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ADVISORY COMMITTEE ON CIVIL RULES

Washington, D.C.
October 17-18, 1996

AGENDA
Advisory Committee on Civil Rules
October 17-18, 1996

I. Opening Remarks of Chairman (Oral report)

II. Approval of Minutes of April 1996 Meeting

III. Class Action Proposal

- A. Proposal Published for Comment, Three Public Hearings Scheduled, Comment Period Expires February 15, 1997
- B. Discussion of Rule 23 by the Standing Committee and Subsequent Report Focussing on Primary Rule 23 Issues

IV. RAND Report Evaluating CJRA Plans

- A. Consideration of the Report, Especially its Potential Impact on the Civil Rules (Oral report)
- B. Timing and Status of Judicial Conference Report on CJRA to Congress

V. Consideration of Scope and Nature of Rules Governing Discovery

- A. American College of Trial Lawyers' Proposal
- B. RAND Study Dealing with Discovery Issues (Oral report)

VI. Status of Review of Copyright Rules of Practice and Procedure

VII. Service of Post-Complaint Papers by Commercial Carriers

- A. Consideration by Bankruptcy Rules Committee of a Proposal to Authorize Service of Motions and Accompanying Briefs by Electronic Means
- B. Service by Commercial Carriers

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VIII. Supplemental Admiralty Rules B, C, and E

IX. Proposal Facilitating Use of Expert Witness Panels in Mass Tort Litigation

X. Consideration of Proposed Amendment to Evidence Rule 103

XI. Next Meeting in Conjunction with ABA Conference on RAND Study of CJRA at the University of Alabama, Tuscaloosa, March 20-22, 1997

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Agenda Item I & II

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 18 and 19, 1996

NOTE: THIS DRAFT HAS NOT BEEN REVIEWED BY THE COMMITTEE

The Civil Rules Advisory Committee met on April 18 and 19, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge John L. Carroll, Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Committee on Rules of Practice and Procedure; Professor Daniel Coquillette attended as Reporter, And Sol Schreiber, Esq., attended as liaison member, 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 Rules Committee Support Office, and Karen Kremer of the Administrative Office of the United States Courts also attended. Thomas E. Willging represented the Federal Judicial Center. Other observers and participants are named in the appendix.

Judge Higginbotham welcomed the members of the Committee, other participants, and observers.

The Minutes of the November, 1995 meeting were approved.

RULES PUBLISHED FOR COMMENT IN 1995

Amendments of four rules were published for comment in 1995. Rules 9(h), 26(c), 47(a), and 48 drew substantial written comments. Hearings were held in Oakland, California; Atlanta, Georgia; and New Orleans, Louisiana. All members of the Committee had the complete written comments and transcripts of the hearings. Summaries of the written comments and the hearing testimony also were provided. Action on these proposals came first on the Committee agenda.

Rule 9(h)

The proposal to amend Rule 9(h) would remove an ambiguity in the present rule provision relating to interlocutory appeals in admiralty. It is not clear whether appeal can be taken under § 1292(a)(3) when, in a case that includes both an admiralty claim and a nonadmiralty claim, the court acts on a nonadmiralty claim by an order that would qualify for § 1292(a)(3) appeal if it had involved an admiralty claim. The proposal resolves the ambiguity by permitting appeal. Public comment was sparse, but was approving. The Committee voted unanimously to recommend that the

Standing Committee recommend adoption of the amendment to the Judicial Conference.

Rule 26(c)

The proposal to amend Rule 26(c) has been discussed extensively by the Committee. The proposal that was published in 1995 was discussed extensively at the October, 1994 and April, 1995 meetings. The proposal drew substantial written comment and testimony.

Discussion began by observing that the most frequently expressed concern was that the proposal expressly recognizes the common practice of entering discovery protective orders on stipulation of the parties. This reference to stipulated orders rested on the Committee's belief that in creating explicit procedures to modify or dissolve protective orders, existing stipulation practice should be confirmed. In March, 1995, the Judicial Conference asked the Committee to reconsider the proposal. One basis for its concern was that the proposal submitted to the Judicial Conference had been modified from the proposal that was first published. The Committee responded by recommending publication of the same proposal for a new round of public comment. Publication in fact prompted extensive comment that repeated concerns that had become familiar from earlier public comments and Committee deliberations.

The new round of public comment and testimony also focused substantial attention on the reliance factor that was listed in both the first and second published proposals as one element in the determination whether to modify or dissolve a protective order. The fear expressed is that this factor will make it too difficult to get relief. The thread of the comments seems to reflect a desire to require a judge-made finding of good cause before a protective order can be entered, and at the same time to make it easier to modify an order. This combination of desires does not seem likely to be realized in the real world; once a judge has made an express determination of good cause, it is likely to be more difficult to persuade the judge to modify the order.

Exploration of Rule 26(c) was initially prompted by Congressional concern that protective orders may be thwarting access to information that is important to protect the public health and safety. Throughout consideration of the gradually developed proposal, several members of the Committee have been skeptical of the need for any action. This history may help in choosing among the present alternatives: (1) change the proposal still further, perhaps so extensively that another round of public comment should be requested; (2) reject the proposal; (3) send the proposal forward with a recommendation for adoption; or (4) continue to study the proposal in a broader framework that includes study of the Rule 26(b)(1) scope of discovery.

The first observation expressed a lack of enthusiasm for going forward with the proposal. This subject has been studied

extensively, and it is not clear that the proposal is any better than present practice, that it will improve anything. The inquiry began in response to a desire to integrate the Enabling Act rulemaking process with Congressional study. If our conclusion is that there is no real need to act, perhaps it is better to hold the topic for continuing study as part of a broader review of discovery. This view was repeated later, with the observation that there are not many problems in actual practice. The proposal may upset general procedure that now works perfectly well by stipulation, creating a whole series of hearings that are not held now. Other members of the Committee agreed that they simply do not encounter problems in practice.

Kenneth Sherk, representing the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers, noted that they had concluded that the proposal is innocuous so long as stipulation practice is clearly protected. They could easily agree, however, that there is no need to make any change.

The responding view was that the changes are good and should be sent forward. The decision of the Sixth Circuit in the recent Proctor & Gamble litigation with Business Week may show skepticism about stipulated consent orders that could cause difficulty in the future. But the language relating to stipulated orders should be revised to require that the stipulation show good cause, or that an evidentiary showing be made: "for good cause shown by motion, by stipulation of the parties, or by evidentiary showing."

The need for language referring to an evidentiary showing was questioned. If there is a hearing, the opportunity to advance evidence is clear. The requirement that there be a motion if there is no stipulation carries a hearing opportunity with it. And the Sixth Circuit concerns were thought to arise from the fact that the parties had, by consent, sought to seal pleadings and other materials filed with the court.

Other advantages were urged in support of going ahead with the proposal. Rule 26(c) now seems to require a showing of good cause. Stipulated orders are common, however, and can be beneficial. The stipulation practice should be confirmed by the rule. And the explicit provisions for modification or dissolution clarify many lingering doubts that beset present practice. The factors listed in subdivision (c)(3)(B) also make it clear that if a protective order is entered by stipulation, the court must consider the need for protection de novo when a motion is made to modify or dissolve the order. This change too is good.

Discussion then returned to themes that were sounded at earlier meetings. Protective orders are an integral part of the arrangement that makes tolerable the sweeping scope of discovery allowed by Rule 26(b)(1). Discovery sweeps in much information that otherwise is protected against any public inquiry, and sweeps it in merely on showing that it is relevant to the subject-matter involved in the pending action. There is no need to show that it would be admissible in evidence, so long as it appears reasonably

calculated to lead to the discovery of admissible evidence. The proposal that the Committee reconsider this scope of discovery will provide occasion for further consideration of protective orders. The scope of discovery has been approached in the past, but no changes have been recommended. In 1970, the requirement of good cause was dropped from the document-production provisions of Rule 34. The concern with stipulated protective orders today seems to focus in large part on documents produced in discovery, and historically there has been an interaction between the working of document production and protective orders. Perhaps further consideration of protective orders should be integrated with a broader study of the scope of discovery. If the scope of discovery is to be narrowed, it may be important to reappraise the role of protective orders in relation to narrower discovery.

A motion was made to hold the Rule 26(c) proposal for further study in conjunction with study of the broader scope of discovery. Discussion suggested that it should be made clear that the Committee is not backing away from the proposal, which expresses good practice. An additional reason for going slow is that the RAND report on local practice under the Civil Justice Reform Act will be available soon, and likely will bring additional Rule 26 topics to the Committee agenda. The ABA plans a major program on the RAND study early next year.

It was asked whether deferral would require yet another round of publication and public comment if the Committee should decide in the future to recommend adoption of the current Rule 26(c) proposal. It was recognized that at some point, continued delay might give rise to a need for new comment in relation to whatever developments might occur in actual practice. No clear time line was identified for this possibility.

The motion to join further consideration of Rule 26(c) to study of the general scope of discovery provided by Rule 26(b)(1), and the related question whether document discovery should be governed by standards different than those that govern other discovery methods, was adopted by unanimous vote.

Rule 47(a)

The Rule 47(a) proposal published in 1995 would establish a right for lawyers to participate in voir dire examination of prospective jurors, subject to reasonable limits set by the court in its discretion. This proposal drew extensive comment. Almost all of the many federal judges who commented on the proposal spoke in opposition. Comments from the bar were not as nearly unanimous, but the very large majority of bar comments supported the proposal.

Discussion opened with the observation that in an ideal world, virtually all federal judges would allow lawyer participation in voir dire under present Rule 47(a). The common theme of most comments by federal judges is the fear that they will lose control if they lose the unlimited right to deny any lawyer participation in voir dire. There also is a hint of the "random selection" philosophy that there is no real value in jury selection, that any

group of six or more jurors will do as well as any other, although this view is seldom made explicit. Many of the adverse comments reflect direct experience with state systems in which the right of lawyer participation has run riot.

As compared to judicial comments, many lawyers say that selection practices are inadequate in many courts. Judges do not adequately understand the case, and fail to appreciate the importance of direct lawyer questioning to supplement initial questioning by the judge. Written questions submitted to the judge simply to not provide sufficient opportunity to follow up answers with further questions. The lawyers recognize that they will not be allowed an open field with the jury.

These competing visions of reality make it difficult to write a rule.

Most federal judges now do what the draft would have them do. They can share their experience with other judges, encouraging them to test the waters. The Federal Judicial Center can be encouraged — and indeed seems receptive — to put voir dire on its educational agenda for new judges and for judge workshops. The workshops may be vital. Simply bringing judges together with small numbers of respected local attorneys for frank discussion can prove highly productive.

The comments from the bench and bar before and during the comment period have proved most useful. They can set the stage for new educational efforts and improved communication on these issues. In addition, they identified the potential problems that arise from the use of questionnaires to supplement oral voir dire. Questionnaires can be quite useful. But they also can become quite extensive, seeking information for a psychological profile to be used by "jury consultants." This is cause for concern.

Discussion turned to the most effective means of encouraging education of both bench and bar. The first step should be an information report to the Standing Committee, for the Judicial Conference, describing the problems that have been reported to the Committee. Significant problems with jury selection have been clearly identified by comments from the bar, and the conclusion that the best present solution may not involve amendment of Rule 47(a) does not justify complete inaction. The Committee should encourage informal meetings between groups of judges and respected local lawyers for frank discussion of the problems. The Committee also should consider whether there is some other means of spreading the information gathered during the public comment period. There may be some room for systematic experimentation to test the information provided by the Federal Judicial Center survey of federal judges.

Concern was expressed that Rule 47(a) was published for comment in tandem with identical proposed changes in Criminal Rule 24(a). The Criminal Rules Advisory Committee had not yet met to discuss the public comments — most of which were addressed alike to both rules — and might reach a different conclusion as to the

wisdom of pursuing rules amendments now. The need for lawyer participation in voir dire examination may seem even stronger in criminal prosecutions, particularly in capital cases. The Committee anticipated, however, that the Criminal Rules Committee also would conclude that education is the better part of immediate reform efforts.

The Committee concluded unanimously that it should continue to study Rule 47(a), while encouraging the Federal Judicial Center to go ahead with educational efforts and also encouraging further study of jury questionnaires.

Rule 48

The 1995 proposal would amend Rule 48 to require that all civil juries begin trial with 12 members, absent agreement by the parties on a smaller number. As under present practice, there would be no provision for alternates, and the unanimity requirement would remain unchanged. This proposal drew substantial public comment. Much of the comment approved the proposal. No part of the comment suggested that 12-person juries are intrinsically inferior to the 6- or 8-person juries commonly used in civil actions today. Concerns were expressed about cost and delay, however, focusing on the need to assemble larger panels, select and pay more jurors, and meet the problem arising from the fact that some magistrate-judge courtrooms have jury boxes too small to accommodate 12-person juries. Some concern also was expressed with the prospect that failure to agree on a verdict might be more common with 12-person juries than with smaller juries.

Discussion began with reflections on the great divergences among estimates of the marginal costs associated with moving to 12-person juries, and on the equally great uncertainties of all the estimates. None of the plausible estimates, however, seem to threaten undue additional cost. The problem of inadequate jury boxes can be addressed in various ways, including scheduling magistrate-judge civil trials in district court rooms that are equipped for 12-person juries; when that is not possible, the parties will need to add the need for agreement on a smaller jury to the factors that influence the decision whether to consent to magistrate-judge trial. The available data, including most persuasively the comparison between 6-person civil juries and 12-person criminal juries, indicate that there is no measurable difference in the failure-to-agree rate.

In voicing tentative support for the proposal, one reservation was noted arising from trials in sparsely populated rural areas. It may prove difficult to assemble sufficiently large jury panels to ensure 12-person juries, particularly in cases that involve frequent acquaintances between potential jurors and the parties or people related to the parties. If 30 jurors are summoned, it is never certain how many will appear. In at least some of these cases — especially civil actions brought by prison inmates — the parties are not likely to stipulate to smaller juries. Perhaps, as with Rule 47(a), it would be better simply to encourage the use of

12-person juries.

Reservations were expressed on the basis of the public comments. Some suggest that the comments do not reflect a groundswell of support for the change: Eight-person juries have become common in civil trials of any expected length because of the abolition of alternate jurors, and 12-person juries are common in complex cases because of the fear that jurors will be lost as the trial extends to several days or even weeks. And we may have underestimated the costs, including the burdens imposed on the jurors themselves, their employers, and others. So long as we have a unanimity requirement, defendants will always prefer 12-person juries, and will not stipulate to smaller juries simply to have an earlier trial before a magistrate judge.

The magistrate-judge concern was met by reference to data showing that in the most recent year available, the average was 1.1 civil jury trials per magistrate judge. Many magistrate judges never try jury cases. Most jury trials before magistrate judges occur only in specific parts of the country. Concerns about prisoner litigation should not control a matter of such general importance. There is also some hope that the prisoner litigation problem will be eased by proposals pending in Congress.

It was observed that the entire cost of the jury system, including both civil and criminal cases, is less than the cost of one manned bomber. It is not so much as a blip on the screen of the national budget, and is a tiny fraction even of the budget for the judiciary.

Six-person juries have been used only since Chief Justice Burger, by extra-curial comment, effectively directed their use as a cost-saving measure, and perhaps also with some sense of hostility to jury trial. "Six is half-way to zero." To say that people are comfortable with the system is not comforting; those who have experience with 12-person juries in civil cases often are less sanguine about smaller juries than those whose experience has been only with smaller juries.

Unanimity is a false issue. In criminal cases, studies show that the unanimity requirement affects the dynamics of deliberation, but not the rate of hung juries. Hung juries are very rare, both in civil and criminal trials.

It is incontestable that 12-person juries more than double the probability that a particular jury will include representatives of various minority groups. The increase in representativeness is almost exponential. Many lawyers have commented as well that it is easier for a single forceful person to dominate a smaller jury, lending anecdotal support to the regular findings of psychologists and sociologists. The dynamics of jury deliberations are different in larger juries. The jury studies that lent support to the initial proposal remain convincing. The actual experience of a 12-member jury trial is more reassuring. Putting aside any mystical qualities, the 12-person jury developed and was adhered to for centuries, distilling the wisdom of vast experience. "Carpentry

costs" should not stand in the way.

The question whether bankruptcy-judge and magistrate-judge trials should be exempted from a 12-member jury requirement was discussed briefly. It was concluded that it is better to encourage scheduling in 12-person jury courtrooms, so as not to complicate the choice between district-judge and other-judge trials. Consent to smaller juries can resolve such scheduling difficulties as remain.

The motion to recommend that the Standing Committee recommend adoption of the proposal to provide for 12-person juries in Rule 48 was approved by vote of 11 for, 2 against.

Rule Not Yet Published

Rule 23

Discussion of Rule 23 began with an invitation to consider the draft by asking what can be achieved by (b)(3) class actions that cannot be achieved by consolidation and other tools. The 1966 version of Rule 23 came into being as the Advisory Committee worked through concerns about civil rights injunction class actions. What would the world look like if (b)(3) were abrogated? Is (b)(3) desirable for single event disasters, such as airplane crashes? What of the securities field, where private enforcement often takes the form of a (b)(3) class action? And what of other fields of litigation that amass large numbers of small claims into a (b)(3) class?

One of the changes that emerged from the November, 1995 meeting was an addition to (b)(3) of a required finding that a class action be "necessary" for the fair and efficient adjudication of the controversy. The purpose was to serve a heuristic function by encouraging courts to look beyond "efficiency," to emphasize the fairness of trying individual traditional cases in traditional ways. The combination of "necessary" with "superior" is awkward, however, seeming to require denial of certification for want of necessity, even though a class action might seem superior. In informational discussion with the Standing Committee in January, 1996, moreover, some concern was expressed about the tangled history of "necessary" parties in Rule 19. The present draft suggests elimination of "necessary" from the required (b)(3) findings, and substitution of a new subparagraph (A) that requires consideration of the need for certification as one factor bearing on the findings of predominance and superiority.

