rejection arose from the structure of the proposal that collapsed the separate categories of (b)(1), (b)(2), and (b)(3) classes; it was feared that certification might be denied in what is now a (b)(1) class, and believed that a class action might not be found "superior" if the underlying claims simply were not worth the trouble.

Despite the concern arising from fears of hostility to particular rights, the problem remains. Many wise observers believe that too many class actions serve only to enrich class counsel without achieving any real benefit for class members and without implementing any important public interest. The possible gains may justify the risk of discriminatory enforcement.

If the importance of success on the merits is to be considered as part of the certification decision, one formulation would add a new factor to the list in Rule 23(b)(3):

> * * * (F) the significance of the public and private values of the probable relief to individual class members in relation to the complexities of the issues and the burdens of the litigation.

An obvious alternative would be to authorize some form of fluid class relief, avoiding the administrative costs that weaken or defeat any attempt to effect individual relief. Pricefixing bakers could be ordered to reduce the cost of bread for six months, false advertisers could be ordered both to publish corrective ads and to provide free products to charitable organizations, and so on. Serious consideration of such approaches should begin with the question whether they are authorized by the Enabling Act process. Over the last four years, at least, the Committee has not shown any interest in this alternative.

D. Settlement Classes

The question whether a class can be certified only for purposes of settlement has not been much discussed by the Committee. The question has been propelled back to the center of attention by the decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 3d Cir.1995, 55 F.3d 768-823. It may well be that this question — or, perhaps more accurately, the many questions that arise from this issue — should

be left for continued development in multiple actions in many courts. If some reassurance is to be provided in the text of Rule 23, the first question is whether it should reach all of the subdivision (b) categories, or should be limited to (b)(3) actions. The draft set out here is limited to (b)(3) actions. It could be adapted to other categories by creating a separate provision, perhaps as part of subdivision (e).

It is not likely that a settlement class should be exempted from any of the subdivision (a) requirements of numerosity, commonality, typicality, and representativeness. The central question seems to be whether a finding of superiority (or necessity) can rest on the distinction between trial and settlement, whether a class can be certified for settlement purposes even though the same class would not be certified for trial. The answer surely must be influenced by the level of confidence that can be placed in the means available to supervise settlement. Approval of a settlement class is more likely to seem desirable if subdivision (e), as it is or as it may be improved, provides strong reassurance that most approved settlements accomplish a fair and adequate disposition of class members' claims. If the Committee is confident on that score, a variety of circumstances might suggest that a settlement-only class is desirable. One obvious situation would be that class litigation is made impracticable by significant differences in the state-law rules that must be applied to the claims of individual class members. Another would be that class-wide litigation of common issues must be followed by individual disposition of individual matters that are bound up with the class adjudication. A class-wide adjudication of the defendant's fault, for example, might be followed by the need for individualized determinations of comparative fault — a matter that can scarcely be separated from litigation of the defendant's fault. Other circumstances might provide more troubling tests. Settlement, for example, might seem a reasonable means of compromising claims that should not be litigated on a class-wide basis because the facts or law are so uncertain that an all-or-nothing answer is premature.

Two changes could adapt subdivision (b)(3) to settlement classes. The finding of superiority could depend on "disposition," not "adjudication," and a new factor could be added to the list of superiority factors:

> (3) the court finds * * * that a class action is superior to other available methods for the fair and efficient ~~adjudication~~ disposition of the controversy. The matters pertinent to the findings include: * * * (G) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class;

II Detailed Changes

The current draft Rule 23 includes a host of changes designed to incorporate current style conventions. The "shall" - "must" convention is put aside, however, to honor the Supreme Court's concern that confusion might arise from piecemeal incorporation through the amendment of individual rules. These changes are not noted separately. The notes that follow are intended to cover every issue that might seem worthy of discussion. The intention surely is not fulfilled. Some items that should be discussed will be omitted, and many of the items that are included will not deserve discussion. Independent review of the draft is indispensable.

Many of the detailed changes have been taken over from the familiar draft prepared while the Advisory Committee was chaired by Judge Sam Pointer. The Committee was sufficiently confident of that draft to recommend it to the Standing Committee for publication. The recommendation was withdrawn not because of subsequent doubts but for fear of adding one major task too many to a process in which many other rules revisions were in various stages of completion. The Committee, moreover, had arrived at a moment when many new members were expected, and it was thought desirable to gain the advantage of their wisdom before pressing ahead. The time has come for addressing that wisdom to the details, if they are to be proposed for publication.

Lines 3 to 5: The new material is intended to emphasize the opportunity already provided by Rule 23 to certify classes that reach only portions of a complete dispute. The summer survey suggests that Committee members are not especially enthusiastic about this emphasis. But there is continuing interest in modest adaptations to address the problems of dispersed mass torts. Issues classes and opt-in classes are among the most conservative means of starting down that road.

Line 11: The "positions typify" language was Judge Pointer's elegant solution to the problem of introducing the "issues" emphasis to language that now is built around "claims or defenses." The Committee has not been interested in abandoning the "typicality" requirement. The "positions typify" language might be misread to permit representation by a person who is a "member" of the class only in the sense that she is willing to argue in the ways that we think class members would argue. Explanation in the Note may be effective to forestall this risk. If not, alternative drafting may be necessary.

Lines 12 to 16: The changes are intended to emphasize the fiduciary responsibilities of counsel and representative parties. They have proved controversial, both within the Advisory Committee and outside. Those who oppose the changes argue that it is already accepted that fiduciary duties are owed, that these changes do

nothing to clarify the nature of the duties, and that not enough is gained by added rhetorical emphasis to justify the risks of increased confusion. The "all persons while members of the class" language may not be necessary, although it provides clear opening and closing points – no duty is owed to a potential member of an opt-in class before opting in, and no duty is owed to a former member of a class after opting out. This language clearly should be changed or deleted if these consequences are troubling. It also should be changed or deleted if there is a risk that it may negate any duty to class members during the period before certification. The final words, "until relieved by the court, etc.," seem particularly empty. An alternative would be to attempt to establish meaningful and detailed rules governing some aspects of the fiduciary responsibility. The conflict-of-interest problems that arise on settlement, and particularly on settlements that involve common representation of present and "futures" claimants, would be particularly interesting. This alternative would encounter great difficulties that would not be significantly eased by anything the Committee has yet heard in gathering information from the bench, bar, and academy.

Lines 33 to 37: Far fewer words are used. The new language makes it clear that a defendant class is proper in an action for specific relief, a matter of some disagreement under the present rule. Committee members have shown some skepticism about defendant classes, but at a minimum there must be a clear answer. The emphasis continues to be on "final" injunctive or declaratory relief. This emphasis is not intended to defeat preliminary relief. (One question may be whether the rule should speak to the relationship between class certification and issuance of a temporary restraining order or a preliminary injunction. The most likely place for such a provision would be in (c)(1), particularly if the chosen approach were to permit or require limited certification for the specific purpose of preliminary relief.)

Lines 38 to 41: (Item numbers are added to emphasize the individual importance of each of the three requirements in this first paragraph of (b)(3).)

Item (i) is the most important portion of the revision as it reflects issues classes. It requires only that the questions common to the certified class predominate over individual questions that are included for disposition in the class action. If a class is certified as to one common issue only, class treatment is appropriate even though that issue does not predominate over a host of individual questions that must be resolved by other means as to each class member. Commonly discussed illustrations would be certification of a class on the issues of design defect and general causation, leaving for resolution by other means each individual issue of "legal cause," injury, and damages. This is the better understanding of the present rule, read as a whole.

Lines 41 to 44: Item (ii) is one of the four fundamental issues discussed in Part I. It would require consideration of the probable outcome on the merits in determining whether to certify a class. The bracketed language is intended to respond to the difficulty of incorporating success against a defendant class; better drafting should be attempted.

Lines 44 to 47: Item (iii) also is one of the four fundamental issues discussed in Part I. It would require that certification of a (b)(3) class be "necessary," not merely "superior." The change from "adjudication" to "disposition" in line 46 is part of the proposal to authorize certification for settlement purposes only.

Lines 49 to 54: Two changes are intended in Matter (A). The emphasis on the practical ability of individual class members to pursue their claims without class certification is new, at least as an explicit statement. This concern can be addressed through the present rule by concluding that there is no "interest" in pursuing alternatives that are not practically available, but the express emphasis seems useful. And this language removes any implication that the only comparison is to "individually" controlled actions — aggregation on some other basis, including class actions for differently defined classes and in different courts, is included.

Lines 55 to 57: The changes in Matter (B) are relatively minor. In referring to other litigation, substituting "related" for "concerning the controversy" may imply a slight loosening of the relevant relationships — if it reduces even slightly the opportunity for pettifoggery, so much the better. Substituting "involving class members" for "commenced by or against" members makes it clear that other class actions are included in the calculation. And deleting "already commenced" avoids any artificial time limit — the court is allowed to consider any other litigation. The Note might even suggest that in some circumstances the court could consider sufficiently mature plans to initiate litigation not yet filed.

Lines 61 to 65: The new language from lines 62 to 65 sets the difficulties of managing a class action in perspective. If other means of adjudication would create greater difficulties than class adjudication for the judicial system as a whole — including state as well as federal courts — certification should not be defeated by the difficulties in managing a class action.

Lines 66 to 67: Matter (E) corresponds to one of the fundamental questions discussed in Part I, consideration of the probable outcome on the merits. It is redundant with item (ii) at lines 41 to 44. Redundancy has the virtue of emphasis and the vice of possible confusion. Do we need it?

Lines 68 to 71: Matter (F) corresponds to another of the fundamental questions discussed in Part I. The vernacular

shorthand for this suggestion has been "just ain't worth it." This drafting lacks elegance. If it captures the underlying functional concerns, it may do.

Lines 72 to 75: Matter (G) again corresponds to one of the fundamental questions discussed in Part I, providing for certification for settlement purposes of a class that would not be certified for litigation.

Lines 76 to 88: This opt-in class provision looks quite different from the earlier version because the present draft retains the current structure of Rule 23. The basic purpose and most of the elements, however, are carried over.

At least two purposes are served by providing for opt-in classes. Opt-in classes may be a particularly attractive means for joining groups of defendants. There is much less need to worry about adequate representation of class members who have opted in, and there are far more effective means of reducing the burdens imposed on the representative defendants. Opt-in classes also may be attractive means of addressing dispersed mass torts, although it seems probable that they will more prove effective for litigation than for settlement.

Opposition to opt-in classes has sprung primarily from the fear that a court that otherwise would certify a (b)(3) opt-out class may fall back on an opt-in class instead. This draft does not limit opt-in classes to situations in which the court has considered and rejected certification of a mandatory or opt-out class. As an abstract matter, it seems better not to limit opt-in classes in this way. An opt-in class may prove fully effective as a practical matter, and at much lower cost. The limit, however, might help win acceptance of the opt-in class proposal.

The introductory lines identify the opt-in class as a particular form of permissive joinder. In effect, the familiar class action is used as an analogy to regulate many of the issues that otherwise need to be resolved case-by-case in more open-ended means of permissive joinder. The opportunity to require cost-sharing is made explicit in subdivision (c), at lines 117 to 120.

The detailed opt-in class factors are carried over from the earlier draft. There is substantial overlap among them. (A) and (B) together identify such matters as these: an opt-in class makes little sense when the controversy involves widespread minor injury. It makes good sense when the controversy involves substantial injuries that would support individual litigation, and perhaps already have involved individual litigation. Both situations may be combined, as if a widely distributed product has caused serious injuries to a significant number of users and a relatively minor loss of investment value to vast numbers of users. Conjoined certifications of opt-out and opt-in classes may be useful in such

cases. The conflicts of interest referred to in (C) may reach across all of the other class categories – all employees who are members of a protected class, for example, may have seriously conflicting interests in an action claiming employment discrimination. The factor (D) interest in securing a final and consistent resolution speaks in part to the concern that the charms of an opt-in class may seduce a court into rejecting a superior alternative in (b)(1), (2), or (3) class certification. (E) simply directs attention to the nature of the opt-in class as a permissive joinder device.

Lines 89 to 92: Paragraph (5) is entirely new. It is intended to end the practice of including individual damages claims in a (b)(2) injunction class without opportunity to opt out. As drafted, that intention is not made explicit. An alternative would be to transfer this provision to (b)(2), stating that individual damages claims can be included in the class only if it is also certified under (b)(3) or (b)(4). Whatever the drafting approach, the central question is whether there always should be an opportunity to opt out as to individual damages claims. There also may be subsidiary questions. If the class loses on the demand for injunction or declaratory relief, can issue preclusion defeat an individual claim for damages by a member who has opted out of the damages portion? Why should the answer be any different from the case in which certification is limited to injunction or declaratory relief, without creating any damages class? Rule 23 has not yet addressed any of the preclusion consequences of class actions; perhaps that tradition should be maintained.

Line 97: The requirement that a certification decision be made as soon as practicable is deleted. The Committee has discussed this issue, showing a strong inclination toward the view that this requirement is ignored often and for good reason. Perhaps the most important concern is that premature definition of the class may impede efforts to identify a fair and practical settlement class.

Lines 101 to 105: The issues class alternative is again emphasized.

Lines 106 to 113: The provisions for opting out include, as item (ii), an important limit on settlement classes. This provision is intended to require that class members be allowed to opt out of the actual settlement. It does not address related questions. If class members are allowed to opt out of the settlement, some provision must be made for dissolution of the settlement; it seems safe to leave that to the terms of the settlement and approval process. More important, a "futures" class presents the problem of opting out by people who do not yet know that they have claims and will some day come within the class. There is much to be said for the proposition that they should be allowed to opt out of the settlement when their claims individually

mature. This approach need not defeat any possibility of settlement – at least in theory, it could create an incentive to create a settlement so attractive that future claimants will prefer it to the hazards of opting for individual litigation. It must be decided whether to address these questions in the Rule, in the Note, or at all.

Lines 113 to 118: These provisions regulating opt-in classes include express authorization for expense-sharing terms that may make opt-in classes more attractive.

Line 120: It may be better to state that a certification order "is" conditional, avoiding the implication that a court may bind itself at the time of certification.

Line 122: "Final judgment" seems the appropriate point for terminating the power to alter or amend a certification order. Cutting off the power upon "decision on the merits" might imply that the court is bound to a class certification after, for example, deciding liability and before addressing remedial questions that may affect the wisdom of the class definition.

Lines 123 to 168: In the spirit of the earlier draft, the notice provisions are substantially changed. Unlike the earlier draft, however, the notice provisions continue to depend on the distinctions between the various subdivision (b) categories of class actions.

Lines 123 to 133: There is little that is controversial here. The requirement that notice be given in (b)(1) and (b)(2) class actions is made explicit for the first time. The creation of opt-in classes is reflected.

Lines 133 to 137: This bracketed provision was drafted simply to illustrate the possibility. If a court is to be required to consider the merits as part of a (b)(3) certification decision, it is natural to reëxamine the *Eisen* question whether at times a defendant should be ordered to advance the costs of notifying a plaintiff class. It may be the course of wisdom to delete this provision even if it seems sound.

Lines 138 to 145: The means of notice required in a (b)(1) or (b)(2) class is expressed here in functional terms. There are several questions to be addressed. The most obvious is whether these are the right functional concerns. Another is whether there should be express focus on the cost of notice – if a defendant has ready means of sending notice to all class members as part of a regular communication, for instance, notice to all members should be required. If proposed subdivision (b)(5) is adopted, requiring (b)(3) or (4) certification of any damages class in conjunction with a (b)(2) injunction class, it may be desirable to add an express link to the item (ii) and (iii) provisions for notice in

(b)(3) and (4) actions. The intent is to require the often more thorough (b)(3) notice: is that clear enough? Yet another question is whether some simpler form should be found – the most obvious would be to require "reasonable" means of notice, with some amplification in the Note.

Lines 146 to 164: There are two changes from present (b)(3) notice requirements. The first permits sampling notice in actions with large numbers of class members who have small claims. The idea seems inescapably good, but the execution may need improvement. The second change deletes the references to opt-out rights and the effect of the judgment on the theory that the notice should include the order certifying the class. The order itself will cover these matters. Perhaps it is unwise to include the order with the notice. If it is wise to include the order with the notice, perhaps this assumption should be made explicit.

Lines 165 to 168: The notice provisions for opt-in classes are kept simple, in line with the generally relaxed approach to such classes.

Lines 169 to 181: This is a modest edit of the present rule. If it holds, the Note would have to state that the phrase "whether or not favorable to the class" has been deleted as redundant.

Lines 182 to 185: This (c)(3)(C) simply adds parallel provisions binding members of an opt-in class, if opt-in class provisions are adopted.

Lines 186 to 195: These lines carry forward the emphasis on issues classes in the prior draft. Committee sentiment seems divided on the change. The provision that a subclass need not satisfy the numerosity requirement of (a)(1) seems sensible as an alternative to requiring individual joinder of each of a small number of people with special interests.

Lines 199 to 203: This provision is taken verbatim from the prior draft. Most courts, but not all, recognize the authority to dismiss under Rule 12 or grant summary judgment under Rule 56 before determining whether to certify a class. It seems useful to confirm the general and better practice.

Lines 204 to 229: Mostly this (d)(2) is the present (d), with style changes. The provision for notice of refusal to certify a class is new, but simply underscores a power that exists now. The addition of notice of the right to be excluded from or included in the class, lines 221 to 222, is focused on the addition of opt-in classes, but adds an otherwise redundant reference to opt-out classes for balance and to avoid potential confusion. We may need to think about the line 224 provision for imposing conditions on class members. It seems to make sense, particularly if opt-in classes are developed. But this draft removes at least part of the

function – the earlier draft had complex provisions for imposing conditions on opt-out members that have been omitted from this draft.

Lines 230 to 232: The changes fit this provision into the new structure of subdivision (d) and improve the style.

Lines 233 to 238: This new subdivision (e)(1) is carried forward from the prior draft. It protects against the possibility that class members may have relied on the filing of a class action that subsequently is sold out from under them.

Lines 239 to 243: Only style changes.

Lines 244 to 251: Subdivision (e)(3) restores an approach that gradually disappeared from the prior draft. Early versions of the prior draft included observations in the Note that seemed to contemplate independent investigation of a proposed settlement by a court-appointed officer. These observations eventually were tamed, perhaps because nothing of the sort was ever intended. Independent investigation, however, offers an express response to the fundamental difficulty encountered by the court when all parties appear to support a proposed settlement. It proceeds from the premise that individual class members suffer great disadvantages in attempting to gather information that supports their own informed appraisal of a settlement and presentation of possible challenges. Failing effective adversary presentation, the court must find some alternative. But it may be no answer at all to move the court toward an inquisitorial role; at best it is an answer only if a court-appointed official can do the task well.

An alternative may be to provide more explicit control of the means the parties use to present a settlement and the criteria a court uses to review it. Judge Schwarzer has addressed the Committee on this topic; his proposals may provide a path that should be pursued.

Lines 252 to 258: This is the permissive interlocutory appeal provision noted in Part I.

United States Court of Appeals
for the Fifth Circuit

May 8, 1995

PATRICK E. HIGGINBOTHAM
CIRCUIT JUDGE

UNITED STATES COURTHOUSE
1100 COMMERCE STREET
DALLAS, TEXAS 75242

TO: Members of the Advisory
Committee on Civil Rules

Dear Colleagues:

Those attending the N.Y.U. symposium heard the plan for discussing issues over the summer leading to their formal consideration at the fall meeting. Ed Cooper and I have been preparing that plan. Ed's paper for the N.Y.U. symposium treats proposals the committee has been discussing over the past several months. Reflecting Ed's exam mode, I enclose a series of multiple choice questions prepared by Ed and designed to begin the organization of our discussion.

Please respond to these questions at the level of detail you think appropriate and identify any additional issues that should be considered by the committee. Our effort is not to foreclose consideration of any proposal. These are the ones that have received the most attention. If you have other ideas, please put them on the table. I emphasize the importance of putting any additional suggestions on the table now. The committee will have only one more round at these ideas before the draft in early fall. A draft will draw our attention and tend to push aside other possibilities. This is not a request for ideas that do not appeal to you. Rather, I urge that now is the time for those that do.

Please organize your responses by question and forward your responses to me and Ed, with a copy to all other members of the committee, by Friday, June 9, 1995.

The fall meeting of the committee will be at the University of Alabama in Tuscaloosa, Alabama. We are looking at late October or early November and will forward alternate dates shortly.

Sincerely yours,

Pat

Patrick E. Higginbotham

Rule 23 Agenda: The First Pass

The Committee decided at the April, 1995 meeting that the time has come to attempt to move from gathering information about Rule 23 toward drafting. The first task must be to set an agenda of issues to be considered. A lengthy version of an agenda is set out in the attached draft of *Rule 23: Challenges to the Rulemaking Process*. Focus is better provided, however, by setting out a more succinct list of topics that for the most part avoids detailed development. Cross-references are provided to the *Challenges* piece to supply greater detail. The question for this first stage is whether we should be thinking at all about various topics; it will be time enough for detailed discussion when the major topics are addressed.

In an effort to keep this first pass simple, the topics are followed by a list of summary responses. The hope is that some items will yield a strong consensus that sorts out at least a few issues that can be put aside, at least for the time being. However that works out, it is even more important to have freeform responses suggesting items that should be explored and others that should be jettisoned. This form is intended to prod suggestions, not stifle them.

The Do-Anything Question

The first question is whether we should attempt to do anything about Rule 23:

(1) We should act now to improve Rule 23.

(2) We should keep it in play before deciding whether to drop it.

(3) We should forget it.

The Big, Structural Questions

Cut Back on Small-Claims Classes: Among many possibilities for cutting back on small-claims classes, see pp. 5-12, two stand out:

A court should be empowered to determine that class-action enforcement of an asserted right is not worth the burdens in light of the benefits to individual class members and the social values of enforcement, p. 8:

(1) We should consider including this as a factor.

(2) This is not worth further consideration.

A court should consider the probable success of the class claim on the merits as a factor in determining whether to certify the class, pp. 8-12, a lateblooming suggestion that has drawn strong support from many observers:

(1) The probable success factor should be included, and modeled on the preliminary injunction analogy.

(2) The probable success factor should be included, but drafted on independent Rule 23 grounds.

(3) Probable success should not be a factor.

Dispersed Mass Torts: pp. 12-17. There are many possibilities for addressing dispersed mass torts. Among the more obvious would be an attempt to cut back on the innovative efforts that have been made in the last few years to resolve such problems as those presented by asbestos and silicone gel breast implant litigation. The equally obvious alternative is to attempt to build a new rule on these efforts, attempting to create a framework that can be generalized to other mass torts as they come to maturity. A middle ground is presented by the current draft Rule 23, or some variation of it: provisions for opting out or in are made more flexible, conditions may be imposed on opt-outs or opt-ins, and issues classes are emphasized. The choices are too multifarious to present easy choices. Instead they may be sketched as follows, recognizing that multiple votes may make sense:

(1) We should ignore mass torts

(2) We should attempt to repeal present mass tort experiments

(3) We should attempt to create a bold new rule

(4) We should undertake modest changes that support continuing experimentation.

Control Counsel: The continuing perception that class actions often involve lawyers without clients, pp. 17-20, leads to a variety of suggestions for establishing some means of control. Many means are possible within the framework of present Rule 23(a), focusing on adequacy of representation. A solicited representative client, for example, could be found inadequate. Courts could undertake more active supervision of a representative's understanding of the action and involvement in it, or to regulate the process of selecting counsel. Other means may require amendment of Rule 23, including proposals for steering committees, class guardians, or the like. One of the central questions is how far class actions should make courts responsible for supervising one side of an adversary contest.

(1) We should not worry further about adequate representation

(2) We should emphasize the court's general responsibility to ensure adequate representation, but not attempt detailed regulation.

(3) We should consider additional means of ensuring adequate

representation, such as:

Class as entity: pp. 17-25: It may be possible to draft a rule that in some ways treats a certified class as an entity separate from the individual members. This separation might encourage clearer thinking about some of the incidents of certification, and at the same time emphasize the need to focus on the interests of each individual class member as something separate from the class. It also might confuse thinking beyond any likely benefit.

(1) It is worthwhile to continue to think about treating the class as an entity.

(2) Give up on it.

Specific Draft Questions

The current draft Rule 23 presents several occasions for focusing many of the suggestions that have been made for developing practice without making substantial departures from the basic approach now followed. See pp. 25 ff. The first questions obviously grow out of the proposed revisions; the later questions simply ask whether greater changes should be proposed.

Opt-out, Opt-in: The draft would permit the court to allow opting out of what now are (b)(1) and (b)(2) classes, and to prohibit opting out of what now is a (b)(3) class. It also would permit creation of an opt-in class. It includes a relatively detailed but incomplete provision permitting the court to control the res judicata consequences of opting out. Opt-in classes might be particularly useful with respect to claims that are so significant as to support individual litigation, as a means of achieving choice-of-law or like ends, or as a means of regularizing defendant classes. Opting out may be attractive as a means of addressing class conflicts even in (b)(1) and (b)(2) classes.

(1) We should continue to work on more permissive opting out

(2) We should continue to consider opt-in classes

(3) The present structure is better

Notice: The draft requires some form of notice in all class actions, but relaxes the requirement of individual notice now attached to (b)(3) classes. It may be attacked on the ground that individual notice is required at least when there is an opportunity to opt out, and the rule should make the nexus explicit. It may be defended on the ground that notice calculated to reach most members of a class is sufficient to provide opportunity to police the

adequacy of representation, and that the right to opt out can be assured by other means whenever there is a realistic prospect that individual litigation will be brought.

(1) It is good to make explicit the requirement that some notice be provided in all class actions

(2) Individual notice should be required in all opt-out classes

(3) It is good to permit relaxation of the individual notice requirement even for opt-out classes.

Collapsing Categories: The draft collapses the now separate categories of class actions, see pp. 29-30, converting the present distinctions into factors to be considered in determining whether a class action is a superior means of resolving a dispute. The FJC study seems to be puncturing the argument that this step is desirable because much time is now wasted by indirectly litigating notice and opt-out questions through artificial arguments about which class category applies. Notice, opt-out, and opt-in questions can be addressed without collapsing the distinctions among the categories, and it may be desirable to maintain the tradition embodied in (b)(1) and the moral force reflected in (b)(2) classes. At the same time, the draft has a strong functional attraction, and offers a neat drafting chore already accomplished.

(1) We should redraft in an attempt to preserve the traditional (b)(1), (2), and (3) categories.

(2) It is too early to choose.

(3) The draft should be maintained for the time being.

Issues Classes: see pp. 45-46. The draft emphasizes issues classes in part as a means of cautiously approaching mass torts. This is only a change in emphasis, not a direction for any particular departures from present practice.

(1) Added emphasis on issues classes seems useful.

(2) Why encourage separate litigation of issues in ways that may only complicate or distort separate litigation of the individual issues that remain to be litigated?

Defendant Classes: see pp. 30-33. This discussion has been triggered by the draft Rule 23(a)(4) requirement that the class representatives and their attorneys be "willing" to represent the class. It also involves the redrafting of (b)(2) to make it clear that a defendant class may be appropriate in an action for an

injunction, and the suggestion in the Note that an opt-in class may be desirable for defendants. The willingness requirement is an indirect way of approaching the problems that surround defendant classes. There are several possible approaches, and it is difficult to present a short list of alternatives because none of the possibilities seems particularly compelling. Free-form comment on this question may be particularly helpful, but a few choices might help get it started:

(1) Willingness should stay;

(2) Willingness should go.

(3) Rule 23 should state separate requirements for defendant classes.

(4) Rule 23 need not state separate requirements, but the Note should offer advice on the special problems of defendant classes

(5) This is too complicated to think about; we should leave it to continued judicial development

Fiduciary Responsibility: see pp. 33-35. Draft (a)(4) casually refers to the fiduciary duty of class representatives and counsel. It is fair to question the wisdom of this reference-without-guidance, as many have done. There might be real advantages in attempting to provide more guidance in Rule 23, but the task of providing wise guidance is a formidable challenge.

(1) We should keep the fiduciary duty reference and let it rest with that.

(2) We should abandon the fiduciary duty reference and not attempt any regulation of fiduciary responsibility.

(3) We should attempt to provide some guidance on the nature of the fiduciary responsibilities of representatives and counsel.

Settlement: see pp. 35-38. Draft Rule 23(e) deals with this in part, particularly with the provision for reference to a magistrate judge or master. Judge Schwarzer has made detailed suggestions for regulating the judicial approval process. The question of settlement classes lurks close to the surface. This is a topic that surely deserves further consideration and a draft.

(1) I disagree – let's not try anything more on settlement.

(2) I agree we should do more with Rule 23(e). My specific suggestions are set out in my freeform response.

Control Representatives: In many ways, reflected in part with the discussion of controlling counsel, concern has focused on the role of the class-member representative. The securities bill provisions for guardians or steering committees are prominent examples. An approach akin to the guardian approach, but in some ways less troubling, would be to require the court to appoint representatives – an approach that might give renewed importance to the "willing" representative requirement. Alternatively, courts might demand that representatives show actual understanding of the litigation and remain actively involved as clients; this, and other measures such as a simple inquiry into the circumstances that brought representative and attorney together, could be accomplished without amending Rule 23.

(1) We should attempt to do something to bolster the role of class representatives.

(2) These problems should be left to continuing judicial elaboration of the adequate representation requirement.

Class Member Participation: See pp. 47-48. The question is whether the rule should include provisions that encourage and support greater participation by nonrepresentative members of the class.

(1) We have enough participation without encouraging more.

(2) This prospect should remain on the agenda.

Overlapping Classes: see pp. 49-50. Although the problems of overlapping classes involve many matters outside the Enabling Act process, including antisuit injunctions, de facto surrender of jurisdiction by yielding priority to another action, intercourt and intersystem consolidation, and the like, it would be possible to approach the question in part through Rule 23. The simplest means would be to add a factor to the draft Rule 23(b) list, authorizing a court to consider the pendency of related class actions as a factor in ruling on certification or decertification. This question also might be added to the matters considered in approving settlement.

(1) We should see whether we can draft something that helps courts respond to the problems of overlapping classes.

(2) Enough already.

Do Anything

(1) Act now **Rowe; Wittmann**
Fox: It would be nice to slow the inevitable slide by tinkering around the edges of Rule 23.
Frank: "[S]imple honesty requires that we face some problems."

(2) Keep in play **Doty; Scirica; Vinson.** **Levi** favors modest efforts to improve.
Niemeyer would make modest changes.

(3) Forget it
Kasanin: We might publicize some of the things we have learned about class actions. But there are strong reasons to make no changes in Rule 23. In addition, "The Bench and Bar need a breather." Recent rules changes are still being digested. More are in the pipeline. But if we try to do something about mass torts, we may wish to address some other aspects of Rule 23 at the same time. All suggestions for possible changes are subject to the premise that, contrary to my advice, we are going to operate on the Rule 23 patient.

Big Structure

<u>Cut Back Small Claims: Not Worth While</u>

(1) Consider: **Doty; Kasanin; Scirica; Vinson; Wittmann**
Fox: Add factor to (b)(3): "(E) the expense and burden of processing the action compared to the benefits sought." But there is a risk that this would come too close to considering the probability of success on the merits, which should not be a factor. We may also need to do something to meet the danger that supplemental jurisdiction under § 1367 will bring hosts of minuscule diversity claims into federal courts.
Frank: "I can think of no reason why class actions should be an exception to the universal rule of cost-benefit of a suit for money."
Levi: opposes general test that invokes philosophy of individual judge. Would be distressed by supplemental jurisdiction invitation to multitudes of small diversity cases, but doubts this is in Rulemaking power.

(2) Not worth further consideration **Niemeyer**
Rowe: This is so far substantive that it should be left to Congress. Too many judges might sell short the importance of deterring activities that inflict small injuries on many victims.

<u>Cut Back Small Claims: Probable Success</u>

(1) Include, on preliminary injunction model **Doty; Wittmann**
Kasanin Include this. John Frank is persuasive.
Levi favors a "preliminary injunction analogy adapted to Rule 23"; not sure how this would work when defendant is eager to bring on a summary judgment motion.