Another of the November changes led to alternative provisions requiring consideration of the probable outcome on the merits as part of the required (b)(3) findings. Increasing concerns have been expressed about the impact of this requirement. One concern arises from the prospect that a prediction of the merits must be supported by extensive discovery, protracting the certification determination and adding great expense. Another concern arises from the effects of the finding; however tentatively and subordinately it may be expressed, the prediction of the merits may

affect all future proceedings in the case and may have real-world consequences as well. Impact on market evaluation of a company's stock was one frequently offered illustration. Various responses are suggested by the new drafts — to require a finding of probable merit only if requested by a party opposing class certification; to eliminate the requirement that there be a finding, but to leave the probable outcome on the merits as one of the factors bearing on predominance and superiority; to consider probable outcome on the merits only as part of an evaluation of the value of "probable class relief"; or to adhere to present practice that, at least nominally, prohibits consideration of the merits in determining whether to certify a class.

The November changes also included in the (b)(3) factors consideration whether the public interest and private benefits of probable relief to individual class members justify the burdens of the litigation. Class actions have become an important element of private attorney-general enforcement of many statutes. In considering the problem of class actions that yield little benefit to class members, the problem is cynicism about the process that generates such remedies as "coupons" that may provide more benefit to the defendants and class lawyers than to class members. Yet there may be indirect benefits to the public at large in deterring wrongdoing, and in some cases it may be desirable to force disgorgement of wrongful profits without regard to individual benefits. The question is in part whether it is wise to rely on private enforcement through Rule 23 rather than specific Congressionally mandated private enforcement devices — and whether the question is different as to statutes enacted before Rule 23 enforcement had become well recognized than as to more recent statutes.

Settlement classes were discussed extensively in November, but without reaching even tentative conclusions that could be embodied in a revised draft. One of the most difficult questions is whether it is possible to provide meaningful guidance on the use of "futures" classes of people who have not yet instituted litigation, may not realize they have been injured, and indeed may not yet have experienced any of the latent injuries that eventually will arise from past events. Classes of future claimants can achieve orderly systems for administering remedies that avoid the risk that present claimants will deplete or exhaust defense resources — including liability insurance — and preempt any effective remedy for the future claimants. There are serious questions that remain to be resolved, however, and that will be addressed in actions now pending on appeal.

Rule 23(f): Interlocutory Appeals

Specific discussion of the multiple drafts provided in the agenda turned first to the interlocutory appeal provision in the "minimum changes" draft, Rule 23(f). This provision has endured with no meaningful changes through several drafts, and has encountered little meaningful opposition. Initial concerns about expanding the opportunities for discretionary interlocutory appeals

have tended to fade on close study of the limits built into the draft.

The most commonly expressed reservations were revisited. Courts of appeals have actively used mandamus review in several recent cases, providing the needed safety valve for improvident class certifications. If an explicit interlocutory appeal provision is added, every case will generate an attempted appeal. A heavy burden will be placed on appellate courts. The cost and delay will be substantial. No lawyer worthy of pursuing a class action will let pass an opportunity to appeal.

The common responses also were revisited. The extraordinary writs should not be subject to the pressures generated by Rule 23 certification decisions. Mandamus should remain a special instrument. The burden of applications for permissive appeals under § 1292(b) is not heavy; court of appeals screening procedures are effective. Motions for leave to appeal will be handled in the same way as other motions. And early review is desirable.

It was noted that the Appellate Rules Advisory Committee is engaged in drafting an Appellate Rule that would implement proposed Civil Rule 23(f). The initial proposal would have amended Appellate Rule 5.1 to include Rule 23(f) appeals as well as appeals from district court review of final magistrate-judge decisions. On consideration, the Appellate Rules Committee determined that it should attempt to collapse present Rule 5.1 into Rule 5, so that there will be one single Appellate Rule that includes all varieties of appeals by permission, present and perhaps future. It is hoped that the product will be available for consideration by the Standing Committee at the same time as Rule 23(f).

One modest drafting change was suggested. The most recent draft refers to appeal from an order "granting or denying a request for class action certification." Deletion of "a request for" was suggested on the ground that it might be redundant, or alternatively might effect an unwise restriction by failing to provide for appeal in the particularly sensitive situation in which a trial court has acted on its own motion to grant or deny class certification. The deletion was approved unanimously.

As revised, new subdivision (f) was approved unanimously.

Benefits and Burdens of Class Action

The next portion of the minimum changes draft to be discussed was (b)(3) subparagraph (F). This draft simplifies the draft that emerged from the November meeting. The November meeting generated a subparagraph (G): "whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation[.]" The minimum changes draft renumbers this factor as subparagraph F, and eliminates any explicit reference to the public interest: "whether the probable relief to individual class members justifies the costs and burdens of class litigation." In this form, the factor emphasizes the importance of the relief to individual class members

— even a significant aggregate sum, when divided among a large number of plaintiffs, may provide such trivial benefit that the justification for class litigation must be on grounds other than the benefits to individual class members.

The origin of the probable relief factor lies in concern that Rule 23(b)(3) is an aggregation device that, separate from the special concerns reflected in (b)(1) and (b)(2) class actions, should focus on the individual claims being aggregated. The traditional focus and justification for individual private litigation is individual remedial benefit. Most private wrongs go without redress. Class treatment can provide meaningful redress for wrongs that otherwise would not be righted, and the value of the individual relief can be important. But class actions should not stray far from this source of legitimacy. Public enforcement concerns should enter primarily when Congress creates explicit private enforcement procedures. As the note to one of the drafts articulated this view, "we should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers." Focus should hold steady on the objective cash value and subjective intrinsic value of the relief available to actual class members.

The "corrective justice" and "deterrent" elements of small-claims class actions were noted repeatedly as a supplement to the focus on private remedies. It was urged that consideration of the value of probable relief to individual class members does not foreclose consideration of these elements as well. But it also was urged that indeed this factor should focus only on the value of private relief. Any other view would put courts in the position of weighing the public importance of different statutory policies, and perhaps the relative importance of "minor" or "technical" violations as compared to flagrant or intentional violations.

Discussion immediately turned to the two central elements of the formulation. How is a court to predict the probable relief? And what are the costs and benefits invoked?

One suggestion was that attention should focus in part on a determination whether the motivating force of the class action is a desire for attorney fees.

"Probable relief" in the (b)(3) context is damages. The example that was used in much of the ensuing discussion was an overcharge of a 2¢ a month imposed by a telephone company for 12 months on 2,000,000 customers. The aggregate damages of $480,000 are not trivial. But it is not clear that such a class should be certified.

Discussion also wove around the question whether assessment of "probable relief" includes a prediction whether the class claim will prevail on the merits. In the November discussion, the probable relief factor was held separate from consideration of the merits. The calculation was to be made on the assumption that the class position would prevail on the merits. If direct consideration of the probable outcome on the merits is eliminated,

however, it is possible to incorporate a prediction of the outcome on the merits in measuring the "probable relief." Language reflecting that possibility is included in the note that accompanies the draft that eliminates the more direct references to outcome on the merits.

Consideration of the substantive merits of the underlying claims through this factor, not as an independent matter, led to the oft-discussed fear that consideration of the merits would lead to expanded discovery surrounding the certification decision. The comparison to preliminary injunction proceedings was noted — they may entail much or little discovery — but found not helpful because of the special factors that affect preliminary injunction decisions. A preliminary injunction decision may be converted to trial on the merits when circumstances permit full information to be assembled and presented before the need to restrain. It may rest on a small fraction of the information needed for trial on the merits. The driving force is the need to preserve the capacity to grant effective relief on the merits, not the calculus of class certification.

It also was asked whether the present rule that certification decisions must be made without reference to the merits is, in practice, a fiction. Explicit recognition of what many feel is a common practice, left unspoken because consideration of the merits is supposed to be forbidden, might lead to wiser reliance on the probable merits.

One effort to bring this role of the merits to a point was made by asking whether the rule should refer to the probable value of the "requested" or "demanded" relief, so as to focus only on the relief, not the merits. This suggestion was quickly rejected.

Alternatives to considering the merits at the certification stage were suggested. One was to require particularized pleading of the elements of each claim offered for class treatment.

Cases with multiple claims were discussed. If one version of a class claim would afford substantial relief, that should be sufficient at least for initial certification. Recognizing that the question of class definition is interdependent with the questions posed by multiple claims, it was understood that the probable relief on all claims suitable to a single class could appropriately be considered and weighed against the costs and burdens entailed by class treatment. At least conceptually, it may be that certification is proper as to some class claims but not another claim that would add greater costs and burdens than the probable relief on that claim.

The problem of weighing returned, with the question whether individual claims averaging a few hundred dollars would justify class treatment. It was noted that the median individual recovery ranges reported by the Federal Judicial Center study ran from something more than $300 to something more than $500. What is to be weighed against the predicted recovery? "Every possible argument will be made." Class proponents will argue public

enforcement values.

John Frank addressed the Committee, urging that trivial claims class actions are a major problem, providing token recoveries for class members and big rewards for attorneys. "This Committee is not the avenging angel of social policy." Congress can create enforcement remedies, some administrative, some judicial, pursued by public or private enforcers.

Further Committee discussion suggested, first, that class actions are not filed on claims that, as pleaded at the outset, would yield only trivial relief. The Federal Judicial Center Study, covering two years in four districts, found 9 cases out of 150 certified classes in which the individual recoveries were less than $100; only 3 of them involved individual recoveries less than $25, with the lowest figure $16. But it was responded that very small claim cases do in fact exist. At least in some parts of the country, very small claims classes are filed in state courts and removed. These cases require enormous administrative work. And they breed cynicism about the courts.

The question of claim size also led to the question whether the initial certification decision should be subject to review as progress in the case provides clearer evidence of the probable relief. Initially plausible demands for significant relief may become increasingly implausible as a case progresses. It was agreed that if there is quick and undemanding certification, the certification decision should be open to reconsideration and subclassing or decertification when it appears that the probable relief fails to justify the remaining costs and burdens of class treatment.

A motion to adhere to the language of the "minimum change" draft passed by vote of 9 to 3. The question whether subparagraph (F) should include consideration of the merits in assessing the probable value of individual relief was discussed further during the later deliberations that voted to discard the explicit consideration of probable merits that was adopted by the November draft.

Need For Class Action

The November 1995 draft added a requirement to subdivision (b)(3) that a class action be "necessary" as well as superior for the fair and efficient adjudication of the controversy. For the reasons noted in the introduction, this concept has been difficult to explain. The draft considered at this meeting suggested replacement of the "necessary" finding by adding a new subparagraph (A) and rewording subparagraph (B). Proposed subparagraph (A) would add as a factor in determining superiority "the need for class certification to accomplish effective enforcement of individual claims." Proposed subparagraph (B) would refer to "the practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions."

The first question was whether factor A is antithetical to factor F as just approved. Factor A suggests that class certification is necessary if claims are too small to support individual enforcement. Factor F suggests that class certification is undesirable if claims are too small. The answer was that the two provisions are complementary. Factor A cuts in two directions. If individual class member claims are so substantial as to support individual litigation, certification may be inappropriate. If class member claims are too small to support individual litigation, certification may be needed to provide meaningful individual relief. But if the individual relief that can be afforded by a class action does not justify the costs and burdens of class litigation, certification should be denied.

The relationship between (A) and (B) also was questioned; in many ways, they seem redundant of each other. The emphasis on the need for class certification for effective enforcement, however, can go beyond the practical ability of individual class members to pursue their claims without certification. Separate actions will not be brought by all members of a class who seem practically able to do so, whether because individual actions in fact are not practicable or because of inertia. Even if separate actions are brought, they may not prove as effective as a class action that pools resources to mount a more effective showing. Class actions also may prove more "effective" for reasons that are more questionable, such as pressure to settle even weak claims that are aggregated into the class. These values of class actions were defended as the heart of (b)(3), the touchstone purpose of aggregation. But it was noted that small-claims (b)(3) class actions have fared quite well since 1966 without any explicit element like proposed factor (A).

The distinction between practical individual enforcement and efficient class enforcement in some ways reflects the distinction between opt-in and opt-out classes. Even with individually substantial claims, there is little reason to believe that the number of participating class members will be the same if the class is certified only for those who opt in as if the class is certified for all but those who opt out. (b)(3) exerts a pressure toward compulsory joinder by requiring an election to opt out of the class. Factors (A) and (B), together with factor (C), allow explicit consideration of the desirability of this inertial pressure to remain in a class for group litigation.

A motion to delete proposed factor (A) passed, 8 to 5. A motion to separate proposed factor (B) into two parts passed unanimously. As restructured, factors (A) and (B) would read: "(A) the practical ability of individual class members to pursue their claims without class certification; (B) class members' interests in maintaining or defending separate actions;".

The discussion noted that the practical ability to pursue individual actions remains a two-edged factor. It weighs in favor of class certification, all else remaining equal, if individual actions are not practicable. It weighs against class

certification, all else remaining equal, if individual actions are practicable.

Another drafting change from present factor (B) also was noted. The 1966 rule refers to the interest "in individually controlling" separate actions. The proposed language refers to the interest in maintaining or defending separate actions. This language better reflects the full range of alternatives that must be considered. An alternative to a proposed class action may be a different class action, or a number of different class actions. Other alternatives may include intervention in pending actions, actions initially framed by voluntary joinder, consolidation of individual actions — including consolidation for pretrial purposes by the Judicial Panel on Multidistrict Litigation or transfers from separate districts for consolidated trial in a single court or limited number of courts, and stand-alone individual actions. Individual members of a proposed class may not "control" many of these alternatives in any meaningful sense, but the alternatives must be considered nonetheless.

Melvin Weiss then addressed the Committee. He has been litigating class actions from a time before adoption of the 1966 amendments. Plaintiff class lawyers were taught then that they were to play the role of private attorney general. That role is confirmed by the adoption of (b)(3) classes. The size of individual class member recoveries was not thought important. The need for private-attorney-general classes is growing. Government enforcement resources are shrinking absolutely, and are shrinking even more in relation to the level of conduct that needs to be corrected. Telemarketing fraud abounds. 900 telephone numbers are an illustration. Suppose most members of a class are hit with $10 or $20 charges for calls to a 900 number, with only a few whose bills run much higher. The government may eventually put a stop to a particular operation, but that provides no redress for the victims. Class-action lawyers do that. It is hard work. It is risky work. Of course class counsel deserve to be paid. If the Committee wants to say that a $2 individual recovery is trivial, it should say so. The matter should not be left to open-ended discretion and open hostility to class enforcement. In one action, the class won $60,000,000 of free long-distance telephone services; this is a "coupon" settlement, but provides a real benefit to class members. Class-action attorneys protect victims. Some even are forced to borrow to finance a class action. These social services should be recognized and appreciated. It would be ironic to cut back on class actions at a time when the rest of the world is admiring American experience and seeking to emulate it.

Peter Lockwood addressed the Committee, observing that factors (A) and (F) do not provide any standards. (A) seems to say the porridge is too hot, (F) that the porridge is too cold, and the whole rule seems to say that courts should seek a nice serving temperature. It is difficult to suppose that a Committee Note could say that a $200 individual recovery is sufficient to justify a class action. This proposal is dangerously close to the limits

of the Enabling Act, trespassing on substantive grounds. The purpose of Rule 23 is to enforce small claims that are legally justified. There cannot be any effective appellate review of trial-court application of these discretionary factors. Anecdotal views of frivolous suits, settled by supine defendants, do not justify an unguided discretion to reject class certification. Factor (F) should be reconsidered.

Beverly Moore observed that factor (F) allows refusal to certify a class if individual claims are small, even though aggregate class relief would be substantial and the costs of administration are low. But certification should remain available if in fact efficient administration is possible. If a defendant has a continuing relationship with class members, for example, it may be possible to effect individual notice at very low cost by including it with a regular monthly mailing. Distribution of individual recoveries may be accomplished in a similar manner. Note should be made of this possibility.

Committee discussions returned to the relationships between factor (A), the practical ability of class members to pursue individual actions, and factor (F), the value of the probable relief to individual members. It was noted that factor (F) involves balancing the complexity of the litigation and the costs of administration in relation to individual benefits. Even the 24¢ individual recovery might qualify for class treatment if it is possible to resolve the merits and administer the remedy at low cost. The practical ability factor encourages certification of small-claims classes, just as the probable individual relief factor at times will limit certification of small-claims classes. If it is apparent at the time of certification that the individual value of the probable class relief is small, the certification decision must weigh the costs and burdens of a class proceeding. There is no specific dollar threshold. Individual recoveries of $50 in a "laydown" or summary judgment case may easily justify certification. Claims for $200 or $300 may not justify certification in a setting that requires resolution of very complex fact issues or difficult and uncertain law issues. This approach means that an initial decision to grant certification, relying on substantial apparent value or apparent ease of resolution and administration of the remedy, remains constantly open to reconsideration and decertification if the probable relief diminishes or the burdens of resolution and administration increase.

Prediction of the Merits

The November 1995 draft added a requirement that in certifying a (b)(3) class the court make a finding on the probable outcome on the merits. Two alternatives were carried forward. One would require only a showing that the class claims, issues, or defenses are not insubstantial on the merits. The other would adopt a balancing test, requiring a finding that the prospect of success on the merits is sufficient to justify the costs and burdens imposed by certification. Either required finding would be bolstered by a

separate factor requiring consideration of the probable success on the merits of the class claims, issues, or defenses. Many observers, representing both plaintiff and defendant interests, reacted to these alternatives with the concerns noted during the first parts of this meeting. These concerns were addressed in the most recent draft by limiting the requirement to cases in which an evaluation of the probable merits is requested by a party opposing class certification.

It was urged that some form of explicit consideration of the probable merits should be retained as part of a (b)(3) certification decision. A preliminary injunction decision requires consideration of the probable merits in addition to the impact on the parties of granting or denying injunctive relief. The public interest often is considered as well. There is a substantial body of learning surrounding this practice in the preliminary injunction setting that can illuminate the class-action setting. It is appropriate to require a forecast of the ultimate judgment before unleashing a class action. There is much at stake; in some cases, the very existence of a defendant is in jeopardy. The prospect that defendants may not want preliminary inquiry into the merits of a plaintiff class claim can be met by requiring the proponent of certification to make a demonstration on the merits, but allowing the opponent of certification to waive the requirement.

Further support for required consideration of the merits was found by John Frank in recent cases, such as In re Rhone-Poulenc Rorer Inc., 7th Cir.1995, 51 F.3d 1293, which emphasized the fact that plaintiffs had lost 12 of the 13 individual actions that had been pursued to judgment at the time of the class certification. The coercive settlement pressure arising from certification even in face of such litigation results also was emphasized by the court. He urged that it is a false terror to be concerned that stock market disaster will follow a finding of sufficient probable success to warrant certification. We should find a way to junk bad cases early.

Discussion of the Rhone-Poulenc decision led to the observation that the defendants had just now offered $600,000,000 to settle all of the pending individual actions all around the country. This offer shows that the class claims were far from weak. Courts may go too fast about the task if consideration of the probable merits is approved.

Discovery concerns continued to be expressed. Consideration of the merits will lead to merits discovery as part of the certification process, and it will be difficult to limit discovery in ways that do not defeat the desire to avoid the burdens that would flow from actual certification.

Beyond the difficulties engendered by probable success predictions, the Federal Judicial Center study shows that ample protection is provided by motions to dismiss or for summary judgment. Consideration of factor (F), the individual value of probable class relief, will further aid in avoiding trivial

actions. If there is any need for added protection, it can be met by making it clear that a court can act on Rule 12 and 56 motions before deciding whether to certify a class.

Without formal motion, it was concluded that the Committee had decided by acquiescence to delete the November draft provisions requiring a finding of probable merit and including probable success on the merits as a factor pertinent to the (b)(3) certification decision.

Attention then turned to the alternative of incorporating consideration of the probable outcome on the merits in the factor (F) balancing of the individual value of probable class relief against the costs and burdens of class litigation. The Committee materials included the suggestion that this result might be achieved by including in the Committee Note to factor (F) language something like this: "In an appropriate case, assessment of the probable relief to individual class members can go beyond consideration of the relief likely to be awarded should the class win a complete victory. The probability of class success also can be considered if there are strong reasons to doubt success. It is appropriate to consider the probability of success only if the appraisal can be made without extended proceedings and without prejudicing subsequent proceedings. This factor should not become the occasion for extensive discovery that otherwise would not be justified at this stage of the litigation. Neither should reliance on this factor be expressed in terms that threaten to increase the influence that a certification decision inevitably has on other pretrial proceedings, trial, or settlement."

Support was expressed for this approach, with the reservation that the draft focused only on the negative. It should be integrated with the statement, agreed upon earlier, that certification may be justified for small claims when there is a very strong prospect of success. Further support was found in the continuing concern that aggregation of large numbers of individually weak claims can create a coercive pressure to settle. Certification often is a major event, even a critical event.

Consideration of the merits in this fashion also was supported on the ground that the certification decision in a (b)(3) proceeding must look ahead to the ways in which the case probably will be tried. The predominance of common issues and the superiority of class treatment depend heavily on the trial that will follow.

This "commentary-in-the-Note" strategy was opposed on the ground that it would whittle down the trial judge's discretion. Even without any discussion in the Note, lawyers and judges will seize on the idea that the value of probable relief depends not only on the amount that will be awarded upon success on the merits, but also upon the probability of success. Factor (F) can be used in this way, and can be found to support departure from the Eisen rule that forbids consideration of probable merits at the certification stage.

Opposition also was expressed on the ground that the initial discussion of factor (F) had assumed that it focused solely on the amount of probable relief, not the probability of defeat on the merits. The problems persist whatever the level of emphasis in the text of the Rule or the Note. Consideration of the merits will entail discovery on the merits, and an expression evaluating the probable merits for certification purposes will carry forward to affect all subsequent stages of the litigation. Even if the Note were to say that this process should not justify any discovery on the merits, nefarious results would remain.

Consideration of the merits, moreover, suggests that certification can be denied because of doubts on the merits even though the case cannot be dismissed under Rule 12 or resolved by summary judgment. Courts in fact require particularized pleading of class claims at a level that supports vigorous use of Rule 12.

It also was suggested that the proposed Note language is not a "soft" compromise of a difficult debate. The Committee should decide what it wants to do, and be explicit in the text of the Rule.

Sheila Birnbaum urged that the suggested Note is a balanced attempt to go beyond the limits of Rules 12 and 56, in a way that focuses on the extraordinary case. There should not be discovery, but the merits should be open to consideration with factor (F).

Beverly Moore suggested that every defense lawyer will want to get into the merits at the certification stage in every case. The Draft Note reflects empirically invalid assumptions that there are many frivolous cases and coercive settlements. That is not so.

Peter Lockwood observed that the draft Note fragment can only address cases that cannot be resolved by summary judgment. He asked how is a court to determine that a case that is strong enough to go to trial on a Rule 56 measure still is not strong enough to certify.

Robert Heim, who had initially supported consideration of the merits, but has moved away from the November 1995 draft proposals, supported the proposed Note on factor (F). The concern with discovery is overstated; there is substantial discovery on certification issues now. And there are cases that are very weak. Judges have felt hamstrung by the Eisen prohibition of merits review. The draft authorizes a "preliminary peek."

Alfred Cortese also supported the proposed note. Some claims justifiably earn certification under (b)(3) because they have merit but cannot practicably be enforced individually. Others should be weeded out.

The proposition that the draft Note would merely open a small door for consideration of the merits was doubted. Once the door is open, legions will march through.

A motion to reject the draft Note discussion of incorporation of the merits in the factor (F) determination was adopted, 8 votes

to 5.

A motion was made to say nothing about consideration of the merits in conjunction with the factor (F) determination. It was suggested that the Note has to say something, because in the face of silence many courts will read factor (F) to support consideration of the probable result on the merits. "Probable relief" intrinsically includes the probability of any relief. The motion to say nothing was adopted, 7 votes to 6.

Settlement Classes

The November draft included in subdivision (b)(3) a new factor (H) that included as a matter pertinent to the predominance and superiority findings:

> **(H)** 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 * * *

Discussion began with the question whether this factor should be added. It was recalled that the November meeting discussed settlement classes without reaching any conclusions. There are a wide variety of settlement classes. It seemed to be the consensus in November that not enough is known to support intelligent rulemaking with respect to futures classes. The use of settlement classes under subdivision (b)(1) also seems too complicated for wise rulemaking. But for (b)(3) classes, the Third Circuit decision in the General Motors pickup truck litigation has stirred the question whether a class can be certified only on the hypothesis that certification of that class is appropriate for litigation. Many believe that the Third Circuit opinion permits application of the subdivision (a) prerequisites and the subdivision (b)(3) factors in a way that permits certification of a class for settlement purposes even though the same class would not be certified for trial. Others are uncertain. Settlement classes have been found useful by many courts. The practice has evolved from initial hesitancy to regular adoption as a routine practice. They have worked not only in the exotic cases that attract widespread attention, but also in smaller-scale cases such as a class of 1,200 homeowners seeking post-hurricane insurance benefits. The class probably could not have been certified for trial because there were many individual questions. A class that could not be certified for litigation because of choice-of-law problems, general problems of manageability, the need to explore many individual issues, or the like, may profitably be certified for settlement. Subdivision (H) is the law everywhere, with the possible exception of the Third Circuit. But if Rule 23 remains silent, other courts may be troubled by the uncertainties engendered by some readings of the Third Circuit opinion. On the other hand, it may be argued that courts are in the business of trying cases, not mediating settlements. To certify for settlement a class that the court would not take to litigation is to take courts into the claims-administration business. Just what is

properly the stuff of judicial business remains open to dispute.

The first response was that settlement classes are extremely important, for plaintiffs and defendants alike, but that it may not be appropriate to adopt a rule that does not provide a list of factors to help the trial judge. Many settlements, moreover, are important because they provide a means of dealing with future claimants. In some situations settlement may not be possible unless all claimants, present and future, are included. In others, failure to provide for future claimants may mean that by the time future claims ripen there will be no assets left to respond in judgment. Futures classes would be left in the wilderness by this draft.

The next response was an observation by John Frank that settlement classes have been the most offensive part of the current class-action process. They offer a bribe to plaintiffs' counsel to take a dive and sell res judicata. As a moral matter, do we want this in the judicial system? If so, settlement classes should at most be allowed only if the same class would be certified for litigation. And it should be made clear that all requirements of the rule apply to futures classes. There also should be provision for increased judicial scrutiny of any proposed settlement. Professor Jack Coffey's views on this subject are sound. The often-decried "coupon" remedies all have been settlement classes.

The choice was put as a minimalist choice between doing nothing or taking a modest first step. Factor (H) does not speak to the futures settlements now pending on appeal in the Third and Fifth Circuits. It only says that the fact that a case cannot be tried as a class need not defeat certification for settlement.

Another option was offered, suggesting that perhaps subdivision (e) should be amended to include the list of factors for reviewing settlements recommended by Judge Schwarzer in his Cornell Law Review article. Subdivision (e) also might provide that closer scrutiny is required if a class is certified at the same time as a proposed settlement is presented. The Committee has never explored this prospect beyond preliminary observations. Nor has it considered the question whether independent counsel might be appointed to assist in evaluation of a proposed settlement.

Opposition to factor (H) was expressed on the ground that it might encourage judges to certify classes simply in the hope that a settlement would clear the docket. It is unsavory to certify a class that cannot ultimately be tried. How can we receive and certify a class that would not be tried? A related fear was that the factor would encourage certification of litigation classes in hopes that the certification would spur settlement.

Support for settlement classes was expressed on the ground that settlement can avoid choice-of-law problems that defeat certification of a broad class. Article III requirements and personal jurisdiction standards still must be met. A settlement class can make all the difference in resolving massive disputes. The pending silicone gel breast implant cases and the Georgine

asbestos settlements come to mind. These settlement classes also can avoid problems of individual causation that would defeat any attempt at class-based litigation. Certification of a (b)(3) settlement class permits dissatisfied class members to opt out.

The view was suggested that cases that rest on a settlement reached before certification are so different that they should be addressed in a separate rule, perhaps as a new Rule 23.3.

It was suggested that perhaps settlement classes should be put in subdivision (e) by a provision allowing the court to waive the requirements of (b)(3) for purposes of settlement. The response was that the proposal is not that the requirements of (b)(3) be waived, but that these requirements be applied with recognition of the differences presented by the settlement context.

Article III and personal jurisdiction questions were addressed briefly. There is a live controversy between individual class members and the party opposing the class; the only question is how many of these live controversies can be resolved by class treatment. Personal jurisdiction concerns are mollified by the facts of notice and opportunity to opt out. In federal courts, moreover, all class members ordinarily will have sufficient contact with the United States to satisfy all due process requirements.

The opportunity to opt out of a (b)(3) class was again stressed as an important factor in the settlement-class equation. Class members will opt out if the settlement represents a bargain to sell res judicata on terms favorable to the defendant. If class members choose not to opt out, having notice of the class and the settlement, they are not hurt. If Rule 23(b)(3) is to be used for mass torts, the choice well may lie between permitting settlement classes and adopting the creative devices that have been used by some courts to substitute for litigated resolution of the required elements of individual claims. The Fifth Circuit decision in In re Fibreboard deals with the difficulties of these devices.

Further support for settlement classes was expressed with the view that most settlement classes "are not fixes. There are legitimate uses." Clients are better off, particularly when the defendants have insurance. Settlement also has the advantage of treating alike people who, although similarly situated, would be treated differently in separate actions. Choice-of-law, differences in local courts and procedure, problems of proving individual causation, and the like ensure disparate treatment if class disposition is not available.

Thomas Willging reminded the Committee of the information provided by the Federal Judicial Center study. Of 150 certified classes in the study, 60 were certified only for settlement. 30 of these 60 had consent to a settlement at the time of certification. 25, "mostly (b)(3) classes," did not, and indeed in 8 of these 25 there was opposition to certification. All of the 25 had at least 2 months between the motion and certification.

A motion was made that Rule (b)(3) should not speak in any way

to settlement classes. The motion was defeated by vote of 5 for and 8 against.

Turning to the question of what should be said about settlement classes, the suggestion was that a means should be found to say that the court should apply all the prerequisites of subdivision (a) and the requirements of (b)(3) in light of the knowledge that the case was being certified for settlement, not trial. An alternative suggestion was that subdivision (e) be amended to provide that a trial court may, if the parties consent, certify a settlement class even though a class action might not be superior or manageable for litigation.

The next suggestion was that a new subdivision (b)(4) be adopted, providing that if the parties consent a settlement class can be certified even though the (b)(3) requirements are not met. This suggestion met the response that (b)(3) is the right location if settlement bears on application of the predominance and superiority requirements.

Further discussion of the (b)(4) alternative generated several draft proposals. One would have added a new clause in subdivision (b)(3), at the end of the first sentence: "provided, however, that if certification is requested by the parties to a proposed settlement for settlement purposes only, the settlement may be considered in making these findings of predominance and superiority." It was concluded, however, that the prerequisites of subdivision (a) and the requirements of (b)(3) could more clearly be invoked by adoption of a specific settlement class provision as a new subdivision (b)(4). After various drafting alternatives were considered, discussion focused on a draft reading:

> **(4)** the parties to a settlement request certification under subdivision (b)(3) for purposes of the settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

As a separate paragraph of subdivision (b), paragraph (4) is controlled directly by subdivision (a). Subdivision (a) also is invoked by the first paragraph of subdivision (b), which repeats the requirement that the prerequisites of subdivision (a) must be satisfied. In addition, the provision for "certification under subdivision (b)(3)" means that the predominance and superiority requirements of subdivision (b)(3) must be satisfied, following consideration of the pertinent factors described in (b)(3).

The phrase allowing certification even though the requirements of subdivision (b)(3) might not be met for purposes of trial is intended to make it clear that the prerequisites of (a) and the requirements of (b)(3) must be applied from the perspective of settlement, not trial.

A suggestion to delete the words "for purposes of trial" was rejected as inconsistent with the need to make clear the differences between settlement classes and litigation classes.

The description of "parties to a settlement" is intended to require that there be a complete settlement agreement at the time class certification is requested. It was argued that provision should be made for a "conditional" settlement class certification, to be made in hopes that a settlement might be reached but acknowledging that the class must be decertified if settlement is not reached. This argument was rejected on at least two grounds. The first was that no prudent lawyer would suggest certification of a settlement class unless agreement had already been reached; if there seem to be cases in which certification is ordered before a settlement is presented before approval, it is either because of bad lawyering or because the parties have chosen not to present an agreement actually reached. The second was that there are undue risks that certification of a settlement class before agreement is reached may lead to coercive pressures to settle, reinforced by the threat of taking an untriable class to trial.

A motion to adopt the proposed subdivision (b)(4) was approved unanimously.

A later motion to reconsider proposed (b)(4) to add "proposed," so that it would recognize a request for certification by the parties to "a proposed settlement." It was objected that this change would encourage certifications that could coerce settlement, based in part on the fear that the certification might be carried forward to trial of an unmanageable class. Certification for settlement purposes should not be available merely because the parties "have an idea about a settlement." The motion failed with 2 supporting votes and 11 opposing votes.

Subdivision (e)

The earlier discussions of subdivision (e) were revived with a suggestion that the special master provision in (e)(3) of the November draft should be adopted. The biggest problem with settlements is that they sidestep the adversary process, depriving the court of the reliable information needed to evaluate a settlement. The idea of the draft provision is to ensure independent review. There is evidence that some state-court judges are simply rubber-stamping class settlements. Some means of independent investigation should be required at least for settlement classes. Adversary process is provided only if there are objectors.

It was objected that this seemingly benign provision could have unintended adverse consequences. There is a problem, but this solution may make things worse. If someone else is appointed to investigate the settlement, responsibility may transfer from the judge to the adjunct. The parties, indeed, may agree on the master, who may provide a less probing inquiry than the court would provide. It is better to leave the responsibility squarely on the judge, who will respond with careful inquiry.

It was suggested that instead of incorporation in subdivision (e), the use of special masters might be noted in the Note to the settlement class provisions of new subdivision (b)(4).

Sheila Birnbaum observed that substantial protection is provided by the requirement of notice of settlement. The parties want to ensure that the notice is sufficiently strong to protect the settlement judgment against collateral attack. At the stage of settlement, it is the defendant who pays for the notice; cost is not an obstacle to effective notice.

The key is adequate class representation. Special masters, or for that matter the class guardians who were suggested in earlier discussion, are no better assurance than direct supervision of the named class representatives. The problem, moreover, arises with other class actions. Classes certified for litigation under subdivisions (b)(1), (2), or (3) may settle after certification. The certification itself may result from stipulation.

John Frank spoke in favor of proposed (e)(3) as "better than a band-aid." It would provide some added protection against the fear of class sell-out settlements.

H. Thomas Wells, Jr., suggested that present subdivision (e) settlement procedure is adequate. If there are problems, they arise from inadequate implementation of the procedure.

It is possible to appoint a guardian ad litem for the class, and appointments have been made when the need arises. Settlement classes can come into being quickly, usually after little discovery. They are "packaged." It is hard for a judge to be an independent examiner. There ought to be an independent voice. But the "guardian" label should be avoided, because many collateral consequences are likely to flow from the label.

Adoption of the draft paragraph (e)(3) was opposed on the ground that courts now have power to rely on masters or magistrate judges, or to appoint guardians or other independent representatives to investigate a settlement. It may be appropriate to comment on these matters in the Note to new subdivision (b)(4), but there is no need for an independent provision.