Niemeyer would include a probability of success requirement "if we can do so without affecting the remainder of current class action jurisprudence."
Rowe also prefers the preliminary injunction analogy; probable success should be included to protect against the coercive effects of certifying weak claims. It should be made clear that a strong claim on the merits tips toward certifying when other factors are in rough balance. Is afraid of what would be included in a probable success calculus that cuts free of the preliminary injunction analogy.
Scirica: Use the preliminary injunction analogy. Likes John Frank's comments

(2) Include, but independent Rule 23 grounds **Vinson**
Frank A blend – "the certification procedure might well be something falling between TRO procedure and preliminary injunction procedure." Affidavits could play a large role; difficult fact questions need not be resolved; public interest often may play a greater role than usual in injunction cases. The 7th Circuit decision in Rhone-Poulenc is essentially consideration of probable success on the merits.

(3) Not a factor **Fox**

Dispersed Mass Torts

(1) Ignore
Niemeyer Would make no change to address these problems; an appendix of "Mass Tort Issues" is attached

(2) Attempt to repeal present experiments
Fox: A lengthy statement that cannot be summarized; a copy should be obtained by anyone who cannot find it. The conclusion is that at least as to dispersed mass torts, we should attempt to impede reliance on Rule 23. We should amend (b)(1)(B) to defeat use of the "limited fund" theory when it relies on comparison of unliquidated tort claims to the defendant's net worth and insurance coverage. Reorganization and bankruptcy are superior means of preserving or liquidating a mass-scale tortfeasor. Courts must resist the temptation to try to solve problems that other social institutions are not willing to address; we must preserve "the traditional, almost sacred, role of the American courts: treat litigants with respect, hear their disputes, apply the law and dispense justice." (b)(3) should be amended to elevate the standard for certification – something like "a clear and convincing preponderance of the relevant factors." At least this might slow the tide of mass tort cases.
Wittmann: We should restrict Rule 23 to single event torts such as air crashes and refinery explosions. "The toxic tort class actions, such as those in which I am currently involved in the tobacco industry, create

incredible problems of case management, as well as constitutional concerns (7th Amendment), and the potential for creation of litigation where none existed in the first place." The 7th Circuit decision in the Rhone Poulenc blood products case deserves our study.

(3) Attempt to create bold new rule

(4) Undertake modest changes – support experiments **Scirica**

Doty: Agrees with Vinson that it might be well to exclude mass torts from revisions; perhaps shunt it to MDL or other complex litigation procedure. But circles modest changes.

Frank: Asbestos is sui generis. Breast implants may be the only real example. MDL is the instrument of choice. We do not know enough to make wise decisions. But the idea of resolving the claims of future claimants is bad; "I think we have no right at all to decide unborn cases."

Kasanin: the modest changes in the Pointer draft are likely to help those who must work in this difficult area.

Levi: favors "middle ground" modest changes.

Vinson: "we should break out the mass tort question for a separate rule (if warranted); specifically exclude mass torts from existing Rule 23 * * *." Circled (3) – we should attempt to create a new rule, applicable only to mass torts.

Rowe: We cannot ignore because of the restraining effects of the 1966 Note. To repeal current experiments would interfere with substantive matters. And in purely procedural terms, to take class actions out of the range of devices that can be used to deal with mass torts might put undue pressure on alternative devices. A bold new rule seems unwise, especially because middle-ground measures may do quite a bit of good.

<u>Control Counsel</u>

(1) Not worry further **Fox**

Levi: District courts have adequate tools

Niemeyer: Make no changes; leave for courts

Rowe: We might retain the Pointer draft reference to fiduciary duty. It is better to do nothing more; (2) is likely to be mere finger-wagging.

(2) Emphasize court's general responsibility **Doty; Scirica; Vinson; Wittmann**

Kasanin: Yes, but not attempt detailed regulation. "Many class actions present a sordid picture of the avarice of lawyers." If Congress amends the securities laws, we might consider whether to follow that lead. Courts should look more to adequacy of representation than "first to file."

(3) Consider additional means

Frank: Half-way between (2) and (3). The problem is to secure "honest and effective representation of client

interests, as distinguished from the devices of counsel exploitation or defendant control, the two of which tend to merge." Independent representation may fare better than steering committees and named class members, who are controlled by plaintiffs' counsel. Heavier judicial duty could help, but requires time that may not be available. Ancillary help within the judicial institution might be useful.

Class as Entity

(1) Continue to think

(2) Give up **Doty; Fox; Frank; Levi; Scirica; Vinson; Wittmann**

Kasanin: Too complicated to undertake now.

Niemeyer: "This concept is fraught with the highest risks to traditional jurisprudence."

Rowe: The entity idea is too conceptual even for an academic.

Specific Draft Questions

Opt-In, Opt-Out

(1) More Permissive Opt-out.

Levi favors consideration of more permissive opting out and opting in.

Rowe: Both more permissive opt-out and opt-in. For example, class members might be allowed to opt out of the damages aspects but not the injunction aspects of an employment discrimination action, perhaps with conditions on the opt-outs.

(2) Opt-in

Rowe: Opt-in can help address "real client" problems; one illustration may be institutional investors as plaintiff class members in securities litigation. The combination of easier opting-out with opt-in supports the case for discarding the Pointer draft's choice to collapse the distinctive categories of (b)(1), (2), and (3) into a single class action.

Scirica: Should consider opt-in, "although I have reservations about this concept."

(3) Present structure better. **Doty; Fox; Frank; Kasanin; Niemeyer; Vinson; Wittmann**

Notice

(1) Make requirement specific. **Doty; Scirica; Vinson**

Rowe: Yes to both (1) and (3). We should not attempt to formulate a due process standard and draft it into the rule. We should not require individual notice where it is not now required because it is not feasible to identify some individual class members.

(2) Require individual notice in opt-out classes **Kasanin; Vinson; Wittmann**

Frank: The 1966 committee clearly and unanimously thought

(b)(3) required notice, and that there should be no class certified if notice is not practical. I think due process requires individual notice, and read the Supreme Court that way. Those who disagree seem "compelled by an ardor for class determinations which overrides other values."

(3) Permit relaxation even for opt-out classes

(4) Make no changes [added in response to popular demand]
Fox Keep present formulation and Eisen
Levi inclined to leave notice as in present rule
Niemeyer Make no changes on class notice

Collapsing Categories

(1) Preserve traditional **Doty; Fox; Levi; Wittmann**
Frank: (b)(1) and (2) work. The problems arise from attempts to force (b)(3) classes into (1) or (2). Changes would create problems greater than any problems that might be fixed.
Kasanin: The advantages of the collapse are outweighed by the concomitant confusion and need to develop new law. Practitioners would see the collapse as unnecessary and confusing tinkering.
Niemeyer thinks "quite strongly that we should refrain from redrafting." The categories have historical roots and developed jurisprudence. Collapse would create unconstrained discretion and inconsistent determinations.
Rowe: The present categorization does not seem to cause real problems. We should think about Hazard's suggestion that more than one category could be certified, especially if we decouple opt-out and notice from the categories.

(2) Too early to choose
Scirica: but there are strong reasons for maintaining the present structure.

(3) Maintain present draft **Vinson**

Issues Classes

(1) Added emphasis useful **Scirica**
Kasanin: Ambivalent on this. But if we are going to make other changes, and if this would help with mass torts, would favor it.
Rowe: Strongly for added emphasis; does not see any problem with issues classes. We should clean up the confusion created by the predominance requirement so that no one is misled; predominance should focus only on the matters to be resolved in the class action – if only one issue is resolved in common, that is enough to predominate *in the class action*. This "could have the additional advantage of making it easier for courts to deal in usefully partial ways, rather than by strained global treatment, with mass tort class actions" – common issues would be resolved, but global settlements would be

considered only if resolution of common issues makes many class members willing to settle en classe.

(2) Why encourage? **Doty; Fox; Vinson; Wittmann**
Frank: "Recent pretrial procedures can separate issues if they need to be separated."
Levi would not add language
Niemeyer would make no change

Defendant Classes

(1) Willingness should stay
Kasanin: It is time to get rid of the defendant class.

(2) Willingness should go **Doty; Fox; Rowe; Scirica**

(3) Separate requirements for def classes
Vinson: yes, "if we determine that there is a need for such classes (which I'm not sure there is)."

(4) No separate requirements, but Note Advice **Scirica**

(5) Too complicated: **Wittmann**
Frank: We have more pressing problems
Niemeyer would make no change
Rowe: sees no promising ideas for separate Rule text, nor for advice in a Note. But would clear up the glitch in (b)(2) that makes it uncertain whether a defendant class can be certified in an action for injunctive or declaratory relief.
Levi would not try to draft for defendant classes

Fiduciary Responsibility

(1) Keep fiduciary duty reference **Doty; Kasanin; Scirica; Vinson**
Levi "would leave the language on fiduciary duty as it is – apparently referring to draft
Rowe leans toward this, with some unease that it is mere finger-wagging.

(2) Abandon reference and give up **Fox**
Niemeyer would make no change

(3) Guide on fiduciary responsibilities: **Wittmann**
Frank: "Yes, if we think it would do any good. The curses which plague class actions to-date would not be cured by wholesome admonitions and if declared responsibilities, there must be some contemplated mechanism for their enforcement."

Settlement

(1) Try nothing more **Doty**
Niemeyer inclines to make no change. This is controversial. Judge Becker has identified some of the problems, and may be on the right track in tying Rule 23 to adjudication.
Vinson: try nothing more, "except to point out to the judges that the settlement class and the arrangements should be subjected to close scrutiny."

(2) Do more:

Frank: "[I]n the interest of plain honesty we have to do something about certification after settlement. The rule as it stands is perfectly explicit and it is being violated grossly." If we approve of actual practice, we should condone it by rule changes. The settlement class system "is an invitation to a fix and we should get rid of it." As unpleasant as it may be, the judicial duty of review must be enlarged. "To promote honesty, fees should be separated form settlements."

Fox: Discourage settlement classes – require that they meet the same standards as litigation classes. Conditioning class certification on the assumption the case will never try is a perversion; the normal conclusion that it is good to facilitate a settlement pressed by all concerned fails here because the consensus results from "the nastiness of the alternatives," not the social desirability of class action solutions. Futures classes or subclasses "strain credulity," whether separate counsel is appointed to act without identifiable clients or no counsel undertakes to represent only futures claimants. Perhaps certification should be decided without reference to a proposed settlement when simultaneous requests are made for certification and settlement approval.

Kasanin: If we do anything, we might improve on an unsatisfactory situation arising from conflicts of interest and lack of adversariness at the time a settlement is presented for approval. Judge Schwarzer's proposals seemed to attract wide support in Philadelphia. John Frank's suggestion that honesty would be promoted by separating fees from settlements is interesting.

Levi further consideration to settlement classes

Rowe: Worth an effort. We should be wary of codifying much in an area where case-law development may be most promising, and particularly wary about approaching "settlement classes."

Scirica: Should we address the litigation/settlement class issues of the 3d Circuit General Motors decision, or rely on case-law development?

Wittmann: "I agree with the current draft, but think that we should give serious consideration to the elimination of so-called settlement classes. Apparently the use of settlement classes has led to some abuses, and I think that the thrust of Rule 23 should require careful consideration of the Court before issuance of any class certification order."

<u>Control Representatives</u>

(1) Attempt to bolster representative role **Vinson**

Frank: This is only one angle of the broader topic needing consideration – how to achieve a true adversary relationship between plaintiff class and defendant, and

how to maintain it.
Kasanin: Particularly if Congress does something in a specific area. If its road map is decent, we might follow it for the sake of uniformity between securities class actions and others.
Scirica: Perhaps in the Note

(2) Leave to judicial elaboration **Doty; Fox; Levi; Niemeyer; Wittmann**
Rowe: there do not seem to be significant problems; if securities litigation presents such problems, let Congress fix them. Opt-in classes and the "fiduciary duty" reference may offer independent help on this score.

Class Member Participation

(1) We have enough **Doty; Niemeyer; Scirica; Vinson**
Levi would not change to foster participation

(2) Keep on agenda: **Wittmann**
Frank: Same comment as controlling representatives.
Kasanin This seems related to controlling representatives
Rowe: A limited vote, because of opt-in's attractions.

Overlapping Classes

(1) Try to help **Vinson; Wittmann**
Levi we should try; "this is a problem which can be addressed without stirring up a hornet's nest."
Rowe: mild interest, but wants to know whether there is a real problem that is not better handled by MDL transfer and that can be solved without running into the Anti-Injunction Act.

(2) Enough Already **Doty; Frank; Fox; Kasanin; Scirica**

Other

Appealability: **Doty:** Agrees with **Scirica and Vinson** – Rule is desirable. **Fox, Kasanin, Niemeyer,** and **Rowe** concur.
Wittmann: "I also firmly believe that class certification orders should be reviewable by appeal, whether or not the case is certified, in order to avoid unnecessary expenditure of time and effort in the District Courts."

Time of Certification: **Rowe:** We should relax the requirement that certification occur as soon as practicable. The requirement is often ignored, and it may be desirable to postpone certification while settlement talks go on. If we include a probable success factor, that would be added reason for going slow while the parties have an opportunity to address the merits of the claim.
Niemeyer agrees that we should remove the requirement for early certification decisions.
Frank: We are not getting along all right with the present fairy tale system; let's decide when certification should occur.

Fox repeats the theme; the requirement "is rarely complied with anyway." Speedy certification leads to speedy notice that is not as informative if it might be with a better matured case.)

General:

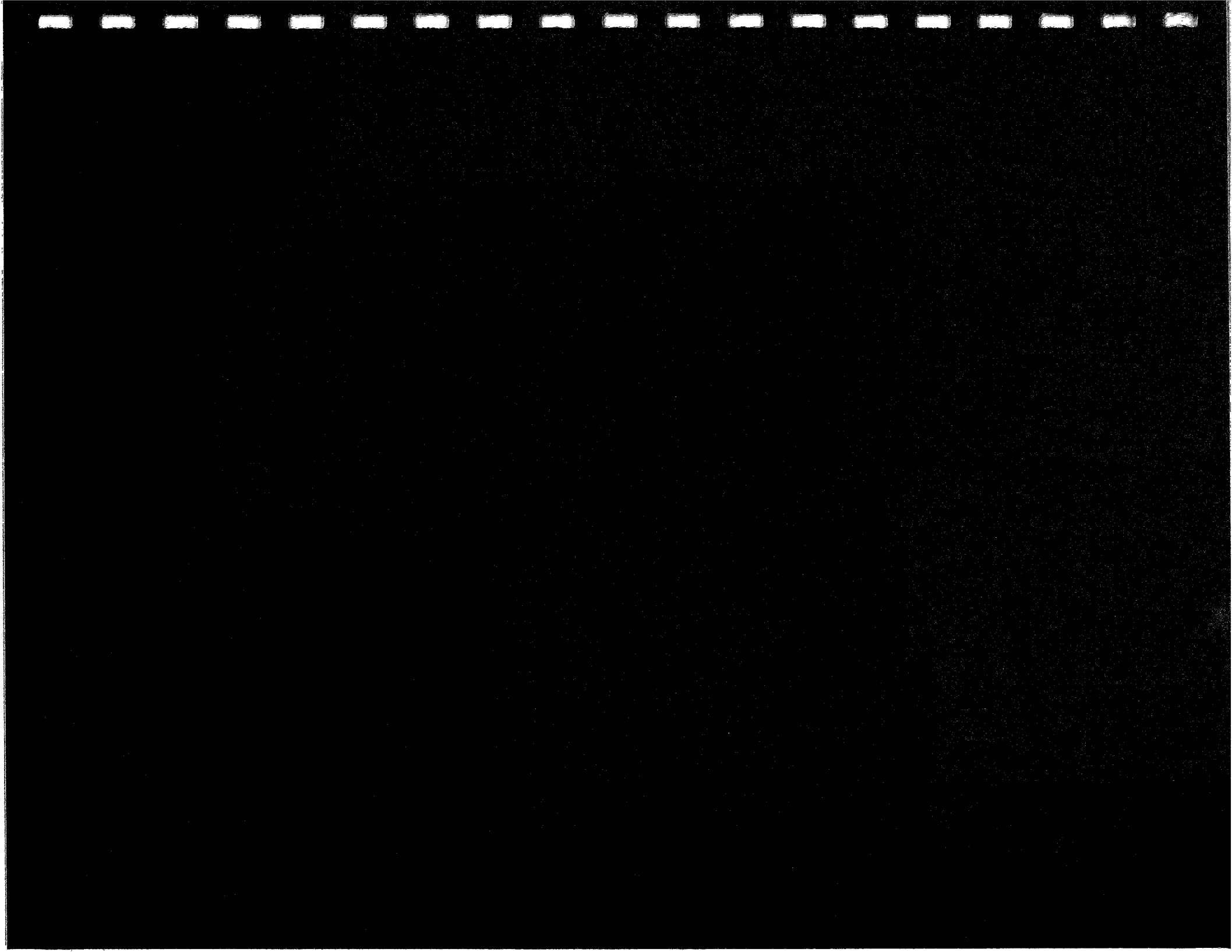
Frank: The specific questions in the questionnaire provide an adequate framework to address the question whether we want "real classes" rather than creatures of the attorneys. The issue in part is whether a class should be limited to a maximum number of members who "can be truly connected" with their representative.

Niemeyer: Rule 23 should be viewed as a claims joinder procedure, not "an administrative process involving the collection of money from wrongdoers for distribution to claimants who either do not exist or are not interested in pursuing a claim." Generally we should let the commonlaw process fix the few minor problems in Rule 23. But there may be a few specific problems the Rule can fix, such as appealability. We should bear in mind the need for restraint to honor the interest and possible intervention of "the democratic processes."

Rowe: Favors: (1) adopting the Pointer draft provision for precertification dismissal or summary judgment. (2) eliminating the typicality requirement of (a)(3). It adds nothing. And there may be cases in which it is better to have a nonmember provide adequate representation. An association might represent its members, particularly if a defendant class; sellers might represent the interests of their customers in litigation with regulators who seek to control their transactions. (3) We should relax the requirement that certification occur as soon as practicable. See above.

Scirica: Rule 20 is being misused to effect a de facto class and global settlement without going through the requirements of Rule 23. Should we inquire of the MDL?

Vinson: Continue the project, deliberately rather than with speed. Concentrate on a few modest changes such as appealability.



PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) potential conflicts of interest among members;

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

consistent resolution of the matters in controversy; and

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

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

(B) An order under this subdivision

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

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

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

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

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

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

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

(d) **Orders in Conduct of Class Actions.**

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

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

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

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

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

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

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

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

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

intervenors;

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

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

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

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

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

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

COMMITTEE NOTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

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

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

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

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

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

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

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

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

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

the party opposing the class, or

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) potential conflicts of interest among members;

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

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

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

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

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

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

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

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

(d) Orders in Conduct of Class Actions.

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

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

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

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

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

(ii) the proposed extent of the judgment; or

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

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

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

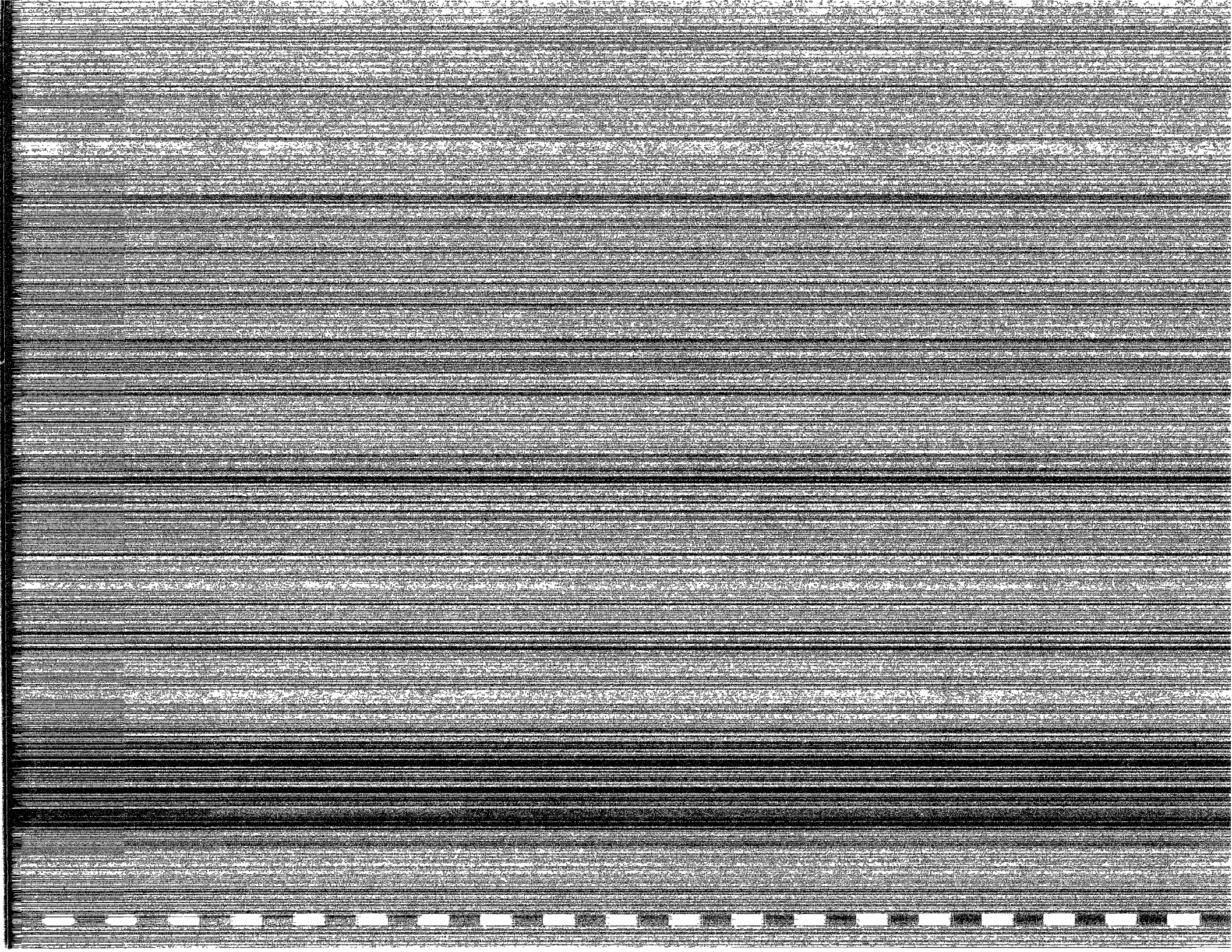
(F) deal with similar procedural matters.

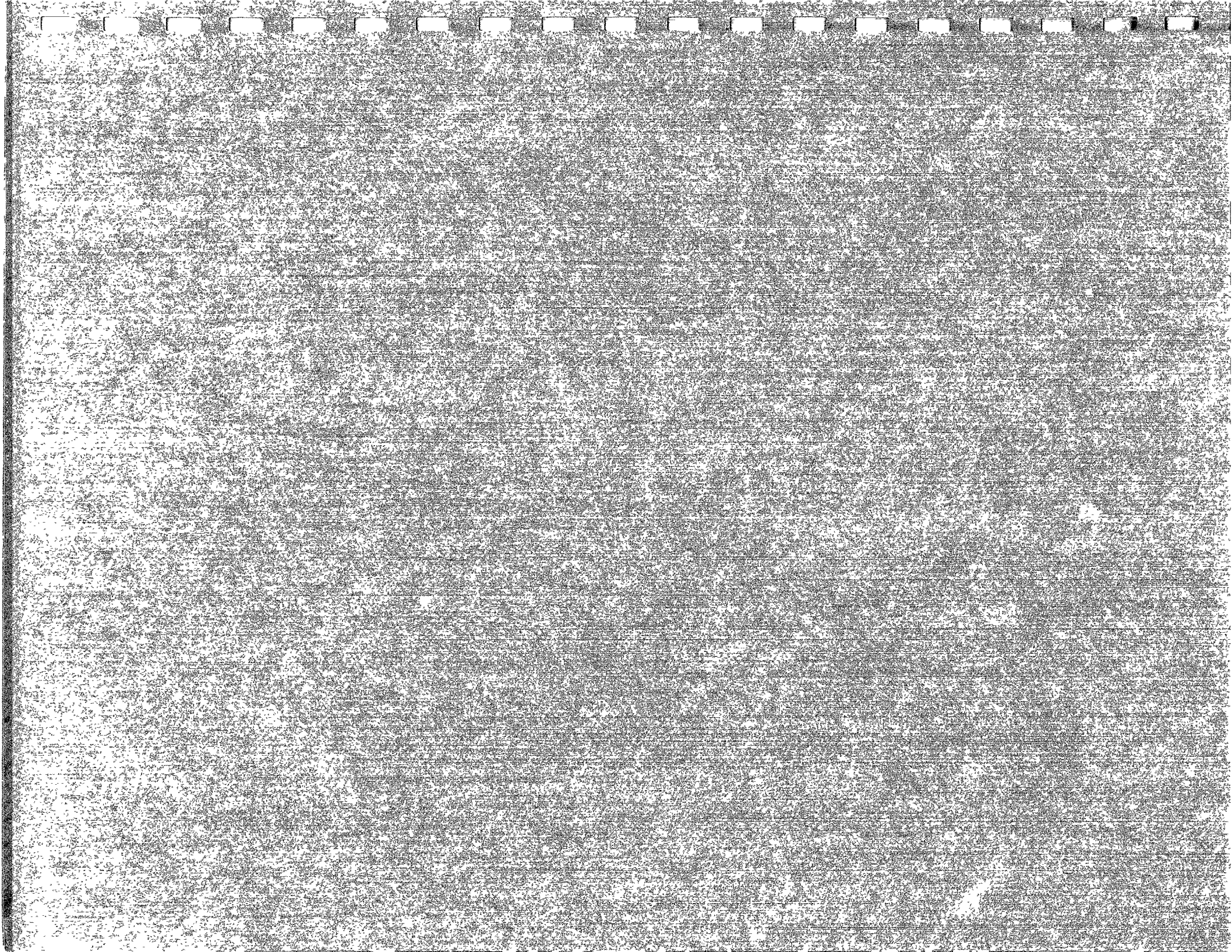
(2) An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended.

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

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

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





Rule 23: Challenges to the Rulemaking Process

Introduction

For some time now, the Civil Rules Advisory Committee has been studying the possibility of amending Civil Rule 23. Following suggestions of an American Bar Association Committee, a comprehensive draft was prepared during the time when the Committee was chaired by Judge Sam Pointer. A copy of that draft is attached as an appendix. It seems fair to describe the draft as in many ways a modest revision that would clean up many aspects of the rule, and – through deliberately flexible drafting – leave the way open for some measure of future growth. By now, the draft has been reviewed informally by a goodly number of practicing lawyers, judges, and academics. Reactions have varied. The academics, and to some extent the judges, have viewed the draft as indeed modest, a conservative but worthwhile effort to improve some obvious rough spots that does not attempt to take on the larger or more difficult questions. The practicing lawyers also have tended to view the draft as modest, but believe that the cost of adoption would far exceed the possible benefits. In their eyes, it has taken nearly three decades to beat Rule 23 into a workable instrument, an achievement that would be set back at least a decade if they were given the chance to litigate and strategize about the proposed changes.

These mixed reactions point up the questions that, in the end, are most important: Has the time come to attempt any changes in Rule 23? If so, what – and how dramatic – should they be?

Even this articulation of the questions assumes that it is appropriate to study Rule 23 with an eye to possible improvement. That assumption, at least, seems sound. The unspoken barrier that shielded Rule 23 from Enabling Act scrutiny for many years has come down. Rule 23 was last revised in 1966. The 1966 version of the rule has taken on a life that would have astonished the Advisory

Committee. Answers have been given to many questions that were not, could not, have been foreseen. A comprehensive review of this experience is now appropriate. It would be astonishing if this review were to show that we have, by a common-law process of elaborating Rule 23, developed an ideal class-action procedure. Surely there is room, both here and there, to improve the rule.

The conclusion that this is an appropriate time to study Rule 23 does not mean that this is an appropriate time to change Rule 23. Improvement carries its own costs as lawyers and judges struggle to understand, implement, amplify, and take strategic advantage of the intended changes. And if there is room to improve, there also is room to confuse, weaken, or even do great harm. Perhaps more to the point, seizing the opportunity to make modest improvements today will surely mean that Rule 23 will not be revisited for many years. If more significant or better improvements might be made in five years, or ten, it likely would be better to defer present action. There is no imperative to act once a problem is studied, no shame in inaction. Much depends on the state of present knowledge and the quality of present foresight. Foresight is particularly important, not only in developing wise answers but also in drafting them into a rule that will deliver those answers in the face of determined attempts by adversary lawyers to wrest different answers from it.

A question framed in this way cannot be answered without also determining the measure of risk aversion appropriate to the Enabling Act process. The rulemaking process works best when it generalizes the lessons of actual experience in a smaller arena. That comforting security, however, is not always available. Rule 23 might never be amended if first we must have controlled experiments, or clear empirical measurement of actual local experience with a new provision. The Enabling Act process has often relied successfully on less rigorous evidence. The aggregated experience of all of those engaged in the formal

rulemaking process, as well as the many insights provided by public comment and less formal processes such as this Research Conference, can provide a secure foundation. But judgments can and do differ about the lessons of experience. There are seldom likely to be changes to any rule that do not encounter some risk, however small the rule and the changes may seem. Some risks are properly accepted. If there is a clear problem and no experience-tested solution, real risks may justifiably be run. If there is no clear problem, an esthetic desire to pretty up a rule does not justify any significant risk. The urgency of the need is as important an element as the state of knowledge and quality of foresight.

In many ways, the pending reconsideration of Rule 23 provides a good test of the Enabling Act process. If the process can operate only when there are rigorous and clear answers to the important questions about present experience, Rule 23 must remain out of reach. If the process requires rigorous and clear predictions as to the effects of any changes, Rule 23 is even further beyond our reach. Prediction of the effects of a new rule in comparison to continued judicial evolution of the present rule, to development of other possible methods of aggregation, or to individual litigation, never will be precise. And it is simply impossible to reckon with such questions as the possible impact of new court rules in encouraging or discouraging procedural or substantive lawmaking by Congress or state legislatures.

As if these questions were not difficult enough, it also should be reflected that consideration should extend beyond the federal courts. State courts too are in the class-action business, and many are likely to adapt their rules to the federal rules. It is proper at least to consider the experience of state courts, and to attempt to draft a rule that recognizes the role of state-law claims not only in federal court but also in state courts.

The final caution is that there always is a temptation to do more than really should be done by rule. Even if firm answers can

be found for all the questions, large and small, it is better to avoid complicating the rule with answers to all the small questions. Once the framework is established, judicial evolution may provide good — perhaps better — answers, and can be better than the formal rulemaking process at adapting the answers to changing needs. The Manual for Complex Litigation enjoys similar advantages in helping to shape developing practice.

As to Rule 23, my own mood at the moment is one of optimistic caution. The caution arises from the staggering array of questions any of us can address to the state of present knowledge without receiving clear answers. Many of these questions are described below. Caution also arises from the dramatic new uses that are being made of Rule 23 in dispersed mass injury cases. In that field, a perfect grasp of today's reality would be superseded before it could be captured in a clear rule. The optimism arises from the belief that there are some ways at least in which Rule 23 can be improved without great cost. The optimism also is the shiny back side of a darker view that it will be at least ten years before we know enough to be able to undertake more sweeping changes within the confines of the Rules Enabling Act process.

Big Changes

There are two obvious occasions for potentially big changes in Rule 23, one negative — from the perspective of class action fans — and one positive. The negative changes would seek substantial curtailment of class action practice. The positive changes would seek to capture and perhaps improve the growing efforts to adapt the present rule to the needs of dispersed mass injuries. There also may be room for a third and essentially conceptual change, perhaps not so big but potentially important. This change would recognize openly that the class — amorphous, defined in the end only by judicial fiat — is an entity apart from those who volunteer (or may be coerced) to speak for it. It is, to be sure, a juridically created entity, and must speak through people just as

a corporation must speak through people. But it may help to sharpen the focus on class as client, speaking through one set of agents to another. These possible changes are addressed at the outset, before turning to the more detailed, even niggling questions that may be addressed whatever is done about the larger issues. The big changes will be described in terms that reflect assumptions about current experience that are widely shared but unreliable. One of the most important tasks is to learn more about the realities that underlie these and other assumptions, a task that the Federal Judicial Center is attempting. Reality may be different from perception, and perhaps markedly different. But large questions may provoke more diligent inquiry into reality, and thereby serve a purpose even if the questions prove irrelevant in the real world.