A motion to add proposed paragraph (e)(3) failed, 5 for and 8 against.

It was observed that hearings are held on subdivision (e) approval motions, and provide the best means of review. There is no explicit hearing requirement in subdivision (e), however. It was moved that an explicit hearing requirement be added. The rule would read: "A class action shall not be dismissed or compromised without hearing and the approval of the court, after notice of the proposed dismissal or compromise ~~shall be~~ has been given * * *." The motion passed with 9 supporting votes.

Maturity

It was moved that subdivision (b)(3) factor C be amended as proposed in the drafts, adding "maturity" of "related" litigation "involving class members." The reasons for adding the maturity factor are those discussed in November, and reflected in the draft Note. The motion carried unanimously.

Subdivision (c)(1)

Subdivision (c)(1) now requires that the determination whether to certify a class must be made "as soon as practicable" after commencement of the action. The draft completely revises (c)(1). The question whether the "as soon as practicable" requirement should be deleted flowed into the question whether it is desirable to propose every possible improvement in Rule 23 at one time. The proposals already adopted will require extensive consideration and will draw much comment during the succeeding steps of the Enabling Act process. There is much to be said for not making the process more complicated than necessary to advance the most important changes. On the other hand, it is not likely that Rule 23 will be revisited for at least another ten years. For the last many months, it has been tacitly assumed that if a few substantial changes are proposed, the many other changes in the draft would fall by the way. We must be careful about the number of changes proposed.

A motion was made to revise subdivision (c)(1) to require determination whether to certify a class "when practicable" after commencement of the action. Substitution of the full draft revision was suggested as an alternative, but put aside because the changes were more stylistic than substantive. The motion was adopted by consensus. It was pointed out that the substitution of "when practicable" would serve the same function as the proposal to add a new subdivision (d)(1) expressly permitting decision of motions to dismiss or for summary judgment before the certification question is addressed. The Note to revised (c)(1) can point out that the revision removes any support for the minority view that the "as soon as practicable" requirement defeats pre-certification action on such motions.

Subdivision (b)(2)

The draft would revise subdivision (b)(2) to resolve the ambiguity that has led some courts to rule that it does not authorize certification of a defendant class. The motion failed by 2 votes for and 11 votes against.

Subdivision (c)(2): (b)(3) Class Notice

The November draft includes at lines 156 to 161 a provision that would authorize sampling notice in a (b)(3) class if the cost of individual notice is excessive in relation to the generally small value of individual members' claims. A motion to adopt this provision was resisted on the ground that it is inconsistent with the new (b)(3) factor (F) that allows refusal to certify a class when the probable value of individual relief does not justify the costs and burdens of class litigation. It was responded that to the contrary, this notice provision will implement the purposes of factor (F) by reducing the costs and burdens of certification, making it feasible to enforce claims that otherwise might not justify class litigation. Some concerns were expressed about the requirements of due process. The motion failed for want of a second.

It was agreed that the proposed revisions of Rule 23 agreed upon at this meeting should be submitted to the Standing Committee with a recommendation for publication for public comment.

New Business

The American College of Trial Lawyers Federal Rules of Civil Procedure Committee has recommended that the Committee take up the question whether the scope of discovery authorized by Rule 26(b)(1) should be restricted. The recommendation is supported by a detailed chronology of past Committee consideration of the many problems that surround the scope and practice of discovery. This topic will be on the agenda for the fall meeting. Earlier discussion of the proposal to amend Rule 26(c) emphasized the early and recent concerns that have tied the scope of discovery to protective-order practice. The Committee has continually sought to sidestep the fundamental question by attempting more modest approaches. The 1993 adoption of mandatory disclosure in Rule 26(a) is the most recent example. The time has come to consider the central questions once again. And thanks are due to the American College of Trial Lawyers for the careful supporting work they have provided.

Standing Committee Self-Study

The most recent draft Self-Study prepared by the Standing Committee self-study subcommittee was included in the agenda, along with a set of questions framed by the Reporter for this Committee. Professor Coquillette, as Reporter of the Standing Committee, suggested that the several advisory committees need not be concerned that the self-study will stimulate a response that must be anticipated by advisory committee deliberations and advice. This Committee took no action with respect to the draft self-study.

Admiralty Rules

Proposals to amend Supplemental Admiralty Rules B, C, and E were added to the agenda at the last minute. It was concluded that better advance preparation will be required to support informed consideration of these proposals. They are carried forward to the fall agenda.

Next Meeting

It was agreed that the next meeting of the Committee will be held on October 14 and 15.

Judge Higginbotham, as chair, closed the meeting by noting deep appreciation and thanks to John Rabiej and Mark Shapiro for their continuing and excellent support of the Committee. He also expressed thanks to all Committee members for sustained, diligent, and successful work.

Respectfully submitted,

Edward H. Cooper, Reporter

Agenda Item IIIA

Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure

Request for Comment

AMENDMENTS ARE BEING PROPOSED TO:

Appellate Rules	5, 5.1, and Form 4
Civil Rules	23
Criminal Rules	5.1, 26.2, 31, 33, 35, and 43

PUBLIC HEARINGS WILL BE HELD ON THE AMENDMENTS TO:

- Appellate Rules in Denver, Colorado on November 15, 1996;
- Civil Rules in Philadelphia, Pennsylvania on November 22, 1996,
  Dallas, Texas on December 16, 1996, and
  San Francisco, California on January 17, 1997; and
- Criminal Rules in Oakland, California on December 13, 1996.

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 1997

Address all communications on rules to
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

August 1996

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * * *

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(3) the court finds that the 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) the practical ability of individual class members to pursue their claims without class

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* New material is underlined. Superseded material is struck out.

certification;

(~~A~~B) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ class members' interests in maintaining or defending separate actions;

(~~B~~C) the extent~~,~~ ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

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

(~~D~~E) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) ~~As soon as~~ When 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.

* * * * *

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without hearing and the approval of the court, ~~and~~ after notice of the proposed

dismissal or compromise ~~shall be~~ has been given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying 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.

COMMITTEE NOTE

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of aggregating large numbers of small claims that would not support individual litigation. The experience of more than three decades, however, has shown ways in which Rule 23 can be improved. These amendments may effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. New factors are added to the list of matters pertinent to determining whether to certify a class under subdivision (b)(3). Settlement problems are addressed, both by confirming the propriety of "settlement classes" in subdivision (b)(4) and by making explicit the

need for a hearing as part of the subdivision (e) approval procedure. The requirement in subdivision (c)(1) that the determination whether to certify a class be made as soon as practicable after commencement of an action is changed to require that the determination be made when practicable. A new subdivision (f) is added, establishing a discretionary interlocutory appeal system for orders granting or denying class certification. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996).* The study provided much useful information that has helped shape these amendments.

Subdivision (b)(3). Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts by courts and

lawyers to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking.

The probability that a claim would support individual litigation depends in part on the expected recovery. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median individual class-member recovery figures reported by the Federal Judicial Center study ranged from $315 to $528. These amounts are far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases may sweep into a class many members whose individual claims would support individual litigation, controlled by the class member. In such cases, denial of certification or careful definition of the class may be essential to protect these plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. More complicated variations of this problem may arise when different persons suffer injuries that are similar in type but that vary widely in extent. A single course of securities fraud, for example, may inflict on many people injuries that could not support individual litigation and at the same time inflict on a few people or institutions injuries that could readily support individual litigation. The victims who could afford to sue alone may be ideal representatives if they are willing to represent a class, and may be easily able to protect their interests in separate litigation if a (b)(3) class is certified. If a (b)(1) or (b)(2) class were certified, however,

the court should consider the possibility of excluding these victims from the class definition.

Individual litigation may affect class certification in a different way, by shaping the time when a substantial number of individual decisions illuminate the nature of the class claims. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

These concerns underlie the changes made in the subdivision (b)(3) list of matters pertinent to the findings whether the law and fact questions common to class members predominate over individual questions and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. New factors are added to the list, and some of the original factors have been reformulated.

Subparagraph (A) is new. The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages — but does not forbid — class certification

when individual class members can practicably pursue individual actions. If individual class members cannot practicably pursue individual actions, on the other hand, this factor encourages class certification. This encouragement may be offset by new subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation.

Subparagraph (B), revised from former subparagraph (A), complements new subparagraph (A). The practical ability of individual class members to pursue individual actions is important when class members have significant interests in maintaining or defending separate actions. These interests include such fundamental matters as choice of forum; the timing of all events from filing to judgment; selection of coparties and adversaries; the ability to gain choice of more favorable law to govern the decision; control of litigation strategy; and litigation in a single proceeding that includes all issues of liability and remedy. These interests may require a finding that class adjudication is not superior because it is not as fair to class members, even though it may be more efficient for the judicial system in the limited sense that fewer judicial resources are required. The right to request exclusion from a (b)(3) class does not fully protect these interests, particularly as to class members who have not yet retained individual counsel at the time of class notice. These interests of class members may be served by a variety of alternatives that may not amount to individual control of separate litigation. The alternatives to certification of the requested class may be certification of a different class or smaller classes, intervention in other pending actions, voluntary joinder, and consolidation of individual actions — including transfer for coordinated pretrial proceedings or transfer for consolidated trial.

The practical ability of individual class members to pursue individual litigation and their interests in maintaining separate actions

may come into conflict when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. The plaintiffs who might win the race to secure and enforce individual judgments have an interest that is served at the cost of other plaintiffs whose interests are defeated by exhaustion of the available assets. In these circumstances, fairness and efficiency may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether to certify a (b)(3) class must rest on a judgment about the practical realities that may thwart realization of the abstract interests that point toward separate individual actions.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is related and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual

litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims. If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication. The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is slight, however, the core justification of class enforcement fails.

The value of probable individual relief must be weighed against the costs and burdens of class-action proceedings. No particular dollar figure can be used as a threshold. A smaller figure is appropriate if issues of liability can be quickly resolved without protracted discovery or trial proceedings, the costs of class notice are low, and the costs of administering and distributing the award likewise are low. Higher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive. Often it will be difficult to measure these matters at the commencement of an action, when individually significant relief is likely to be demanded and the costs of class proceedings cannot be estimated with any confidence. The opportunity to decertify later should not weaken this threshold inquiry. At the same time decertification should be

considered whenever the factors that seemed to justify an initial class certification are disproved as the action is more fully developed.

Subdivision (b)(4). Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir.1982); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170-171, 173-178 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2). As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class. In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied. Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many

other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement. Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a trial class without adequate reconsideration. These

protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3), but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or — if the class is certified under subdivision (b)(3) — whether to request exclusion. One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is amended to provide for certification "when practicable."

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules

requiring determination within a specified period. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." The amendment makes this approach secure, and supports the changes made in subdivision (b)(3) and the addition of subdivision (b)(4). Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise the factors identified in new or amended subparagraphs (A), (B), (C), and (F). These and similar inquiries should not be made under pressure of an early certification requirement. Certification of a settlement class under new subdivision (b)(4) cannot happen until the parties have reached a settlement agreement, and there should not be any pressure to reach settlement "as soon as practicable."

Amendment of the "as soon as practicable" requirement also confirms the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision. A few courts have feared that this useful practice is inconsistent with the "as soon as practicable" requirement.

Subdivision (e). Subdivision (e) is amended to confirm the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The judicial responsibility to the class is heavy. The parties to the settlement cease to be adversaries in presenting the settlement for approval, and objectors may find it difficult to command the information or resources necessary for effective opposition. These problems may be exacerbated when a proposed settlement is presented at, or close to the beginning, of the action. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Agenda Item IIIB

LEONIDAS 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

September 20, 1996

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Questions, Suggestions, and Concerns Expressed by Members of the Standing Rules Committee on Civil Rule 23*

At its June 19-21, 1996 meeting, members of the Standing Rules Committee raised questions, proposed suggestions, and expressed concerns regarding the publication of the amendments to Civil Rule 23. The committee believed that a record of their discussions might be helpful to the advisory committee during its future deliberations on these amendments.

Draft minutes of the Standing Committee meeting have been prepared that describe in some detail the committee's discussion of Rule 23. That section is attached.

John K. Rabiej

Attachment

Amendments for Publication

FED.R.CIV.P. 23

1. Committee Process

Judge Stotler pointed out that the Advisory Committee on Civil Rules had been studying class actions for several years, and it had invited many interested parties to participate in its deliberations. In an effort to gather as much information as possible before drafting specific amendments to Rule 23, the committee had convened large meetings tantamount to public hearings to discuss class action issues with interested attorneys, judges, and academics. She complimented the committee on seeking out the best information possible from knowledgeable persons on complicated and controversial issues.

She stated that the advisory committee had only recently decided upon the final language of its draft proposal. She suggested that recent correspondence objecting to publication of the proposal was probably attributable to the recent nature of the advisory committee's action, coupled with the very public nature of its deliberations. She noted that copies of all recent correspondence had been distributed to each member of the standing committee, and she urged the members to take their time and work through the advisory committee's proposal carefully and thoroughly.

Judge Higginbotham noted that correspondence opposing the proposed changes had been received from many members of the academic community. He stated that the views expressed had been made with the best of intentions and should be regarded as very positive because they demonstrated the importance of the proposed amendments and the public attention they would receive. He added that it was vital that the committee hear from the users of the system. He pointed out, however, that there is a prescribed public comment period, and the commentators could appear at the hearings, present their views in person, and respond to questions.

Judge Higginbotham stated that the advisory committee had begun its review of class actions six years earlier at the direction of the Judicial Conference to study mass tort and asbestos cases. During the first round of consideration, under Judge Pointer's leadership, the committee had approved a set of proposed revisions to Rule 23 based in large part on a proposal by the American Bar Association. The committee, however, had not sought approval of the revisions because of the press of other matters on its agenda.

Judge Higginbotham explained that after he had become chairman, the advisory committee returned to Rule 23 and decided that it needed to reach out widely and learn as much as it could about class actions. This required not just seeking reactions to a particular proposal for amending the rule, but also a broad effort to deal with basic concepts and to explore the practical operation of all aspects of class actions.

Judge Higginbotham pointed out that the advisory committee had invited prominent class action lawyers to attend its meetings and discuss class action issues. It had also convened symposia and meetings on class actions with practitioners and scholars at university settings in Philadelphia, Dallas, New York, and Tuscaloosa. Many people had participated in these gatherings, and they had been encouraged to speak freely and share their differing viewpoints. Judge Higginbotham stated that the lawyers and academics had been generous with their time, and he thanked them for their contributions to the work of the advisory committee.

2. Substantive Issues

Judge Higginbotham pointed out that Rule 23 does not lend itself to neat analysis. It is peculiarly dependent on experience and practice. He emphasized that there are many different categories of class actions, ranging from securities cases, to product liability cases, to tort cases, to civil rights cases. The practical problems of class action litigation and the interests and viewpoints of the participants vary substantially from one category of litigation to another.

He also stressed at the outset that there is a critical difference between (b)(1) and (b)(2) classes, on the one hand, and (b)(3) classes on the other. In a (b)(1) or (b)(2) class, claimants have no right to opt out of the class. On the other hand, the right to opt out is key to the operation of a (b)(3) class. He stated that in the case of a (b)(3) settlement class, plaintiffs have the choice of either accepting the proposed settlement offer or refusing it and assuming the risk of prosecuting their cases individually. Accordingly, from a plaintiff's viewpoint, a claimant in a (b)(3) settlement action has greater rights than a claimant in a case that is first certified and then proceeds later to settlement.

Judge Higginbotham stated that the advisory committee had considered a number of proposals to revise Rule 23. In the end, the members took a very cautious approach and decided to adopt a "minimalist" draft. As an example, the committee had considered a proposal to require the court to look at the merits of the case and the strength of the proponent's claim as an element in determining whether to certify the class. After examination, though, the committee decided that the price of that inquiry was simply too great, for, among other things, it would require a minitrial.

Judge Higginbotham then described in turn each of the eight proposed changes that the advisory committee would make in Rule 23. He emphasized that the eight changes were stated distinctly, but they were interrelated and reinforced each other.

1. The list of factors pertinent to the court's findings of predominance and superiority would be expanded. A new subparagraph (b)(1)(A) would require the court to consider the practical ability of individual class members to pursue their claim without class certification.

2. Subparagraph (b)(3)(B) would be revised to make it clear that the court must look at alternatives to a class action. The amendment would emphasize the autonomy of individual claimants to determine their own destiny.

3. The word "maturity" would be added to subparagraph (b)(3)(C), thus requiring the court to look not only at the ability of plaintiffs to prosecute their claims, but also at the extent to which there has been development or maturity of the claims.

4. A new subparagraph (b)(3)(F) would be added, requiring the court to weigh the probable relief to individual class members against the costs and burdens of the class litigation.

5. New paragraph (4) would explicitly authorize settlement classes.

6. In subdivision (c) the requirement that the court certify a class "as soon as practicable" after commencement of the action would be changed to "when practicable" after commencement of the action. Read in conjunction with other proposed changes above, requiring the court to look at the maturity of claims and to consider other alternatives to a class action, the amendment would remove the incentive in the present rule for a judge to certify a class quickly.

7. Subdivision (e) would be amended to require that the court hold a hearing on settlements in class actions. Even though courts routinely hold hearings on settlements, the rule would now explicitly require it.

8. New subdivision (f) would authorize interlocutory appeals of district court orders granting or denying certification of a class.

Finally, Judge Higginbotham pointed out that the advisory committee had decided not to address "futures" classes, which are the subject of ongoing case law development. He also emphasized that the proposed amendments did not deal with (b)(1) or (b)(2) class actions, but only with (b)(3) class actions. The committee had insisted on retention of the right of a claimant to opt out of a settlement class. Moreover, the amendments did not dispense with the Rule 23(a) prerequisites or the notice requirements of (b)(3).

3. Views of the Members

The chair asked the members first for any general comments they had regarding the proposed amendments to Rule 23.

Chief Justice Veasey suggested that it would be helpful if the committee note were expanded to include some of the introduction and background just enunciated by Judge Higginbotham. The note would also benefit by: (1) updating the case law to include the *Georgine* case, and (2) addressing some of the concerns expressed in recent correspondence to the committee. Judge Higginbotham responded that the note could be expanded to discuss *Georgine,* but interested parties were very much aware already of the issues and the case law, and they would submit knowledgeable and helpful comments during the public comment period.

Mr. Perry stated that it was clear from the committee note that the opt-out provision applied to settlement classes. Yet, he asked whether the rule itself should be amended to provide explicitly that a settlement class under (b)(4) is governed by all the provisions applicable to (b)(3) classes, including a right of opt-out.

Judge Higginbotham responded that the text might be expanded, but the advisory committee had concluded that the language of the amendment provided clearly that a settlement class is a (b)(3) class. He added that it could not reasonably be interpreted as dispensing with the opt-out provision and other requirements associated with a (b)(3) class. He suggested that confusion on this point had been introduced because some people who had read the text had not read the committee note. He recommended that the language of the rule be published without change and that drafting improvements be considered as part of the public comment process.

Mr. Schreiber stated that he had spent 30 years in class action work, as a plaintiff's lawyer, a defense lawyer, a judge, a teacher, and a special master. He argued that the proposed amendments were defendant-oriented and would cripple class actions. The central premise of the advisory committee, he said, had been that something had to be done to address mass tort problems. But by attempting to solve those problems by amending Rule 23, the committee would set up an entirely new class action structure that would spawn many new problems. He added that the proposed amendments would prevent consumer class actions and cause great disturbance in securities and antitrust class actions, unless the advisory note were expanded to identify explicitly what a judge may and may not do under the rule.

Judge Stotler then took up each of the eight suggested amendments to the rule in order, soliciting comments from the members on each.

Mr. Schreiber stated that the advisory note accompanying subparagraphs (b)(3)(A) and (b)(3)(B) had to be expanded to specify that the judge must take into account the tremendous cost of class litigation. For example, an individual plaintiff might have a large claim for $200,000, but the potential relief could well be dwarfed by the cost of maintaining the class action and obtaining discovery, which might may run into millions of dollars.

Mr. Schreiber expressed reservations about subparagraph (C), dealing with the maturity of related litigation involving class members. He alluded to a Seventh Circuit case in which, he said, the trial judge had decertified a class action on the grounds that a handful of the plaintiffs had tried and lost their individual cases and the defendants apparently would have refused to settle the cases under any circumstances. He argued that as a result of the court's decertification of the class and the plaintiffs' inability to pursue a class action, they had to settle for 30-40 percent of what similarly-situated claimants later received in Japan. He strongly recommended that a decision to decertify a class should not be based on only a few cases. He said that he was not opposed in general to the concept that the maturity of related litigation should be a pertinent factor in the court's certification decision, but it should be explained more fully in the advisory committee note.

Judge Easterbrook responded that in the Seventh Circuit case described, there had been 13 trials at the time of the class decertification decision. The defendants had prevailed in twelve cases, and the plaintiff had prevailed in one case, winning about a million dollars. The case ended up being settled for the actuarial value of plaintiff verdicts in the set of 13 litigated cases. He stated that the key issue was that the trial judge must determine in each case the appropriate number of cases that constitute maturity of related litigation.

Mr. Sundberg pointed out that he had been involved in the case personally and believed that the issue of maturity of litigation had not been dispositive of the case. There were many other important factors that had a major influence on the outcome of the case.

Mr. Schreiber stated that if the amendment and committee note were published without change, a huge number of people would testify at the hearings to express their concerns and objections. As a result, the advisory committee would have to reexamine the amendments, correct them, and republish them. Judge Higginbotham responded that the public comment period was a vital part of the rules process. If the public comments demonstrated that changes in the amendments or note were needed, the advisory committee would make the changes and republish the proposal, if necessary..

Mr. Schreiber argued that proposed new subparagraph (b)(3)(F) was the most troublesome provision of all because it appeared to weigh the claims of individual litigants against the total cost of the class litigation. He proposed that the committee note state clearly that the totality of all the claims, rather than each individual claim, be compared to the costs of the litigation. In its present form, he stated, the amendment could literally end all consumer cases. He added that, alternatively, the problems could be resolved by revising the language of the rule itself.

Judge Ellis said that the language of the rule was not clear on the point and might have to be revised. He added, though, that sending the proposal back to the advisory committee would serve no useful purpose since the committee had studied the matter long and hard. Rather, the time had come to solicit the advice of the public and make any needed changes later.

Judge Ellis continued that there was a question as to whether the amendments fell within the bounds of the Rules Enabling Act because it could be argued that they affected substantive rights. He suggested that there was a fundamental ideological fight between people who believe that class actions should be used for certain purposes and people who believe that they ought not to be used for those purposes. He concluded that publication of the amendments would generate a very important debate and lead to helpful suggestions for improvements.

Judge Easterbrook suggested that a court should not compare the probable relief to individual class members against the total costs of class litigation. Rather, it could compare either: (1) individual claims against the pro-rata cost per class member, or (2) the aggregate benefits to all class members against the aggregate costs of the litigation. He added that he believed that the proposed amendment was perfectly clear in this respect, but if the public comments were to show that it was not clear, the language could be adjusted.

Mr. Sundberg said that the language could perhaps stand some clarification, but it should be published in its present form. The bench and bar would understand the issues, provide helpful insights, and suggest language improvements.

Professor Coquillette noted that, as a technical matter, it would aid electronic research if subparagraphs (b)(3)(C) and (b)(3)(D) were not renumbered.

Judge Easterbrook suggested that the text of paragraph (c)(2), referring to paragraph (b)(3), should be amended to include a specific reference to (b)(4). Professor Cooper responded that the advisory committee had decided not to adopt that approach. It had drafted (b)(4) to provide that a settlement class is a class certified under (b)(3). If (c)(2) were amended to include a reference to (b)(4), it would carry the implication that a (b)(4) class is not a (b)(3) class. He added that another way to clarify the matter would be to replace the words "under subdivision (b)(3)," as they appear in (b)(4), with the words "request certification of a subdivision (b)(3) class." Judge Easterbrook concluded that any language changes should be deferred to the public comment period.

Judge Higginbotham added that the advisory committee had decided as a matter of policy not to dispense with the (b)(3) requirements in a settlement class action. Stylistic refinements to reinforce that point could be made after the comment period without requiring publication of the amendments.

Mr. Schreiber stated that he supported the addition of paragraph (b)(4) to the rule. But he recommended that the committee note be expanded: (1) to specify the factors that a judge must consider in determining whether to certify a settlement class, and (2) to address the issue of future claimants. He added that the *Georgine* opinion had discussed these matters well, and they needed to be included in the committee note.

Judge Stotler explained that the *Georgine* opinion had been issued after the advisory committee had settled on the language of the amendment and committee note. She suggested that *Georgine* should be addressed, and it might be advisable to refer to the case in the publication sent to bench and bar.

Judge Higginbotham said that he found the *Georgine* decision to be troubling, and it was in conflict with the holdings of five other circuits. In *Georgine,* the court of appeals would require the trial judge, in considering whether to certify a class, to engage in the hypothetical exercise of determining whether or not the case could be tried. He added that the *Georgine* opinion, applied literally, would bar certification of the breast implant cases and a great many securities cases.

Mr. Schreiber stated that the basis of the *Georgine* holding was that the court had found no typicality on the part of the representative party, who was a present claimant attempting to represent future claimants. He added that he believed that Judge Becker would find settlement classes appropriate in certain cases.

Chief Justice Veasey stated that the public comment period would be better informed if the committee note were enhanced to discuss: (1) the important cases, including *Georgine,* and (2) the factors relevant to determining whether the probable relief to class members justifies the costs and burdens of class litigation. Judge Higginbotham responded that the committee note could easily be expanded to include a citation to *Georgine.*

Professor Hazard stated that he strongly supported publishing the amendments and agreed with the observations of Judge Easterbrook, Chief Justice Veasey, and Mr. Schreiber regarding revisions to the rule and note. He added, though, that the changes should be made following the public comment period.

He said that he had reached the conclusion that settlement classes were necessary. They appeared to be what most class actions were about. He explained that under (b)(4), the lawyers may negotiate a deal before they file the case and seek certification of the class. The proposed settlement they reach requires court approval to constitute a contract, because if the court does not certify the class, a condition essential to the settlement fails to materialize, and the deal is effectively canceled. In essence, the issue is not one of judicial approval, for the court ultimately must approve every settlement. Rather, the key question is whether the lawyers should be able to bargain without superintendence of the judge or be compelled to bargain under what could be the court's close superintendence.

In other words, it boiled down to the question of whether the rules should legitimate the pre-filing settlement contracting process. He concluded that he was satisfied that there were good reasons for permitting that process. The trial judge still must make a gestalt decision—based on all the facts in each particular case—as to whether the particular class suit, as configured by the lawyers, is on balance a good thing. He emphasized that the subject was multidimensional and involved many variables. Accordingly, it just did not lend itself to an easy, definitive resolution in a rule of procedure.

Professor Hazard added that some of the academics who had written to the committee had misunderstood the rule and the significance of the (b)(3) requirements, which the advisory committee had intended to be applicable in settlement class actions. They had also been unrealistic in addressing what the real social alternatives would be to a settlement class in large, continuing tort situations. He said that he was satisfied that the asbestos cases, for example, had reached the point where settlement was the only sensible way to deal with them.

He argued that the *key* question in *Georgine* should have been whether the proposed settlement was on balance a good thing. He regretted that the opinion had not been more explicit in acknowledging that issue.

Mr. Schreiber said that he approved of the proposed change in subdivision (c). It would replace the current requirement that the court make a decision as to whether the class action should be maintained "as soon as practicable" with a requirement that the court make the decision "when practicable." He pointed out that the change would reflect current reality, since most cases are not certified within 60 or 90 days.

Judge Easterbrook said that the proposed change in subdivision (e), requiring a hearing on dismissal or compromise of a class action, was fine in principle. He questioned, though, whether a hearing is necessary when there is no opposition to the dismissal or compromise. He suggested that the advisory committee might want to consider substituting the words "opportunity for a hearing." Judge Higginbotham responded that the suggestion would be taken into account by the advisory committee.

Mr. Schreiber asked why class certification decisions warranted an interlocutory appeal when: (1) other types of equally important matters cannot be appealed, and (2) the courts of appeals were overburdened. He doubted whether a special exception was needed for class actions. Judge Higginbotham responded that the advisory committee was of the view that class actions as a matter of policy did in fact warrant a special path, at least to the extent that a party could request leave to appeal a certification decision. He concluded that the courts of appeals would have little difficulty in distinguishing between those matters that warrant an interlocutory appeal and those that do not.

Judge Higginbotham pointed out that class action certification issues had come before the appellate courts only in mandamus cases. The proposed new Rule 23(f) would recognize reality and authorize a discretionary, interlocutory appeal, rather than force the appellate courts to continue relying on the extraordinary writ.

Mr. Sundberg strongly supported the interlocutory appeal provision. He said that experience in the Florida state courts—where there is an interlocutory appeal as of right from a certification decision—had demonstrated that these appeals had not created caseload burdens for the appellate courts. Moreover, the proposed interlocutory appeal would be purely discretionary, and it was clearly preferable to having the appellate courts stretch to use the mandamus remedy.

Judge Higginbotham added that the advisory committee had not addressed a number of other issues in the proposed amendments because it had concluded that they should continue to be developed through decisional law. Professor Hazard added that the advisory committee had been wise in deciding not to address the issue of future claims in the proposal.

Judge Stotler called for the vote on sending the proposed amendments to Rule 23 out for public comment, with a citation or two added to the committee note. **The committee voted without objection to approve the proposed amendments for publication.**

Mr. Schreiber requested that the members of the advisory committee be given a report of the standing committee's discussions regarding the Rule 23 proposal. He said that the members had raised serious concerns that needed careful examination. Judge Stotler asked Mr. McCabe to provide an detailed record of these concerns for consideration by the advisory committee.

Informational Items

FED.R.CIV.P. 26

The advisory committee had decided not to seek Judicial Conference approval of proposed amendments to Rule 26(c), governing protective orders. Rather, it had concluded that Rule 26(c) should be held for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45.

Judge Higginbotham pointed out that at one time the standards for document discovery had been more stringent than those for oral discovery, in that they required a showing of good cause. He stated that members of the bar had expressed strong sentiments to the advisory committee that the linkage of the two kinds of discovery had caused problems and should be reconsidered. He added that the issue would be considered at the next meeting of the advisory committee.

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

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EVIDENCE RULES

TO: Standing Committee on Rules and Practice*

FROM: Patrick E. Higginbotham
Chair, Advisory Committee on Civil Rules

Professor Edward H. Cooper
Reporter, Advisory Committee on Civil Rules

RE: Comment on Proposed Changes to Rule 23

DATE: August 7, 1996

I

These eight proposed changes in Rule 23 submitted for comment are modest, as measured by an array of changes urged by numerous scholars, practitioners, law teachers, and myriad organizations. They reflect the distilled judgment of the Advisory Committee after five years of study. This study includes participation in national conferences, sponsored by the law schools of N.Y.U., the University of Pennsylvania, and Southern Methodist University, as well as by the Southwestern Legal Foundation. The study included extensive discussion at meetings of the Advisory Committee at the University of Alabama School of Law, the Thurgood Marshall Federal Judiciary Building in Washington, D.C., and other gatherings in New York, San Francisco, and Tucson. Representatives of the Litigation Section of the American Bar Association, the American College of Trial Lawyers, the American Trial Lawyers, and others attended and participated in this dialogue. The Committee also sought the counsel of distinguished lawyers with particular experience with class actions.

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* The report was intended to be included in the *August 1996 Request for Comment* pamphlet, which contained the proposed amendments to Civil Rule 23. But it was not included in the pamphlet, because the report had not been considered by the Standing Rules Committee during its deliberations on whether to publish the proposed amendments to Rule 23. The report will be circulated to the Advisory Committee on Civil Rules and the Standing Rules Committee at their next meetings.

II

We think it useful to describe the sense of the Advisory Committee regarding the present forces for change. Review of the proposal may include an examination of the validity of the Committee's vision of this dynamic.

Rulemaking has, at least since the Enabling Act of 1934, reached for transubstantive application, an elusive goal when the line between substance and procedure is difficult to locate. And the familiar dance of procedure and substance has unique purchase in the operation of Rule 23. The Advisory Committee is persuaded that the law of class actions today is largely a set of legal cultures surrounding distinct areas of substantive law. For example, class actions in private antitrust litigation, securities litigation, employment discrimination, and mass disaster tort litigation have common links but differ fundamentally as each resonates with its own body of substantive law. Bluntly stated, the "law" of class actions is more the child of substance than procedure. The status of the passing on defense in antitrust litigation, of fraud on the market and other reliance theories in securities suits, and of punitive damages in tort law dictate the course of each of these class litigations. In short, the "law" of class actions travels more along substantive than procedural lines, and today is better described as a softly defined legal culture than a coherent body of case law expressed in filed opinions.

Much follows from this reality, but we make only three brief points. First, those who would solve a "problem" with class actions today must first make the case for the relevance of the desired change in the rule, that the illness to be cured is not beyond the grasp of the civil rules, because it is an illness of the underlying substantive law. The current controversy over "mass torts" offers an example. We must ask how much of the difficulty is with the indeterminacy of tort law. The large number of filings in a failed product case, for example, generates pressure to aggregate. Yet as Professor Francis McGovern has taught, the number of cases is often remarkably elastic. Whether this elasticity reflects an underlying uncertainty of tort law and the system's insecure handling of science is not clear. We suspect that legal standards blessing lawyer solicitation and soft rules governing the admissibility of expert testimony are at work. Nor do we yet fully understand the negative effects of consolidating cases before a single MDL transferee judge. Given these uncertainties, including what is sometimes called the expressway effect, it may be that we are too quick to bring to bear the forces of MDL treatment. These are difficult problems and only a sampler. The relevant point is that rules of procedure and the process of rulemaking have a limited ability to solve them. An assessment of these proposals, including whether the Advisory Committee proposes too little or too much, must consider this context, keeping in the forefront the reality that these social issues are beyond the charge of the rulemakers.

Second, the above discussion illustrates that we need to encourage the development of a coherent body of law by making greater use of the appellate courts. The debate over the interaction of substance and procedure will benefit from the knowledge and judgment of these institutions, often cut out of the process by settlement.

Third, rule change ought here to proceed with caution, in increments. We think it unwise to attempt broad changes in Rule 23, given the large uncertainty of cause and effect laced throughout this subject.

We turn to a brief summary of the Advisory Committee deliberations; our summary is designed to elicit comment on the issues that generated much of the Committee debate.

III

Subdivision (b)(3)

Most of the proposed changes affect subdivision (b)(3). Comment on these issues will be helpful, including comments — if any there be — that the Committee has in fact reached the best accommodation. It will be even more helpful to have comment on issues that may have been overlooked.

1

Subparagraph (A) is added to the illustrative list of matters pertinent to the predominance and superiority findings required for certification of a (b)(3) class. This factor emphasizes the practical ability of individual class members to pursue their claims without class certification. It will confirm and encourage the use of class actions to enforce small claims that will not support separate actions, subject to new subparagraph (F). At the same time, it will encourage courts to reflect carefully on the advantages of individual litigation before rushing to certify classes — such as mass tort classes — that include claims that would support separate actions.

2

Closely related are the changes in subparagraph (B), which make it clear that the court should consider not only solo litigation but also aggregation alternatives to a proposed class, alternatives that do not involve "control" by individual class members.