Cutting Back on Rule 23. Virtually all of the current discussion assumes that there is little need even to tinker with the core of (b)(1) and (b)(2) classes. This tacit assumption is hardly surprising. There may be room to change such incidents as notice and the opportunity to opt out. Creation of an opportunity to opt out would provide an indirect means of addressing the conflicts among individual members of the groups that, because of similarities that at times may be only superficial, are assumed to constitute homogeneous classes. But there is no perceived need to rethink the justification for these classes. To the contrary, it is widely assumed that (b)(1) and (b)(2) classes represent the traditional and persistently legitimate core of Rule 23. They also account for a relatively small minority of all class actions.

It may be surprising, on the other hand, that there have been few suggestions that the time has come to rethink the public enforcement function of (b)(3) classes. It is commonly accepted that (b)(3) classes, by providing a means for aggregating small claims that would not bear the cost of individual enforcement, have significantly expanded the effective reach of many substantive

principles. This effect is not beyond examination, both to assess whether it is as pervasive as some observers assert and to determine whether it is desirable. Because the question is not at the front of discussion, it deserves only brief and preliminary expansion.

One consequence of (b)(3) classes can be likened to the "freeway effect." One lesson from the early years of urban freeway construction was that pre-freeway traffic volumes expanded quickly as freeways were opened. Given an opportunity for more convenient driving, more people drove more places. The same consequence flows from procedural devices that aggregate small claims into more convenient litigating units. This effect obviously touches the aggregation court – claims that otherwise would be filed elsewhere are brought to the aggregation court. It is widely believed that beyond this reallocation of business among courts, aggregation also increases the number of claims that are made in any court. It cannot be assumed that the result always is "more justice," even accepting the underlying substantive rules at full value. One obvious risk is that defeat of aggregated claims will obliterate many claims that would have been justly vindicated in individual actions. That this risk is seldom discussed reflects the realistic assumption – of which more later – that aggregation creates a nearly irresistible force to award something to the claimants. Another risk is found in the common cynical observation that individual actions may be brought on ten or twenty percent of valid claims, while aggregated actions may be brought on one hundred and twenty percent of valid claims. Creating aggregating mechanisms that accurately sort out the unfounded individual claims may reduce the values of aggregation substantially.

A more troubling concern is that many of our substantive rules are tolerable only so long as they are not fully enforced. One version of this concern is that full enforcement simply costs more than it is worth. One illustration, not fanciful, is provided by

the class action to recover on behalf of consumers who had been duped into buying recorded music "performed" by a group that lip-synched to a performance by other artists. Putting aside any lingering doubts about the nature of the injury, great cost is incurred in mounting the action, supervising it, possibly deciding it on the merits should settlement fail, and distributing relief. It is a real question whether the cost is justified by the individual benefits of the actual award, or the aggregate benefits from deterring similar behavior. In some settings, these costs can be reduced by finding substitute means of relief – the offending musicians stage a free concert or reduce the price for the next record they actually perform themselves (if anyone will buy it), or a monetary recovery is awarded to a plausibly relevant charity, or whatever.

Whatever ingenuity might devise by way of "fluid," "cy pres," or "class" recoveries, they present a question that can be articulated in at least two ways. The direct mode is to ask whether such dispersed benefits stray too far from the connection that justifies imposing private remedies for private wrongs. The more diffuse mode is to ask whether all substantive principles really merit pervasive enforcement. Many of our substantive principles are tolerable only if they are not fully enforced. I do not offer any examples because each of my examples would offend some, whose counterexamples might at times offend me.

One response to this question would be to inquire whether three decades of experience with broad enforcement of at least some substantive rules through (b)(3) class actions justifies significant retrenchment. The absence of any suggestion that this inquiry should be undertaken may reflect general satisfaction with Rule 23 as a private enforcement means for public values. Surely there are many who do feel satisfied. Perhaps even those who are not satisfied have become reconciled. However that may be, there is a separate problem for the rulemaking process. Rule 23 has

grown into a device with sweeping substantive consequences. Substantive consequences flow from good procedure as well as bad; it is not ground for shrinking from a procedural improvement that it will facilitate more thorough enforcement of substantive principles. It is too late to argue that the 1966 creation of present Rule 23(b)(3) is invalid because of its profound substantive impact. But it would be different to cut back on Rule 23(b)(3) because of concern that it leads to over-enforcement of substantive rules. Revising Rule 23 to cut back its substantive consequences may be as much within the Enabling Act as its original adoption and subsequent amendment, but the motive would be perceived — and correctly so — as a desire to abridge substantive rights as they are now enjoyed. It may seem a paradox, but use of the Enabling Act process to correct its own excesses, even unanticipated excesses, is fraught with real controversy.

Two relatively modest steps might be taken toward cabining the substantive effects of Rule 23. One, by far the simpler, would be to permit consideration of the balance between the need for private enforcement of public values through Rule 23 and the costs of the proceeding. A court might be permitted to conclude that regardless of the merits, certification is inappropriate in light of the effort required to superintend the litigation, the trivial nature of individual benefits, and the insignificant character of the alleged wrong. Using a term perhaps not appropriate for the language of a formal court rule, this approach would enable a court to refuse certification because a class action "just ain't worth it." As compared to the second approach, certification could be denied even on the assumption that the class has a strong claim on the merits.

The second limiting approach, in some ways related, would be to undo present doctrine and permit or require preliminary consideration of the probable outcome on the merits. Although motions to dismiss for failure to state a claim or for summary

judgment are more effective than many have thought in defeating suits brought as class actions, there is genuine concern that very weak claims can survive such preliminary challenges. At least two purposes would be served by looking beyond these devices for means to consider the probable outcome, each reflecting the burdens imposed by class certification. If the class claim is likely to lose, it may be doubted whether a substantial share of scarce judicial resources should be devoted to it. And certification of weak claims can exert a strong pressure to settle, notwithstanding likely failure on the merits, because of the costs of defending a class action and even a small risk of a large judgment.

It is tempting to analogize preliminary consideration of the merits to the approach taken in deciding whether to issue a preliminary injunction. The comfort provided by this analogy unfortunately proves illusory on examination. Each of the factors in the familiar injunction formula must be considered differently. This should be no surprise, since the function of the inquiry differs in the two settings. The primary objective of a preliminary injunction is to preserve the opportunity to grant effective relief after trial, to preserve a meaningful opportunity to resolve the claim on the merits. The primary objective of refusing certification for class pursuit of claims that do not bear the freight of individual litigation is to protect against the burdens and corresponding pressures of class action litigation. This difference affects each of the four familiar factors.

There is no reason to suppose that the threshold probability of success on the merits should be measured in the same way in the two settings. At the outset, the preliminary injunction question is likely to be addressed at the beginning of the litigation on the basis of procedures affected by the need for promptness; more deliberate procedures, often including controlled discovery, are likely to be available in addressing the class certification question. More important, the required level of probability is

likely to fluctuate around a lower point in the class certification setting, particularly when it seems highly probable that individual claims never will be resolved on the merits absent certification. Reducing the required probability of success also seems justified by the differences in consequences between class certification and preliminary relief, as reflected in the remaining three factors.

The harm of denying relief must be measured in the class setting more by appraising the merits of the class claim than by the real-world impact of ongoing conduct that might be controlled by injunction. It also is possible to develop a test that considers not only the prospect of class success but also the importance of class success, akin to the first suggestion. If little individual harm is done by denying relief, a relatively strong prospect of success might be demanded.

The harm of granting relief must be measured in the class setting by the burdens of the class litigation process and the pressure to settle out of the litigation burdens, again not the real-world impact of controlling primary human activity. The importance of class success affects this assessment inseparably from the assessment of the harm of denying class relief.

The public interest, finally, must play a far larger role in class certification determinations than ordinarily occurs with preliminary injunction decisions. Class actions that aggregate small claims that cannot effectively be enforced one-by-one are more important as means of vindicating and enforcement the underlying public purposes of regulating legal rules than as means of providing often trivial relief to individual claimants. Perhaps because it is so important, measurement of the public interest must begin with the question whether it is proper for courts to distinguish – or, in a less flattering word, discriminate – between the levels of public importance represented by different underlying legal rules and by different asserted violations of those rules.

No real comfort can be found in the preliminary injunction analogy. The suggestion that class certification should be affected by a preliminary look at the merits also must reckon with the collateral consequences of taking a look. The time for making the certification decision, for example, is likely to be postponed in order to provide an adequate basis for going beyond the showings required on motion to dismiss. Often it may be possible to rely on a summary judgment record for the conclusion that although summary judgment is not warranted, the case is so thin that class certification can be denied. But at other times a summary judgment motion may focus on only some parts of the case, leaving the need for more global exploration and appraisal. If a significant prospect of success is required, it may be appropriate to reconsider the question whether a defendant should bear some part of the costs of notifying a plaintiff class. The proposal to create an opportunity for permissive intelocutory appeal from class certification decisions is another example — if appraisal of the merits affects the certification decision, the nature of the appeal will be changed, the probable delay increases, and the court of appeals must wrestle with the prospect that permitting appeal will embroil it in consideration of issues that will reappear on a later appeal. Many other effects are likely to emerge, some that can be foreseen with diligent imagination and others that are beyond our powers of prediction.

Either of these proposals for cutting back on Rule 23(b)(3) may be challenged as inviting improper judicial discrimination among favored and disfavored substantive principles. An unadorned provision allowing consideration of the probable outcome on the merits would be least subject to this charge, but would not be immune. Consideration of the probable outcome has strong attractions nonetheless. The simplest form would add probable outcome on the merits as one of the factors to be considered with all other factors in deciding on certification. Whether in this simple form or some more complex variation, much good might be done

in protecting against the risk – however symbolic or real – that weak claims can impose heavy burdens and, through the burdens, coerce unjust settlements.

The mood of the moment, at any rate, seems to be that Rule 23 should not be cut back significantly. At most, some support might be found for permitting consideration of the probable merits of the class claim. The questions are whether it should be expanded, or at least made to work more effectively within its present sphere.

Mass Torts. A great deal of attention is being focused on "mass torts," carefully distinguishing between "single event" cases and those that arise out of more dispersed injuries. The single event cases are exemplified by hotel fires, airplane crashes, bridge collapses, and other circumstances in which a concluded transaction has generated a known and identifiable universe of claimants. The dispersed injuries are exemplified by environmental contamination and product injuries – most prominently asbestos – in which a prolonged course of conduct produces effects that may span periods of years or even decades, generating unknown and perhaps unpredictable numbers of claimants who suffer a wide variety of injuries that range from trifling to serious or fatal. Whether or not the consequences of such events are well-suited to resolution through any variation of our adversary judicial process, courts have had to cope with them. The starting point has been traditional enough: as compared to the small claims that will not bear the costs of individual litigation, mass torts give rise to large numbers of individual actions. The questions arise from efforts to reduce the staggering costs of proceeding case-by-case, costs that include not only transaction costs but the inconsistent treatment of claimants who on any rational ground should be treated consistently. Many ingenious efforts have been made, often outside Rule 23, at times within the scope of Rule 23, and at times nominally within the scope of Rule 23 but well beyond the reach that anyone would have imagined until two or three years ago.

The mass tort phenomenon provides a particularly inviting opportunity for creative rulemaking. In broad terms, the question is whether we can invent an aggregating procedure that, as compared to present procedures, affords better net results to most claimants than now flow from individualized litigation. Many lawyers would say that present practices have not achieved this goal – that given a choice, an individual whose claim is sufficient to support individualized litigation usually is better off opting out of an aggregated proceeding. It would be a stunning triumph to develop a procedure that supersedes this judgment. The triumph would be stunning, however, because the difficulties are so great. Perhaps three groups of these difficulties merit attention – lack of knowledge, limits of the Enabling Act process, and the intrinsic limits of judicial procedure.

Lack of knowledge needs the least emphasis. We are in the infant stages of aggregating mass tort litigation. Many different approaches are being tried. The wisdom and long-run success of these improvisations cannot be measured for years to come. The only thing that can be said with confidence is that some approaches are dispatching cases. The most recent and dramatic examples seek to resolve tens of thousands of cases and incipient ("futures") cases through class-based settlements that are driven by the defendants' needs to buy "global peace." Dispatching cases, and on a reasonably uniform basis, is a great virtue. But the most dramatic approaches also are the most improvisatory. They also veer furthest from traditional judicial methods and closest to administrative systems. In one variation or another they are being applied to problems that are similar only in presenting large numbers of claims. Some settings have matured in the senses that the facts are (or seem to be) fully developed, the law is clear, and there is substantial experience with individual litigation that demonstrates the realistic strategic value of individual claims. Some settings may generate the particularly difficult questions of marshalling limited assets to meet competing present and future

claims. Other settings have none of these characteristics. But all have it in common that we are nowhere near the point of understanding evaluation.

It is confounding, for example, to contemplate the question of "maturity." The nature of dispersed torts virtually forecloses aggregation before some individual actions have been tried. If the plaintiffs should win all of a substantial number of individual actions, an aggregated adjudication that establishes liability seems sensible if courts should shy away from nonmutual issue preclusion. This approach becomes more troubling as the proportion of defense victories increases, and becomes more troubling in a complicated way. An aggregated once-for-all adjudication is not attractive at the other end of the spectrum at which plaintiffs should lose all of the same number of individual actions. If the aggregated litigation should impose liability in favor of all remaining class members, we would be troubled by doubts as to the correctness of the result, and troubled also by the prospect that the earlier losers should remain without redress when many others are compensated through the class adjudication. Our doubts as to the correctness of the result might well be enhanced by fear that the unnerving prospect of denying all recovery to every plaintiff may itself exert significant pressure to impose liability. And the alternative of a settlement that in effect establishes partial liability does not gladden all hearts. As much as we value private peacemaking, the compromise may reflect either the overwhelming power of the defendant to defeat claimants in one-on-one litigation or the overwhelming power of class litigation to coerce capitulation. Surely the outcomes of individual actions that have been tried to judgment should be considered in determining whether and how to aggregate remaining claims; the means of weighing this factor, however, cannot be easily described.

The limits of the Enabling Act are equally obvious. The Civil Rules cannot directly affect the subject-matter jurisdiction limits

that may impede thorough-going aggregation in federal courts. Indirect effects might be possible, most likely through clarifying the conceptual character of class litigation, but this prospect is uncertain at best. There may be greater hope for addressing questions of personal jurisdiction, subject only to Fifth Amendment due process constraints; Civil Rule 4(k)(2) may provide reassurance on this score. The Civil Rules cannot do anything direct about the choice-of-law problems that beset aggregation, particularly through class actions. Indirect effects may be more plausible in this area, by such devices as opt-in classes for those who agree to abide a specified choice of law or narrow issues classes that seek to resolve fact issues or lowest-common-denominator issues of law application. Such indirect effects may help, but fall far short of giving coherent focus to the traditional forces that generate widely disparate consequences, state by state, for a common course of activity pursued on a regional or national level. One approach may be to attempt a closer integration of the Enabling Act process with Congress, working toward simultaneous solutions in which new rules and new legislation follow parallel paths. Any such approach must be undertaken with great care, however, lest the great virtues of Enabling Act independence be gradually diminished.

The intrinsic limits of judicial process require reflection on what can be and on what ought to be. What is possible depends not only on procedure but also on structure: it would be possible to provide prompt individual trials by traditional procedures to all asbestos claimants, for example, if only there were enough judges — and lawyers — to handle them. Fewer lawyers and judges would be needed if common liability issues were resolved by preclusion, whether arising from a global class determination, nonmutual preclusion based on individual litigation, consent to "belwether" litigation, or some other means. To note this possibility is not to champion it even as an abstract possibility. In fact, no government is going to assume the direct costs, quite apart from a lingering wonder about the uses to be found for all those lawyers

and judges when the asbestos cases are cleaned up. More important for our purposes, it may be wondered whether traditional adjudication of such a mass of cases is desirable at all. If liability remains open in each case, there will be inconsistent determinations of liability – very few as time goes on, but some nonetheless. Even if liability is taken as established, like injuries will win dramatically different awards. We live with the inconsistencies and irrationalities that are inevitable in our system when they occur on small levels of low visibility. It is more difficult to accept them on a large and highly visible scale.

In the real world, individual litigation of all asbestos claims will not occur. If they are to be decided by courts – as they must be for default of any alternative – some expediting device must be found. Aggregation seems to be the answer, whether it is as modest as joint trial of ten or twelve cases at a time, as imaginative as projection of a selected sample of damages verdicts to a universe of claimants, or as ambitious as class-based settlement of tens of thousands of cases at one time. These and other aggregating devices share the virtues not only of saving costs but also of promoting consistent outcomes. They also reduce or eliminate individual control of individual litigating destiny, and move courts away from the traditional roles that give reassurance of legitimacy. In the more dramatic forms, they may involve courts in relatively remote supervision of administrative tasks and structures such as claims resolution facilities that bear scant resemblance to traditional adjudication. The departure from traditional structures and procedures reflects a carefully considered judgment that new means must be found to meet new needs, but the departure remains substantial.

Volumes have been written about mass tort litigation, and whole shelves will be filled. Every branch of the bench and bar is contributing. The question for the rulemaking process is whether the successful beginnings can be identified and captured in a few

hundred words that consolidate the good, discard the weak, and above all provide the flexibility needed for future growth. It is not particularly important whether the words are placed in Rule 23 or in some new Rule "23.3." But it is vitally important to know where to start. The most cautious approach is that embodied in the current draft. The draft includes an increased emphasis on issues classes, and creates opt-in classes as well as expanded opportunities for opting out or defeating any opting out. These features were deliberately designed to support further development of Rule 23 in mass tort cases without attempting to predict the direction or extent of the development. A bolder approach may be justified, but the information base must be secure.

Class as entity and client. Rule 23 requires that a class be represented by a "member" of the class whose claims or defenses are "typical" and who will "fairly and adequately protect the interests of the class." Courts rightly seek to ensure adequate representation. Representation, however, can be provided by counsel. The role of the member-representative is more ambivalent. At times courts seem to want member-representatives who can fulfill the role of sophisticated client, exercising a wise and restraining judgment. At other times courts seem more concerned with the member-representative as a token, offered up to appease memories of a superseded model of client-adversary that lingers only in tradition and the formal trappings of Rule 23(a). Representatives with no significant stake and no plausible understanding of the litigation may be accepted with good cheer. Nowhere is the ambiguity more obvious than in the decisions that recognize continued representation by a class member whose individual claim has been mooted.

The questions that surround the individual representative are reflected in current congressional attempts to revise class action procedures for claims under the securities laws. One proposal would require appointment of a guardian for the class; another

would require appointment of a steering committee of class members with very substantial individual stakes. These proposals evidently spring from a fear that there are no real clients in these actions, and – the important point – that the system suffers for the lack.

Class representation could be sought in many quarters. Many different forms of public representation are possible; none seems a likely candidate for adoption by amending Rule 23. The familiar alternatives include class members, organizations that represent group interests more than individuals, and class counsel.

The difficulties that surround class representation by a class member vary across a broad range, reflecting the broad range of class actions. When challenged acts have inflicted relatively trifling injury on many people, there is little incentive to devote any significant time or energy, much less money, to the common cause; if member representatives are not literally hard to find, the likely reason is that counsel who find representatives assure them that they need not really bother with things. Or perhaps other rewards are involved. When significant numbers of people have suffered individual injuries that would support individual litigation, the problems are quite different. There are likely to be conflicts of interest, more or less acute, beginning with selection of the forum, definition of the class, choice of counsel, setting the goals of litigation, and straight on to the end. These conflicts run almost indifferently among class members, representative class members, and counsel. Resolution is most likely to be effected by counsel, at times explicitly but often implicitly in the course of making tactical decisions. Quite different problems may be involved with "institutional reform" litigation. An employment discrimination class, for example, may include people of divergent interests and beliefs; representative members may not be aware of the divergences, or may prefer to present the image of a homogeneous class.

Organizations that maintain class actions behind the facade of

individual representatives often provide highly effective representation, driven by commitment to lofty ideals and fueled by experience and sophistication. There is a risk, however, that ideological commitment may create as much conflict with the views and interests of class members as ever arises from divergences among class members themselves. There is little reason to believe that all problems disappear when an interest group assumes the role of client.

Class counsel often enough provide the originating genius of class actions. Very often they are the only source of informed, sophisticated judgment about the goals to be pursued, and in all but the exceptional case must choose the means of pursuit. In most cases, effective representation will be provided by counsel, without substantial let or hindrance, or it will not be provided at all. Adverse reactions to this phenomenon arise from an array of concerns. A familiar concern is that class counsel in fact are the class: they seek out token representatives, pursue the class claim primarily for the sake of fees, and measure success by their own fees rather than class relief. A somewhat different concern is that ideologically driven counsel may persist in pursuing imagined class goals far beyond the point of optimum class benefit. In greater extremes, there may be a concern that nearly frivolous claims are pursued for nuisance or strike value, without any thought of class benefit.

These tensions surrounding adequate representation will not be resolved by any likely revision of Rule 23. Some help might be found, however, in subtle changes that focus on the class more and the member representatives less. One direct approach would be to focus directly on representation of class interests, considering the involvement of class members as simply one factor bearing on adequacy. The class would be regarded as the client, and adequate representation by counsel as the test. The greatest virtue of this approach may be derided as little more than esthetic – it would

greatly reduce the unseemly spectacle of recruiting representatives who know little or nothing of the dispute and are no more than token clients. But esthetics count for something; the cynicism that readily surrounds representative class members can taint the occasional genuinely representative member. More important, this common sham can exert a gradual corrosive effect that weakens more important constraints on the behavior of counsel. Beyond the esthetics, focus on the class as the client might improve our approach to other problems. Mootness doctrine could focus solely on the life and death of the class claim, without the complicated doctrines of relation back, continued representation by a mooted representative, and the like that now cloud the picture. Discarding the image of the representative's claims as typical might encourage a more direct focus on the definition of the class and on the conflicts that may require multiple classes or subclasses. And courts would become more obviously responsible for ensuring adequate representation.

The entity concept of the class might afford one useful perspective for addressing the question whether class counsel also should represent individual class members. At least when individual class members have claims that would support individual litigation, there is a risk that duties to an individual client and prospects of personal attorney advantage may conflict with duties to the class. Even if individual claims would not support individual litigation, there is a risk of conflict if class reprsentatives are allowed compensation for the effort devoted to pursuing the class claim. If the class is seen as a separate client, these questions can be addressed more thoughtfully.

Quite different advantages might flow from treating the class as an entity in dealing with questions of jurisdiction. A Rule 23 amendment that defined the class as an entity might of itself be sufficient to establish the class claim as the measure of the amount in controversy required for diversity jurisdiction. A

rather neat intellectual trick would be required, justifying interpretation of the amount-in-controversy requirement as a means of identifying the cases suitable for federal adjudication by the total amount involved and the importance of the defendant's stake, while simultaneously continuing to permit focus on individual representatives to avoid the frequently disabling impact of the complete diversity requirement.

Focus on the class as party also might influence thinking about due process constraints on exposing individual claimants to adjudication in a distant forum having no apparent contact with their individual claims. Connections to the interrelated events underlying all claims can be viewed as connections to the class, and membership in the litigating class as itself a tie to the forum. Jurisdictional concepts are thoroughly – and often foolishly – conceptualistic. Providing a clear concept is proper business for the Enabling Act process.

Really imaginative use of the entity concept might even support a more rational approach to choice of law. Viewing a class of victims as a whole, it is very difficult to understand why different people should win or lose, or win more or less, because different sources of law are chosen to govern the self-same conduct. If it were possible to imagine a class claim, it would be possible to choose a single law to govern the single claim, or – more likely – to choose a single law to govern the claim as to each defendant. It need not matter which variation of choice-of-law theory is selected after that point. As attractive as this prospect might seem to a true heretic, it probably reaches too far for present acceptance. It is too easy to argue that class certification can do no more than take individual claims as they exist in the nature of individual choice-of-law processes, however much those processes depend on the choice of forum. As a mere procedural device, class treatment cannot alter the conceptual substance of the individual claim, no matter how drastically the

claim is affected in fact. Separate sovereignties account for the unseemly differences in outcome, and their interests cannot be thwarted by this trick.

Entity treatment also might help in confronting the preclusion consequences of a class action judgment. In one direction, it would underscore the proposition that the claim pursued by the class often is narrower than the claim that would be defined for purposes of individual litigation. Although an individual would, for example, be expected to join statutory discrimination and contract theories in a single action for wrongful termination, a class action for discrimination often should leave the way free for an individual contract action. This benefit could become particularly important in settings that involve many claimants with small damages and a few with large damages growing out of the same setting. Illustrations are offered by the purchasers of defectively designed motor vehicles. Many will have relatively small claims based on depreciated value; a few will have large claims based on personal injury. It is unthinkable that either settlement or litigated judgment in a class action on behalf of all should preclude individual actions by those who suffer personal injuries, either before or after the class judgment. Recognizing that the class claim is limited to the common injury would help to express and ensure this conclusion. Matters are more confused in another direction. Class actions may augment the risks of litigation that is premature in relation to advancing knowledge. A claim on behalf of millions of users of an over-the-counter drug might be brought and fail because of inability to prove that it causes a particular side-effect. Ten years later, convincing proof might become available, and be most convincing as to users who were members of the original class. We are prepared to accept preclusion in individual cases that present this problem. It is not clear whether we should be prepared to accept preclusion by representation on such a grand scale. Open recognition of the distinctive character of class litigation would at least help open

the question for direct investigation and response.

Attempts to pursue overlapping or successive class actions are less likely to yield to an entity vision of the class, but some progress might be made even in this direction. Certification of a class in one court could be found to engage the class claim, invoking the rules that are appropriate when two or more actions are brought by the same plaintiff on the same claim. Courts are often surprisingly willing to allow two actions to proceed on parallel tracks, however, and it may be unduly optimistic to hope that a different approach would be taken when different representatives presume to voluntarily submit the same class claim to different court. Successive attempts to certify a class after failing in one action may prove even more difficult to control. It would be convenient to assert that the asserted class is bound by the determination that it does not exist, but the seeming self-contradiction will be difficult to accept. The initial refusal to recognize the class as an entity seems to leave no one to be bound when a different putative representative appears with a second request for recognition.

Entity treatment of the class also could provide the paradoxical benefit of encouraging more careful thought about the individuals who constitute the class. Because the entity is obviously artificial, its separation makes it more difficult to pretend that the class <u>is</u> its members. Greater care may be taken in addressing questions of class membership and conflicts of interest, and in considering whether to frame the action as a mandatory, opt-out, or opt-in class. The sharp distinction between the class as entity and its constituting members, moreover, may underscore the need to think clearly about the members' rights to participate both individually and through influence on class counsel.

Increasing judicial responsibility for adequate class representation may be the most important single reason for

rejecting a change that would define the class as the client. Although courts now are responsible for policing adequacy, treating the class as entity would make it clear that this responsibility is not shared with any particular class representative. It also would be clear that the representatives cannot be relied upon to make the initial selection of counsel (or, perhaps more realistically, ratifying self-selection by counsel who sought them out). At the outset, courts would be more responsible for the identity of counsel. There is no reason to allow class counsel to be selected by the first representative who appears, much less by a representative recruited by would-be class counsel. At a minimum, the court could be required to give notice of any action seeking class certification and to invite competing applications to appear as counsel for the class. As exciting as it may be to contemplate such devices as auctioning the oppportunity to represent the class, judicial responsibility for selecting counsel for one of the adversaries makes substantial inroads on a system that relies on the court to remain impartial between adversaries who appear before it on their own motion. Even more troubling, courts would remain responsible throughout the litigation, taking on a role that necessarily involves particular consideration of the interests and position of one party. Maintaining a distinction between neutral assurance of adequate representation and acting as guardian of class interests must be difficult, and perhaps not fully possible. The token class member representative may not do much to assure adequate representation, and courts now are responsible for assuring adequate representation, but the change could be troubling nonetheless.

If focus on the class as client might have esthetic advantages, moreover, it also might have symbolic disadvantages. We can pretend that class member representatives are clients. It is more difficult to pretend that a class is a real client. Cries of barratry, champerty, and maintenance — or the more contemporary buccaneering — would redouble.

And of course the urge to focus on the class as client provides another illustration of generalizing from one or two class action phenomena. The need for a client is most real in cases that aggregate large numbers of small claims and do not win the involvement of any class members with substantial stakes. Entity treatment may seem most promising in such cases. Yet it is possible — although just barely — that in fact named representatives often monitor counsel in genuine and important ways, a proposition that will be almost impossible to disprove by any readily available means of empirical research. The problems that arise from actions brought by organizations that may not speak for the purported class are quite different, while the problems that arise from aggregation of large numbers of substantial individual claims are of a still different order. For that matter, defendant classes should not be overlooked. The idea of suing a class without naming at least one real defendant-representative is not plausible.

The Current Draft

An Outline. This is not the occasion for a detailed review of the current Rule 23 draft. In broadest terms, it would make three major changes in present practice. The present line between "mandatory" classes and opt-out classes would be blurred by empowering the court to permit opting out from any class, to deny opting out from any class, or to certify an opt-in class. Notice provisions would be generalized, explicitly requiring notice in all class actions but relaxing to some extent the strict requirements now exacted in (b)(3) classes. And the present opportunities for certifying subclasses and "issues" classes would be emphasized. These changes inevitably blur the sharp differences in consequence that have flowed from the choice between (b)(1), (b)(2), and (b)(3) classes. They need not necessarily blur the conceptual differences between these categories of classes; it is possible to craft a rule that allows opt-out of a (b)(1) class, that explicitly requires

notice in all classes, and so on, without collapsing the categories. Nonetheless, the draft transforms the "superiority" requirement of present subdivision (b)(3) into a subdivision (a) prerequisite for any class. The (b)(1), (2), and (3) categories become merely factors to be considered in determining superiority, adding the "matters pertinent" of present (b)(3) to the list of superiority factors. In addition to these changes, a number of smaller changes also deserve note.

The Changes. One item that has drawn strong reaction is the addition of a requirement that a representative party be "willing" to represent the class. It is widely believed that this requirement will sound the death knell of defendant classes — except perhaps for the most dangerous case in which a named defendant is willing to "represent" the class because its interests diverge from class interests, and may even converge with the plaintiff's interests.

Quite different reactions are provoked by the allied requirement that the representative member "protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty." This provision is intended to underscore the fiduciary responsibilities borne by a representative party. It does not, however, explain in any way the nature or extent of those duties. There is no indication of any specific change in present practice. Practicing lawyers in particular react to the provision with dismay. They view present understanding of the fiduciary responsibilities of counsel and representatives as satisfactory, and fear that this opaque invocation will generate much contention and no improvement.

Subdivision (b)(2) is rewritten to make it clear that it is proper to certify a defendant class in an action for injunctive or declaratory relief. Apart from the question whether a willing representative should be required, this change seems noncontroversial.

The subdivision (b)(3) requirement that common questions of fact or law predominate is mollified, making "the extent to which" common questions predominate one factor in calculating superiority. This change is one of many that are intended to ease the path toward certification of issues classes.

Difficulties in management are made relevant to the classes that were (b)(1) and (b)(2) classes as well as (b)(3) classes, but essentially are subordinated by requiring comparison to the difficulties that will arise from adjudication by other means.