3

Subparagraph (C) is revised, among other things, to include the maturity of related litigation as a factor bearing on certification; this factor has loomed particularly large in the early years of litigating dispersed mass torts.

Together, subparagraphs (A), (B), and (C) are designed to encourage careful reflection on the advantages and disadvantages of class litigation in relation to other modes of proceeding, including later certification of substantially the same class. They do not force any particular conclusion in any specific action. Is this the right balance? Should there be tighter control, or even less?

Subparagraph (F) allows a court to consider as one factor, in the certification decision, the balance between the probable relief to individual class members and the costs and burdens of class litigation. This new factor is not intended to end the common practice of certifying class actions to enforce individual claims that are too small to bear the cost of individual actions. Nor is it intended to require that the amount of relief to any single class member be balanced against the overall costs and burdens of litigating the class action. The aggregation of many small individual recoveries may readily justify aggregate costs that overshadow any single individual recovery. Subparagraph (F) is intended to permit a court to ask whether class litigation is justified when the probable relief to individual class members is insignificant in relation to the costs and burdens of generating that relief. A fair estimate of the costs to the judicial system — and the corresponding opportunity costs to other litigants who seek to use the judicial system — should be included in the calculation.

The Advisory Committee has not been able to develop more precise language to guide district court discretion. The very reason for relying on district court discretion is the inability of the drafting process to imagine and resolve the many different situations that litigants will bring to the courts. Some have suggested that more drafting is needed to ensure the continuing and important role of small claims class action actions. Specific suggestions will be welcome.

Some proposed drafts of subparagraph (F) would have required that "the public interest in * * * the probable relief to individual class members" be included in the balance. The public interest factor was deleted because of concern that it seemed to invite judicial evaluation of the wisdom of the substantive rules that might be invoked in class-action litigation. What are the factors to be weighed and how ought they be captured in the rule?

Subdivision (b)(4)

Proposed subdivision (b)(4) deals with settlement classes. In providing for certification of a class "under subdivision (b)(3)," the rule is intended to require that the predominance and superiority requirements of (b)(3) must be satisfied. The purpose of adding subdivision (b)(4) is to make it clear that the fact that certification is proposed only for the purpose of settlement, not for trial, properly influences application of the prerequisites of subdivision (a) and the requirements of subdivision (b)(3). The choice to rely on "under" as better than "pursuant to" was deliberate. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules p. 34 (1996). Early reactions, however, indicate that some lawyers may find it difficult to adjust to this drafting choice. Several alternatives were considered by the Advisory Committee, and deserve comment.

The simplest alternative would be to revise (b)(4) to read:

the parties to a settlement request certification of a subdivision (b)(3) class for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

A lengthier variation on the same approach would be:

the parties to a settlement request certification of a subdivision (b)(3) class for purposes of settlement and the requirements of subdivisions (a) and (b)(3) are satisfied for purposes of settlement, even though these requirements might not be met for purposes of trial.

Still another approach would be to incorporate settlement classes directly into subdivision (b)(3), perhaps like this:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
* * *

(3) the court finds that the 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~~ disposition of the controversy. If the parties to a settlement request certification, the court may for the purpose of certifying a settlement class determine that the prerequisites of subdivision (a) are satisfied, and find predominance and superiority, even though the court might not certify the same class or any class for purposes of trial. The matters pertinent to the findings of predominance and superiority include: * * *

The importance of anchoring the settlement class provision in subdivision (b)(3) is enhanced by the need to ensure compliance with the provisions of subdivision (c)(2) governing notice and the right to request exclusion. Proposed (b)(4) applies only to classes certified for settlement under (b)(3); the drafting question is the only question on this score.

Proposed subdivision (b)(4) applies only when certification of a (b)(3) class is requested by the parties to a settlement. It does not apply before a settlement agreement has been reached. This limitation was adopted for several reasons. Certification of a settlement-only class before agreement has been reached might affect the terms of settlement and might even exert untoward pressure to settle because of the class definition and the implicit expectation of settlement. There is some risk that if settlement fails, the class definition will be carried forward for litigation purposes without adequate reconsideration. And the opportunity to opt out is enhanced by the fact that the terms of settlement will be known at the time class members must decide whether to

opt out. Settlement classes are not new. Class certification has followed settlement in a substantial percentage of all class actions. Are these reasons sufficient to justify the limitation, or should a less restricted version be considered?

Concerns are regularly voiced about the difficulties that confront a court faced with the task of evaluating a proposed settlement. Should more specific terms guiding judicial review be added to subdivision (b)(4), subdivision (e), or both?

6

Subdivision (c)

Subdivision (c) is amended by deleting the requirement that the determination whether to certify a class be made "as soon as practicable" after commencement of the action. The change to "when" practicable supports the common practice of deciding motions to dismiss or for summary judgment before addressing the certification question. The change also supports precertification efforts to settle and seek certification of a settlement class. The Federal Judicial Center study and other information suggest that in practice, "as soon as practicable" has come to emphasize practicality in ways that are better reflected by the "when practicable" term. Is there a risk that the change will encourage undue delay in administering class actions?

7

Subdivision (e)

Subdivision (e) is amended to confirm the common understanding that a hearing must be held as part of the process of reviewing and deciding whether to approve dismissal or compromise of a class action. The Committee has not thought of any arguments against this protection; is there some unexpected loss?

8

Subdivision (f)

Subdivision (f), drawing from the power conferred by 28 U.S.C. § 1292(e), proposes a method of permissive interlocutory appeal, in the sole discretion of the court of appeals, from orders granting or denying class certification. Proposed changes to Appellate Rule 5 would establish the procedure for petitioning for leave to appeal. The Committee has repeatedly reconsidered this proposal in light of numerous expressions of concern that any additional opportunity for interlocutory appeal will lead to undue delay and burdens on the courts of appeals. The concern seems to be that one party or another will always seek review, whether for good-faith questions about the certification decision or for less worthy motives. The Committee believes, building on experience with permissive interlocutory appeal practice under 28 U.S.C. § 1292(b), that this fear will be met in several ways. District court proceedings are to continue

unless a stay is expressly ordered. The courts of appeals should be able to decide whether to permit appeal quickly, and at little cost. Responsible practitioners should come to recognize that most certification decisions involve routine matters of discretion that do not warrant application for leave to appeal. Is this confidence misplaced?

IV

Matters Put Aside

The Committee considered many other proposals and put them aside. They are not likely to be revived soon unless comment suggests serious ground for further present consideration.

Broad questions were considered as to the structure of Rule 23. Among them were the desirability of requiring that (b)(1) and (b)(2) classes be found superior to other available methods of adjudication; notice requirements; extending the opportunity to request exclusion to (b)(1) and (b)(2) classes; denying an opportunity to opt out of a (b)(3) class; and creating opt-in classes.

Extended consideration was given to a proposal that the merits of the class claims, issues, or defenses be considered in determining whether to certify a (b)(3) class. Two alternatives were considered. One would require only a showing that the claims, issues, or defenses are not insubstantial on the merits. The other would invoke a balancing test reminiscent of the preliminary-injunction test, asking whether the prospect of success on the merits is sufficient to justify the costs and burdens imposed by class certification. In the end, this proposal was overcome by fears that it would unduly enhance the burdens of litigating the certification question itself, and that a merits finding made at the certification stage would exert undue pressure on all subsequent stages.

Finally, the Advisory Committee declined to treat "futures" classes, unpersuaded that there is as yet sufficient experience with this use of Rule 23 to justify addressing it in the text of the Rule.

Agenda Item IV

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September 4, 1996

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Timing and Status of Judicial Conference Report on CJRA to Congress*

The Civil Justice Reform Act of 1990 (CJRA) required each court to develop and implement a civil justice expense and delay reduction plan. Civil Justice Reform Act of 1990, Pub. L. No. 101-650 (codified at 28 U.S.C. §§ 471-82). The plans were prepared by district courts in consultation with local advisory groups. CJRA required that the advisory groups consider including in the plans six principles and guidelines of litigation management and cost and delay reduction, which are listed in 28 U.S.C. § 473(a). The provisions of the Act and presumably the local CJRA plans remain in effect until December 1, 1997.

Judicial Conference Report on CJRA to Congress

Under § 105 of Pub. L. No. 101-650, the Judicial Conference must submit a report to Congress by December 31, 1996 evaluating the results of the CJRA plans. The report must include a recommendation as to whether all or some of the courts should be required to adopt the six principles and guidelines of litigation management and cost and delay reduction. If the Judicial Conference recommends that some or all of the courts adopt the principles and guidelines, the "Judicial Conference shall initiate proceedings for the prescription of rules implementing its recommendations" in accordance with the Rules Enabling Act.

If the Judicial Conference does not recommend that the courts adopt the six principles and guidelines, it must "identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and the Judicial Conference may initiate proceedings for the prescription of rules implementing its recommendations...."

The report must also evaluate the plans and compare the impact on costs and delays between plans of ten pilot district courts that were required to include the six principles and guidelines and plans of ten other courts that were not required to include them based on a study conducted by an independent organization. RAND had extensive expertise in Federal court management and was selected to conduct the study. Copies of the final RAND report should be available by October 1, 1996, and will be sent to each committee member.

Six-Month Reporting Extension

Section 707(c) of the Federal Courts Improvement Act of 1996 (H.R. 3968) would extend the deadline for the Judicial Conference report for six months, until June 30, 1997. It is very likely that the statutory extension will be approved by Congress. As a practical matter, the Judicial Conference will likely act on the CJRA recommendations at its March 18-19, 1997 session. (The ABA Conference at Tuscaloosa on RAND's CJRA study will meet on March 20-22, 1997.)

The Judicial Conference Committee on Court Administration and Case Management (CACM) has overseen RAND's study and will submit recommendations to the Judicial Conference in accordance with the CJRA reporting requirements. CACM is responsible to "monitor all case management activity of the appellate and district courts and make recommendations for changes and improvements, as necessary (and to) oversee the implementation of the provisions of the Civil Justice Reform Act of 1990."

CACM meets on December 9-11, 1996. It must complete and submit its report to the Judicial Conference no later than February 11, 1997, but we expect to know CACM's recommendations soon after its meeting. CACM's final report will be available for circulation on a confidential basis to each committee member.

Rules Committee Role

The Judicial Conference report to Congress might require the initiation of the rulemaking process, suggesting proposed amendments to the Civil Rules for the consideration of the advisory committee. The advisory committee and the Standing Committee on Rules will have about one to two months to coordinate a response, if appropriate, on CACM's recommendations to the Judicial Conference.

John K. Rabiej

Agenda Item V

Rule 26: The Scope of Discovery

Discovery has been on the Advisory Committee docket constantly for three decades. The first stage of response was the 1970 amendments, which continued a process of expanding discovery. Responses since 1970, beginning with the 1980 amendments, have sought to gain greater control over the discovery process without limiting the general scope of discovery. Now it is proposed that the Committee once again consider serious proposals to narrow the scope of discovery that were first advanced twenty years ago.

The case is strong for embarking now on the necessarily long process of fundamental inquiry into the scope of discovery. Achingly persuasive complaints continue to be made about the misuse, overuse, and abuse of discovery. Repeated inquiry will be required so long as many lawyers and clients believe the discovery system needs repair, whatever the fact may be. There is good reason, moreover, for beginning another round of inquiry now. The time for reporting on experience with local plans under the Civil Justice Reform Act has arrived. Local experiments with disclosure and discovery will be one of the central subjects of the report. The information gleaned from these experiments may provide a strong foundation for reform. More likely, it will help provide a foundation for better-planned empirical research. Whatever the level of information provided, it is important to face the information with a coherent set of questions about the need and the possible means of reform.

The observations that follow are not a rigorous agenda for study. They are more nearly reflections prompted by reading through the immensely useful "Material on Civil Rule 26(b) Scope of Discovery" prepared by the American College of Trial Lawyers Federal Rules of Civil Procedure Committee for the April, 1996 meeting. Occasional references are made to the materials, identifying them by the tab each item lies behind.

Preliminary Reminder on Discovery

The federal system that combines "notice" pleading with sweeping discovery seems to many a natural entitlement. The system places much of the responsibility for pretrial communication on discovery, as supplemented by the new Rule 26(f) meeting of the parties and Rule 16 pretrial conference procedures. The 1993 amendments, moreover, added the provision in Rule 11(b)(3) that approves pleading of specifically identified "allegations and other factual contentions" that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Litigants who feel that they generally function at an information disadvantage as compared to their adversaries believe that this system is essential to support proof of meritorious claims. Product-liability plaintiffs, for example, and plaintiffs advancing claims under many contemporary regulatory schemes, often would be helpless if they were required to begin by pleading detailed information about the alleged wrongs. As noted below, many litigants continue to believe that discovery does not yield all the information they rightfully should have.

These strong feelings about the scope of discovery no doubt account for the fact that efforts to reduce the problems have focused on the procedure of discovery, not the scope. The question is whether still further changes in discovery procedure may provide effective relief, or whether it is time to restrict the scope of discovery.

Other Sources of Dissatisfaction

There are several sources of dissatisfaction with the scope of discovery that are seldom expressed openly. They should be considered nonetheless. If it should be found that much of the dissatisfaction arises from sources outside procedural rules, the case for amending the discovery rules would be weakened.

One cause for dissatisfaction is displeasure with the substantive rules enforced with the aid of discovery. The belief that the law is wrong naturally leads to resistance to discovery rules that help to uncover violations. Closely related to this feeling is a belief that remedies should be provided only for open and easily proved violations. If there is no more than the level of good-faith suspicion required by Rule 11, on this view, it is better for society that obscure and well-buried wrongs lie undisturbed. These views do not seem a promising foundation for discovery reform.

Another cause for dissatisfaction is the scope of trial evidence. Complex substantive rules have been matched by permitting complex methods of proof. The quest for information that may lead to discovery of evidence admissible under the wide-open rules that govern some trials can be indeed searching. So long as we want to have and enforce such complex rules, by way of trials on evidence that may seem to pass human understanding, these concerns also provide little basis for discovery reform. The alternative to complex trials based on overwhelming discovery may be complex trials based on overwhelmingly incomplete and misleading information.

It is important to bear these concerns in mind, and to seek to identify related concerns, in considering limits on discovery. The question is whether discovery yields benefits that justify the costs, and whether most of the benefits can be got at significantly less cost. It would be difficult — although not impossible — to justify restrictions on discovery on the ground that discovery is too effective a means of enforcing substantive rights.

The Rule 26(b)(1) Proposal

The proposal advanced again by the American College Federal Rules Committee is a modification of a proposal first advanced by an ABA Committee in 1977. The modification reflects the form adopted by the Advisory Committee when it adopted the proposal and

published it for comment in 1978. The Advisory Committee retracted the proposal in the materials that became the 1980 discovery amendments. The proposal was not forgotten. It was most recently circulated to the Advisory Committee in a November, 1990 memorandum. That it has not been adopted after repeated consideration is not ground for invoking principles of finality. The decision to try lesser measures first — including the not-so-modest disclosure rules that emerged from the deliberations that were under way in 1990 — does not foreclose reconsideration if the lesser measures have not proved as effective as hoped.

The proposal is easily stated. Rule 26(b)(1) should be amended by deleting reliance on "the subject matter involved in the pending litigation" as the measure of discovery:

> **(1)** *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to ~~the subject matter involved in the pending action, whether it relates to~~ the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. [The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.]

The American College Federal Rules Committee also suggests that much mischief has resulted from the addition in 1946 of the final sentence, which allows discovery of information reasonably calculated to lead to the discovery of admissible evidence.

The original ABA proposal actually advanced two means of narrowing the scope of discovery. In addition to deleting the "subject matter" test, it sought to add the limit that discoverable matters be "relevant to the * * * issues raised by the * * * claims or defenses * * * of any party." The Advisory Committee dropped the "issues" limit, fearing that a new "issues" limit would "invite unnecessary litigation over the significance of the change."

This proposal reflects the belief that the scope of discovery has been allowed to expand too far, and that narrowing the scope will provide substantial relief from unnecessary discovery burdens. It must be examined from many perspectives, even accepting the debatable assumption that some further change should be made in discovery practice. Two perspectives are intrinsic to this proposal: has the "subject matter" term played a substantial role in the expansion of discovery? and how would litigants and courts respond to deletion of the term? The other perspectives cumulate in a single question: what alternatives should be considered?

Justice Powell's opinion in Oppenheimer Fund v. Sanders, 1978, 437 U.S. 340, 350-353, is frequently cited in the ACTL materials for the proposition that a broad meaning is attributed to Rule 26(b)(1)'s "relevant to the subject matter" test. This reliance is somewhat surprising. The underlying question went to the means by which plaintiffs in a class action could achieve access to information identifying class members. The court of appeals ruled that the information was available by way of discovery, and that the discovery rules controlled the allocation of costs for compiling the information. The Supreme Court disagreed, ruling that access to the information should be controlled by Rule 23(d). "The critical point is that the information is sought to facilitate the sending of notice rather than to define or clarify issues in the case." The Court did say next that the "relevant to the subject matter" phrase

> has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. * * * Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. * * * Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

From this point, the Court went on to note that discovery can be denied as to claims or defenses that have been stricken, or as to

events before the limitations period that are not otherwise relevant. Turning to the names and addresses of class members, the Court ruled that this information "cannot be forced into the concept of `relevancy' * * * The difficulty is that respondents do not seek this information for any bearing that it might have on issues in the case." They sought the information to enable them to send class notice, a matter outside Rule 26(b)(1).

This language could easily be read to adopt even the ABA-proposed limit to "issues," and to show that even an issues limit will not significantly change the scope of discovery.

Perhaps more importantly, the Court's language reflects the function that long has been assigned to discovery. Discovery is designed not only to support or refute issues defined in the pleadings, but to continue the process of refining the issues framed by the pleadings, discarding some of these issues, and adding new issues. In practice, discovery sweeps beyond the claims or defenses framed by the pleadings. It will take a very clear signal to change this ingrained custom.

Quite apart from the language of a particular opinion, the most important task is to identify and to articulate clearly any change to be made in the scope of discovery. The more indeterminate the language change in the rule, the more important it will be to rely on the less certain path of Committee Note and other pronouncements. Simply striking "subject matter" from the rule without any explanation would do very little. A clear statement that the Committee believes that discovery has gone too far in some cases and needs to be restricted would do little more. Better guidance is needed to effect a fundamental shift. Nor is it likely to be better to add a mere reference to the "issues raised by the claims or defenses of any party." A claim or defense can "raise" issues that are not identified in the pleadings; indeed, it is easy to understand a "claim" or "defense" to include anything that will allow a party to prevail on the merits.

A potentially more effective approach would be to limit discovery to matters relevant to the issues framed by the pleadings. Since notice pleading often does not identify issues with much clarity, thorough pursuit of this alternative would require a complete reworking of notice pleading as well as discovery. If the time has not come for such drastic measures, a more modest approach could attempt to build on the approach taken to Rule 26(a)(1)(A) and (B) disclosure. Troubled by the frequent comments that disclosure could not be managed in light of the open-ended complaints often encouraged by notice pleading, the Advisory Committee worked out the test that limits the disclosure requirement to material "relevant to disputed facts alleged with particularity in the pleadings." The Committee hoped that this limit not only would provide manageable guidelines, particularly with the support of the Rule 26(f) meeting of the parties, but also would encourage more helpful pleading. Although Rule 26(a)(1) has not been in operation long enough — or widely enough — to yield much useful information on how it will come to work, there may be enough experience to help shape a parallel approach to the general scope of discovery.

The proposal to cure the ills of modern discovery practice by amending the scope of discovery defined in Rule 26(b)(1) must overcome these formidable difficulties. It would be relatively easy to draft a truly revolutionary change in direction. Although many years of experience would be required to work through the unintended consequences that would follow, such consequences are the price of dramatic procedural reform. It is much more difficult to draft and implement more modest restrictions. That difficulty may account for the focus of past reforms on the procedures of discovery, not the scope. And that difficulty warrants exploration of alternatives that do not address the basic scope of discovery.

Party-Controlled Discovery

Whether benign or malign, the guiding genius of modern

discovery has been reliance on party control. In some ways, the most fundamental challenge of discovery reform lies in this procedural fact. Whatever scope may be assigned to discovery by Rule 26(b)(1), the system will work only as well as the subjective good faith and objective skills of the parties allow. We do not have, and are not likely to find, judicial resources to control more than the more obvious excesses. Judicial resources will not be found to cure the inadequacies. Judges cannot, in our system, take over control of any system of discovery that bears any resemblance to the present system. The most pressing question of discovery reform is whether any system resembling present practice can be made to work.

The prospect that party-controlled discovery remains feasible is supported by at least two sources of information. The first arises from empirical studies going back twenty years and more. These studies found that there is no discovery at all in a significant number of cases, that discovery is reasonably proportioned to the needs of most cases, and that serious issues of discovery misuse arise in only a small fraction of all cases. The earlier study was directed by Professor Maurice Rosenberg for the Columbia University Project for Effective Justice, a Field Survey of Federal Pretrial Discovery — Report to the Advisory Committee on Rules of Civil Procedure (February, 1965). A more recent project is reported as Connolly, Holleman & Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center 1978). The other source of information is the familiar anecdotal source. The testimony and comments during the period that led to the 1993 discovery amendments suggested that discovery is not a serious problem in most cases, but that it can be a very serious problem in some cases. Time and again, the comments and testimony suggested that the best cure is not in rule reform but in judicial control. Give us a judge who becomes familiar with a case early and takes control, they said, and we have a workable system now. One of the most important questions is whether the time has come to attempt to test this anecdotal

information by another rigorous study. Many changes have been made in the discovery rules since the FJC study. Unless the RAND report on CJRA experience proves remarkably informative, another FJC study may be a central ingredient in any new wave of reform.

One obvious set of questions for a new study would be whether excessive discovery can be correlated with easily identified characteristics of litigation. Common invariables include the subject-matter, amount in controversy, number of parties, part of the country, and similarity of federal practice to state practice. Experience with "tracking" systems that respond to these and other variables would be a central part of this inquiry.

One of the more elusive questions that might be pursued in a new study would ask about the sources of whatever excessive discovery might be found. "Misuse" may be thought of as arising from inept use of the discovery tools. It can arise from lack of experience, the ease of relying on standardized discovery practices without thinking about the needs of each specific case, or the phenomenon of "litigators" who have little if any experience with the actual needs of trial. There may be other sources as well. "Over use" may be thought of as discovery out of proportion to the reasonable needs of the case. It may be client-directed. It too may result from lawyer ineptitude. Or it may be caused by hourly-billing greed, or possibly by fear of malpractice exposure. "Abuse" may be thought of as deliberate pursuit of discovery to inflict delay and burden on an adversary, or even inquiry made for the purpose of acquiring information for nonlitigating purposes. Abuse too may be client-directed, and indeed it may be wondered whether "scorched-earth" discovery often combines the wishes of clients with the practices of lawyers who are retained in hopes of maximizing the potential use of discovery to harass and oppress. We should know more than we do about the sociology and psychology of discovery, and if possible we should know about it for different areas of the country.

Pessimists may fear that study will reveal that the working

ethic of the adversary system has declined to a point that precludes continuing reliance on party-directed discovery. There is continuing reason to hope, however, that the basic framework remains sound. And it seems certain that reform cannot yet assume to abandon the premise of party control. The question will come back to choice between doing nothing, attempting to revise the basic scope of discovery, and seeking to devise yet different means of making discovery work well without changing the basic scope.

Under-Discovery

Before turning to alternative means of control, it must be recalled that excessive use is not the only discovery problem. Drawing from work by then-Professor Brazil, the comments of the United States Chamber of Commerce on the proposals that led to the 1993 discovery amendments suggest that "litigants still believe that they have not obtained the information they need to properly try their cases." (ACTL tab 10, p. 3.) It is possible that the tools and scope of discovery are too limited, not too broad. Instead, the problem — if it exists — may be that existing tools are not used effectively.

Another possibility is that discovery demands are not met in good faith. Whether clients or lawyers are responsible, there may be outright suppression of requested information. Perhaps more likely, poorly framed demands may be construed in self-serving ways to "justify" responses that omit the most useful information. And anecdotes continue to abound about the waves of document responses that do provide the critical documents but manipulate the context to obscure them as much as possible.

Even in reasonable good faith, another explanation for under-discovery may be that clients simply do not try hard enough. Thorough compliance can prove costly in direct terms. The indirect costs of distraction from life- and business-as-usual are often more important, even if less noticed by some lawyers.

Still another explanation may be that desired information does not in fact exist. It is easy for a partisan to believe that full and honest responses by an adversary would readily prove the justness of the cause. Subjective suspicions do not of themselves establish suppression.

It seems fair to assume that discovery does not always yield all of the useful information that exists to be disclosed. That inevitable assumption does not show how often if falls short, nor by how far. It is not even a particularly useful argument against narrowing the scope of discovery or imposing other limits. But it may provide a useful point for evaluating new proposals. If discovery does not now yield all useful information, how much more would be lost if new limits were imposed? It would be a triumph to design a system that inflicts lower costs but yields almost as much useful information as the present system. Success may be found in systems that yield closer balances between costs saved and information lost. But attention must be paid to the information lost as well as the costs saved.

Alternative Proposals

A number of alternative proposals have been advanced. Most of them could be combined with revision of the Rule 26(b)(1) scope provision. Some go directly to the (b)(1) provision. Several of these alternatives are gathered here, in no particular order.

Different Rules for Documents. In placing the scope of discovery on the Committee agenda, it was suggested that document discovery seems to be a principal source of discovery problems. The 1993 discovery amendments established presumptive limits for the numbers of depositions and interrogatories, but did nothing to affect the frequency or extent of Rule 34 demands. It has been suggested that parallel changes might be made to Rule 34, limiting the number of documents that may be demanded or limiting the total number of "pages" that must be produced. This suggestion seems unworkable. The demanding party has no way of knowing how many documents are

involved with a particular request, no way of knowing the number of pages involved, and no way of relying on the producing party to select the most important materials to fill whatever limits might be set.

A more cogent suggestion is that the scope of document discovery should be distinguished from the general Rule 26(b)(1) scope of discovery by other means. The distinction could be incorporated in Rule 26(b)(1), in Rule 34, or both. Any of the limits that have been proposed for 26(b)(1) could be adopted for Rule 34 alone. Or the procedure for Rule 34 production could be changed. History provides interesting lessons. In 1938, the "relevant to the subject matter" standard of Rule 26(b) applied to depositions. Rule 34 provided for production of "designated documents * * * which constitute or contain evidence material to any matter involved in the action." Rule 34 further provided for production only on motion showing "good cause." Rule 26(b) was amended in 1946, and Rule 34 was amended at the same time to incorporate the "scope of examination permitted by Rule 26(b)." In 1970, Rule 34 was further amended to delete the motion and good cause requirements. The motion and good cause requirement could be restored. This step might not impose great burdens on the courts. "Meet and confer" preconditions and Rule 26(g) sanctions could reduce actual resort to motions considerably. The effect of adding a motion requirement would be to change the balance of discovery bargaining more than to force actual motions.

Another suggestion, aimed at ensuring compliance rather than reducing burdens, is that increased obligations be placed on counsel to ensure and to certify that clients have in fact produced all the documents demanded.

Tracking. Tracking cases for discovery according to simplified criteria has been practiced in various forms in many courts. There is a persisting strain of thought that a single system of discovery cannot work properly for all cases in federal courts, however large or small, however simple or complex, however important or

unimportant beyond the immediate parties, however different in other dimensions. Local plans adopted under the CJRA will provide evidence on some of the actual experience. This experience should be studied with care.

State Facts That Define Relevance. Another suggestion is that a party demanding discovery should be required to state the facts that make the requested information relevant to the action. Careful drafting would be needed to achieve workable measures of what constitutes a "fact" for this purpose, and of what establishes "relevance" if the result is to restrict present discovery practices. One obvious model would be to require gradually stricter standards of pleading as discovery progresses, whether or not the discovery-demand documents were formally characterized as pleadings. If strict demands are exacted early in an action, the result could be a substantial change in the present system that relies on discovery to facilitate actions filed on the basis of imprecise information.

Direct Relevance. One proposal is that the scope of discovery be limited to facts that are "directly relevant" to the litigation. This proposal might be coupled with deletion of the provision that permits discovery of information that "appears reasonably calculated to lead to the discovery of admissible evidence." It is not clear who would administer this limit, or how. If primary reliance is to be placed on the responding party, there might be a particularly sharp reduction in the information supplied by responses to Rule 33 interrogatories and Rule 34 requests to produce.

Disclosure. After another two or three years of experience with disclosure and Rule 26(f) meetings, it may be appropriate to consider changes in the balance between disclosure and discovery. Initial disclosure requirements could be expanded. The option in Rule 26(a)(1)(B) to "describe" documents could be deleted, requiring production as part of the disclosure. With or without these changes in disclosure, success with disclosure and Rule 26(f)

meetings might justify some reduction in the scope of discovery.

Expense Allocation. Many means could be devised to reallocate the costs of complying with discovery demands. Former Rule 26(f), added in 1980, provided a discovery conference procedure that the Advisory Committee did not contemplate would be used "routinely." One of the provisions buried in the description of the order to be entered after the conference was that other matters could be determined, "including the allocation of expenses." There was no elaboration of this cryptic phrase in the Committee Note. The proposals that led to the 1993 discovery amendments advised abolition of the Rule 26(f) discovery conference because it had been seldom used and to little effect. The substitution of the meeting of the parties provision now in Rule 26(f) came as part of the continuing development of the disclosure provisions. The bemusing provision for an allocation of expenses might be revived as a more pointed power. A more specific provision might be modeled on Rule 45(c)(2)(B), which provides that an order to compel production of documents "shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection or copying demanded." A Rule 34 analogue to this provision could be drafted with little difficulty.

Provisions that shift the costs of discovery compliance are calculated to work systematically in favor of parties who typically have more information about the subjects of litigation, and against parties who typically have less information. Individuals suing governments or business entities are most likely to suffer the consequences. It does not seem likely that the time has come to adopt a rule requiring that the demanding party bear the expenses of interparty discovery, nor even that the expenses be divided equally. It may be possible to develop more subtle and nuanced approaches, but the task will be formidable.

Increasing Party Responsibility. The present system provides two direct approaches to responsible discovery practice. Rule 26(g) applies to "[e]very discovery request, response, or objection." It

requires the attorney — or a party who has no attorney — to certify that the discovery move is not based on an improper purpose, and that it is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Rule 26(b)(2) provides that the court shall limit the frequency or extent of use of discovery methods in circumstances that seem to encompass virtually all potential misuses.

This two-pronged approach to maintaining balance in discovery has not satisfied the critics. Neither assigning initial responsibility to the parties nor giving direct backup responsibility to the courts seems to have been fully effective. There may be some means of increasing the responsibility of the parties to implement directly the many laudable phrases of balance and containment set out in Rule 26(b)(2). This possibility raises all of the questions that surround the attempt to combine cooperative party discovery with adversary party settlement and trial.

One means of reallocating responsibility would be to adopt a presumptively narrow test of discoverability, subject to expansion. There is a vague parallel in the presumptive limits established in 1993 for the numbers of depositions and interrogatories. But this approach would cut deeper, and would cut far deeper if the presumptive limits were narrow. The hope might be that the parties could work out sensible discovery programs without need for frequent court orders, and that Rule 26(f) meetings would be more productive if more important.

Deposition Time Limits. The discovery rule proposals published for comment in August, 1991 included a proposed Rule 30(d)(1) that might be reconsidered for adoption:

> **(1)** Unless otherwise authorized by the court or agreed to by the parties, actual examination of the deponent on the record shall be limited to six hours. Additional time

> shall be allowed by the court if needed for a fair examination of the deponent and consistent with the principles stated in Rule 26(b)(2), or if the deponent or another party has impeded or delayed the examination. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

The Note contemplates that the six-hour limit applies to examination by all parties: "Experience in courts that have imposed such limits by local rule or order demonstrates that, when a deponent is to be examined by more than one party, counsel can usually agree on an equitable allocation of the time permitted."

Defer Discovery Pending Motions. Taking a page from the 1995 Securities Litigation Reform Act, a general provision could be adopted to regulate discovery while Rule 12(b) motions are pending. Discovery would not be suspended completely — at a minimum, many Rule 12(b) motions turn on fact disputes that may require discovery. And provision must be made for preserving discovery opportunities that may vanish. Some provision must be made for cases in which discovery relevant to the motion also bears on the merits — disputes about transaction-based personal jurisdiction are the most obvious example. The effects on motion practice also must be considered.

Nondiscovery Alternatives. Rule 29 provides that the parties may "modify * * * procedures governing or limitations placed upon discovery." The limits of this provision are not clear. Parties concerned about modification of a stipulated protective order, for example, might attempt to stipulate additional protections by making an exchange of information entirely outside the formal discovery system. Rule 29 might be modified to encourage agreements that provide for information exchanges that are not formally governed by Rules 26 through 37. The incentive to create workable cooperative systems might be sufficient to overcome the disincentives that commonly arise when the parties have unequal

access to information outside discovery.

A Cautionary Postscript

Several Advisory Committee members attended the March, 1995 Conference on the Federal Rules of Civil Procedure co-sponsored by The Southwestern Legal Foundation and The Southern Methodist University School of Law. The Conference focused on discovery and class actions. The Reporter, Professor Geoffrey C. Hazard, Jr., submitted a summary that included the following remarks about discovery:

> Civil claims are an integral part of law enforcement in this country. Many civil actions, particularly those where discovery is burdensome, are in effect "private attorney general" suits. Liberal discovery is an integral part of effective enforcement, as evidenced by the free range traditionally accorded the grand jury and afforded to administrative agencies in modern government. Hence, the scope of discovery determines the scope of effective law enforcement in many fields regulated by law.
>
> Comprehensive limitation of discovery thus implicates major social issues, particularly rights of individuals as against organizations public and private. It is doubtful that comprehensive limitation of discovery would be politically acceptable. It is also doubtful that such limitation would be socially desirable in the long run. Law enforcement through civil justice is burdensome and expensive, but the alternatives would be much reduced enforcement or enforcement through public bureaucracies.
>
> An acceptable approach to excess in discovery requires two principal measures. One is to develop much better knowledge about discovery abuse. There is reason to think that abuse occurs only in a small percentage of cases and that abuse occurs disproportionately in "big" cases. However, much more systematic investigation is required to gauge the contours of this and other judicial administration problems.
>
> The second measure is to revise the present discovery rules to permit better control of discovery, particularly in the types of cases where abuse exists or is perceived to exist.

The impact of discovery on settlement also needs to be

reckoned. Complaints about the burdens of discovery frequently include the statement that large institutional litigants are compelled by the costs of discovery to settle nuisance claims that would be easily defeated, or not be brought at all, in a less expensive system. A variation of this complaint is that even in reasonably based actions, overbroad discovery may be used deliberately as a tool to coerce settlement. These arguments certainly seem to counsel reduction of discovery. Discovery, however, also may be important in fostering settlement for good reasons. A major obstacle to settlement arises from differing estimates of probable outcomes on the merits. Discovery can bring the parties' estimates together and promote settlement. Reduction of discovery may lead to fewer desirable settlements as well as fewer coerced settlements.

The long history of attempts to contain discovery shows that the stakes are great and the task is difficult. "Tinkering changes" are not likely to do much good. Careful work, spread over several years, will be required to support more fundamental but more useful improvements.

Agenda Item VI

Reporter's Note: Copyright Rules

The attached materials bring up to date – mid-September – the story of the long-forgotten Copyright Rules. It is clear that something must be done. It is equally clear that the Committee hopes to find some means of learning more about the needs of Copyright practice before deciding on what should be done.