The new opt-out and opt-in provisions are set out in subdivision (c)(1)(A), perhaps the single most important portion of the revised rule. The list of "matters pertinent to this determination" is intended to discourage opt-out (b)(1) or (b)(2) classes, but not to forbid them. Opting out of such classes is designed, at least in part, as a means of revealing the conflicts of interest that may lurk in a class that seems homogeneous to the court. The illustration in the Note is an employment discrimination action in which employees who are members of the class as defined by the court may prefer to align with the employer on questions of liability or relief. Provision is made for imposing conditions on those who opt out, including a bar against separate actions or denial of nonmutual issue preclusion should the class win. (The bar against separate actions may need to account for class judgments that do not bar separate actions by those who remain class members.) Opt-in classes are proposed as solutions for at least two sets of problems. Opt-in defendant classes may prove plausible in some circumstances, greatly reducing the difficulties that now appear in defendant classes. Opt-in plaintiff classes may be particularly useful as to classes that include many members whose claims would support individual actions, and may help avoid problems beyond the reach of the Enabling Act. Those who opt into a class, for example, would surrender any objections to "personal jurisdiction" and could be forced to

acquiesce in a stated choice of law. For all that appears on the face of the draft, finally, it may be possible to combine all features in a single class: opting out could be prohibited to some claimants and permitted to others, while defining a class that includes nonmembers only if they choose to opt in. As one possible illustration, the class might be mandatory as to small-stakes claimants, optional as to large-stakes claimants, and defined to exclude those who already have suits pending unless they choose to opt in.

The new notice provisions are set out in subdivision (c)(2). Notice of class certification is required in all class actions. The court has discretion in determining "how, and to whom, notice will be given," considering among other factors the nature of the class, the importance of individual claims, the expense and difficulty of providing individual notice, and the nature and extent of any adverse consequences from failure to receive actual notice. There has been no adverse reaction to the choice to adopt explicit notice requirements for what now are (b)(1) and (b)(2) classes, nor, perhaps surprisingly, to the softening of individual notice requirements in what now are (b)(3) classes.

Subdivision (c)(4) is the focal point for a phrase that recurs throughout the draft amendments. A class may be certified as to particular "claims, defense, or issues." Although subdivision (c)(4) now provides for issues classes, there is a deliberate attempt to focus attention on, and to encourage, this practice. Once again, mass torts are not far from view. One potential use of issues classes would be to resolve common elements of liability, leaving for separate actions resolution of individual elements of liability such as comparative fault and damages. Adroit definition of the "issue" also might help to reduce choice-of-law problems, particularly with respect to fact-dominated issues such as general causation.

A new subparagraph (d)(1)(B) expressly recognizes a practice

followed in most courts, permitting decision of motions under Rules 12 or 56 before the certification determination. This confirmation of general practice seems unexceptionable.

Subdivision (e) is amended to make it clear that court approval is required for dismissal of an action in which class allegations are made whether dismissal is sought before determination of the certification question or after certification is made. It also provides that a proposal to dismiss or compromise a certified class action may be referred to a magistrate judge or "other special master." The role of the special master is not defined. The Note refers to "investigation" of the fairness of a proposed dismissal or settlement, to the need to consider sensitive information, and to the problem that when all parties seek approval of a settlement the court cannot rely on genuinely adversary presentation of information that might undercut the proposal. There could be real advantages in independent investigation by a master, but the more independent and thorough the investigation the greater the departure from the ordinary role of court officers. There may be real advantages as well in confidential submissions to an officer who will not be called upon to decide the merits if the settlement should fail, but to preserve this advantage the master may need to report to the judge in terms that do not allow effective evaluation of the master's own recommendations.

New subdivision (f), finally, authorizes the court of appeals to permit an appeal from an order granting or denying certification. The only change is to eliminate the requirement of district court certification that may defeat appeal under 28 U.S.C. § 1292(b). This subdivision rests on two judgments. The first is that interlocutory review of the certification decision can be very important, to protect against both the "death knell" effects of a refusal to certify and the "in terrorem" (reverse death knell) effects of certification. The second is that the courts of appeals will exercise sound judgment, granting permission to appeal only in

cases in which the certification determination is manifestly important and at least subject to fair debate. Routine determinations in mature areas of class action practice are not likely subjects for permission. This provision has drawn strong support but also, although less often, vigorous disagreement.

Some Obvious Questions. The outline of the amendments suggests the most obvious questions.

Should the now-accepted (b)(1), (2), and (3) distinctions be collapsed? The direct reason for the collapse is the desire to change opt-out practice, create an opt-in practice, and improve the notice provisions. This reason ties to a second reason, the belief that unnecessary energy is wasted on disputing the choice of class category as an indirect means of affecting notice and opt-out decisions. This second reason may be unimportant — even if there is significant litigation of class category determinations in areas that have not developed a routinized class practice, direct changes in the opt-out, opt-in practice, and in notice, should redirect energy toward the intended target.

The risk of collapsing class categories may lie in part in surrender of the legitimacy lent by the traditions that underlie (b)(1) and the moral force lent by the contemporary civil rights uses of (b)(2). More important risks may arise from the prospect that class members might be allowed to opt out, particularly from (b)(1) classes. Equally important risks may arise from the opportunity to defeat opting out from (b)(3) classes, particularly as to class members who wish to pursue individual litigation in hopes of better results. Flexibility and discretion have carried us far in modern procedure, but perhaps these are situations that call for the rigidity of present rules. Even if more flexibility is appropriate, the rule should provide as much guidance as possible for its exercise.

The question whether class representatives should be willing

has focused attention on defendant classes. There are many reasons why a defendant should be unwilling to assume the obligations of class representative. As representative, the defendant has fiduciary obligations to the class. Presumably one duty is to defend vigorously in proportion to the stakes – and the stakes are expanded, perhaps exponentially, by class certification. (Even if the representative is theoretically subject to joint liability for the plaintiff's entire claim, the very reason for pursuing a defendant class is to enhance the prospects of actual recovery.) Freedom to settle or even abandon the defense is sharply curtailed. And if the representative defendant is allowed to escape the duties of representation by settling individual liability alone, the burdens of representation may exert a coercive force to settle on unfair terms. Barring an extraordinary congruence of interest between the representative and all other class members, the duty of counsel is changed and made more difficult (if not impossible): fiduciary obligations run to absent class members as well as the original client. And any attempt to find means of compensating the representative for these added burdens will remain difficult. Opt-in defendant classes make clear sense; opt-out classes that involve sophisticated defendants with clear actual notice can make equal sense; in other settings, these problems seem acute. Addressing them by adding a "willing" representative requirement may not be as effective as some alternative.

It is not clear, moreover, that a willing representative is any more to be welcomed. Long ago I stumbled across a case that certified a (b)(2) defendant class in an action to enjoin patent infringement. Quite apart from individual questions of infringement, different infringers may have very different stakes in the question of validity; the representative defendant, for example, could enjoy a technology that yields a scant 5% cost saving with practice of the invention, while all other class members compete with an older technology that yields a 25% cost saving with practice of the invention. The representative

defendant may be made better off by a holding of validity that binds the industry. The potential conflicts may be much more subtle than this simple illustration, but equally dangerous.

The willing representative requirement also provokes the question whether defendants should be able to force plaintiff class treatment. The idea may seem far-fetched, but it is not clear whether it should be hobbled by dropping a willingness requirement into Rule 23(a)(4). The question can easily be turned back to the defendant class issue, moreover, by the device of a transposed parties action in which the plaintiff names a defendant class and seeks a declaration of nonliability. In some settings this device would be ludicrous. Imagine, for example, an action by a government official against a class of public benefit recipients for a declaration that a new restrictive regulation is valid.

This illustration suggests that it may be appropriate to think about defendant class actions in terms that extend beyond the immediate problems of the representative defendant. Concerns about the willing representative requirement have been expressed by pointing to situations in which defendant classes seem important. The most common examples include securities law actions against underwriting groups and actions against many-membered partnerships. These examples are particularly persuasive because the class members have formed a real-world entity whose activities give rise to the claim; recognizing the entity for this limited legal purpose, even if for no other legal purpose, is appropriate. A more exotic example is an action to resolve the identical rights of hundreds or thousands of owners of fractional interests in mineral rights leases. This example seems persuasive because the class members have willingly engaged in a set of closely related and indistinguishable transactions. Another setting that has posed difficulties under present Rule 23(b)(2) is an action against numerous public officials pursuing seemingly identical policies but so far independent that there is no common superior to name as

defendant. The classic illustration was an action against county sheriffs who, in defiance of local federal decisions and state policy, denied contact visits to pretrial detainees. This illustration may seem persuasive because there is a strong suspicion of conscious parallelism, if not outright conspiracy, and because of the clarity of the violations both in law and in fact. The question is whether Rule 23 should attempt to capture these features in a way that clearly distinguishes between the requirements for certifying plaintiff and defendant classes.

One possibility would be to limit defendant classes by a "transaction or occurrence" requirement similar to the Rule 20 requirement for joining defendants. Others would be to stiffen the Rule 23(a) requirements of typicality and adequacy of representation, to require individual notice to all defendant class members, or to expand the right of individual participation to the limits that would be applied had all class members been joined as individual defendants. Or the plaintiff might be required to name several representative defendants, and to name those who have the most substantial stakes if class members have substantially different levels of interest in the outcome. It might even prove feasible to require the plaintiff to name all members of the defendant class that can be identified with reasonable effort — including preliminary discovery — so that the court can select a group of representatives and develop a cost-sharing plan.

Perhaps better approaches will come to hand. The important point is that we cannot blithely rely on the abstract assertion that there is no difference between precluding a potential right and imposing a liability. We must reflect on the human intuition that there is a difference, whether expressed as the psychological reality of present endowments, as the ephemeral character of "individual" rights that practically can be asserted only on a group basis, or as some more profound perception.

The almost casual reference to fiduciary responsibility may

touch too lightly on the single most troubling set of class-action issues. It is not enough to assert that everyone understands that both representative class members and class counsel have fiduciary responsibilities to the class. The trick is to elaborate that principle in ways that respond to the special difficulties of class actions, difficulties that arise whenever there are possible conflicts of interest between individuals joined as if a homogeneous class in which anything that advances the interests of one must automatically advance the interests of all others in equal measure. The most familiar analogy may be to the problems that confront a single lawyer who represents two plaintiffs, each of whom seeks to win the maximum possible individual advantage in litigating or settling with a common defendant. The problems of class representation, however, are far more complex. The lawyer with two clients can help each client to develop and articulate that client's own best understanding of personal needs; each of the two clients at least is in a position to supervise the lawyer's representation. Counsel for the class seldom is in a position to consult with each class member to determine inidividual interests and needs, or to measure and reconcile the conflicts among individual interests and needs. Many class members likely will prove unable to supervise the class lawyer at all, and reliance on the representative class members provides a pale substitute.

The difficulties presented by the attorney-class client relationship are exacerbated by the wide variousness of classes. Much current debate focuses on settlement classes that join mind-boggling numbers of members whose individual claims would support the costs of individual litigation, but who paradoxically may fall into the group of "futures" claimants who do not yet even know that they may have been injured. Such settings may present the most troubling opportunities for truly irreconcilable conflicts, and for conflicts that are not easily resolved by creating subclasses. Rigorous notice requirements and clearly explained multiple opportunities to opt out may help. The same devices may not help

in other settings, particularly if the typically small size of individual claims makes opting out the equivalent of surrendering any individual claim. And quite different problems are likely to arise if the class action actually goes to trial, although the relative infrequency of trials provides little foundation for speculating even about the nature of the problems, much less about the nature of possible solutions.

Rule 23 is silent on the nature of the fiduciary duties borne by class representatives and counsel. There would be real advantages in addressing these questions through the rule. Federal courts would be released from the common reliance on state law to govern issues of professional responsibility, although as members of state bars lawyers might face dual regulation. In addition, it may be possible to free these questions from the constraining impact of association with matters of "ethics" — it is easier to discuss the question whether a lawyer has conformed to a procedural rule than to frame the debate in terms of ethical behavior, as discussions of current class settlements demonstrate. Yet it will be extraordinarily difficult to articulate any explicit provisions. Since outright repeal of Rule 23 does not seem to be an option, it seems responsible to make other improvements even if ignorance forces continued silence. The challenge that may be made by those who hope for some guidance in the rule, however, is daunting and must be addressed even if it is not accepted.

The encouragement of resort to masters to evaluate proposed settlements raises broader questions about judicial review of class settlements. These questions become all the more important as we enter an era in which settlement classes are sought out by defendants, eager to buy global peace by agreement with volunteer representatives of thousands or tens of thousands of claimants. Extraordinarily complex arrangements are being made, at the cost of pushing Rule 23 beyond all of the limits that would have seemed invulnerable until tested by the force of so many claims. In some

of these cases the uncertainties seem so great that reasoned evaluation of fairness may not be possible by any means. In others there is a strong attraction to independent investigation and report, but the means seem elusive. A master, charged as the court to be impartial but armed as a party to undertake independent investigation, is one possibility. Developing practice with judgment-enforcement masters in institutional reform litigation may provide some guidance. Another possibility is to appoint an independent representative for the class, whether or not called a guardian, charged with reviewing the settlement in ways that duplicate the responsibilities of class counsel but work free from the fear of self-interest. Reliance on a master may help solve the problems of judicial time, but does little to address the questions that arise from blending advocacy and investigation with the judicial role. Reliance on a class guardian may confuse the roles of counsel and representative members, and create a framework that conduces to inadequately informed second-guessing. If the problem is real, the most obvious solutions all seem weak.

A quite different settlement role involves the familiar use of masters to facilitate settlement. Involvement of a master in the process that leads to a settlement agreement may not only improve the process but also provide a measure of reassurance that the settlement is reasonable. Good experience with this practice ensures that it will continue, even without explicit provision in Rule 23 or any obvious support in Rule 53. It may be desirable, however, to consider the question whether a master who has promoted a settlement should be responsible for advising the court on the fairness of the settlement. Despite the great advantages of familiarity, it might be better to rely on a magistrate judge or a new and independent master if the court, unwilling to rely entirely on class member objectors, seeks advice from people who do not have a stake in the settlement.

The provision for invoking the aid of masters or magistrate

judges hints at the more pervasive provisions that might be created to spell out the process of reviewing and approving class-action settlements. The first set of questions arise from the common resort to "settlement classes," either by an initial certification that makes it clear that the class may be decertified if settlement is not reached, or by simultaneous presentation of a motion for certification and a motion to approve a settlement already negotiated. The most basic question is whether the basic criteria for certification should apply differently to class settlement than to class litigation. It seems difficult to argue that there should be any significant differences in the prerequisites of numerosity, commonality, typicality, and effective representation. If superiority becomes an additional prerequisite, however, there may be more room to argue that there are very substantial differences between the superiority of class settlement and the potential superiority of class litigation. Application of the other factors that bear on a determination of superiority, moreover, is likely to be quite different with respect to settlement than with respect to litigation. Not all of the differences favor settlement; the court's ability to determine the importance of individual litigation, for example, may be much better informed by adversary argument than by the cooperative presentation made when class and adversary join to urge acceptance of a settlement. And at a deeper level, it has been argued that counsel for a class that has been certified only for purposes of settlement bargains at a great disadvantage, and perhaps with a conflict of interest. The defendant's incentive to settle is no longer the prospect of trying this case on the merits, but instead the hope of avoiding vast numbers of individual cases. And counsel for the class stands to gain nothing if settlement fails, a prospect that becomes most unsettling when class certification is sought simultaneously with a "done deal" with a defendant who might have aborted all negotiations with that counsel.

Many other details could be added to Rule 23 to spell out the

nature of the court's duties in reviewing and approving class settlements. Among them is the question whether class members should be allowed to opt out of a settlement. By far the cleanest way to draft such a provision would be to recognize a right to opt out that in form extends to all class actions; it would be difficult to justify any provision that allowed the court to distinguish between class members who might reasonably bring individual actions and those who might not. An unconditional right to opt out of a settlement might, however, impose unreasonable notice costs. Perhaps this problem can be met by an indirect qualification of the right, giving the court discretion as to the means of notice to be employed, anticipating that aggregate methods of notice would be used only when individual claims are small, and perhaps relying on actual notice to a substantial sampling of class members on the theory that a significant opt-out rate should prompt reconsideration of the adequacy of the settlement. If we come to accept classes of people who have not yet experienced injury, moreover, the right to opt out might properly carry forward to the time when injury occurs and the class member chooses whether to participate in the class settlement or to pursue an individual remedy.

Other proposals for regulating settlement include various means of bringing more lawyers into the negotiation on behalf of different subclasses, bargaining for allocation among differently situated members of a nonhomogeneous "class"; providing some means of representation independent of the lawyers who have been recognized as class counsel; improving the information made available to objectors, both by detailed notice to all class members of settlement terms and by more specific response to objectors, before they are forced to articulate their grounds for objecting; and recognizing the court's power to modify the terms of settlement so long as the defendant's total obligation is not materially increased.

Discussion of settlement also involves issues of attorney fees. Simultaneous negotiation of class relief and fees creates manifest conflict-of-interest problems. Partial solutions might be found in requiring that the basis for fee determinations be determined before settlement can be undertaken, or that fee issues be settled only after approval of settlement on the merits. The obstacles that either approach might create to settlement might be reduced by simply considering the occasion for fee negotiations as part of the process of approving settlement and any fee award.

These and related possibilities deserve to be a major focus of the continuing study.

Many other questions could be put to the details of the draft. They get caught up, however, in the long list of questions set out next. These questions are among the number that may fairly be addressed to present practice. For the most part, they recast as questions a welter of anecdotal information, the things that experience has suggested as today's truths to more or fewer class action observers and practitioners. Taken together, they pose the embarrassing question whether we really know enough about Rule 23 to be able to make sound predictions as to the effect of the current draft or any other.

What We Might Wish To Know of Current Experience

When asked for reactions to the current state of Rule 23, one very thoughtful committee replied that it was difficult to achieve any consensus wisdom because its members individually had experience with only a few fields of class litigation. Those with substantial experience in securities litigation did not have any working knowledge of employment discrimination litigation, and so on. This response is a useful warning. The Committee must hear from many voices, reflecting the full spectrum of experience, if it is to learn much. It also must hear voices that speak with as much candor and disinterest as possible. And, to the extent possible,

it must encourage independent investigations of the sort now underway at the Federal Judicial Center. The following collection illustrates the array of assumptions that should be questioned.

Individual Actions and Aggregation. What relationships can be identified between aggregation and numbers of individual actions growing out of the same transactional setting? Does it often happen that large numbers of individual actions proceed in the same court, or in different courts, without any attempt at aggregation? Is it possible to identify elements that encourage or discourage consolidation, considering such things as relative filing dates, progress toward disposition, identity of counsel, size of claims, numbers of claimants, substantive principles, and the like? What elements — the same, or others — influence the means of aggregation? Is actual consolidation ever pursued across the lines that separate different court systems? Are class actions more likely to be pursued after some experience with individual adjudication, or does this depend very much on the substantive area: are class actions the first resort in some fields, as may be in some areas of securities law, and a last or never resort in other fields? How often is class certification denied because it is not desirable to concentrate litigation in one forum, because of the importance of individual control of individual actions, because of the advanced progress of many individual actions, or because of a judgment that individual actions — perhaps bolstered by nonmutual preclusion, or tacit acquiescence in belwether litigation — will prove more manageable?

A quite different question is how many members of certified classes would have maintained individual actions absent the class action. A clear answer in general terms would help shape a good general rule; the expectation that clear answers could be given for individual cases would justify a rule that delegates case-by-case discretion to individual judges. But clear answers are likely to remain elusive, even if shrewd guesses may be possible in some

settings. For that matter, it would be even nicer to know what would have been the outcomes of individual actions, how frequently conflicting results would be reached on the merits, whether results on the merits would tend to converge over time, and how to measure the recoveries both in the aggregate and in individual cases.

Routine Class Actions. One common hypothesis is that a substantial portion of all actions filed with class allegations are virtually invisible because they are somehow standard or routine. This hypothesis may be translated into the judgment that Rule 23 is working well in most applications, that we should not be misled as to the need for reform by the occasional dramatic departures. The hypothesis seems to have at least two parts. The first part, encountered most often in speculation about the reasons that may explain the substantial under-reporting of class action filings recently uncovered by the Federal Judicial Center study, is that boilerplate class allegations are routinely ignored or dispatched without fuss. The second part, encountered regularly in the reactions of experienced class-action lawyers from various fields, is that Rule 23 has been beat into shape by the bench and bar and presents few grounds for dispute in most cases. Everyone recognizes the appropriateness of (b)(3) certification in securities law cases, understands the notice drill, knows how to present and win approval of a settlement and fee awards, and so on. It seems likely that indeed many actions play out in one of these ways. But it would be nice to know, and particularly to know more about the correlations between easy application of Rule 23 and the substantive subjects of dispute. It also would be nice to know what happens in the routine applications: how often is certification granted? What is the relationship between certification and settlement? How often do certified classes go to trial, and how often do they win? Is there any way to get behind bare numbers? Suppose, for instance, it should be found that the same distribution of outcomes occurs in all actions with class allegations as in all other actions, and that the distribution also

is the same for actions in which certification is granted, denied, or ignored – could we know what this really means for common protests that class actions exert a pressure that subordinates the merits of the action to the need to escape alive? True confidence would require an unattainable measure of the merits of all the cases compared; is it enough to assume that class allegations are not added deliberately to bolster weak claims, and that class action procedure – including the cost of notice in (b)(3) cases – is sufficiently hospitable to strong claims?

Whatever can be made of these questions, we should be able to learn more about smaller issues. What is the frequency of (b)(1), (2), and (3) classes? The rate of certifications granted, denied, or ignored? The correlation between substantive area and frequency of class allegations and certifications? The time consumed by class actions (and, would that it could be known, the time that would have been devoted to separate actions)?

Race To File. The lore includes tales of "parachutists," who scramble madly to be the first to file class claims in hopes of assuming a lead role in managment and fees. How often are securities class actions filed immediately upon announcement of a disappointing earnings report, or single-event tort actions before the ashes have cooled? Is there support for the claim that immediate filing is necessary to preserve evidence, particularly in the tort cases, and are class allegations important to achieving that result? Is anything lost, apart from seemliness – are inconvenient forums chosen, is first-filing negatively correlated with the strength of the claim or ability of counsel, do overlapping actions cause unnecessary confusion and clean-up costs? Is there, on the other hand, any reason to reject a simple rule that there is no presumption that counsel who files first should be counsel for the class, and that there must be a competition to select class counsel?

Representatives: Who? Whence? Why? The role of class-member

representative parties is one of the richest sources of anecdotes, and particularly cynical anecdotes. Pending securities litigation reform bills implicitly reflect the view that class-member representatives do not adequately fill the role of client under present practice. It has become a bromide that the beauty of many class actions is that the lawyers don't have any clients to get in the way. These occasionally querulous observations raise many questions.

Perhaps the first question is where representatives come from. Do they search out counsel, or are they recruited by counsel? How are they recruited -- what reality, if any, underlies the provision in the pending securities litigation reform bills that would prohibit brokers from accepting remuneration for assisting an attorney in obtaining the representation of a customer? Are there "professional" representatives who appear repeatedly, at least in particular subject areas? How often do representatives have more than nominal interests? Is there a correlation between the stakes of individual representatives and the form of action -- are (b)(1) actions more likely to draw representatives with substantial stakes than (b)(3) actions? Are representatives in (b)(2) actions for injunctions more likely to be as much affected by the outcome as other class members? And how often are they recruited by interested organizations because they present particularly attractive illustrations of a group interest or injury? What is the real impact of the requirement that the representative's claims or defenses be typical of the class -- does it really add weight to the requirements of common questions and adequate representation? Does it at least provide one illustrative bundle of facts that may facilitate discovery and trial?

Most directly, what are the working relationships between representative class members and class counsel? Do the representatives play any role as clients, participating in the decisions that shape the litigating goals and strategies? How much

time, effort, and expense do representatives actually devote to the litigation? Do courts often attempt to supervise this dimension of adequate representation after the adequacy determination, and, if so, how? In place of reviewing representation directly, do courts attempt to rely on substitutes such as seeking out additional representatives who are not nominated by class counsel, forming class-member committees, or even appointing independent counsel or guardians to represent the class in dealing with class counsel?

Are there significant efforts to supervise class representation by evaluating the performance of class counsel directly? What means of evaluation are chosen, and what steps are taken to reduce the implicit intrusion on the adversary process?

What do representatives get out of it all, whatever the "all" may be? Simply the satisfaction of pursuing justice, and doing good for others when the class claim succeeds? Are they rewarded in some measure for the time and perhaps risk involved in their roles by recoveries that are more favorable than other class members win?

Time of Certification. Is there any pattern to the point at which the first certification decision is made? How often are actions filed simultaneously with proposed settlements and motions for certification? How often are preliminary motions on the merits decided before addressing certification? What is the effect of local rules requiring that a motion for certification be made within a stated period, perhaps 90 or 100 days — do they impede settlement efforts, encourage prompt resolution, or have little effect? How regularly is discovery controlled and focused on the certification question — is it more feasible in some substantive areas than others to separate discovery on the merits from certification discovery? How often are class definitions changed after an initial certification, is an initial denial followed by later certification, or an initial certification by decertification?

Certification Disputes. How much time is spent contesting certification? Are there correlations between the subjects of litigation and certification disputes? Is much effort devoted to contesting the choice between (b)(1), (b)(2), and (b)(3) classes, and does this correlate to the subject of litigation? How much thought – expressed or unexpressed – is given to the impact of the class definition on the prospects for settlement?

Plaintiff Classes. Do defendants ever seek and win plaintiff class certification over opposition of plaintiffs? How often do defendants acquiesce in certification of a plaintiff class, apart from settlement classes? How frequently do defendants agree to settlements that include chancy class certifications that may not deliver the hoped-for preclusion benefits?

Defendant Classes. How common are defendant classes? Are there identifiable but narrow settings in which they are most likely? What happens if a (b)(3) class is certified – do class members opt out in great numbers? Have means been found to alleviate the added burdens inflicted on representative defendants? Are there formal or informal means of costsharing? How often are defendants willing to represent a class? Are unwilling representatives effective? Are willing representatives to be trusted? How do counsel identify potential conflicts between obligations to the representative client and obligations to the class, and how are the conflicts resolved?

Issues Classes and Subclasses. How frequently, and in what settings, are issues classes used? Subclasses? How diligent and sophisticated is the inquiry into possible conflicts of interest within a class whenever relief is (or should be) more complicated than winning the maximum number of dollars to be distributed according to the only possible measure of uniformity? Consider a securities fraud action in which, inevitably, different class members bought and sold different numbers of shares at different times; a "class" of all may disguise differing interests in proving

the ways and times at which the fraud affected the market. Are such subtleties routinely ignored? Is it in fact better to ignore such complications, because the costs of making distinctions outstrip the benefits? What of actions that touch deeper social interests, such as surviving school desegregation cases in which a "class" of all students, or all minority students, almost inevitably includes people with a wide range of views about appropriate remedies?

Is there any experience at all to illuminate the post-class experience with issues classes? How often is a class-based resolution of some issue of liability followed by independent actions in different courts? How are these actions coordinated with any appeals in the issues class? Are any efforts made to ensure that subsequent proceedings to not effectively thwart the class determination? Do the results of individually litigating individual issues diverge substantially – for example, do claimants in some states or regions win systematically greater or lesser recoveries than those in other states or regions?

More fundamentally, is enough care taken to ensure that issues certified for class treatment are usefully separate from issues that remain for individual disposition? It is frequently suggested, for example, that issues of fault and general causation are suitable for class treatment, leaving issues of comparative fault, individual cause, and proximate cause for case-by-case resolution. But how is fault to be compared without retrying the issue of fault, and perhaps implicitly impugning the class finding? And how are individual and proximate cause issues to be resolved without retrying the evidence of general causation? If the answer is found in brute force, will the results in fact achieve sufficient uniformity to justify the attempt?

Notice. What types of notice, at what cost, are required in (b)(1) and (b)(2) actions? Is there any reason to believe that notice in (b)(3) actions is not generally adequate? How much does notice

cost, and does the cost defeat legitimate actions seeking small individual recoveries on behalf of many claimants? Is much effort devoted to litigating notice issues? How often is notice provided of steps other than certification, at what cost, and with what benefit? Do notices of impending settlement provide sufficient detail to enable intelligent appraisal, if any class member should wish to undertake or hire it? And, of course, how many class members even attempt to read the notices?

Opt-Outs. How frequently do members opt out of (b)(3) classes? Can this be correlated with specific subject areas, size of typical individual claims, or something else? Why do members choose to opt out or remain in? Does the fear of involvement conduce more toward doing nothing, or toward getting out? How many opt-outs bring independent actions, and again what correlations might be found? How often is (b)(2) stretched, or (b)(1) distorted, to defeat opt-out opportunities? Is there any significant converse practice, such as defining subclasses in (b)(1) or (b)(2) actions that effectively permit opting out? Is it common to structure settlements that allow the defendant to opt out of the settlement after finding out how many plaintiff class members opt out?

Opt-Ins. Are devices employed to create what essentially are opt-in classes, by such means as defining the class to include only those members who file claims?

Individual Member Participation. How frequently do nonrepresentative class members seek to participate before the settlement stage? What resistance do they meet from designated representatives, class counsel, and the party opposing the class? How much communication is there between class counsel and nonrepresentative members? If nonrepresentative members attempt to seek out class counsel, how are they received? How often to nonmembers challenge settlements? Seek to appeal judgments? Intervene for any purpose? Is there any working concept of the right in a (b)(3) class action to enter an appearance through

counsel that distinguishes it from intervention? Is there experience with this concept that might show whether it should apply to all forms of class actions?

Settlement. Many of the questions have been touched above. Does certification coerce settlement of frivolous or near-frivolous claims? What means have been used to support effective judicial supervision when all parties submit information in support of settlement? And if certification is first sought at the settlement stage, is the attempt to ensure compliance with notice and certification requirements more effective than the attempt to evaluate the merits of the settlement? How frequently do nonrepresentative class members appear to contest settlement, and with what effect? Are significant problems of conflicting interests within the class papered over? Do settlements often include provisions that are, by some reasonable measure, disproportionately favorable to class representatives?

Trial. How often are certified class actions actually tried on the merits? With what results? Is there a correlation with subject matter and class type — are trials more common in (b)(2) actions that pursue still developing legal theories, less common in (b)(3) actions with large sums at stake?

Small Claims Classes. How frequently do certified (b)(3) classes result in relatively trivial relief for individual class members, measured by mean, median, or mode recoveries? Is it possible to guess at the social enforcement value of a significant total parcelled out in many small shares? Are there meaningful parallel questions for other class types, such as trivial injunctive relief in a (b)(2) action, perhaps coupled with significant fees? How often do courts experiment still with substitute modes of recovery, such as distribution to charitable institutions?

Fee-Recovery Ratios. Another cynical belief is that many class actions serve only to confer benefits on class counsel. Token

class benefits are accompanied by handsome fee awards. The pattern of relationships between fee awards and total class recovery will be interesting. The FJC study of a very small number of cases from a sample chosen for other purposes suggested that class benefits regularly exceed fees, and that fees are a larger percentage of class recovery in cases that yield small total recoveries. If this pattern is generally true, it provides substantial reassurance. Additional reassurance would be supplied if there are enough cases tried on the merits to support meaningful comparison of the fee awards and ratios with settled cases.

A more elusive concern lies beyond the simple ratios. A high ratio of fees to recovery may reflect high-quality work done to support weak but deserving claims. It also may reflect the coercive benefits of pursuing undeserving claims, or the betrayal of strong class claims by bargain settlements. This concern may prove almost impossible to test.

If there is any experience to measure, it also would be useful to learn the means by which courts have attempted to regulate fees beyond use of a "lodestar" approach. How often is special importance attached to the actual benefits won for the class? Is there any significant attempt, by auction or otherwise, to stimulate competing offers of representation?

Is there any way to get at such intriguing information as a comparison between the economic gains from representing classes as compared to the economic gains from opposing classes? And is there anything to be learned from such information if it can be found: if, for example, it were concluded that class counsel average a higher return per hour of apparently equal effort, would that tell us more than an equal or lower average rate of return?

Overlapping Classes. How often are overlapping class actions brought in different courts? What means are found to arrange a coherent resolution that avoids parallel proceedings? Are the

problems more severe if one or more overlapping actions are filed in state courts? One description has painted a startling picture of competing class actions, in which the proposed settlement in an opt-out class is met by formation of a rival class with promises of better results: does this really happen? If it does, what are the results for class members? What about more imaginative possibilities, such as formation of a rival class and delegation to the class representatives of the power to opt out of the initial class on behalf of all members of the new class?

Counterclaims and Discovery. There does not seem to be much concern with the prospect of counterclaims and discovery involving nonrepresentative class members. Is there regular acceptance that these devices are not worthwhile? That they are employed, but only in special settings – individual discovery of individual liability or damages issues, for example, is disciplined and occurs only when it becomes immediately relevant? Are there unknown problems that should be addressed?

Res Judicata. Peace is the tradeoff for a class judgment, win or lose. The theory is reasonably clear. But reported cases do not give much sense of actual impact. To the extent that class actions involve claims that would not support individual litigation in any event, there is little reason for concern. But it would be useful to know how often class judgments deter individual actions that otherwise would have been brought; how often individual actions are attempted but fail on preclusion grounds; and how often individual actions overcome preclusion defenses because of direct limits on preclusion, inadequate representation, inadequate notice, or other grounds.

Summary

Several purposes are served by posing a daunting list of questions that are difficult or impossible to answer. The one that may be most important is to demonstrate a central challenge of the

rulemaking process. Courts have cases and must decide them. Procedure must be adapted as well as can be to changing circumstances and needs. If all procedural reform were held hostage to the slow progress of information that meets the rigorous standards of good social science, there would be precious little reform. Nowhere is this prospect more evident than with class actions. What is needed is wise judgment on the balance between the enthusiasm arising from perceived needs for change and the caution engendered by perceived ignorance, and recognition that more confident judgment is needed to justify more dramatic departures from practices proved by at least some experience. When rigorous evidence is lacking, judgment is properly informed by a consensus of anecdotes, encouraging as much anecdotal input, drawing from as much shared experience, as can be. At the same time, judgment is restrained by recognition of the inadequacies of present knowledge and the fallibilities of prediction.

Individual judgments will differ on the results of the last leap into the unknown with Rule 23. The career of the 1966 amendments surely teaches a humbling lesson on the fallibility of foresight, however good the unforeseen consequences may be. Perhaps we know enough to justify modest changes in Rule 23. Possibly we should have the courage to experiment with more drastic changes. If no changes are made, we never will know their fate. If changes are made, it will be years before we even think we know. The greatest cause for concern in the midst of all this is that there seems to be little collective sense of any need for signifcant change, apart from the area of mass torts. There is a real sense that we need to find better means of addressing mass torts, but almost no sense yet as to the blend of substantive and procedural means that will prove better. Rule 23 is only one alternative, and the foundation that might securely anchor a new structure still needs to be sunk.

Admiralty Rule B

Admiralty Rule C, governing in rem actions, was amended in 1991 to reduce the need to rely on a marshal to effect service. Under subdivision (3), a marshal is required to serve a warrant of arrest only if the property to be seized is "a vessel or a vessel and tangible property on board the vessel." Rule B, governing attachment in support of an in personam action, was not expressly amended. The working assumption of the admiralty bar is that a marshal continues to be required under Rule B in circumstances that would not require a marshal under Rule C. It has been proposed that this portion of Rule B should be amended to conform with Rule C.

It was decided at the April, 1995 meeting that a proposal to revise Rule B should be considered at the November meeting. A tentative draft is attached.

The other attachments reflect something of the mysteries that underlie the process that led to the 1991 amendments. It seems safe to conclude that there was no special reason for distinguishing Rule B from Rule C. Indeed, there is a plausible argument that the Committee thought that it had brought the two rules into alignment by a rather circuitous route through Rule E. Even if that is so, it affords no reason to reject an amendment that clearly accomplishes the same result.

This draft also reflects the well-taken suggestion that Rule B should reflect the renumbering of Civil Rule 4 subdivisions. The 1993 Rule 4 amendments are sufficiently complex to make this task a bit difficult.

The choices made in preparing this draft are reflected in the October 3 letter to Mark Kasanin. If he has an opportunity to suggest improvements in advance of the November meeting, they will be circulated separately.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

October 3, 1995

Mark O. Kasanin, Esq.
McCutchen, Doyle, Brown
& Enersen
Three Embarcadero Center
San Francisco, California 94111-4066
by FAX: 415.393.2286

Sender's FAX: 313.763.9375
Voice Phone: 313.764.4347

4 pages this transmission

Re: Supplemental Rule B(1)

Dear Mark:

This is a second request for help, akin to the March 20 letter that should be in your Supplemental Rule B file.

I still do not understand what is going on with the structure of Rules B, C, and E. But I think I do understand the proposition that a marshal should be required to serve attachment under Rule B only in the same circumstances as Rule C — if the property is a vessel or tangible property on board a vessel. The simplest short-term fix, pending style revision of all the Supplemental Rules, is to incorporate the same language bodily in Rule B. This draft does that.

But even that simple solution presents a few problems. (1) In line 14, I have added "summons and" to parallel the present reference to "summons" in line 20. But there may be a reason why summons is issued when process issues without consideration by the court, but need not be issued when process issues after review by the court. (2) I have moved the supplemental process provision from lines 15 through 17 to lines 31 through 33, on the theory that this limits the provisions for service by marshal to the initial summons and process. If we should have a marshal for supplemental process addressed to a vessel or tangible property on a vessel, we need a different redraft. (3) In line 23 I have deleted the "a vessel and" from the language of Rule C. Literally, C does not require a marshal if the warrant is addressed only to tangible property on a vessel. My guess is that you want a marshal then too. But tell me if I am wrong.

There also is the question of the cross-references to the pre-1993 version of Rule 4. In line 34, it is easy to change to 4(n). In lines 42 and 43 I am not quite so sure. Most of the new subdivision letters reflect the disaggregation of

former Rule 4(d). I think it is proper to add a reference to waiver of service, even in a provision that deals with garnishment, but would like reassurance. Adding a reference to the Rule 4(j) provision for service on foreign countries seems reasonable enough. I am quite uncertain whether to add the reference to Rule 4(k), which creates a judicial long-arm for foreign defendants. Present B(2) seems to deal with the manner of service, not the authorization for service in the place where service is made. I am rather inclined to delete the 4(k) reference, particularly since we are dealing with property process, but again would like guidance.

If it is hard to find my March 20 letter, I will send a copy. As usual, I come to the process of preparing an agenda without much time to spare. If Suppplemental Rule B is to be on the November agenda — recognizing that a place on the agenda does not ensure time for Committee consideration — it is enough to know that you think it appropriate to put this version in the agenda materials. If you think there should be significant surgery, however, it would be a big help to have the suggestions quite soon.

Thanks for your help. I had thought some other admiralty group was going to come up with a suggested draft, but I cannot find anything in my file.

Best,

Edward H. Cooper

EHC/lm
attachs.

Rule B. Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing summons and process of attachment and garnishment shall issue. ~~Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court.~~ If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden at a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. If the property is vessel or ~~a vessel and~~ tangible property on board a vessel, the process shall be delivered to the marshal for service. If the property is other tangible or intangible property, the process shall be delivered by the clerk to a person or organization authorized to serve it who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(en), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the

defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) Notice to Defendant. No judgment by default shall be entered except upon proof, which may be by affidavit, * * * (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4 (de), (f), (g), (h), or (i), (j), or (k), or that service has been waived under Rule 4(d), or * * *.

Committee Note

Supplemental Rule B(1) is amended in two ways.

The service provisions of Supplemental Rule C(3) are expressly incorporated, providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel. The reference to former Rule 4(e) is changed to Rule 4(n) to reflect the restructuring of Rule 4 in 1993.

Rule B(2) is amended to reflect the 1993 amendments of Rule 4.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

March 20, 1995

Mark O. Kasanin, Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, California 94111-4066
by FAX: 415 393-2286

Sender's FAX: 313 763-9375
Voice Phone: 313 764-4347
Four pages this transmission

Re: Supplemental Rules B, C [and E]

Dear Mark:

Help!

I have put off reviewing your letter about Supplemental Rules B and C until this morning. John Rabiej helpfully gathered for me such materials about the current history as he could find in the Administrative Office files. I am left baffled by all of this, and have found no help at all in a cursory look at Benedict and Moore's. I know I looked in the right place in Moore's; Benedict defied my efforts – the closest I came was a form for service drawn from the pre-1991 Rule C.

Rule B, as I read it, does not on its face say anything about the procedure for serving process to attach or garnish an admiralty defendant's goods, chattels, or credits and effects. Subdivision (1) provides for "process to attach," later called "process of attachment and garnishment." Subdivision (2) forbids judgment by default unless the defendant gets notice from the plaintiff *or* the garnishee. One method of effecting notice is to serve the complaint, summons, and process of attachment or garnishment as authorized by former Rule 4(d) or (i). (This provision was not amended to reflect the 1993 Rule 4 amendments; when we do something about Rule B, the cross-reference should be changed to Rule 4(e), (f), (g), (h), (i), and likely (j).) This clearly invokes Rule 4, but does not speak to the person by whom service is made – subdivision (c) in the former Rule 4.

The 1991 Rule C amendment clearly provides that in an in rem action a warrant for arrest may be served by a person specially appointed by the court if the warrant covers tangible or intangible property that is not a vessel or a vessel and tangible property on board the vessel.

Rule E applies not only to actions in rem but also to "actions in personam with process of maritime attachment and garnishment." Rule E(1). Rule E(3)(a) provides that process of maritime attachment and garnishment shall be served only within the

district. E(4)(a) deserves to be set out in full:

> Upon issuance and delivery of the process, or in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal *or other person or organization having a warrant* shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

Paragraphs (b), (c), and (d) refer to acts to be done by the marshal "or other person or organization having the warrant," and also in (b) to the "other person executing the process."

Putting these rules together, one possible reading is that Rule E describes the means of serving Rule B process of attachment and garnishment, and provides for service by a person other than the marshal. This reading is much weakened by the fact that Rule C was amended in 1991 to include an express provision for service by a person specially appointed by the court, while nothing was done to Rule B — it would be argued that the references in E(4) apply only to in rem arrests under Rule C. But the scant history suggests that the amendment of Rule E was intended to cover Rule B as well. The version of Rule E(4)(a) published for comment in September, 1984 expressly provided: "In the case of an arrest or attachment or garnishment of any other property the process shall be executed by the marshal or a person specially appointed by the court for the purpose." The Committee Note stated that the purpose was to make the Admiralty Rules consistent with the version of Civil Rule 4(c)(1) adopted in 1983, and to "relieve the United States Marshals Service of the burden of using its limited personnel and facilities for execution of process in instances in which a court appointee is capable of effectuating service without incident."

There is nothing in the records provided by John Rabiej to indicate the reason for the drafting changes in what became the 1991 amendment. A December 15, 1987 Memorandum from Judge Grady as chair of the Civil Rules Advisory Committee to the Standing Committee states that the Committee "proposes to revise" Rules C and E, setting out the language that became effective in 1991 and Commitee Notes that are virtually the same as the 1991 Notes. There is, however, one statement in this memorandum that may be very important. It is stated that the changes "would track a change previously made in Rule 4(c)(1)." Rule 4(c)(1), now Rule 4.1, is discussed below. The Committee Note for the 1991 amendments says the same thing for both Rule C and Rule E:

> These amendments are designed to conform the rule to Fed.R.Civ.P. 4, as amended. As with recent amendments to Rule 4, it is intended to relieve the Marshals Service of

> the burden of using its limited personnel and facilities for execution of process in routine circumstances. Doing so may involve a contractual arrangement with a person or organization retained by the government to perform these services, or the use of other government officers and employees, or the special appointment by the court of persons available to perform suitably.

This statement includes the core explanation of the 1984 draft.

There is one plausible explanation of what happened, and it is consistent with the conclusion that the Committee believed that the 1991 amendments authorize appointment for service under Rule B as well as Rule C. The 1984 draft of Rule C(3) simply referred to "a person specially appointed by the court for service." By 1991, this had become more complicated: Under Rule C(3) the warrant is delivered by the clerk "to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, or a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States." That is a lot of words. Rule E(4)(a) lost the clear provision for process of attachment or garnishment, but the present reference to an "other person or organization having a warrant" may have been intended to say the same thing without having to repeat the mouthfull of C(3).

All of this may be affected by former Rule 4(c)(1), which in 1993 became Rule 4.1. Rule 4.1(a) provides:

> Process other than a summons as provided in Rule 4 or a subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located * * *

Supplemental Rule A provides that the Civil Rules apply to maritime attachment and garnishment "except to the extent that they are inconsistent with these Supplemental Rules." Rule E(3)(a) is inconsistent with Rule 4.1(a) to the extent that Rule 4.1(a) would allow service outside the district, but there is no other apparent inconsistency. A person specially appointed under Rule 4.1(a) to serve process can be a "person * * * having a warrant" within Rule E(4)(a).

In short, I have three guesses. The Advisory Committee thought it was providing for service of attachment and garnishment process by a person specially appointed or a person contracted with

by the United States. It may not have managed to do that by the self-contained provisions of the Supplemental Rules. But the service-of-process provisions of Rule 4(c)(1) in effect in 1991, now embodied in Rule 4.1, seem to accomplish the same result. But if that is so, it was equally true in 1984.

That is all confusing enough. I take it from the letter to you from Philip A. Berns that the Department of Justice believes that a marshal still is required to effect service of admiralty process for attachment and garnishment. That bespeaks a need to clarify the rules, even if they might be read to authorize appointment of someone else. So far as I can make things out, there is no reason to require a marshal. If the rules do not authorize special appointments, it is because of an oversight.

Before attempting to draft a cure, I would like to know whether I am going astray somewhere. I know nothing about admiralty practice, and would hate to overlook something obvious. Your reassurance will be valuable.

If we are going to look at Rules B and C, should we also reconsider the question whether they do enough to ensure neutral evaluation before attachment issues without notice? Rule B, for example, says that an attachment order "shall issue" if the court finds that "the conditions set forth in this rule appear to exist." It seems to be enough that the defendant is not to be "found within the district," even though personal jurisdiction might be acquired by service in another district in the same state. That situation seems to make the device more a matter of security than a jurisdictional device. Is the admiralty bar generally satisfied that the rule now passes muster?

There is still time to get this on the April agenda if you think I am on the right track. But if there are any doubts, I suspect the world can wait a bit longer before we launch a new and improved Rule B on its way.

Best,

Edward H. Cooper

EHC/lm

c: Hon. Patrick E. Higginbotham

U.S. Department of Justice

Civil Division

February 8, 1995

PAB:jam

Telephone:
(415) 556-3146

Torts Branch
West Coast Office
10-4640 Federal Building
Post Office Box 36028
450 Golden Gate Avenue
San Francisco, California 94102-3463

McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, California 94111

Attention: Mark Kasanin, Esq.

Dear Mark:

As per our conversation of Tuesday, February 7, 1995, I am sending this letter to you to call attention to a recommended change to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims to bring it into conformity with Rule C insofar as a marshal is required to serve papers.

In 1991, Rule C was amended, basically, to provide that a marshal would only be needed to arrest a vessel and/or tangible property on board a vessel. All other service of warrants of arrest could be performed by a marshal, a person or organization contracted with by the United States, or a person specially appointed by the court. The purpose of this change was to alleviate the necessity of having a marshal engaged in service of process which did not require a presence of that magnitude. It also recognized the scarce resources and budgets of the Marshals Service. Finally, it recognized that the need for the "gun on the hip" could be a necessity when ships and tangible property on ships were involved.

I have been unable to locate my records but I vaguely remember that the identical proposal was to be made to apply to Rule B so that the presence of the Marshal would only be necessitated when there was to be an attachment of a vessel or tangible property on a vessel. As stated, this did not occur but the rationale and need was the same as in an arrest situation. As a matter of fact, in the Notes of Advisory Committee relating to the 1991 Amendment, following Rule C, the Committee refers to both arrest and attachment.

Therefore, I recommend that you consider amending Rule B to reflect the same changes as were made in 1991 to Rule C in reference to the use of the Marshal. As it presently stands, the Marshal is required to perform all attachments. This mandate should apply only to attachment of vessels and/or tangible property on such vessels.

Very truly yours,

PHILIP A. BERNS
Attorney in Charge
Torts Branch, Civil Division
West Coast Office

cc: Lucille C. Roberts, U.S. Marshal Service, Washington, D.C.
Gary W. Allen/David V. Hutchinson
David Sharpe, George Washington University, Washington, D.C.

Rule 15(a) begins:

> (a) Amendments. A party may amend the party' s pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted * * *, the party may so amend it at any time within 20 days after it is served. * * *

A Rule 12 motion - most commonly a 12(b)(6) motion to dismiss for failure to state a claim - is a motion, not a responsive pleading, and does not cut off the right to amend.

District Judge John Martin has written to suggest that the rule should be amended to cut off the right to amend when a motion addressed to the pleading is served. His suggestion is prompted by experience in a case in which the plaintiff served an amended complaint just as a decision on a motion to dismiss was about to be released. The amendment was available as a matter of right. He observes that while application of Rule 15(a) seems clear in this setting - and is clearly undesirable - it becomes more confused after announcement of a decision granting a motion to dismiss. If the decision also grants leave to amend, there is no problem. But some courts have held that a decision granting a motion to dismiss without addressing leave to amend does not cut off the right to amend, which survives until a responsive pleading is served or a final judgment of dismissal is entered. This problem also becomes entangled with questions of appeal finality, where a variety of answers have been given. See 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.1.

Magistrate Judge Judith Guthrie also has written about Rule 15(a), suggesting a different problem that arises from the practice in the Eastern District of Texas of holding hearings in prisoner civil rights cases before requiring an answer from any defendant. Many cases are dismissed without an answer being filed. But some prisoner-plaintiffs manage to continually file amended pleadings, raising new claims and joining new parties, before a dismissal can be entered. She suggests that Rule 15(a) should be amended by deleting the right to amend even once as a matter of course. As an alternative, she suggests that an amendment made as a matter of course may not add new parties or raise events occurring after the original pleading was filed. Judge Guthrie's suggestion raises the basic question whether there is any need to permit amendment even once as a matter of course. There is a fair argument that amendment should be available only by leave. This approach would encourage more careful initial pleading, supplementing Rule 11. It might permit more efficient disposition of attempted amendments by denying leave without going through renewal of a motion to dismiss and renewed consideration of the motion. Rule 15(a) still would

encourage a free approach to amendments. The drafting chore would be simple; the first sentence of Rule 15 (a) would be deleted, as would be "Otherwise" at the beginning of the second sentence.

There may be sufficient benefit from permitting amendment as a matter of course to continue some version of the present rule. As careful as we want pleaders to be, it may be thought that occasional slips are inevitable and should not be taken seriously. It also may be thought that leave to amend is so freely given that a limited right to amend simply avoids the bother of making a request that almost always would be granted. It may make sense to recognize a right to amend once as a matter of course before an adversary has pointed out a defect. It even make sense to recognize a right to amend once after an adversary has pointed out a defect. But it is difficult to understand the present distinction between pointing out a mistake by a responsive pleading, which cuts off the right to amend, and pointing it out by motion, which does not cut off the right. Although more time, expense, and strategic disclosure may be involved in framing an answer than in making a motion, it is difficult to guess why the reward should be cutting off the right to amend.

The most modest reaction, in line with Judge Martin's suggestion, would be to cut off the right to amend when a responsive motion is filed as well as when a responsive pleading is filed. It may be possible to do this clearly by adding a mere two words, "or motion," to Rule 15(a). Adopting this much of the restyled version, the first sentence would read:

> (a) Amendments. A party may amend ~~the party's~~ a pleading once as a matter of course ~~at any time~~ before being served a responsive pleading or [responsive] motion, ~~is served~~ or, if the ~~pleading is one to which no responsive pleading is permitted and the action has not yet been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served~~, action is not yet on the trial calendar, within 20 days after serving a pleading to which a responsive pleading is not permitted. * * *

There is a risk that "or motion" might not be read with "responsive," so that the right to amend would be cut off by a motion that is not addressed to the pleading as such. A motion to dismiss for lack of personal or subject-matter jurisdiction would be a familiar example. If this risk seems undue, the phrase could be "or responsive motion." A sentence or two in the Note would underscore the distinction. At the end of the sentence, "responsive pleading" remains the proper term, since a responsive motion is permitted as to any pleading.

An alternative approach would be to cut off the right to amend after 20 days or some other brief period, unless a responsive

motion or pleading is filed first:

(a) Amendments. A party may amend a pleading once as a matter of course until:

(1) a responsive pleading or [responsive] motion is served; or

(2) 20 days after the pleading is served.

As noted above, another approach would be to eliminate any right to amend as a matter of course, deleting the entire sentence.

April 1995 Minutes: Rule 15(a). Rule 15(a) establishes the right to amend a pleading to which a responsive pleading is required that endures until the responsive pleading is served. The result is that a motion to dismiss does not terminate the right to amend as a matter of course, while an answer that includes grounds that might have been advanced by motion does terminate the right to amend. It has been suggested that it is not clear why a motion and an answer should have different consequences for this purpose. The suggestion was advanced from the perspective of urging that a responsive motion should cut off the right to amend just as an answer does. Brief discussion included the observation that leave to amend is almost never denied unless the underlying claim is patently frivolous. The Committee concluded that this topic should be carried on the agenda for further discussion, including consideration of alternatives that would expand the right to amend as a matter of course, treat responsive motions in the same way as responsive pleadings are now treated, establish tighter limits on the right to amend as a matter of course, or abolish the right to amend as a matter of course.

Added variations: There are too many possible variations to attempt a comprehensive set. A really tight approach would be to limit the right to amend to 20 days after serving the pleading, without regard to the possibility of a responsive motion or pleading:

(a) Amendments. A party may amend a pleading once as a matter of course until 20 days after the pleading is served.

A more permissive approach would be to allow amendment as a matter of right until some later event. The possibilities include such events as a ruling on the sufficiency of the pleading, placing the case on the trial calendar, or dismissal of the claim addressed by the pleading:

(a) Amendments. A party may amend a pleading once as a matter of course until:

(1) a ruling on the sufficiency of the pleading;

(2) the action is placed on the trial calendar; or

(3) the claim addressed by the pleading is dismissed.

Rule 43(f): Original proposal

Rule 43(f) reads:

> **(f) Interpreters.** The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Criminal Rule 28 is highly similar.

Karl L. Mulvaney has written as chair of the Indiana Supreme Court Rules Committee to raise a question posed by Rule 43(f) and the identical provisions of Indiana Trial Rule 43(f). The judge in a small-claims court action refused to appoint a signing interpreter for a deaf plaintiff. An action has been brought in the United States District Court for declaratory and injunctive relief, claiming that the refusal violates the Americans With Disabilities Act, the Rehabilitation Act of 1973, and 42 U.S.C. § 1983.

As an initial matter, Rule 43(f) does not seem to speak clearly to this particular problem. It does not purport to prohibit appointment of an interpreter at public expense. It simply enables the court to appoint an interpreter as a matter of discretion. It might be argued that there is nothing wrong with the rule: when an external law requires appointment of an interpreter, the court can comply and can impose on the government any resulting costs as payment "out of funds provided by law." Nonetheless, the Rule is not as helpful as it would be if it said something like this:

> **(f) Interpreter.** The court may – and if required by law must – appoint an interpreter of its choosing. The court must fix [the interpreter's] reasonable compensation, to be paid from funds provided by law or by one or more of the parties as the court directs. The court may, in its discretion, tax the [interpreter's] compensation as costs.

The question of signing interpreters for the deaf, and similar questions with respect to witnesses or parties with other impairments, is touched in part by the pending proposal to amend Rule 43(a). This proposal makes it clear that testimony need not be presented "orally," but may be presented by such alternative means as writing or sign language.

The proposed Rule 43(a) does not address even the question whether the obligation to provide an interpreter for a witness lies on the witness, court, or parties. The broader question of

providing an interpreter so that a party can follow the contemporaneous testimony of all witnesses, arguments, and the like, is quite outside Rule 43(a).

The Committee cannot determine the meaning and application of federal statutes. The policies of those statutes, however, can properly influence the rulemaking process. The importance of ensuring that parties are able to understand a trial as it unfolds is undoubted. Cost is the only apparent reason for imposing the obligations of interpretation on parties or witnesses. Whether a civil rule is the best means of addressing this need is the only difficult question. Budget directions have not been the ordinary province of the rules.

A rule designed to address the need for interpreters without regard to the possible requirements of federal statutes might look like this:

> **(f) Interpreter.** The court must appoint an interpreter of its choosing if needed to enable the court [or jury] to understand the testimony of a witness or to enable a party to understand the court's proceedings. The court must fix [the interpreter's] reasonable compensation, to be paid as the court directs from funds provided by law, by the witness, or by one or more of the parties. The court may, in its discretion, tax the [interpreter's] compensation as costs.

Should a rule amendment be pursued, efforts should be made to coordinate with at least the Criminal Rules Committee. The Bankruptcy Rules and Evidence Rules Committees also should be involved unless they prefer to cede to the Civil and Criminal Rules Committees.

April 1995 Minutes, Rule 43(f). Rule 43(f) provides that a court may appoint an interpreter, but does not address the question whether there are circumstances in which a court should be required to appoint an interpreter. An interpreter may be necessary not only to enable the trier of fact to understand a witness, but also to enable a party to understand a witness. It has been suggested that appointment of an interpreter may be required by the Americans With Disabilities Act, the Rehabilitation Act of 1973, or more general principles of due process. The Committee concluded that before considering these questions further, an effort should be made to find out more about present practices that may supplement the bare text of Rule 43(f). The topic will remain on the agenda for consideration at a future meeting.

New Information: Rule 43(f). The Committee on Court Administration and Case Management has been working on expansion of interpreter services, working from the foundations provided by 28 U.S.C. §§ 1827 and 1828. A memorandum from John Rabiej and excerpts from a

Committee report are attached. Legislation also has been introduced dealing with this topic. It is not clear whether the Committee proposals or legislation will address all of the related problems. The initial focus seems to be on providing interpreters for the hearing-impaired. The questions of other impairments that may impede effective communication seem to have remained on the periphery during the early stages, but have been recognized and may come to the fore soon.

Because this subject is being addressed by another Judicial Conference Committee, which already has gathered much useful information, it may be best to suspend further consideration of Rule 43(f) pending completion of work by the Judicial Conference and, perhaps, Congress.

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

August 14, 1995

MEMORANDUM TO PROFESSOR EDWARD H. COOPER

SUBJECT: *Materials Regarding Interpreters*

At its last two meetings, the committee considered proposed amendments to Rule 43(f) that would require the appointment of an interpreter by the court under certain circumstances. (Excerpts from the last two meetings on Rule 43 are attached.) As promised, I am sending to you a copy of our regulations, including interim regulations on the subject.

The Committee on Court Administration and Case Management (CACM) also has been studying this subject. It is part of their responsibility under court administration. At its September 1994 session, the Judicial Conference approved CACM's recommendation to seek amendment of the *Court Interpreters Act*, 28 U.S.C. 1827 to remove the prohibition on the use of appropriated funds to provide sign language interpreters to hearing impaired parties and witnesses in all court proceedings. The recommendation is included in the Judiciary's Improvement bill. (A copy of the bill is attached.)

Meanwhile, the judiciary is studying extending the *Americans with Disabilities Act* to the courts. The Chief Justice must submit a report to Congress by December 31, 1996. CACM apparently is recommending that the judiciary adopt a policy to provide "accommodations to persons with communications disabilities in the same manner as provided by state and local courts under the *Americans with Disabilities Act*," before the coverage of the *Disabilities Act* is extended to the courts. CACM also is recommending that it be authorized to develop written guidelines to implement this policy, once adopted by the Conference. (An excerpt of its report on the subject is attached.)

John K. Rabiej

Attachments

cc: Honorable Patrick E. Higginbotham

Insert

SERVICES TO THE HEARING-IMPAIRED AND OTHER PERSONS WITH COMMUNICATION DISABILITIES

At its September 1994 session, the Judicial Conference approved the Court Administration and Case Management Committee's recommendation to seek an amendment to the Court Interpreters Act, 28 U.S.C. § 1827, to remove the prohibition on the use of appropriated funds to provide sign language interpreters to hearing-impaired parties and witnesses in proceedings not initiated by the United States. (JCUS-SEP 94, p. 50). The Conference resolution noted that this would provide judicial officers with the discretion to decide what services to provide to hearing-impaired parties and witnesses, subject to the availability of appropriated funds. Appropriate language has been included in the court improvements bill, "Federal Courts Improvement Act of 1995," HR 1989, 104th Congress. The Committee now believes the judiciary should go further, and set a policy and guidelines for providing sign language interpreters and similar accommodations to all court participants who need them.

In response to the strong concern expressed by Congress and the hearing-impaired community, and other persons with disabilities that impede their communications, the Committee considered whether the discretionary policy was too limited.

The Committee recommends, in order to continue the steady progression of Judiciary initiatives in this area, that the Judicial Conference adopt a new access policy that would provide the same level of services to the deaf and other persons with communication disabilities as is provided by state and local courts under the American with Disabilities Act. The financial costs of such a policy do not appear to be large.

The Judicial Conference has long been on record as supporting full access to judicial proceedings by all segments of the disabled community. In particular, the latest revisions of the *United States Courts Design Guide* approved by the Judicial Conference adopted interim final rules that for the first time impose specific accessibility requirements in courtrooms and related Judiciary facilities (JCUS-SEP 94, p. 68).

The *Design Guide* notes: "People with mobility limitations are not the only group covered by barrier-free access criteria. People with sight, speech or hearing disabilities are also to be accommodated." Id. at 2-79a (1994 ed.) Thus, the *Design Guide* imposes new requirements for communication access: "Hearing-impaired persons also must be accommodated in courtrooms. In some cases a sound-reinforcement system will be sufficient; in others, a signer will be necessary for proceedings involving deaf defendants and witnesses." Id. at 3-30.

R 43(F) insert -2-

The Judiciary's policy for providing for the needs of those with communications disabilities should keep pace with the policy set forth in the *Design Guide*. Administrative Office staff have received correspondence stating the difficulties that hearing-impaired people have in gaining access to the federal courts. Congress is also aware of the hearing-impaired community's problems. Senator John McCain (R., Arizona) within the last year has drafted two different versions of legislation that would require the judiciary to greatly expand the services provided to individuals who are deaf or hearing-impaired or otherwise disabled.

The Congressional Accountability Act of 1995, Pub. L. No. 104-1, requires the Judiciary to study and make recommendations to Congress on the possible extension of 11 employment and workplace protection statutes, including the Americans with Disabilities Act (ADA), to the judicial branch. The Judiciary's report, to be submitted by the Chief Justice, is due by December 31, 1996. Accordingly, even if Senator McCain's proposed legislation does not advance, submission of the Judiciary's report will focus close congressional attention upon the extent of the Judiciary's compliance with the spirit if not the letter of the ADA. Senator McCain's proposals are not being prepared in a vacuum, of course, as they are motivated by the types of enhanced services that the ADA has required state and local courts to provide to court participants since going into effect in January 1992.

The Committee recognizes costs will be involved, but these appear to be minimal. While the requirements imposed on state and local courts by the ADA appear sweeping, it is interesting--and no doubt revealing--that no hard data on the costs of

R 43(F) insert-3-

meeting such requirements has become available, even after more than three years of implementation. The lack of hard cost data is an indication that state and local courts are not finding it a financial burden to implement these services.

At the federal level courts do not collect statistical data on the frequency of use of sign language interpreters in proceedings not initiated by the United States. However, it does not seem that the number of occasions would be large. The number of sign language interpreters for defendants in court proceedings initiated by the United States totaled less than 100 in each of the last three fiscal years. It is hard to predict the amount of usage under the proposed recommendation, because interpreters would be provided for all hearing-impaired parties, attorneys, and spectators, and in all types of cases, but the increase in usage would not seem likely to be dramatic. At the average cost of $250 per day, the current budget impact for sign language interpreters is approximately $25,000 per year. Expecting a slight increase in the use of these interpreters, as well as the provision of other types of accommodations, such as assistive listening devices and real time transcription, the Committee recommends that $100,000 be set aside for FY 1996 to implement this policy. The budget impact is not great compared to the service the judiciary would be providing.

As to particulars, the Committee believes the most immediate need is to improve access by the deaf and hearing-impaired; however, other needs may arise, such as improving access to those with visual impairments, or other steps may be desirable, such as having individual courts undergo an ADA self-analysis. Accordingly, it is recommended that the Judicial Conference adopt a policy with both general and specific

components. The Administrative Office could be directed to develop detailed guidelines implementing this latter policy, and to prepare other related guidelines that experience dictates are needed. One guideline could establish procedures for responding to questions or complaints regarding the policy. The Committee recommends that the guidelines be subject to review and approval by this Committee, but would not have to be approved by the full Judicial Conference unless the Committee felt such review was necessary.

Recommendation: That the Judicial Conference:

a. Adopt as a policy that all Federal courts provide accommodations to persons with communications disabilities in the same manner as provided by state and local courts under the Americans with Disabilities Act;

b. Require courts to provide, at Judiciary expense, sign language interpreters or other appropriate auxiliary aids to deaf and hearing-impaired participants in Federal court proceedings in accordance with guidelines prepared by the Administrative Office; and

c. Direct the Administrative Office, under the supervision and subject to the approval of the Court Administration and Case Management Committee, to develop other appropriate written guidelines to implement the Judicial Conference's policy.

R 43(f) insert -5-

Rule 56(c)

The first two sentences of Rule 56(c) establish this procedure for summary judgment motions: "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Rule 5(b) provides that service by mail is complete upon mailing. Read together, the two rules seem to permit a party opposing a motion for summary judgment to wait until the day before the hearing to mail affidavits to the moving party, confidently expecting that the moving party will not receive the affidavits before the hearing.

One response to this bizarre possibility has been local rules governing the time for making summary judgment motions and responding to them. Local Rules in the Central District of California, for example, have required that the motion be filed 21 days before the hearing, or 24 days if service is by mail. The opposition must be filed 14 days before the hearing, and a reply must be filed 7 days before the hearing. This schedule makes it possible for the court and all counsel to be prepared for the hearing, and also may make it possible to determine that a hearing is not required. But the schedule seems inconsistent with the Rule 56(c) provisions that the motion must be served at least 10 days before the hearing, and that opposing affidavits may be served up to the day before the hearing. In Marshall v. Gates, C.D.Cal.1993, 812 F.Supp. 1050, reversed 9th Cir.1995, 44 F.3d 722, the district court refused to consider opposing papers filed after the local deadline, noting that service had been by mail and that moving counsel had not seen the opposing papers at the time of the hearing. The papers included both affidavits and many other forms of submission. In its first opinion, C.A.9th, Nov. 8, 1994, No. 93-55022, the Ninth Circuit reversed on the ground that as applied to affidavits the local rule was invalid because of conflict with Rules 5(b) and 56(c). After another Ninth Circuit judge pointed out that every district in the Circuit has rules similar to the Central District rules, the court withdrew its opinion. The new opinion finds the local rule valid on the ground that Rule 56(c)

> does not unconditionally require a district court to accept affidavits up to the date set for hearing on the motion * * *. Rather, the rule allows district courts to adopt procedures pursuant to which the nonmoving party may oppose a motion prior to a hearing date. Local Rule 7.6 in no way eliminates this opportunity; instead it places a condition on that right.

The initial Ninth Circuit opinion was called to the attention of this Committee by several distinguished judges. Even after the revision, the problem remains. Clarification of Rule 56(c) may be in order.

One model falls ready to hand. The package that amended Rule 50 originally included a complete revision of Rule 56 that integrated it with Rule 50. Although the Judicial Conference rejected the Rule 56 revision, attention apparently focused on the perception that the revision simply restated present practice - depending on the eyes of the beholders, this character made the revision either unnecessary or an unnecessary confirmation of undesirable practice. There is no reason to suppose that anything particular was found amiss in the provisions of proposed Rule 56(c), which would not only create a realistic set of time limits but also impose other requirements of specificity that should help ensure good practice.

The Rule 56(c) proposal, as drafted, looked like this:

(c) Notion and Proceedings Thereon. A party may move for summary adjudication at any time after the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response thereto.

> (1) Without argument, the motion shall (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.
>
> (2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying with respect thereto the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing such facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be deemed to have admitted such fact.

(3) If a motion for summary adjudication or response thereto is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

(4) Arguments supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion for summary adjudication or response thereto or at such other times as the court may permit or direct.

Apart from the reference to "summary adjudication," taken from the other portions of the rule, these provisions could be cast in current style conventions and provide a strong framework for regulating summary judgment practice. Some questions, however, may deserve further consideration. This proposal does not include any explicit relation between the time for response and hearing; perhaps it can be assumed that the moving party will set a hearing date beyond the 30-day period permitted for responding. The initial timing provision, allowing a motion to be made only after a reasonable opportunity for discovery, may invite unnecessary squabbling; Rule 56(f) may be sufficient protection. A simplified version of Rule 56(c) might look something like this:

(c) Motion and Proceedings. A party may move at any time for summary adjudication against a party that has appeared. A party opposing the motion may serve and file a response within 30 days after the motion is served.

(1) Without argument, the motion must:

(A) describe the claims, defenses, or issues as to which summary adjudication is warranted;

(B) specify the adjudication sought;

(C) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute, citing the particular pages or paragraphs of [stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the assertions.

(2) Without argument, a response must:

(A) specify any summary adjudication that the

party agrees is warranted;

(B) (i) respond to the facts asserted under paragraph (1)(C), and (ii) recite in separately numbered paragraphs any additional facts precluding summary adjudication, citing the particular pages or paragraphs of [stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the response;

(3) The court may accept the truth of a fact asserted as required by paragraph (1) (C) if a response is not made as required by paragraph (2)(B).

(4) A party must append to a motion or response [the pertinent parts of] any materials cited that have not been filed.

(5) The court may permit a party to supplement the materials supporting a motion or response.

(6) A party must submit its contentions as to the controlling law or the evidence respecting asserted facts in a separate memorandum filed with the motion or response or at the time the court directs.

This form does not set a time for hearing, nor a time that relates the time of the response to the time for hearing. Since 30 days are allowed for response, there is an indirect constraint – the moving party must allow at least 30 days for the hearing, and should allow more if it wishes an opportunity to consider the response before the hearing. It is possible that so many lawyers will find ways to behave foolishly that additional constraints should be provided. A local rule requiring that the motion be made at least x days before the hearing date would not be inconsistent with this rule. Local rules may make more sense than an attempt at greater detail in the national rule.

April, 1995 Minutes, Rule 56(c). Rule 56(c), on its face, establishes implausible time periods for notice of a summary judgment and response to the motion. Many courts have adopted local rules establishing more sensible periods, and also providing procedures that require specification of the facts claimed to be established beyond genuine issue and identification of supporting materials. It may be time to adopt uniform national standards. The Committee concluded that this topic should be set for further discussion on the agenda for the fall meeting.

Rule 73 (b)

This suggestion arises from a remark made by Judge Easterbrook during the January, 1995 meeting of the Standing Committee. The discussion topic was proposed interim rules for jury trials in bankruptcy courts. He observed that Rule 73(b) is a trap because it happens that after all original parties have consented to civil trial before a magistrate judge, a new party is joined and matters proceed before the magistrate judge without getting the consent of the new party. He asserts that any resulting judgment is void. And so the Seventh Circuit rules. See, e.g., Mark I, Inc. v. Gruber, 7th Cir.1994, 38 F.3d 369, resting in Jaliwala v. U.S., C.A.7th, 1991, 945 F.2d 221. (In Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc., 7th Cir. 1995, 31 Fed.Rules Serv.3d 754, the court ruled that a successor to a party who consented to a magistrate-judge trial is bound by the consent.)

This problem could be cured by adding one or two new sentences at the end of the first paragraph of Rule 73(b). on the theory that it makes sense to incorporate current style conventions when a substantive change is made to a rule, the new material is set out here at the end of the introductory paragraph of the Style Committee draft. It could as easily be added to the end of the first paragraph of current Rule 73(b).

(b) Consent Procedure. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must [within the period set by local rule] jointly or separately file an election consenting to this exercise of authority. <u>If a new party is added after all earlier-joined parties have consented, the new party must be notified of the consents and given an opportunity to consent. If a new party does not consent [within the period set by local rule], the district judge must vacate the reference to the magistrate Judge.</u>

(1) A district judge or magistrate judge may be informed of a party's response to the clerk's notification only if all parties consent to referring the case to a magistrate judge.

(2) A district judge, magistrate judge, or other court official may again advise the parties of the availability of a magistrate judge, but, in so doing, must also advise the parties that they are free to withhold consent without adverse substantive consequences.

(3) For good cause - either on the judge's own

initiative or when a party shows extraordinary circumstances - the district judge may vacate a reference to a magistrate judge under this rule.

The style draft deletes the present reference to time limits set by local rule. Presumably local rules setting time limits remain appropriate as not inconsistent with the rule. If the reference seems a useful warning, it can be restored readily.

The Rule 73(b) proposal was in the materials for the April 1995 meeting, but was not brought up for discussion. There is no burning need to consider this question. When time permits, however, it may be wise to take a look.

Rule 81(c)

Rule 81(c). It has been pointed out that Rule 81(c) continues to refer to the "petition" to remove an action from state court. The procedure for removal has been changed from a petition to a notice of removal. The Committee agreed that revision is appropriate, but also concluded that minor technical matters of this sort may better be accomplished by legislation than by the lengthy Rules Enabling Act process. It was concluded that the appropriate procedure is to accumulate proposals of this sort, to be submitted to the Standing Committee for recommendations to Congress.

Copyright Rules of Practice

An inquiry to the Rules Committee Support Office about the status of the Rules of Practice for Copyright cases has revealed a surprising state of affairs that merits prompt attention. The most difficult task will be to devise a suitable means of considering the fate of these Rules. Even a cursory preliminary scan of the Rules shows that something should be done, and suggests strongly that the Advisory Committee should seek special help.

The starting point is Civil Rule 81(a)(1) , which provides that "These rules * * * do not apply to * * * proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

The Copyright Rules are set out in 17 U.S.C.A. following § 501, at page 546 of the current volume. Rule 1 says:

> Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright," including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.

This Rule, and the remaining rules, were adopted under an enabling provision in the 1909 Copyright Act that was repealed in 1948 on the ground that it was superseded by the general Rules Enabling Act, 28 U.S.C. § 2072. Former Rule 2 established a special rule of pleading that required that copies of the infringed and allegedly infringing works accompany the complaint; it was rescinded in 1966 on the ground that it was incompatible with the general pleading spirit of the Civil Rules. The remaining Rules 3 to 13 govern pretrial seizure of allegedly infringing "copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright."

There are many reasons to be embarrassed by the persistence of these rules without change, apart from rescission of Rule 2 in 1966. The initial reference to the 1909 Act, which has been superseded by the 1976 Act, is embarrassment enough; such incidentals as reference to the Civil Rules governing appeals, rather than the Appellate Rules, add an additional twist. U.S.C.A. sets out the Notes of the Advisory Committee on Rules after each rule, without any date; they may come from 1966, since they refer to Copyright Rules 3 to 13. At any rate, the Notes say, after each rule:

> "The Advisory Committee has serious doubts as to the desirability of retaining Copyright Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal

Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief. However, in view of the fact that Congress is considering proposals to revise the Copyright Act, the Advisory Committee has refrained from making any recommendation regarding Copyright Rules 3-13, but will keep the problem under study.

The seizure procedures established by these Rules seem to be inconsistent with the discretionary impoundment procedures established by 17 U.S.C. § 503(a).

More important, the procedures established by these Rules seem to be inconsistent with due process requirements that have evolved since the Rules were adopted. The plaintiff files an affidavit stating the location and number of things to be seized, and a bond. "Upon the filing * * * the clerk shall issue a writ directed to the marshal * * * directing the said marshal to forthwith seize and hold * * *" the infringing items. (Rule 4) Apart from a procedure for objecting to the sufficiency of the bond, the defendant may apply for return with an affidavit of facts tending to show the articles seized do not infringe (Rule 9). "Thereupon the court in its discretion, and after such hearing as it may direct, may order such return" on the defendant's filing of a bond (Rule 10).

A strong statement of the inconsistency of the supplemental rules with § 503(a), and the probable unconstitutionality of several aspects of the rules, is provided by Judge Sifton in Paramount Pictures Corp. v. Doe, E.D.N.Y.1993, 821 F.Supp. 82. Judge Sifton suggests that temporary restraining order procedures may provide the most secure analogy for impoundment under § 503(a). This suggestion may be a promising lead to further inquiry.

Roberta Morris tells me that copyright practitioners universally assume that the Civil Rules apply in copyright cases, nothwithstanding the antique reference to the 1909 Act in Rule 1. It is assumed that the supplemental seizure rules apply to actions under the 1976 Act. They do not seem to be used often.

Thorough knowledge of the theory and practicalities of copyright practice must be brought to bear on this topic. Some means must be found to secure detailed, neutral, and expert advice. There may be one or more copyright law organizations or committees that can serve this need. If the conclusion is that there is no longer any need for supplemental rules, there will be no drafting chore. If there is a need, it must be thoroughly understood before drafting can begin.

April 1995 Minutes, Copyright Rules of Practice. The Copyright Rules of Practice have not been considered since 1966. In 1966,

the Committee expressed doubts about "the desirability of retaining Rules 3-13 for they appear to be out of keeping with the general attitude of the Federal Rules of Civil Procedure * * * toward remedies anticipating decision on the merits, and objectionable for their failure to require notice or a showing of irreparable injury to the same extent as is customarily required for threshold injunctive relief." It refrained from acting at that time because Congress had begun the deliberative process that led to enactment of the 1976 Copyright Act. The 1976 act includes discretionary impoundment procedures, 17 U.S.C. §503(a), that seem to be inconsistent with the Rules of Practice. These Rules are unfamiliar territory to present members of the Committee. The topic will be carried forward on the agenda while additional means of information are sought.

MISCELLANEOUS

Recycled Paper, Double-Sided Copying

Christopher D. Knopf, Esq., has suggested revising the Civil and Appellate Rules to require that all papers filed with the court be on recycled paper, and that double-sided copying be used. His letter to the Committee is attached. The same proposals are developed at greater length in his article, Closing the Loop: Requiring Double-Sided Copying and Non-Chlorine Bleached Recycled Paper for Federal Court Papers, 1995 Wis.L.Rev. 345-462.

The Appellate Rules Advisory Committee has considered both of these proposals. It published a double-sided copying proposal for public comment. The comments received persuaded it not only to abandon the proposal, but by vote of 7 to 1 to revise proposed Appellate Rule 32 to prohibit double-sided copying for 8½" x 11" format papers. The recycled paper proposal was briefly considered and failed of adoption.

As laudable as the purposes pursued by this proposal may be, there are several reasons for caution. Mr. Knopf seeks to provide reassurances about the availability and cost of recycled paper and the ready availability of double-sided copying to most members of the profession. The reassurances become somewhat attenuated when addressed to the final stage of the proposal, being cast in terms of a prediction that if federal courts adopt a requirement that non-chlorine bleached recycled paper be used, sufficient demand will be generated to elicit a suitable supply. If the Committee were to be careful, it would seek some better information on this score at least, and perhaps also on the more general questions of environmental impact.

A different range of questions arise from the role of the rulemaking process. Requirements adopted for the well-working of the courts are easily justified. It is not as easy to justify using the Enabling Act process to pursue other social goals that are more obviously within the competence of legislative and administrative agencies.

There also is the question whether requirements of this sort should be added to the already considerable bulk of the Civil Rules. The Rules have not been used to address minutiae of form. The proposed requirements may raise similar cautions. Adoption and amendment of the Civil Rules is a lengthy process that demands the attention of many institutions. Recent experience with requirements for filing by facsimile transmission suggests that there are better ways to address such questions.

The question of enforcement also must be reckoned with. The proposal is that clerks return filings that do not comply with the rule, but that the date of the noncomplying filing be used for any

corrected filing. This means of enforcement may be reasonable, but it generates burdens of its own.

In all, this is not a proposal suited for immediate adoption. It may not be a proposal suited for action by this Committee. As a matter of institutional competence, perhaps some other body should address these questions.

Miscellaneous: Privilege, Loser Pays — Civil Rights

Senator William S. Cohen forwarded to Peter McCabe a letter from John F. McDonough, Councilor and Chair of the Legislative Committee of Portland, Maine. Mr. McDonough advances two suggestions. Each seems to be outside the scope of the Civil Rules Advisory Committee.

The first proposal is that there should be an evidentiary privilege protecting against discovery of police internal affairs investigation reports. This proposal is better considered by the Evidence Rules Advisory Committee. The history of privilege in the Evidence Rules is well known. 28 U.S.C. § 2074(b), reflecting the difficulties encountered on adoption of the Evidence Rules, provides that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."

The other proposal is that unsuccessful plaintiffs in actions under 42 U.S.C. § 1983 or the Americans with Disabilities Act should be required to pay the reasonable attorney fees incurred by defendants. Recognizing that some plaintiffs will be unable to satisfy this obligation, the proposal would add a provision that the loser's attorney pay any part that the plaintiff cannot pay. This topic seems beyond the scope of the Rules Enabling Act. In any event, Congress has addressed the question of attorney fees in civil rights actions, and the field should be left for action by Congress.

CHRISTOPHER D. KNOPF
ATTORNEY AT LAW
1623 Compton Road
Cleveland Heights, Ohio 44118
(216) 932-5317

September 20, 1995

Peter G. McCabe, Secretary
Judicial Conference of the United States
Committee on Rules of Practice
and Procedure
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Practice to Reduce the Adverse Impact of the Practice of Law on the Environment

Dear Mr. McCabe:

The purpose of this letter is to propose the following amendments to the federal rules of practice to reduce the adverse impact of the practice of law on the environment:

1. Effective January 1, 1997, require the use of recycled paper for pleadings, motions, and other federal court papers and permit the double-sided copying of these documents;

2. Effective January 1, 2001, require the double-sided copying of federal court papers; and

3. Effective January 1, 2003, require the use of non-chlorine bleached recycled paper for federal court papers.[1]

These requirements would not apply to dividers or original exhibits.

The proposals would amend Rule 10 of the Federal Rules of Civil Procedure and Rule 32 of the Federal Rules of Appellate Procedure. The Committee on Rules of Practice and Procedure should refer these proposals to the Advisory Committee on Civil Rules and the Advisory Committee on Appellate Rules. Appendix 1 accompanying this letter contains the full text of these proposals. These proposals are analyzed in detail in *Closing the Loop: Requiring Double-Sided Copying and Non-Chlorine Bleached Recycled Paper for Federal Court Papers*, 1995 Wisconsin Law Review 345 (1995), a copy of which is also enclosed.

In an era where attorneys are much maligned, these proposals reaffirm the commitment of the legal profession to serving and responding to the needs of society. These proposals

[1]As the judicial system responds to technological advances, electronic filings and document exchange will likely reduce the need for documents to be printed on paper. However, court documents are likely to be produced on paper for the foreseeable future and, in light of this, these proposals aim at reducing the adverse environmental impact of paper usage by the legal profession without eliminating the use of paper.

address the environmental degradation caused by the legal profession's use of paper, promote long-standing federal policies, yet would not unduly burden the practicing bar or the judiciary.

These proposals build upon rules or statutes requiring the use of recycled paper for court filing in California, Colorado, Florida, Montana, New York, and Tennessee and administrative filings with the Illinois Pollution Control Board to devise rules that are effective and practical. To promote the use of conforming paper, the proposals require that each document submitted to a court or served on another party bear a statement indicating that the document is printed on conforming paper. The clerk of court would return a document not bearing the certification statement, but the filing date would remain the date of filing the original, nonconforming document; thus, the rights of parties would not be prejudiced by initial noncompliance with these form requirements.

The discussion below further explains these proposals. Parts I and II identify the environmental problems addressed by the proposals and the federal policies which the proposals promote. Part III demonstrates that the proposals will not impose an undue burden on the practicing bar or the judiciary. Part IV explains the meaning of the terms "recycled paper" and "non-chlorine bleached recycled paper." Part V demonstrates that the proposals promote the ethical traditions of the legal profession.

I. ADOPTION OF THE PROPOSALS WILL REDUCE THE ENVIRONMENTAL DEGRADATION CAUSED BY THE PRODUCTION AND DISPOSAL OF PAPER.

A. The Use of Recycled Paper and the Double-Sided Copying of Documents Will Reduce the Need for the Disposal of Solid Waste Through Landfilling and Incineration.

Paper constitutes approximately thirty-eight percent of municipal solid waste, making it the largest single component of the waste stream.[2] From 1960 to 1990 the amount of municipal solid waste generated in the United States more than doubled.[3] The use of recycled paper and the double-sided copying of documents reduce the need for the disposal of solid waste through landfilling and incineration and the environmental degradation associated with these disposal methods. A study of municipal solid waste landfills found that nearly ninety percent had groundwater contamination.[4] Municipal solid waste landfills compose more than twenty percent of the sites listed or proposed for listing on the National Priorities List of most-contaminated Superfund sites.[5] Incinerators emit an array of toxic substances into the air, thereby

---

[2]Franklin Assoc., *Characterization of Municipal Solid Waste in the United States: 1992 Update* ES-4 (1992).

[3]*Id.* at ES-3. Chief Justice Rehnquist has observed: "Generating solid waste has never been a problem. Finding an environmentally safe disposal sites has." *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 114 S. Ct. 1345, 1356 (1994) (Rehnquist, C.J., dissenting).

[4]53 Fed. Reg. 33,314, 33,319 (Aug. 30, 1988).

[5]*Id.*

contributing to air pollution.[6] In addition, incineration reduces the amount of waste by only two-thirds, leaving behind an ash containing a multitude of toxic constituents.[7]

B. The Use of Recycled Paper and the Double-Sided Copying of Documents Will Conserve Natural Resources.

The production of paper from virgin timber consumes vast quantities of natural resources. Twenty-seven percent of the domestic timber harvest is used for producing paper.[8] The production of one ton of pulp from virgin timber requires sixty percent more energy than the production of one ton of pulp from recovered paper.[9] The use of recycled paper and the double-sided copying of documents will reduce the amount of natural resources consumed by the legal profession's use of paper. It is estimated that, on average, each of the 800,000 attorneys in the United States uses one ton of paper each year.[10] This paper is used for filing annually more than 265,000 cases with federal district courts and nearly 72,000 cases with federal appellate courts.[11]

C. The Use of Non-Chlorine Bleached Recycled Paper Will Reduce the Discharge of Chlorinated Organic Compounds That Cause Cancer and Reproductive Abnormalities.

Requiring the use of non-chlorine bleached recycled paper will address the problems associated with the discharge of chlorinated organic compounds from paper mills. In 1990, pulp and paper mills in the United States used 1.4 millions tons of chlorine to bleach paper, resulting in the discharge of a thousand chlorinated organic compounds, including dioxins.[12] Dioxins are carcinogenic and can lead to reproductive abnormalities, including feminization in certain animals, which happens because these substances can imitate naturally occurring hormones.[13]

---

[6]56 Fed. Reg. 5488, 5490 (Feb. 11, 1991).

[7]*See, e.g., Environmental Defense Fund v. Chicago*, 948 F.2d 345, 346 (7th Cir. 1991) (thirty-two of thirty-five samples of ash taken from an incinerator over a seven-year period exhibited the toxicity characteristic of a hazardous waste), *vacated,* 113 S. Ct. 486 (1992), *aff'd,* 985 F.2d 303 (7th Cir. 1993), *aff'd,* 114 S. Ct. 1588 (1994).

[8]Claudia F. Thompson, *Recycled Papers: The Essential Guide* 10 (1992).

[9]*Id.* at 65-66.

[10]*See* Clay Hathorn, *How to Recycle, Cut Waste*, A.B.A.J. 33 (Apr. 1991).

[11]*1992 Admin. Office of the U.S. Courts, Federal Court Man. Stat.* 28, 168 (1993).

[12]Cong. Rec. E2006 (daily ed. Aug. 5, 1993) (statement of Rep. Bill Richardson).

[13]See Janet Roloff, *The Gender Benders: Are Environmental Hormones Emasculating Wildlife?*, Science 24-25, 27 (Jan. 8, 1994); Bette Hileman, *Dioxin Toxicity Research: Studies Show Cancer, Reproductive Risks*, Chem. & Engineering News 5 (Sept 6, 1993); Richard M. Sharp & Niels E. Skakkebek, *Are Oestrogens Involved in Falling Sperm Counts and Disorders of the Male Reproductive Tract?*, 341 The Lancet 1392, 1392-95 (1993). Testimony of Dr. Theo Colborn, Sr. Fellow with the W. Alton Jones Found., Before the Senate Oversight Comm. on Gov't. Affairs 3 (Apr. 7, 1992); *Proceedings of the Roundtable on Contaminant-Caused Reproductive Problems in Salmonids* (Int'l Joint Comm'n ed., 1990).

II. ADOPTION OF THE PROPOSALS WILL PROMOTE LONG-STANDING FEDERAL POLICIES.

A. The Recycling and Reduction of Solid Waste Are Goals of the Federal Government.

Requiring double-sided copying and use of recycled paper for federal court papers promotes long-standing federal policies to reduce and recycle solid waste. In enacting the Resource Conservation and Recovery Act of 1976 ("RCRA"),[14] Congress called for the development of alternatives to landfills and provided for the procurement of recycled paper by the federal government to the maximum extent practicable.[15] The U.S. Environmental Protection Agency ("EPA") has established a hierarchy of solid waste management that gives priority to reducing and recycling solid waste over landfilling and incineration.[16] The proposals also promote the objectives of Executive Order 12,873 issued by President Clinton in 1993 ("1993 Executive Order"), which requires federal agencies to purchase only recycled paper and requires parties operating under federal government contracts and grants to print their documents on recycled paper.[17] The 1993 Executive Order also requires federal agencies and these private parties to double-side copy their documents.[18]

B. Eliminating the Discharge of Chlorinated Compounds Is a Goal of the Federal Government.

Requiring documents to be printed on non-chlorine bleached recycled paper is a tangible means of achieving the objectives of the Federal Water Pollution Control Act ("Clean Water Act")[19] and the Great Lakes Water Quality Agreement of 1978 ("Great Lakes Agreement")[20] between the United States and Canada. The Clean Water Act established a national goal of eliminating by 1985 the discharge of water pollutants, such as dioxins and other chlorinated organic compounds.[21] By stimulating a demand for paper that is not bleached with chlorine, the proposals provide a tangible step toward achieving this goal of the Clean Water Act that Congress intended to be fulfilled a decade ago.

---

[14]Pub. L. No. 94-580, 42 U.S.C. § 6901 *et seq.* (1988).

[15]RCRA § 6002(i)(1); 42 U.S.C. § 6962(i)(1).

[16]EPA, *Decision-Makers Guide to Solid Waste Management* iii, 3-4 (1989).

[17]58 Fed. Reg. 54,911 (Oct. 22, 1993).

[18]58 Fed. Reg. 54,915.

[19]Pub. L. No. 92-500, 33 U.S.C. § 1251 *et seq.* (1988).

[20]Great Lakes Water Quality Agreement of 1978, Nov. 22, 1978, U.S.-Can., 30 U.S.T. 1383 [hereinafter Great Lakes Agreement].

[21]Clean Water Act § 101(a); 33 U.S.C. § 1251(a) (1988).

The Great Lakes Agreement provides that the discharge of "persistent toxic substances,"[22] which include chlorinated compounds, shall be "virtually eliminated"[23] and that the policy to achieve this objective is "zero discharge."[24] Implementing the Great Lakes Agreement is a major focus of the International Joint Commission ("IJC"), a United States-Canadian organization. With respect to the use of chlorine, the IJC unambiguously has called for the United States and Canada to "develop timetables to sunset the use of chlorine and chlorine-containing compounds as industrial feedstocks."[25] Requiring the use of non-chlorine bleached recycled paper will help create a market for paper whose production process is consistent with the Great Lakes Agreement and the efforts of the IJC.

III. THE PROPOSALS WILL NOT IMPOSE AN UNDUE BURDEN ON THE PRACTICING BAR OR THE JUDICIARY.

Some members of the legal profession may oppose these proposals simply because they are another "unfunded mandate" by the federal government. As a solo practitioner, I am sensitive to the demands that businesses face. However, the proposals put forth in this letter are not unduly burdensome, particularly when considered in light of the strong public policy objectives which they advance and the ethical tradition of the legal profession. The discussion below examines practical issues associated with the proposals to demonstrate that they are not unduly burdensome.

A. The Proposals Build Upon the Experiences at the State Level to Devise Rules That Are Effective and Practical.

Rules or statutes requiring the use of recycled paper for court filings have been adopted in California, Colorado, Florida, Montana, New York, and Tennessee.[26] An administrative agency in Illinois, the Illinois Pollution Control Board ("PCB"), has adopted similar requirements for filings with it.[27] Appendix 4 contains letters discussing the implementation of these requirements in Florida, Montana, New York, and the Illinois PCB. The proposals put forth in this letter build upon the experiences at the state level to devise rules that are effective and practical.

The state provisions are of two general types: those that require parties to certify that the document is printed on recycled paper (New York, Illinois PCB) and those that do not require such certification (California, Colorado, Florida, Montana, Tennessee). These proposals elect to follow the approach of New York and the Illinois PCB and require that each document

---

[22]"Persistent toxic substance" means "any toxic substance with a half-life in water of greater than eight weeks." Great Lakes Agreement, annex 12, § 1(a).

[23]*Id.* art. II.

[24]*Id.* annex 12, § 2(a)(ii).

[25]Int'l Joint Comm'n, *Sixth Biennial Report on Great Lakes Water Quality* 28-30 (1992).

[26]Cal. R. Ct. 40, 44, 201, 501; Colo. Rev. Stat. § 13-1-133 (1993); Colo R. Civ. P. 121, § 1-20; Fla. R. Jud. Admin. 2.055(a); Mont. Unif. Dist. Ct. R. 1(b)(5); Mont. R. App. P. 27(a); N.Y. R. Ct., 1st Dep't § 600.10(e); Tenn. Code Ann. § 20-6-103 (1994).

[27]Ill Admin. Code tit. 35, § 101.103(d) (1994).

submitted to a court or served on another party bear the following statement on the cover of appellate briefs and appendices, or on the signature page or certificate of service for all other documents: "This document is printed on recycled paper." Effective January 1, 2003, this certification statement would read: "This document is printed on non-chlorine bleached recycled paper." Requiring documents to bear such a certification statement will enhance the ability of courts to determine compliance with the requirements. Appendix 4 contains a letter from the Clerk for the Supreme Court of Montana stating that its rule, which requires the use of recycled paper, but does not provide for a certification statement, would be improved by the addition of such certification.

As is explained in Part IV of this letter, the proposals provide an express definition for the term "recycled paper." The purpose of this is to assist the practicing bar in selecting conforming paper. Appendix 4 contains a letter from the Clerk for the Supreme Court of Florida emphasizing the importance of a clear definition for the term "recycled paper."

B. Requiring the Use of Recycled Paper Will Not Impose an Undue Burden.

1. Recycled Paper Is Readily Available.

Recycled paper is readily available throughout the country. Appendix 2 lists paper mills producing recycled paper and their phone numbers.

2. The Quality of Recycled Paper Is Comparable to that of Non-Recycled Paper.

Repeated examinations of the quality of recycled paper have found that it is comparable to non-recycled paper. In adopting its rule requiring the use of recycled paper, the Supreme Court of Florida observed that the Florida Rules of Judicial Administration Committee found no discernible difference in quality between recycled and non-recycled paper.[28] Several Great Lakes states extensively tested recycled paper and found it to perform satisfactorily prior to a 1993 joint purchase of thirty million pounds of recycled paper.[29] Other studies have come to similar conclusions.[30]

3. The Cost of Recycled Paper Is Comparable to That of Non-Recycled Paper.

There is no significant difference between the price of recycled and non-recycled paper. The Supreme Court of Florida found the price of recycled and non-recycled paper to be similar

---

[28]In re *Amendments to Florida Rules of Judicial Admin.*, 609 So. 2d 465, 465 (Fla. 1992).

[29]*See* Danelle Kratzer, Wisconsin Dept. of Admin., *Recycled Paper Performance Testing in State Agency Office Equipment* (Sept. 1993) (performance study used by the Great Lakes states for purchasing recycled paper).

[30]*See, e.g.*, Dataquest, Inc., *Document Management of North America* B-46, Table 70 (Oct. 12, 1992) (survey of electronic printer users found that more than 91% of the respondents who used recycled paper were satisfied with its performance); Letter from Ms. Suzanne P. Clark, Paper Specialist for Eastman Kodak Co., to Mr. Steve Grealy, Revery Sciences (July 12, 1990) (Eastman Kodak Co. found recycled paper to perform satisfactorily in its copiers).

and that their prices seldom varied more than ten percent.[31] A 1994 national survey of paper distributors came to a similar determination, finding that when recycled paper was more expensive than non-recycled paper, the price differential was typically less than one-tenth of a penny per sheet of paper.[32] The increased expense from using recycled paper will be offset by the savings realized from decreased paper consumption through double-sided copying.

C. Requiring the Double-Sided Copying of Documents Will Not Impose an Undue Burden.

A significant portion of the legal profession already has in-house capabilities to double-side copy documents; thus, requiring the double-sided copying of documents will not unduly burden practitioners. This requirement also will not unduly burden the judiciary. In response to the September, 1994 proposal by the Advisory Committee on Appellate Rules to permit the double-sided copying of documents filed with appellate courts, commentators opposing the proposal expressed concern that highlighting double-sided-copied documents would lead to "bleed through" to the other side of the sheet, thereby destroying legibility.[33] This is a specious argument. The very summary of comments published by the Advisory Committee on Appellate Rules is double-sided copied and highlighting this document does not create legibility problems.

Commentators opposing the proposal also asserted that double-sided copying would prevent judges and clerks from using the backside of documents for notetaking.[34] This is a tenuous basis for opposing double-sided copying. The U.S. Supreme Court requires most documents submitted to it to be double-sided copied[35] and the justices and clerks of the Supreme Court have managed to analyze arguments presented to the Court without the benefit of the backside of documents for notetaking. Lower courts also should be able to function with documents submitted to them that are double-sided copied.

D. Requiring the Use of Non-Chlorine Bleached Paper Will Not Impose an Undue Burden.

At the present, non-chlorine bleached recycled paper is not widely available. This is not the result of any technical prohibitions. Indeed, the Appendices accompanying this letter are printed on non-chlorine bleached recycled paper. The lack of availability is a reflection of a lack of demand. Adoption of these proposals will help stimulate the demand needed to induce paper mills to produce non-chlorine bleached recycled paper. By establishing an effective date of January 1, 2003, the paper industry and legal profession will have ample time to adapt to the new requirement.

---

[31] In re *Amendments to Florida Rules of Judicial Admin.*, 609 So. 2d at 469.

[32] Cal. Integrated Waste Mgmt. Board, *Report to the Legislature: Survey of U.S. Paper Distributors Regarding Recycled Printing and Writing Papers* 18-20 (Nov. 1994).

[33] Advisory Comm. on App. P., *Proposed R. 32 of the Fed. R. of App. P.* 158 (1995) (summarizing comments on the proposed amendments).

[34] *Id.*

[35] *See* Sup. Ct. R. 33.1(b) (eff. Oct. 2, 1995).

IV. DEFINING THE TERMS "RECYCLED PAPER" AND "NON-CHLORINE BLEACHED RECYCLED PAPER."

A. "Recycled Paper."

In 1988, EPA developed a definition of recycled paper for federal agencies to use in procuring recycled paper.[36] In March, 1995, EPA issued draft guidelines ("1995 Draft Guidelines") revising this definition to better reflect current market standards.[37] EPA expects to finalize these guidelines by December, 1995.[38] When finalized, the definition of recycled paper contained in the guidelines will establish the *de facto* national definition for recycled paper.[39] The definition of "recycled paper" in these proposals is consistent with the definition for this term contained in the 1995 Draft Guidelines. If the final guidelines alter the definition of "recycled paper," it is recommended that the definition in the final guidelines be used for federal court papers. The definition of recycled paper is further discussed in Appendix 3.

B. "Non-Chlorine Bleached Recycled Paper."

The recovered fiber used for making recycled paper will virtually always include some fiber that has been bleached with chlorine in the original manufacturing process before it was diverted from the waste stream. Consequently, even if pulp made from recovered fiber is not bleached with chlorine, the fact remains that chlorine bleaching was likely used in the original papermaking process. In light of this, this proposal defines "non-chlorine bleached recycled paper" as "recycled paper that is unbleached or has been bleached without using a chlorine-containing compound. Recovered fiber used to produce recycled paper may contain paper that has been bleached with a chlorine-containing compound prior to the recovery or diversion of that paper from the waste stream."

V. ADOPTION OF THE PROPOSALS WILL PROMOTE THE ETHICAL TRADITIONS OF THE LEGAL PROFESSION.

There may be some who assert that it is not within the purview of the legal profession to modify its rules of practice to address broader societal issues, such as environmental concerns. Such an assertion ignores the ethical traditions of the profession and its rich heritage of public interest.

The legal profession does not exist apart from society. The Preamble to the American Bar Association ("ABA") Model Rules of Professional Responsibility states that "a lawyer must . . . be able and ready to shape the body of law to the ever-changing relationships of society."[40] Ethical Consideration 8-2 of the ABA Model Code of Professional Responsibility echoes this theme: "Rules of law are deficient if they are not just, understandable, and responsive to the

---

[36] 40 C.F.R. pt. 250 (1993).

[37] 60 Fed. Reg. 14,182 (March 15, 1995).

[38] 60 Fed. Reg. 23,928, 23,986 (May 8, 1995).

[39] 60 Fed. Reg. 14,183.

[40] American Bar Foundation, *Annotated Code of Professional Responsibility* 1 (Olavi Maru ed., 1979).

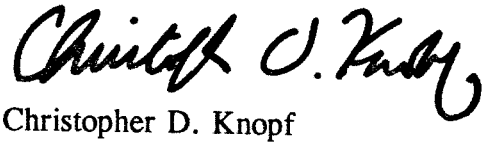
needs of society."[41] The existing rules of practice are "not responsive to the needs of society" in that they do not respond to the need to protect the environment.

VI. CONCLUSION.

The proposed amendments outlined in this letter are practical means for the legal profession to reduce the adverse impact on the environment resulting from its paper usage. This letter has demonstrated that the proposals promote long-standing federal policies, are not unduly burdensome, and advance the ethical traditions of the legal profession.

I would be happy to provide you with any additional information that you may need regarding these proposals.

Sincerely,



Christopher D. Knopf

Enclosures

cc: Honorable Patrick E. Higginbotham, Chair,
Advisory Committee on Civil Rules (w/ encl.)
Professor Edward H. Cooper, Reporter
Advisory Committee on Civil Rules (w/ encl.)
Honorable James K. Logan, Chair,
Advisory Committee on Appellate Rules (w/ encl.)
Professor Carol A. Mooney, Reporter,
Advisory Committee on Appellate Rules (w/ encl.)

d:\recycle\mccabe.let

[41] *Id.* at 379.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

October 5, 1995

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Protective Orders*

For your information, I am attaching several media articles reporting on *Business Week's* publication of materials that were subject to a protective order in a fraud action brought by Procter & Gamble against Bankers Trust New York before Judge John Feikens. The reporter for *Business Week* asserted that she obtained the documents from a confidential source without knowing that the materials were subject to a protective order. Instead of publishing the materials immediately, *Business Week* requested Judge Feikens for permission to publish. The judge refused and ordered *Business Week* not to publish the materials. He deferred final decision until a later hearing. *Business Week* immediately requested Justice John Paul Stevens to lift the ban as a prior restraint. Justice Stevens refused in a three-page opinion, apparently on procedural grounds. Judge Feikens later held a hearing. He unsealed the records, but upheld the prior restraining order. As it later developed a partner in the law firm representing Bankers Trust New York "unwittingly" disclosed the materials to *Business Week*.

The *Business Week* proceedings are noteworthy in that they extend the scope of the protective order to individuals and organizations who were not parties in the original action. These developments continue to receive wide media attention.

I have also attached several media articles reporting on the proposed amendments to Civil Rule 26(c), which were submitted to the Judicial Conference in March 1995 .

John K. Rabiej

Attachments

SEVEN NEWSPAPER ARTICLES

ON

BUSINESS WEEK'S PUBLICATION

OF

RECORDS SUBJECT TO A PROTECTIVE ORDER

Business Week Is Cleared to Publish Article

By Patrick M. Reilly
And Wade Lambert
Staff Reporters of The Wall Street Journal

A federal judge in Detroit unsealed a court document at the heart of a First Amendment fight over a Business Week article, clearing the magazine to publish the piece after three weeks of courtroom battles.

But Judge John Feikens also added to concerns that the fight would have a chilling impact on the press, with a ruling that lambasted Business Week for its use of sealed documents and supported his original order to quash the article.

At issue in the case was a sealed filing by **Procter & Gamble** Co. supporting its motion to add racketeering charges to a year-old lawsuit claiming that **Bankers Trust New York** Corp. sold it speculative derivatives securities without explaining their risks. Business Week had prepared an article based on the filing, but Bankers Trust and P&G successfully fought to quash it.

By unsealing the P&G filing, Judge Feikens managed to let Business Week publish while still upholding the legal logic of his earlier decision to quash. In a 16-page ruling, he formally upheld that restraining order, accusing the magazine of "duplicity" and declaring that it knew it was working with sealed documents and knowingly violated his court's protective order.

Stephen B. Shepard, Business Week's editor in chief, said the magazine will act quickly to publish the disputed article, and has expanded it to be the cover of its issue that appears Friday. Eager to show the world what it had fought to make public, Business Week last night began sending by fax excerpts of the long-delayed story in a press release to news organizations. The release includes this week's cover, with the headline, "The Bankers Trust Tapes." The release was also disseminated last night electronically via the Internet's World Wide Web and "other electronics means of distribution," according to a spokesman.

The magazine also said it quickly appealed Judge Feikens's ruling to uphold his earlier restraining order, which it worried would become a precedent that could hurt other journalists.

"This places an immediate chill and inhibition on legitimate news-gathering activities of journalists seeking access to confidential information," said Kenneth Vittor, general counsel of the magazine's publisher, McGraw-Hill Cos.

Because Judge Feikens is a federal trial judge, his ruling isn't binding on other federal courts. But if the ruling isn't overturned, it could be cited in other attempts to prevent the reporting of confidential court information.

One thorny legal problem: It isn't clear whether the Sixth U.S. Circuit Court of Appeals will agree to hear the ruling, now that the court is no longer stopping Business Week from publishing its article. "The mere possibility of it happening again is not grounds for an appeal," said University of Virginia law Prof. Robert O'Neil, director of the Thomas Jefferson Center for Protection of Free Expression.

Judge Feikens's ruling offered a strong statement that courts can stop the presses when a publication is using sealed documents. "The efficient administration of discovery necessitates that I be able to prevent Business Week from publishing what never would have existed independently of the discovery process," he wrote.

He continued, "I cannot permit Business Week to snub its nose at court orders. Business Week was aware of the protective order in this case but nevertheless continued to pursue the sealed information."

That argument stirred surprise and strong criticism from First Amendement specialists. "The injunction the judge has entered seems to be at war with the First Amendment," said Floyd Abrams, a prominent constitutional lawyer.

Mr. Abrams noted that for years the Supreme Court and lower courts have held prior restraint of the press to be unconstitutional in cases based on far weightier claims, such as national security. "In this case, there is no such claim. . . . The idea that a protective order entered between two parties to a civil litigation binds not only those parties but the rest of the world is absolutely novel and wholly unconstitutional," he said.

At McGraw-Hill, Mr. Vittor argued: "Even if the documents were known to be stolen, Business Week can't be restrained from publishing. . . . You punish the thief, not prohibit the publication."

Judge Feikens cited a 1984 Supreme Court decision in which the Seattle Times was barred from using confidential information that was obtained through the pretrial information-gathering process. But Mr. O'Neil, the Virginia law professor, pointed out a crucial distinction: In that case, the newspaper was a party to the litigation and had agreed to keep the material secret. "This enlarges the potential scope of [the Seattle Times case], and that is troublesome," he said.

Leaky Credibility

Big Law Firm's Gaffe Over Sealed Records Raises Troubling Issues

Sullivan & Cromwell Blew Bankers Trust Secrecy In Highly Sensitive Case

Mr. Holley and His Press Pals

By MILO GEYELIN
Staff Reporter of THE WALL STREET JOURNAL

Business Week legal editor Linda Himelstein was scanning a new court filing about a major lawsuit against Bankers Trust New York Corp. when she noticed something peculiar. On the cover page of an attached memorandum were these three words: "Filed Under Seal."

It made no sense. Sealed documents were supposed to be strictly off-limits, under possible penalty of contempt and stiff sanctions. Yet Ms. Himelstein had obtained her copy simply by picking up the phone and calling a friendly source at Bankers Trust's law firm, Sullivan & Cromwell.

Now, she later testified, she called her source and told him, "I have learned this document is sealed." On the other end of the phone line, she testified, came the reply: "Oh, s—."

The source—later identified, to the surprise of clients and some fellow lawyers, as rising litigator Steven Holley – contends that that conversation never happened. But the 38-year-old partner admits he gave Ms. Himelstein the documents, testifying that he believed they were public.

Derivative Decisions

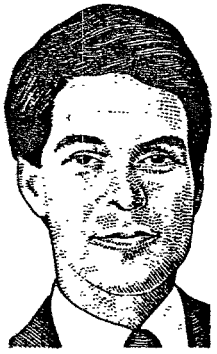
A federal judge allowed Procter & Gamble Co. to add civil-racketeering charges to its $196 million lawsuit against Bankers Trust New York Corp. over derivatives sales, making a settlement more likely in the long-running legal battle.

A federal judge unsealed a court document at the heart of the three-week battle over publication of a Business Week article. But the judge criticized earlier bids to use the document. Article on page B7. In other coverage:

- **Procter & Gamble can add further charges against Bankers Trust, A3.**
- **Litigating in the public courts is increasingly a private affair, B1.**

Now Mr. Holley's actions have plunged him into the center of an embarrassing nightmare that has enveloped one of the nation's most prestigious white-shoe corporate law firms. Yesterday, a Cincinnati federal court judge let stand an earlier order that had prevented Business Week from publishing a story based on the documents, which are at the heart of Procter & Gamble Co.'s $196 million lawsuit against Bankers Trust over Procter's losses in derivatives transactions. But he also unsealed the documents, effectively allowing publication by Business Week—and other news organizations – to go forward.

For Sullivan & Cromwell, the outcome offers little solace. Already, the case has not only laid bare missteps by Mr. Holley but also focused a spotlight on lax practices on the part of 119-year-old Sullivan & Cromwell that could alarm its other clients. Among other transgressions, according to the testimony, the firm didn't file the sealed papers in a secure place, contrary to the law firm's policy. Also contrary to its policy, the documents weren't stamped "confidential" on every page. An associate working on the matter freely handed them over to Mr. Holley, who wasn't working on the case himself and shouldn't have had access to the papers without notifying the partner in charge. And the associate, in violation of the court order, didn't tell Mr. Holley the documents were sealed.



Steven Holley

The case has also raised questions about the confidentiality of other Sullivan & Cromwell client matters. Mr. Holley testified that while he had spoken with Ms. Himelstein on occasion, he didn't have a confidential-source relationship with her, contradicting her testimony. That put her credibility at stake, prompting Business Week to produce notes of her conversations with Mr. Holley when he was representing Microsoft Corp. during its antitrust fight with the Justice Department. Reading from Ms. Himelstein's notes, a Business Week lawyer quoted him in an off-the-record conversation making a crack about an outfit worn by the Justice Department's top antitrust prosecutor, Ann Bingaman. The notes also show him making biting personal snipes about Ms. Bingaman and saying that "everyone on her professional staff thinks she's out of her mind."

Such lapses go straight to the heart of the essential work of a corporate law firm that depends on the confidence of some of America's biggest clients, including, in Sullivan's case, Goldman, Sachs & Co., Exxon Corp., Eastman Kodak Co. and CS First Boston Inc., a unit of CS Holding. Already, some clients are privately expressing concern. "The whole thing is pretty surprising," says a top Microsoft official. "He's a very, very smart guy."

Exxon officials decline to comment, and Goldman officials couldn't be reached. First Boston spokesman Maynard Toll says the firm has sharply cut back its use

Please Turn to Page A6, Column 1

of the firm since the 1980s and "is not in a position to comment on this particular case, but based on our own dealings with Sullivan & Cromwell we have the highest confidence in the firm and in its professional standards." At Kodak, senior vice president and general counsel Gary VanGraafeiland says a partner "called to explain the controversy to us, and my take-away from this was that the Bankers Trust incident was an aberration."

Sullivan & Cromwell issued a public apology, expressing in a written statement its "profound regret to Bankers Trust" and announcing an immediate review of its internal procedures "to insure that this type of exceptional breakdown never occurs again." The firm declined to comment for this article, and Mr. Holley couldn't be reached.

For those who know him, Mr. Holley's involvement in the whole mess came as a shock. Thorough and methodical, the New York University law-school graduate has worked at the firm since he was a summer associate. He was named a partner in 1991 and appointed to the New York City Bar Association's committee on Professional and Judicial Ethics a year later. Although Sullivan & Cromwell has traditionally eschewed anointing superstars from among its ranks, he had come to be seen by many as an exception.

Calculated Leaks

A litigator and an antitrust specialist, Mr. Holley helped guide Microsoft to its successful consent decree with the Justice Department last year and helped successfully appeal a federal judge's order rejecting that settlement. He also represented the grunge-rock band Pearl Jam when it charged that Ticketmaster Holdings Group was illegally wielding monopoly control over the distribution of concert tickets. Mr. Holley's handling of the case – and his calculated leaks to the media – helped spark a federal investigation, which later was dropped, as well as congressional hearings into how tickets are peddled.

Along the way, he became a deft handler of the press. He testified last week that part of his strategy in the Pearl Jam case was to encourage reporters to publicize the allegations. One of the reporters he spoke to was Business Week's Ms. Himelstein.

Just last month, Mr. Holley was the subject of a flattering piece in Architectural Record magazine, which ran a pictorial on his newly renovated loft, a former industrial space just off Manhattan's Union Square. The piece, featuring photos of a soaring home divided by clear and sandblasted panes of glass, admiringly noted that he "proved to be as methodical in his architect-selection process as in preparing a court case." One of his architects added approvingly that his interest in Modernism was key, and that "the tipoff was he mentioned the Bauhaus."

Meeting Ms. Himelstein

Mr. Holley had first met Business Week's Ms. Himelstein in 1993, at a reception hosted by Sullivan & Cromwell at Tavern on the Green restaurant in New York during an annual American Bar Association meeting. A Columbia Journalism School graduate with extensive experience in writing about legal affairs, she testified that she had relied on him as a confidential source nearly a dozen times. (Throughout her testimony, she referred to him only as her "source"; his identity didn't become known until later.)

The confidential relationship was seldom stated but always understood when she called, according to Ms. Himelstein's testimony in federal court in Cincinnati on Sept. 21. Mr. Holley denies that he was regularly a confidential source, but there is no question that he returned a phone call from Ms. Himelstein on Tuesday, Sept. 12, [illegible] for help make arrangements for Business Week to pick it up.

Uptown, at Business Week's offices in Rockefeller Center, Ms. Himelstein skimmed the two-inch-thick document that had just landed on her desk and instantly realized it was newsworthy, she testified. She wrote a quick note by e-mail to Zachary Schiller, the bureau chief in Cleveland, to let him know she had gotten the papers. And at 5:45 p.m. Tuesday she met with Kelley Holland, the Business Week editor in charge of money and banking who had been following Bankers Trust and who would take the lead in writing the article. Together, they alerted senior editor Chris Wells to clear space in the magazine.

The deadline would be tight. For the following week's editions, Business Week closes shop at 9 p.m. on Wednesday – giving the magazine in this case a little more than 24 hours to fully report, write, edit and get clearance from the magazine's lawyers to publish the story. Neither Ms. Himelstein nor Ms. Holland was aware that they were basing their news on a document with potentially explosive legal ramifications, they testified last month. Indeed, the only Business Week staff writer who knew of the protective order was Mr. Schiller, according to the testimony, and he wasn't due to return to Cleveland from a trip out of town until the following morning, Sept. 13.

A Job Interview

But Mr. Schiller had known about the protective order for nearly a week; why hadn't he alerted his New York editors? Mr. Schiller would later testify that he had more pressing concerns: an interview with a company CEO that he needed to prepare for and a trip to San Francisco to consider a possible job transfer.

When he found out about the protective order Sept. 7, Mr. Schiller testified last week, he thought the Bankers Trust story was dead. And in any case, if Ms. Himelstein was still following up through her source at Sullivan & Cromwell, he reasoned, the law firm would surely advise her of the protective order.

Business Week, it turned out, wouldn't learn of this crucial detail until midmorning on Sept. 13, when Mr. Schiller, back at his office in Cleveland, told Ms. Himelstein. The two were discussing the planned Bankers Trust coverage for that night's deadline. "He told me that he had heard that at least some of the documents had been sealed," Ms. Himelstein testified.

To the legal editor, this didn't make sense. Court complaints, including requests to add a new claim to an existing lawsuit, are almost always a matter of public record. Exceptions are virtually unheard-of. The Business Week reporters continued working on their story.

Closer Look

But by Wednesday afternoon, Bankers Trust had gotten back to Business Week. The pleading was indeed confidential, the bank said, and now, for the first time, Ms. Himelstein decided to look at it closely for any indication that it was sealed by a protective order. What she found popped up on the fifth or sixth page, she testified: The words, "Filed Under Seal."

Back at Sullivan & Cromwell, Mr. Holley had been at his weekly partners' lunch during the early afternoon, unaware of what was unfolding at Business Week. He had made plans to leave the office early and fly to Detroit for a long weekend with his parents in Michigan, returning the following Sunday on Sept. 17. Shortly after 3 p.m. he left by cab to pick up his bags at home and rush to the airport. At this point Mr. Holley's and Ms. Himelstein's accounts of what happened diverge sharply.

The Business Week editor maintains – with phone records to back her up – that she called Mr. Holley at home about 3:30 p.m. to alert him that the documents she had received from him had been under seal, and that he had responded with an expletive. According to Ms. Himelstein, Mr. Holley asked first that she not write the story and, failing that, asked that she keep his name out of it. She agreed to protect his confidentiality.

A Different Version

Mr. Holley tells an utterly different version of events. Testifying last week, he denied ever speaking to Ms. Himelstein after sending her the court papers as a courtesy. But he had no explanation for Business Week's phone records showing that she called from her office to his home at 3:31 p.m. – and spoke to someone there for nearly two minutes.

Mr. Holley testified: "I didn't have this conversation."

Bankers Trust, unaware that its own lawyer had leaked the papers, believed Business Week had deliberately violated

the court's order, possibly by stealing the sealed documents from the file in Cincinnati. When Ms. Himelstein reached Bankers Trust attorney Michael Cooper, at Sullivan & Cromwell, for comment late Wednesday afternoon, the lawyer told her it was "inappropriate for me to be asking the questions, inappropriate for him to be responding to questions and inappropriate for Business Week to be doing the story," Ms. Himelstein testified.

He followed up with a faxed a copy of the protective order and a letter advising Business Week to contact its lawyers. But by now, Business Week's lawyers were already involved, and in their view the magazine was entitled to publish. The protective order barred only the parties in the lawsuit – Bankers Trust and Procter & Gamble – from disclosing the contents of sealed documents.

Faxes in Action

But as Kenneth M. Vittor, general counsel for Business Week publisher McGraw-Hill Inc., was wrapping up a routine prepublication review of the article at 6 p.m., his office fax machine suddenly jumped alive. Unknown to him, the federal judge overseeing the Bankers Trust suit had just signed a restraining order barring Business Week from publishing its story – and threatening to hold Mr. Vittor personally in contempt of court if the magazine refused.

With the magazine's deadline three hours away, Mr. Vittor was stunned by the order. Senior District Judge John Feikens, 78 years old, had just signed it at the request of Bankers Trust and P&G after a telephone conference call to his chambers by lawyers for both companies. The ruling was extraordinary; Business Week wasn't given a chance to respond, and no hearing was held. Moreover, no permanent record was kept of the conference call, and the judge's order was open-ended rather than having a time limit placed on it.

The order set off a scramble by Business Week's lawyers that culminated, after a series of unsuccessful appeals up to the U.S. Supreme Court, with a hearing before the judge in Cincinnati to determine if Business Week had violated the court's protective order. Bankers Trust was still asserting that the magazine had broken the law, "possibly by invasion of the court's own sealed record."

But by now, Business Week's lawyers knew what Bankers Trust still did not – that the source of the Bankers Trust story was a lawyer at the bank's own law firm. As the hearing date approached, Business Week and Ms. Himelstein kept that information to themselves, honoring her promise of confidentiality to Mr. Holley. Even as she took the stand to testify in her defense Sept. 21, Ms. Himelstein was determined not to disclose his identity.

Pressing Hard

Lawyers for Bankers Trust, the Cincinnati firm of Vorys, Sater, Seymour & Pease, pressed hard, arguing that under Ohio law, newsmagazine reporters have no First Amendment shield against being compelled to cough up a source. Business Week countered that New York law – and its broader press shield – applied.

That gave Bankers Trust an opening. Was Ms. Himelstein's source from "the state of New York," she was asked? Ms. Himelstein answered that the source was.

That was enough. By midafternoon, lawyers for Bankers Trust put in a call to Sullivan & Cromwell, which in turn launched an immediate review of its messenger log. About 3 p.m. Mr. Holley's name turned up, along with that of Business Week. Three hours after Ms. Himelstein finished testifying, Mr. Holley got a call from Sullivan & Cromwell litigation partner Richard Klapper.

"Did she ever ask you for a copy of the complaint in Procter & Gamble and Bankers Trust?" he asked Mr. Holley, according to Mr. Holley's testimony last week. "Yes, she did," Mr. Holley answered.

"You didn't give it to her, did you?" Mr. Klapper asked.

"Yes, I did," Mr. Holley responded.

"Meet me on the 30th floor," Mr. Klapper snapped. "We need to speak to the chairman of the firm."

Pleading Ignorance

Up to this point, Mr. Holley had kept quiet, too. He testified that he didn't know that the court's protective order had been breached or that Bankers Trust was blaming Business Week, though both events were extensively reported in the media. Mr. Holley testified he doesn't own a television set, so he didn't see any news accounts of the case. He doesn't regularly read The Wall Street Journal and canceled his subscription to the New York Times, he testified. The first he learned that he had inadvertently violated the court's protective order was when he was summoned before Sullivan & Cromwell Chairman Ricardo A. Mestres Jr. on the firm's 30th floor on Sept. 21, he said.

"You're not going to tell me that this document came from Sullivan & Cromwell?" the chairman asked.

Mr. Holley's – and Sullivan & Cromwell's – troubles were just beginning. Mr. Mestres was "as distressed as I've ever seen him," Mr. Holley testified last week. The lawyers immediately began planning how to tell Judge Feikens, not to mention their client Bankers Trust. The first call was to Bankers Trust's lawyers in Cincinnati late Thursday afternoon, Sept. 21.

Though Mr. Holley had by now come forward, Sullivan & Cromwell nevertheless told the Cincinnati lawyers only that it suspected it might be the source of the breach. The firm waited until the following morning to confirm it officially; the judge was informed that afternoon.

Once everyone involved realized who the source was, Mr. Holley was called to testify, in a hearing last week. It was then that he admitted he had indeed furnished the documents, though he asserted that he was unaware that they were under seal. He also played down his contacts with Ms. Himelstein, testifying they didn't have a confidential-source relationship. His comments prompted Business Week's rejoinder, in which one of its lawyers read aloud from Ms. Himelstein's notes of his off-the-record, unflattering comments about the Justice antitrust official's outfit.

Mr. Holley's future is unclear. At 10 p.m. on Friday, Sept. 22, the young partner was summoned before Sullivan & Cromwell's chairman, Mr. Mestres, and senior litigation partner John Warden. Mr. Warden was livid.

"He told me," Mr. Holley testified last week, "that what I had done was incredibly stupid, that I had imperiled Bankers Trust, a very important client of Sullivan & Cromwell, that I had imperiled the partnership, that I had imperiled Mr. Pepperman, who was my friend and one of our very best associates, that I had imperiled myself, that this sort of careless and unthinking behavior was not tolerable from partners of Sullivan & Cromwell and . . . it just could never happen again."

The New York Times

High Court Will Not Lift Magazine Ban

Hearing To Resume On Prior Restraint

By DEIRDRE CARMODY

In an unusual First Amendment ruling, Supreme Court Justice John Paul Stevens Jr. refused yesterday for procedural reasons to overturn a lower-court order prohibiting Business Week from publishing an article containing information from sealed court documents. The ruling sent the case back to the Federal District Court in Cincinnati that issued the order.

Later yesterday, at a hearing in that court, Judge John Feikens extended until Oct. 3 the order he had issued on Sept. 13. This means, in all probability, that the magazine will be prohibited for a third week in a row from publishing the article with the disputed material. Business Week is complying with the order so that it will not be found in contempt of court.

The Federal court hearing is scheduled to resume on Tuesday.

Calling the ruling by Justice Stevens extremely rare, lawyers said they could remember only one time when a Supreme Court justice had declined to overturn an order like the one involved here, directed at a publication that was complying with the order. In that 1976 case, Nebraska Press Association v. Stuart, Justice Harry Blackmun vacated part but not all of a restraining order. The Supreme Court later struck down the remaining part of the order.

"What was until today a nearly absolute judicial bar against prior restraints on news reporting seems less firm today," said Floyd Abrams, a First Amendment lawyer and an expert on this kind of order. "While today's ruling is procedural in nature, the substantive impact is that prior restraints on publication, entered without even a chance for the press to be heard, are far less unthinkable than ever before."

Lawyers said another unusual aspect to the case was the seeming lack of urgency by both Judge Feikens and Justice Stevens.

"That sense that it must be done immediately, that basic principle that every hour that goes by is an affront to the First Amendment, seems to have been lost here," said Robert D. Sack, a First Amendment lawyer in the New York office of Gibson, Dunn & Crutcher.

The documents, which had been put under an order protecting their confidentiality, were filed in a lawsuit between the Procter & Gamble Company and Bankers Trust Company. Judge Feikens issued the order without a hearing after learning that Business Week planned to publish information in the documents.

Some observers see a lack of urgency among the judges.

Tom Parisi, a spokesman for Bankers Trust, praised Justice Stevens's ruling. "Our position is that the integrity of a protective order should be respected," he said. "To do otherwise is to make a mockery of the judicial process."

Stephen B. Shepard, editor in chief of Business Week, said he was disappointed with Justice Stevens's ruling, but believed that when factual record was established in the district court, the magazine would be upheld.

At yesterday's hearing, Linda Himelstein, the Business Week reporter who obtained the documents, testified that the documents were obtained legally from a confidential source, whom she declined to name.

Justice Stevens, in his ruling, chided Business Week's owner, the McGraw-Hill Companies for not having asked the district court for a hearing before appealing to the Supreme Court. But Business Week said it went to the United States Court of Appeals for the Sixth Circuit, in Cincinnati, last week to get the order vacated as soon as possible. When the appeals court said it did not have jurisdiction, the magazine went to Justice Stevens, who hears emergency appeals for that circuit.

But Justice Stevens stated he was "satisfied that the wiser course is to give the District Court an opportunity to find the relevant facts and to allow both that Court and the Court of Appeals to consider the merits of the First Amendment issue before it is addressed in this Court."

Lawyers said the ruling by Justice Stevens sent a clear message to the press: If you obtain confidential documents and you are sure they are authentic, do not call anyone for comment, just publish.

Justice Lets Business Week Order Stand

By PATRICK M. REILLY
And PAUL M. BARRETT
Staff Reporters of THE WALL STREET JOURNAL

NEW YORK – Supreme Court Justice John Paul Stevens dealt Business Week a surprising setback, leaving in place, at least temporarily, a federal judge's Sept. 13 order barring the magazine from publishing an investigative article about a big banking legal battle.

The justice's action was highly unexpected, since the Supreme Court has consistently refused to allow lower-court judges to stop the presses for anything short of an immediate threat to national security. In the Business Week case, Bankers Trust New York Corp. had argued that the magazine had obtained documents that were sealed by court order.

But because Justice Stevens's three-page order focused narrowly on procedural issues in Business Week's appeal, experts on constitutional law said it wasn't likely to set a sweeping precedent.

"Today's ruling is procedural, but with a substantive bite," said Floyd Abrams, a leading First Amendment lawyer. "A prior restraint on publication of a news article, which had been viewed as all but impossible, is now conceivable if still unlikely."

The justice ordered McGraw-Hill Cos., publisher of Business Week, to take its case back to the trial court in Cincinnati. Yesterday the big New York publisher was back in the courtroom of Judge John Feikens for what turned out to be an inconclusive hearing. The judge scheduled another hearing for Tuesday and said he would reach a decision before Oct. 3.

"Every day that goes by is a violation of our rights under the First Amendment . . . We will fight it until the end," said Stephen B. Shepard, Business Week's editor-in-chief.

Business Week's article probably will see publication in the end. First Amendment lawyers said the Supreme Court is unlikely to block publication of the article, which is based on documents that have been widely circulated.

The broader danger for publishers and broadcasters is that in the future, subjects of investigative journalism will almost certainly try to use the Stevens opinion, despite its ambiguous nature and focus on procedural issues, to defend lower-court gag orders.

Justice Stevens seemed to signal that he didn't intend his opinion to be used in that way. He said that the order against Business Week appeared to have been improperly imposed without notice to the magazine and that it seemed to lack "the findings of fact required by" the federal rules of civil procedure.

He didn't question, or even address, the firmly established legal principle that the First Amendment almost always forbids judges to suppress an article before it is published, or a TV show before it is broadcast. In a highly unusual approach, Justice Stevens didn't cite any case law whatsoever in his opinion, possibly underscoring his desire not to be seen as chipping away at the numerous precedents against prior restraints.

The justice is known as a strong backer of First Amendment rights on a court where some more conservative justices are far more tolerant of government restriction of speech.

Justice Stevens rebuked McGraw-Hill for failing to follow correct procedure in attacking the gag order in the lower courts. He said McGraw-Hill should have tried to persuade Judge Feikens, who originally issued the order, to withdraw it himself.

Indeed Justice Stevens said that if McGraw-Hill "had filed a prompt motion to dissolve" the original order, "I assume" Judge Feikens "would have granted that relief," presumably because he hadn't given Business Week a chance to oppose it in the first place and because it lacked a sufficient factual basis. If Judge Feikens had refused to change his mind, Justice Stevens said, the Sixth U.S. Circuit Court of Appeals in Cincinnati "would have had jurisdiction to address the merits of the restraint."

But instead of following this course, McGraw-Hill immediately filed an appeal with Justice Stevens, the member of the Supreme Court who supervises that appeals court. Dow Jones & Co., publisher of The Wall Street Journal, also filed a brief with the Supreme Court in support of McGraw-Hill's position.

In an interview yesterday, McGraw-Hill general counsel Kenneth Vittor said the company tried unsuccessfully to find Judge Feikens on the night of his order, with Business Week's deadline just hours away. The next day McGraw-Hill took the order to the Sixth Circuit, and after failing there, filed a further appeal with Justice Stevens, the member of the Supreme Court who supervises that appeals court. Dow Jones & Co., publisher of The Wall Street Journal, also filed a brief with the Supreme Court in support of McGraw-Hill's position.

In yesterday's trial-court hearing, Bankers Trust attorneys grilled Business Week about how it obtained the court documents at issue in the prior-restraint order. The documents are 300 pages that Business Week legal affairs editor Linda Himelstein obtained from a confidential source, containing evidence to support Procter & Gamble Co.'s allegation that Bankers Trust violated racketeering statutes related to derivatives trading for the Cincinnati household-products giant.

Bankers Trust has consistently denied charges of wrongdoing in connection with its dealings with P&G.

Ms. Himelstein said in court yesterday that when she received the documents she was unaware they were under court seal and a restrictive protective order.

Business Week had hoped to print Ms. Himelstein's article in last week's issue, before the original restraining order. It had also prepared to print it in the issue that went to press Wednesday night.

Critics Say Courts Seal Too Much Data

By Richard B. Schmitt
Staff Reporter of The Wall Street Journal

For many companies and their lawyers, litigating in the public courts is increasingly a private affair.

Boris Feldman, a Palo Alto, Calif., lawyer who represents high-tech companies, says that when he files a lawsuit, his first order of business is to persuade the opposition that any documents his client supplies should be kept strictly under wraps. Judges often "rubber stamp" such agreements, he says, though a million pages of documents may be involved even in a routine matter.

More business information is being kept from the public under court seal, and the trend raises questions about the public's right to know – and the ability of litigants to turn to the courts without giving up their privacy.

The ease with which corporations can limit public access to court documents was highlighted in the recent attempt of Business Week magazine to publish information from sealed documents in a suit involving Bankers Trust New York Corp. and Procter & Gamble Co. A federal judge had ruled that the magazine couldn't publish the materials. But after legal maneuvering by Business Week and the two companies, the judge unsealed the documents yesterday, saying Bankers Trust had failed to show that there was "a substantial governmental interest" in keeping them secret.

Still, sealing court documents has become standard in many business disputes, and that troubles free-speech advocates and even some corporate adversaries, who say the agreements are being used in some cases simply to avoid bad publicity.

"A system of taxpayer-supported public justice ought to carry a heavy presumption of openness," says Bruce Sanford, a First Amendment lawyer at Baker & Hostetler in Washington. Increasingly, he says, companies are deciding, "Let's keep the press and public out of this, and the courts go along with it." Indeed, a committee of federal judges recently proposed streamlining the ground rules for sealing court documents in a way that critics charge would result in even more secrecy.

> 'A system of taxpayer-supported public justice ought to carry a heavy presumption of openness,' says Bruce Sanford, a First Amendment lawyer.

Certainly, companies shouldn't have to give up their privacy rights just because they are dragged into court. Courts have long allowed them to shield trade secrets and other proprietary information from the public.

Mr. Feldman, a partner at the law firm of Wilson, Sonsini, Goodrich & Rosati, cites a practical reason for courts to approve sweeping protective orders: Judges and lawyers would have to spend an inordinate amount of time sorting through an avalanche of documents to determine what really should be kept confidential.

Moreover, unsealing documents could frustrate the purpose of federal court rules that encourage companies to freely swap documents as a way of resolving disputes faster, according to some scholars. "Getting lawsuits resolved by settlement of the parties instead of litigating them to the bitter end is something that a lot of people value very highly," says Edward Cooper, a law professor and expert on civil procedure at the University of Michigan law school.

Yet others say that the courts have allowed corporate litigants to keep too much secret. "We are often talking about a big corporate conglomerate that may well be publicly traded, with a lot of people with a lot of interest in what is going on," says Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press in Washington. "I have no sympathy for corporate litigants who choose to fight their battles in the public courts and then want to keep it private."

Ms. Kirtley adds that even court documents that aren't covered by protective orders and are supposed to be available to the public have become less accessible. Since 1980, parties in federal court cases are no longer required to file depositions and other pretrial evidence at the courthouse. "As a consequence, stuff is certainly not available in the routine way it was before," she says.

The idea of sealing documents has been around for decades, but it has become more widespread and contentious in recent years. Under the Federal Rules of Civil

Please Turn to Page B9, Column 6

Companies Get Courts To Seal Too Much, Some Critics Charge

Continued From Page B1

Procedure, judges are supposed to seal documents only for "good cause." But lawyers say that, in practice, if the parties agree, many judges scrutinize the reasons for sealing documents only if protective orders are challenged in court.

Disputes over protective orders reflect a growing interest by the press in business-law cases. Also, plaintiffs' lawyers are starting to object to demands that they destroy or return documents as part of settling a case, especially in instances involving claims of defective products that may be widely distributed.

These lawyers say protective orders have snuffed out early warning signals about dangerous products, posing a threat to public health and forcing injured plaintiffs to litigate their cases without the benefit of documents that have been sealed in prior cases. Over the years, protective orders have sealed information – at least temporarily – in liability cases involving such products as breast implants, Bic lighters, all-terrain vehicles and Agent Orange.

But confidentiality agreements can raise questions in other business cases. Max Blecher, a Los Angeles antitrust lawyer, recalls unearthing evidence that a major auto manufacturer was fixing the prices that its dealers charged. He says he wanted to hand the information to authorities, but a judge found that the data were obtained under a confidentiality order in the case.

"It is a kind of sophistry," Mr. Blecher says. "It becomes like using the judicial process as a means of suppressing some wrongdoing, which I don't think is the purpose."

Free Business Week

Rule of Law

By Robert D. Sack

Reporting on a major lawsuit between Procter & Gamble Co. and Bankers Trust Co. in a federal court in Cincinnati, Business Week prepared an article based in part on documents allegedly held by the court under seal. The parties, alerted by Business Week's inquiries, informed the court. On Sept. 13, hours before the article was to go to press and without advance notice to Business Week, the court enjoined the article's publication. Business Week sought unsuccessfully to have the restraint lifted by an appellate court and by Supreme Court Justice John Paul Stevens. Two weeks later, the restraint remains in place and the article remains unpublished.

A friend-of-the-court brief filed by Dow Jones & Co., publisher of The Wall Street Journal, and written by Robert D. Sack, the company's counsel, on Business Week's behalf, made the following observations:

The order of the district court restraining Business Week from publishing information in its possession is a prior restraint. As the Supreme Court has repeatedly made clear, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights," and "one of the most extraordinary remedies known to our jurisprudence."

Although not unconstitutional per se, a prior restraint bears "a heavy presumption against its constitutional validity." In order to be lawful, it "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints." The order restraining Business Week plainly falls within none of them. Indeed, having been issued without prior notice to Business Week, the order is peculiarly and categorically forbidden.

The First Amendment establishes a system that operates to negotiate between government secrets and its ability to keep them, on the one hand, and the press's gathering of information and its ability to disseminate it on the other.

The government, including the courts, may in many circumstances attempt to maintain information in secret. But the government, including its courts, has (or is supposed to have) a monopoly on force. If it uses that force to *require* that it win the contest between secrecy and disclosure, the contest—the constitutionally mandated, creative tension between government secrecy and public dissemination of information—is effectively destroyed. Thereafter, only government-authorized information may be disseminated to the public.

In the context of the confidentiality of court records, then, this contest is both constitutionally ordained and fundamental. The press may publish what it learns, but its ability to obtain information is limited. Indeed, the courts may seek to control access to their documents but the means by which that control may be exercised is limited. They may, under many circumstances, order documents kept under lock and key; they may require officers of the court to keep them secret; they may inquire of court officers should the orders be disobeyed. But once the information is beyond the doors of the courts, their officers and parties to litigation, no court may use its powers to regain or further restrain it.

There is also an important practical reason for maintaining the absolute rule against prior restraints such as that entered by the district court against Business Week.

The people and entities that Business Week covers are wealthy and powerful. They have virtually endless legal resources to employ if and when they believe there is a possibility, through use of the judicial process, to avert publication of potentially harmful statements, true or false.

If it were possible to obtain judicial restraints on defamatory statements, those expecting adverse articles would be likely routinely to seek to restrain their publication. Preparation of every critical article about the behavior of a well-heeled person, firm or corporation would carry with it the possibility of costly and time-consuming litigation should they learn of its impending publication. The potential publisher could avoid that risk only by not seeking to publish the material or by keeping the article secret from its object prior to publication. The intimidating effect of this mere possibility would render it of highly doubtful constitutionality.

> *The First Amendment establishes a system that negotiates between government secrets on the one hand, and the press's gathering of information on the other.*

The absoluteness of the rule against prior restraints is therefore crucial. It forecloses the possibility of frequent lawsuits based upon a person's suspicion or fear that adverse commentary or confidential information is about to be published.

This lesson may be learned from abroad. Under the British system, prior restraints to maintain secrecy are indeed permitted. It is on precisely this point that our jurisprudence differs from theirs.

As a practical matter, the difference is as much in the reporting as it is in the keeping of secrets. British reporters simply will not seek comment on secret documents until it is too late for the person from whom comment is sought to obtain an effective restraining order. The result is not the protection of confidentiality but the publication of incomplete information.

A notorious case, *X Ltd. v Morgan Grampian (Publishers) Ltd.* is illustrative. In August 1989, William Goodwin, fresh out of university, was a reporter for the Engineer, a British trade periodical. He received information suggesting that a company in the process of seeking financing had not fully and publicly disclosed the state of its business.

Goodwin did not publish the information, as he was then free to do and as he doubtless would have done had he known the risk of first fully reporting the story. He sought comment from the company, instead. Thus alerted, the company began urgent and, under British law, successful legal proceedings to enjoin publication...

The First Amendment must prevent such interference with the effective functioning of the press. Business Week, after all, was not enjoined because it published documents that are under seal. Business Week has had to invoke the Supreme Court's jurisdiction and the Business Week article remains unpublished, because, before reporting on the documents at issue, it sought comment from Bankers Trust and Procter & Gamble.

To preserve the ability of the press to report fully on matters of public concern, the prior restraint against Business Week must be vacated and the Supreme Court should make it clear once again that all such orders are in all circumstances constitutionally forbidden.

THE SUN

EDITORIALS

When judges stop the presses

Prior restraint: *It's censorship pure and simple, and it's unconstitutional*

A U.S. DISTRICT COURT judge in Cincinnati ordered *Business Week* not to publish an article about a dispute involving two private firms. That is called prior restraint, and the judge knew when he did it that the Constitution forbids such an action. A panel of U.S. appellate judges, who also knew better, refused to over-rule the district court, on a procedural technicality. Yesterday, Supreme Court Justice John Paul Stevens turned down the magazine's emergency request to lift the order.

He certainly knows better. He was a federal appellate court judge in 1971 when the Supreme Court ruled that courts could not restrain the press from printing even most military and diplomatic secrets. And Justice Stevens was on the Supreme Court by 1976 when it ruled unanimously that prior restraint was not justified in a case in which a man's constitutional right to a fair criminal trial might have been compromised by press reports.

The *Business Week* case doesn't come close to the sensitivity of those issues raised in 1971 and 1976. The magazine wants to publish an article about a dispute between Proctor & Gamble and Bankers Trust Co. P&G is suing Bankers Trust for fraud. The news story the judge stopped the presses on is based in part on a 300-page document filed by P&G with the court. The judge had sealed that document, but a *Business Week* reporter obtained a copy. When Bankers Trust learned of that, it sought and got the prior restraint order.

Commercial interests are important, but the courts have never given them the same level of protection as national security and fair trial issues. And to repeat, in 1971 and 1976 the Supreme Court said even those concerns were never — or hardly ever — justifications for prior restraint, which is censorship, pure and simple. The First Amendment's guarantee of freedom of the press is meant to prevent that.

Eventually the full Supreme Court will have to rule again. We are confident the court will come down flatly against such prior restraint, Justice Stevens included. He signaled that he would in 1976. But a long delay in publication can be just as damaging — just as much censorship — as a flat prohibition to ever publish. As Justice William Brennan put it in 1976, "there is . . . a clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting. . . "

FOUR ARTICLES

ON

PROPOSED AMENDMENTS TO CIVIL RULE 26(c)

Effective Rulemaking Damaged by Politics

By Arthur R. Miller SPECIAL TO THE NATIONAL LAW JOURNAL

THE UNITED STATES Judicial Conference's recent rejection of a revision of Federal Rule of Civil Procedure 26(c) proposed by its Advisory Committee on Civil Rules is disturbing, not because the change would have meant any great improvement over the status quo, but because of why it was rejected.

Media and special interest group lawyers successfully mounted a last-minute, high-visibility protest against the proposal. Several aspects of the protest, including its success, are striking if not bizarre. Sadly, they suggest that the outcome may have been shaped more by special interest politics than by reason, experience, or empirical data. Even more sadly, it raises doubts as to the continued viability of a rulemaking process that has served us effectively for over a half century and which has been subjected to enormous external pressure—including from Congress itself—in recent years.

Mr. Miller is Bruce Bromley Professor of Law at Harvard Law School.

The proposed revision, designed to clarify public access to the courts, was the product of more than three years of careful deliberation and public debate. It codified the current practice that allows parties to stipulate to a protective order, made no changes to the "good cause" showing that must be made for issuing a protective order absent a stipulation, and established procedures and standards for non-parties seeking access to litigation information that is subject to a protective order.

My own views of the subject are set

[SEE 'RULES' PAGE A22]

['RULES' FROM PAGE A21]

out in a 1991 Harvard Law Review article, in which I observed that courts were already displaying sensitivity to public access, exercising broad discretion to balance the tension between public access and personal privacy, thus making rule amendments unnecessary. When the advisory committee was first asked to consider the matter, its initial study suggested that there was no need for modifying the rule.

But at the urging of media and special interest group lawyers, the Federal Judicial Center conducted an empirical study of protective order practice in selected federal district courts, which found that over a three-year period, protective orders were requested in only 5 percent to 10 percent of civil cases, predominantly civil rights and contract actions, and that more than half of those requests were fully or partially denied. In sum, the nation's courts were not hiding behind a shroud of secrecy.

Nevertheless, the Advisory Committee proposed a revision of Rule 26(c) that was uniformly perceived as being favorable to the proponents of greater access. The committee revised its proposal twice, each time to accommodate the concerns of the very same groups. Even that did not satisfy them, so they launched their protest.

The protest targeted a reference to the very common and appropriate practice by which parties stipulate to a protective order before discovery in order to facilitate the full and free exchange of documents while protecting against unnecessary public disclosure of confidential information. These stipulations are essential, particularly in complex litigation with multiple parties and massive volumes of documents. The proposal referred to stipulated protective orders solely to conform the rule's text to the day-to-day reality of actual practice, as the attached committee notes made very clear.

At the urging of media and special-interest group lawyers, a carefully decided FRCP revision was withdrawn.

But like deer mesmerized in the glare of oncoming headlights, the protesters focused so much on hypothetical harm they fantasized stipulated protective orders would cause that they were blinded to the obvious benefits the amendment offered them. They claimed the draft rule would undercut Rule 26(c)'s requirement that "good cause" must exist before a court enters a protective order. They were plainly wrong about that, so their protest ironically caused the rejection of a revision that would have worked in their favor.

The intensity of the protest was striking. It was highlighted by a front-page article in the New York Times followed in short order by equally prominent articles across the country. It is highly unusual for a proposed amendment to a court rule to receive such prominent news coverage. Journalists rarely take note of these matters. In fact, the New York Times did not even report the Supreme Court's decision in *Erie Railroad v. Tompkins* in 1938, probably this century's most important case on judicial federalism.

The only explanation for the extensive treatment of the amendment to Rule 26(c) is that access to more and more information is—for the media and special interest group lawyers—the very source of life. Not surprisingly, these two groups consider the public access issue front page news.

> But that tells us nothing about what court rules should be regarding access to litigation materials that may well have been confidential had it not been for the coercive powers of the civil discovery rules. Public access to the courts exists to enhance public trust in the fairness of the judicial system, to promote public participation in the processes of government, and to protect constitutional guarantees. The only justification for destroying the confidentiality of information produced in the discovery process is that it would further these goals, not that it would serve the business interests of the media or of the trial bar.

The Judicial Conference almost always approves proposed rule changes because of its great respect for the rulemaking committees that study and draft the amendments. Until now, the Conference invariably has resisted bowing to outside political pressures, as when it recently discontinued the use of cameras in the courts and when it forwarded another highly controversial discovery rule to Congress despite more than one thousand letters of protest from all segments of the bench and bar. Yet, only three or four special interest groups, such as the Reporters Committee for Freedom of the Press, Public Citizen, and Trial Lawyers for Public Justice, along with Senator Herb Kohl, D-Wis., registered their opposition to the public access proposals. Nonetheless, the Judicial Conference acceded to these voices.

Since there was little if any need to change the existing rule, I do not mourn the abandonment of the proposal. Its rejection will do no great harm to the operations of the courts.

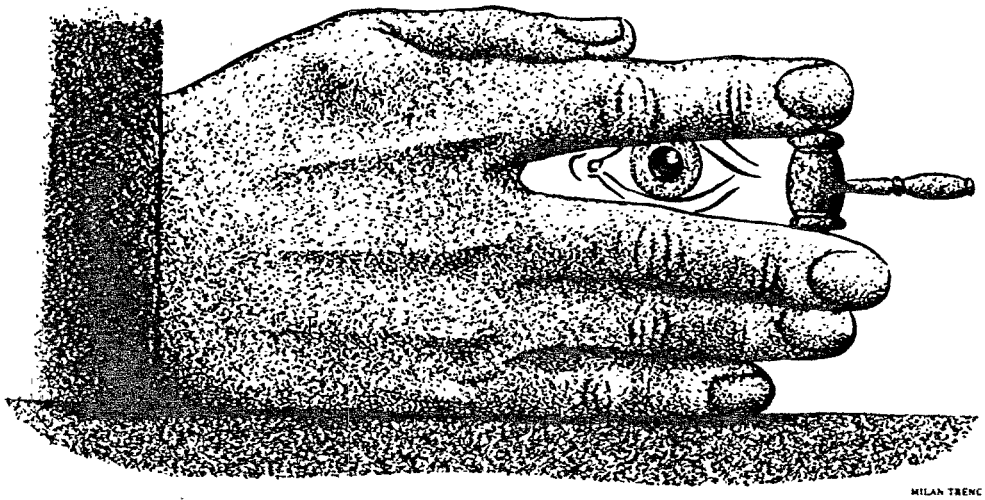
Without an amendment, protective order practice reverts to what it has been. Judges will continue to balance public access to discovery information against the privacy rights of the owners of the information, the needs of the civil litigation system and concerns over the potential for satellite litigation. Parties unquestionably can continue to stipulate to protective orders, as they can to virtually any other matter in litigation. Non-party rights of access to information produced in litigation will continue to be determined on a case-by-case basis according to the prevailing practice in each circuit.

Having gone to extraordinary lengths to satisfy incessant demands for change from media and special interest lawyers, absent an empirical demonstration of any need for it, and having been rebuffed, the advisory committee's best efforts have come to naught. Therefore, I commend that the members recognize the current system is working and sensible; there is no need to change it. The key for the future should be the intelligent administration of Rule 26 (c) by a judiciary sensitive to the competing interests.

This episode should make us think hard about the way that court rules are made. If they are changed without a clear, reasoned basis, people may lose confidence in the fairness and impartiality of the rulemaking process—and ultimately may lose confidence in the civil justice system itself. If our rich tradition of federal rulemaking is to continue, the quality of its product and the integrity of its process must be protected against those who would compromise it, especially those whose special interests reflect a rather parochial view of what is sound judicial procedure.

A Sneak Attack on Open Justice

By Arthur Bryant SPECIAL TO THE NATIONAL LAW JOURNAL



MILAN TRENC

THE U.S. Judicial Conference made headlines in March 1995 by rejecting a proposed change to the Federal Rules that could have dramatically increased secrecy in the courts. Little noticed, however, was an April 20 vote by the Conference's Advisory Committee on Civil Rules urging public circulation and eventual adoption of an identical proposal.

In meetings scheduled for July 6 and 7, the Conference's Committee on Rules of Practice and Procedure (the "Standing Committee") will decide whether to accept that recommendation. It should not do so.

As the Judicial Conference did just months ago, the Standing Committee should protect the integrity of the civil justice system—and the public health and safety—by refusing to allow secrecy unless "good cause" for it is shown.

The primary reason that the rule changes were opposed—and properly rejected—is that, for the first time ever, they would have authorized judges to issue secrecy orders "on stipulation of the *parties.*" This would have been a dramatic shift. Under the current version of Rule 26(c), a court may only issue a protective order when good cause is shown.

The requirement is not easy to meet: To establish good cause, the party seeking secrecy must make a particularized factual demonstration that disclosure of the protected materials would cause it significant, specific harm. See, for example, *Cipollone v. Liggett Group Inc.*, 785 F. 2d 1108, 1121 (3d Cir. 1986). The proposed change would have eliminated the need for any showing. Judges could have simply ordered secrecy whenever the parties agreed to it—even in the complete absence of good cause.

Mr. Bryant is the executive director of Trial Lawyers for Public Justice in Washington, D.C.

In a recent article by Prof. Arthur R. Miller, the author insists that the proposal would have codified existing practice. [NLJ, May 1.] That is not true—and it misses the point. Regrettably, some judges do fail to require a showing of good cause and quickly sign off on stipulated protective orders presented to them by the parties. Most judges, however, do not. They follow the law. The proposed change would "solve" the problem of judicial violations of Rule 26(c) by altering the rule to sanction and would effectively encourage the violations. The proper solution is to try to stop (or at least deter) them.

Without Good Cause

That is what current law does, because protective orders entered without a showing of good cause violate the law. This fact makes a difference in the real world. If these proposed changes had been in effect, critical documents about the dangers of breast implants, heart valves, the Ford Pinto, all-terrain vehicles and other hazardous products could still be under seal.

Proponents of the change attempt to downplay the importance of this issue by citing a Federal Judiciary Center study that shows that protective orders were only requested in 5 percent to 10 percent of the civil cases in three federal district courts. The study is interesting but irrelevant. It tells us nothing about how much more secrecy there would be if judges could legally enter protective orders without a showing of good cause. It also tells us nothing about the type and value of the information being kept secret.

Some advocates say that the proposed change would have been harmless because plaintiffs could always refuse to stipulate to protective orders. The fact is, however, defendants often threaten a lengthy discovery battle unless plaintiffs agree to secrecy. Far too frequently, plaintiffs agree to these demands to avoid costly and time-consuming litigation. The good-cause standard acts as an important counterbalance to those tactics. The parties can agree to whatever they want, but the judge—applying that standard—protects the public's interest.

> The committee should protect the civil justice system by not allowing secrecy unless 'good cause' is shown.

The process by which these changes were proposed was as disturbing as their likely impact. The proposal to allow judges to enter protective orders without a showing of good cause was slipped in at the last minute and never publicly circulated for review. This was in violation of the Judicial Conference's own procedures, which contain extensive requirements for publication, distribution, comment and public hearings on all proposed changes to the Federal Rules. Exceptions are to be made only "in the case of a technical or conforming amendment" or "when the administration of justice requires." Yet the proposed change was sent directly to the Judicial Conference without public knowledge.

No Notification

As a result, even individuals who submitted comments on the original proposal were not informed of the amendment. Indeed, Trial Lawyers for Public Justice stumbled upon the revision just one week before the Judicial Conference was scheduled to vote on the proposal. A number of Judicial Conference members we notified indicated that they learned of it from us.

The Judicial Conference rejected the proposal, as it should have, as well as the other proposed changes to Rule 26(c). Some of these arguably would have improved public access to court documents. For example, one change would have made it clear that non-parties have standing to seek modification of a protective order. (They already do, but the rule doesn't say so.)

We applauded that provision, but, even before we discovered the last-minute change, we concluded that the harm done by the total package outweighed its benefits—primarily because, contrary to current law, it authorized judges to continue protective orders so long as the parties had "relied" upon them. (The change to permit stipulated protective orders made this proposal even worse. It meant that secrecy orders could be entered without any showing of good cause and then continued because they had been relied upon.) Now, however, the Standing Committee is about to consider re-proposing all of the changes—including the weakening of the good cause requirement and the creation of a "reliance" defense.

Litigation conducted in secret erodes public confidence in the courts. Adopting rules that would make it easier for defendants to hide their wrongdoing from the public will only worsen this problem. The Judicial Conference helped maintain the integrity of the courts when it rejected these proposed changes earlier this year. We hope the Standing Committee will do the same thing. Courts shouldn't order secrecy when there's no good cause shown for it.

Judges Alone Should Not Determine Procedures

ARTHUR R. MILLER'S concern that "media and special interest group lawyers" caused the Judicial Conference to reject the proposed revision of Federal Rule of Civil Procedure 26(c) is misplaced. [Podium, NLJ, May 1.] What he should be concerned with is the insensitivity shown in the 11th-hour change of course by the Advisory Committee on Civil Rules and the Committee on Rules of Practice.

Judges alone should not determine judicial procedures. Without the Civil Justice Reform Act, courts would not have published statistics on the performance of individual judges in civil cases.

I believe it's healthy that the advisory committee has asked the standing committee to approve re-publishing the proposed amendments to Rule 26(c) as they were submitted to the Judicial Conference so that a fuller understanding will be in place before final action is taken.

U.S. DISTRICT JUDGE AVERN COHN
Detroit

Keeping The Public In the Dark

By Jane Kirtley

Jane Kirtley is the executive director of the Reporters Committee for Freedom of the Press.

Two proposals would undermine the public's right to know about federal legal proceedings.

It is no secret that vocal and influential factions of the bench and bar are hostile to public scrutiny of the judicial process. Continuing efforts to banish cameras from federal courtrooms are only the most visible signs of this. Pious expressions of concern about debasing the dignity of the courtroom are often code words for initiatives designed to keep the unwashed masses from scrutinizing what goes on in the inner sanctum.

But while the camera debate at least has excited public interest and provoked extensive press coverage, two other low-profile campaigns, also intended to shroud legal disputes in secrecy, are simultanenously being waged before administrative bodies in Washington. If successful, they threaten to undermine the public's right to know in ways far more profound and far-reaching.

For more than three years the Judicial Conference of the United States, the policy making body that will decide the fate of cameras in federal courts, has been considering revisions of the federal rule that governs the sealing of documents exchanged by the parties in civil suits before a trial.

Rule 26(c) currently says these materials may be kept secret only if the parties are able to demonstrate good cause to justify doing so. "Good cause" traditionally has included protection of trade secrets, confidential government data or highly personal information. At the same time, courts in several jurisdictions have held that the public and press enjoy at least a common law, and in some cases a First Amendment, right of access to such material, and that courts must balance these competing interests before declaring documents off-limits.

A proposed amendment to the rule would dramatically change the situation, permitting judges to approve secrecy pacts crafted by the courtroom combatants. Although a separate provision of the amendment would permit others to intervene after the fact by asking the court to dissolve such orders, the net effect would be to cut off access to information of vital public interest.

The Judicial Conference was poised to approve the amendment in mid-March. However, a flurry of negative comments filed by media and lawyers' groups prompted the conference to postpone action and to refer the proposal to one of its committees for reconsideration in July.

Harvard Law Professor Arthur Miller excoriated the Judicial Conference for caving in to what he characterized as "special interest politics" when it declined to embrace the amendment. In an article in the National Law Journal, he complained that media groups criticizing the proposal acted only to advance their "parochial" business interests, by gaining access to information exchanged by litigants in a publicly funded proceeding—information which, Miller implied, the public has no right to know.

Meanwhile, the more obscure Administrative Conference of the United States, which makes recommendations for federal agencies, has been considering a proposal to exempt certain documents used in alternative dispute resolution (ADR) involving federal agencies from the federal Freedom of Information Act. These proceedings, which are of fairly recent vintage, are designed to settle administrative disputes outside the normal court process through the use of mediators.

Unlike private ADR—which involves business mediation between private parties administered by private dispute resolution services—conflict resolution under the ADR Act always includes federal agencies. The federal involvement suggests a clear public interest in media access to the documents. But Mark Grunewald, associate dean at Washington and Lee University, argues that opening them up undermines essential confidentiality provisions.

An Administrative Conference committee briefly suspended consideration of the proposal after receiving comments objecting to it in March. But the panel rubber-stamped the measure in April, referring it for action at the organization's plenary meeting in mid-June, where it is expected to be approved.

Both of these proposals seek nothing less than an official endorsement of secret justice. They would permit participants in a controversy to conspire to conceal information from the public, even while utilizing public resources, funds and forums to settle their disagreements. The public interest in knowing, for example, why the Justice Department has dropped antitrust charges against a software manufacturer, or the details of the settlement of a sexual harassment complaint against a Fortune 500 corporate official, or the content of documents produced by chemical companies sued by veterans exposed to their products during combat, will be trumped by amorphous claims of "privacy," "confidentiality" and "expediency."

This kind of secrecy will only exacerbate the perception that the justice system promotes private interests rather than the public welfare. ●