If the most recent effort to open up channels of information proves successful in time to supplement these materials, more will be provided before the meeting. If there is nothing more, the best course once again may be to defer consideration. More than 30 years have passed since an earlier Advisory Committee put aside the first effort to abrogate the Copyright Rules. Preliminary conversations with experienced copyright lawyers all seem to indicate that there is no urgent practical problem – indeed, there is little if any indication that the problem is more than aesthetic. A deliberate approach seems wise.

NOTE: COMMITTEE HISTORY — COPYRIGHT RULES

John Rabiej has provided full information about the 1964-1965 consideration of the Copyright Rules. The full recommendations, reports, and minutes will be provided when there is a better foundation to consider what should be done about the Copyright Rules. For present purposes, the following sketch should suffice.

In 1964, two related proposals were published for comment. One was that all of the Copyright Rules, first adopted in 1909, be repealed. The second was that Civil Rule 65 be amended by adding a new subdivision (f): "This rule applies to the impounding of articles alleged to infringe a copyright provided for in Title 17, U.S.C. § 101(c)." These proposals were driven in part by a desire to embrace all procedural rules within the Civil Rules. They also reflected dissatisfaction with the actual content of the Copyright Rules. Copyright Rule 2, which required that copies of the alleged infringing works be annexed to the pleadings, was found an unnecessary special pleading requirement. In the end, it was in fact repealed.

The remaining Copyright Rules govern impounding procedure. They were found objectionable in 1964 for reasons summarized in the June 10, 1965 statement of the Advisory Committee to the Standing Committee, p. 17: the procedure "is rigid and virtually eliminates discretion in the court; it does not require the plaintiff to make any showing of irreparable injury as a condition of securing the interlocutory relief; nor does it require the plaintiff to give notice to the defendant of an application for impounding even when an opportunity for hearing could feasibly be provided." (The due process doctrine that underlies the notice concern has been much developed since 1965.) Adopting injunction procedure would confirm the court's discretion to demand irreparable injury, require notice when notice can be accomplished without defeating the capacity to afford an effective remedy, and ensure continuation of a uniform national practice.

Opposition to the proposal was expressed by the American Bar Association and by the Ninth Circuit Judicial Conference (apparently relying on the same advisers). The core of the opposition rested on express satisfaction with the way impounding worked under the existing rules. This opposition did not sway the Reporters, who suggested that alleged infringers are not likely to be sufficiently organized or interested on a sustaining basis to object to the inadequacies of the Copyright Rules impounding procedure.

Comprehensive copyright revision was being considered in Congress in 1965. In the end, the Advisory Committee recommended that its proposals were sound but that the Standing Committee should evaluate the political questions posed by the relationship between the rulemaking process and Congressional processes. The Standing Committee recommended that only Rule 2 should be repealed, Supplemental Report to the Judicial Conference, Sept. 1965, p. 2.

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August 21, 1996

Jon Baumgarten, Esq.
Proskauer, Rose Goetz & Mendelsohn
1233 20th St. N.W.
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by FAX: 202.416.6899 — 18 pages

Re: Copyright Rules of Practice

Dear Mr. Baumgarten:

Thank-you for taking the time to talk with me just now, and more importantly for agreeing to take a look at the questions raised by the antique Copyright Rules of Practice.

I enclose a copy of the Copyright Rules and Notes that appear in 17 U.S.C.A. following § 501. I also enclose a copy of a brief memorandum I prepared for the November, 1995 meeting of the Advisory Committee on the Federal Rules of Civil Procedure. The memorandum serves only to describe my own bewilderment about the nature of the challenge presented.

The simplest thing to do would be to amend Rule 1 to invoke the 1976 Copyright Act and the Appellate Rules. That would leave Rules 3 et seq. untouched. The range of options opens up from there. Rules 3 and following could be revised. They could be deleted entirely, relying on the Civil Rules to govern all aspects of copyright proceedings. (Reliance on the Civil Rules would suggest abrogation of Copyright Rule 1 as well, with a parallel amendment of Civil Rule 81(a)(1).) Quite different rules could be adopted to meet special needs of Copyright practice that are not reflected in the present rules. I cannot even guess what other options may deserve consideration.

The immediate task is to devise a strategy for addressing these problems. It will be important to create a means of generating advice that the Civil Rules Advisory Committee can rely upon in framing proposals. The advice must not only be "detailed, neutral, and expert" — to quote my own memorandum — it also must appear to have those qualities. The Civil Rules Committee reports to the Standing Committee on Rules of Practice and Procedure. A Civil Rules Committee proposal approved by the Standing Committee for publication is published for public comment. The comments are then considered by the Civil Rules Committee; when it feels the process has gone on long enough, it makes recommendations for action to the Standing Committee. When the

Standing Committee is satisfied, it makes recommendations to the Judicial Conference of the United States. The Judicial Conference, if it approves, recommends rules to the Supreme Court. If the Supreme Court approves, it adopts the rules and transmits them to Congress. The rules become effective if Congress does not act to set them aside. At all steps of this process, it will be important to ensure that all participants have confidence in the process the Civil Rules Committee has followed in gathering information and advice.

For the moment, I think the best approach is to find a way of advising the Advisory Committee whether copyright practitioners experience litigating problems with the present Copyright Rules. The greater the detail, the better. And the greater the number of practitioners who can be consulted, the better. But at this stage I think it is not as important to create a formal or informal structure of advisers as it is to get some initial expert advice. Are there problems? What are they? Is there any sense of what approach should be taken to addressing them? For that matter, how many copyright practitioners are even aware of the present Rules?

I know this reaches you on the eve of a very busy week. The Civil Rules Committee meets next in mid-October. The agenda will be put together in mid-September. If it is possible to have at least some preliminary thoughts by then, we should be able to put this topic on the agenda for some initial thinking by the Committee on the means it would like to devise for further work.

Again, thank you for your instant willingness to pitch in.

Very truly yours,

Edward H. Cooper

EHC/lm
attachs.

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.

RULES OF PRACTICE AS AMENDED

Amendments received to October 28, 1995

SCOPE OF RULES

The Rules of Practice set out hereunder were adopted by the Supreme Court of the United States to govern the procedure under section 25 of Act Mar. 4, 1909, which was incorporated in former section 101 of this title. See, now, section 501 et seq. of this title.

ADVISORY COMMITTEE NOTES

Special Copyright Rules governing certain procedures in actions under the Copyright Act were promulgated by the Supreme Court in 1909, pursuant to a limited rulemaking power conferred upon the Court by section 25(e) of the Copyright Act of 1909, 35 Stat. 1075, 1082. In 1934 the Court was granted general rulemaking power by the Rules Enabling Act, 48 Stat. 1064 (now, as amended, 28 U.S.C. § 2072 [section 2072 of Title 28, Judiciary and Judicial Procedure]). Rule 81(a)(1) of the Federal Rules of Civil Procedure [Title 28, Judiciary and Judicial Procedure], promulgated in 1938, stated that the Federal Rules of Civil Procedure should not apply to proceedings under the Copyright Act except as they might be made applicable by later rules to be promulgated by the Court. Rule 1 of the Copyright Rules was thereafter amended to state that proceedings under the Copyright Act should be governed by the Federal Rules of Civil Procedure to the extent not inconsistent with the Copyright Rules.

When the Copyright Act was codified in 1947 as Title 17 of the United States Code, section 25(e) of the Act was carried forward as 17 U.S.C. § 101(f). The Act of June 25, 1948, 62 Stat. 869, thereafter repealed § 101(f) on the ground that it was unnecessary in the light of the Rules Enabling Act.

Rule 1

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.

(As amended June 5, 1939, eff. Sept. 1, 1939.)

HISTORICAL NOTES

References in Text

Section 25 of the Act of March 4, 1909, referred to in text, means Act Mar. 4, 1909, c. 320, § 25, 35 Stat. 1081, which was incorporated in former section 101 of this title by Act July 30, 1947, c. 391, 61 Stat. 652. Subsec. (f) of former section 101 of this title was repealed by Act June 25, 1948, c. 646, § 39, 62 Stat. 992, and its subject matter is now covered by section 2072 of Title 28, Judiciary and Judicial Procedure. The remaining provisions of former section 101 of this title were incorporated in section 501 et seq. of this title in the general revision of this title by Pub.L. 94–553, Oct. 19, 1976, 90 Stat. 2541.

The Rules of Civil Procedure, referred to in text, mean the Federal Rules of Civil

Procedure which are set out in Title 28, Judiciary and Judicial Procedure.

CROSS REFERENCES

Applicability of rules to copyright actions, see Fed.Rules Civ.Proc. Rule 81, 28 USCA.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

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Complaints 4
Presumptions 5
Validity of rules 2

1. Generally

Copyright proceedings are not governed by the rules of civil procedure except insofar as those rules are made applicable by specially promulgated copyright rules. Wildlife Internationale, Inc. v. Clements, D.C.Ohio 1984, 591 F.Supp. 1542, 223 U.S.P.Q. 806.

In view of this rule, Federal Rules of Civil Procedure, Title 28, apply to copyright infringement suits. White v. Reach, D.C.N.Y.1939, 26 F.Supp. 77. See, also, Kingsway Press v. Farrell Pub. Corp., D.C.N.Y.1939, 30 F.Supp. 775.

2. Validity of rules

Neither the Supreme Court nor Congress has declared the Copyright Rules "void" and "no longer in effect"; the consensus of knowledgeable authorities is that the Rules have not been repealed. Warner Brothers Inc. v. Dae Rim Trading, Inc., C.A.2 (N.Y.) 1989, 877 F.2d 1120, 11 U.S.P.Q.2d 1272.

Although the Copyright Rules have never been explicitly abrogated by either Congress or the Supreme Court, their mandatory provisions are clearly inconsistent with the discretionary powers conferred on this Court by the Copyright Act of 1976. Paramount Pictures Corp. v. Doe, E.D.N.Y.1993, 821 F.Supp. 82, 27 U.S.P.Q.2d 1594.

The Special Copyright Rules are, with some changes, still in effect; it was disappointing to note that plaintiff's counsel suggested that the judge "ignore the Supreme Court Copyright Rules" because "it is unclear whether they are still effective or have been superseded by the general provisions of section 503." Warner Bros, Inc. v. Dae Rim Trading, Inc., S.D.N.Y.1988, 677 F.Supp. 740, 6 U.S.P.Q.2d 1423, appeal denied 877 F.2d 1120, 11 U.S.P.Q.2d 1272.

3. Amendment of pleadings

In copyright infringement suit, plaintiff's motion for leave to file amended and supplemental bill of complaint, bringing in owners of copyrights on other musical compositions, in which plaintiff enjoyed same rights as in those set forth in original bill, as additional parties plaintiff because of defendant's alleged infringements of such copyrights since filing of original bill, is governed by Federal Rules of Civil Procedure, Title 28, not former Equity Rule, though original bill was filed before effective date of Supreme Court's application of Federal Rules of Civil Procedure to copyright proceedings. Society of European Stage Authors and Composers v. WCAU Broadcasting Co., D.C.Pa. 1940, 1 F.R.D. 264.

4. Complaints

Rule 8, Federal Rules of Civil Procedure, Title 28, requiring complaint to contain a short and plain statement of the claim showing that pleader is entitled to relief is applicable to a copyright action. April Productions v. Strand Enterprises, D.C.N.Y.1948, 79 F.Supp. 515, 77 U.S.P.Q. 155.

5. Presumptions

In actions for injunction and damages for infringements of copyrights through public performances for profit of musical compositions, the plaintiffs were entitled to benefit of any presumptions which the law affords in making a prima facie case of originality of compositions involved, and such presumptions were as effective under the Federal Rules of Civil Procedure, Title 28, as they were prior thereto,

since the Federal Rules of Civil Procedure were not designed either as a complete code or for purpose of altering, especially restrictively, the rules of evidence theretofore recognized. Remick Music Corp. v. Interstate Hotel Co. of Neb., D.C.Neb.1944, 58 F.Supp. 523, affirmed 157 F.2d 744, 71 U.S.P.Q. 138, certiorari denied 67 S.Ct. 622, 329 U.S. 809, 91 L.Ed. 691, 72 U.S.P.Q. 529, rehearing denied 67 S.Ct. 769, 330 U.S. 854, 91 L.Ed. 1296, 72 U.S.P.Q. 529.

[Rule 2. Rescinded Feb. 28, 1966, eff. July 1, 1966]

ADVISORY COMMITTEE NOTES

Rule 2 of the Copyright Rules required, with certain exceptions, that copies of the allegedly infringing and infringed works accompany the complaint, presumably as annexes or exhibits. This was a special rule of pleading unsupported by any unique justification. The question of annexing copies of the works to the pleading should be dealt with like the similar question of annexing a copy of a contract sued on. The Federal Rules of Civil Procedure [Title 28, Judiciary and Judicial Procedure] permit but do not require the pleader to annex the copy. A party can readily compel the production of a copy of any relevant work if it is not already available to him. Accordingly, Copyright Rule 2 is rescinded.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Rule 3

Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court or a commissioner thereof.

HISTORICAL NOTES

References in Text

Section 34 of the Act of March 4, 1909, referred to in text, means Act Mar. 4, 1909, c. 320, § 34, 35 Stat. 1084, which was incorporated in former section 110 of this title by Act July 30, 1947, c. 391, 61 Stat. 652. Former section 110 of this title was repealed by Act June 25, 1948, c. 646, § 39, 62 Stat. 992, and its subject matter is now covered by section 1338 of Title 28, Judiciary and Judicial Procedure.

Change of Name

Commissioner, referred to in text, means United States commissioner which was replaced by United States magistrate pursuant to Pub.L. 90–578, Oct. 17, 1968, 82 Stat. 1118. United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc.,

deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 321 of Pub.L. 101–650, set out as note under section 631 of Title 28. See, also, chapter 43 (Section 631 et seq.) of Title 28.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Affidavits 1
Waiver 2

1. Affidavits

Affidavits filed by crash test dummy manufacturer in support of its request for ex parte order of inventory and impoundment stated to its best "knowledge, information and belief the number and location" of copies which allegedly infringed copyright, as required by copyright rules, where complaint identified location of alleged infringer's principal place of business, and order of seizure was directed to that location and that location was sole place searched. First Technology Safety Systems, Inc. v. Depinet, C.A.6 (Ohio) 1993, 11 F.3d 641, 29 U.S.P.Q.2d 1269.

Order authorizing immediate seizure from defendants of all video cassettes infringing plaintiff's copyrights and all devices for such copying was not improper on theory plaintiff did not clearly state what tapes were owned by them. Century Home Entertainment, Inc. v. Laser Beat, Inc., E.D.N.Y.1994, 859 F.Supp. 636, 30 U.S.P.Q.2d 1811.

2. Waiver

In copyright infringement action in which a defense motion was made to quash previously issued writs of seizure, record established that movants, due to the absence of timely objection, waived this rule's requirements that a bond be executed by at least two sureties and that such a bond be conditioned on the payment to defendant of any damages which the court may award him against the complainant. Jondora Music Pub. Co. v. Melody Recording, Inc., D.C.N.J.1973, 362 F.Supp. 494, 179 U.S.P.Q. 542, vacated on other grounds 506 F.2d 392, 184 U.S.P.Q. 326, certiorari denied 95 S.Ct. 2417, 421 U.S. 1012, 44 L.Ed.2d 680, 186 U.S.P.Q. 73.

Rule 4

Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means

for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

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1. Constitutionality

Whether compliance with the Copyright Rules is a sufficient basis on which to justify an ex parte order of impoundment is a matter of some debate; some courts have held that compliance with Copyright Rules is constitutionally insuffi-

cient and require a plaintiff to meet burdens imposed by Federal Rules of Civil Procedure. First Technology Safety Systems, Inc. v. Depinet, C.A.6 (Ohio) 1993, 11 F.3d 641, 29 U.S.P.Q.2d 1269.

Provisions and procedures of these rules relating to writs of seizure are constitutional. Jondora Music Pub. Co. v. Melody Recording, Inc., D.C.N.J.1973, 362 F.Supp. 494, 179 U.S.P.Q. 542, vacated on other grounds 506 F.2d 392, 184 U.S.P.Q. 326, certiorari denied 95 S.Ct. 2417, 421 U.S. 1012, 44 L.Ed.2d 680, 186 U.S.P.Q. 73.

2. Construction with Copyright Act

Mandatory provisions of the Copyright Rules, with respect to impoundment of infringing materials, are inconsistent with discretionary powers conferred on the courts by the Copyright Act, and compliance with Rules is not sufficient basis on which to justify ex parte impoundment. Paramount Pictures Corp. v. Doe, E.D.N.Y.1993, 821 F.Supp. 82, 27 U.S.P.Q.2d 1594.

3. Injunctions compared

Although the Rules of Practice for Copyright cases are arguably still in effect, many courts dealing with similar motions for impoundment have required plaintiffs to meet the normal preliminary injunction standards. VanDeurzen and Associates, P.A. v. Sanders, D.Kan.1991, 21 U.S.P.Q.2d 1480.

4. Bonds

District court's finding that $2,000 was sufficient bond for seizure of articles which allegedly infringed upon crash test dummy manufacturer's copyright was not clearly erroneous, even though alleged infringer alleged that value of information contained in records seized was $2.2 million, as copyright rules were only relevant to seizure of infringing goods, and thus information contained in seized business records was irrelevant in setting bond amount. First Technology Safety Systems, Inc. v. Depinet, C.A.6 (Ohio) 1993, 11 F.3d 641, 29 U.S.P.Q.2d 1269.

5. Writs of seizure—Generally

Where a defendant furnished to its customers for their use copies of a directory published by it, which infringed complainant's copyright, but retained title with the right to recall the books on demand, complainant was not entitled to a writ of seizure under this rule to take the books from the bailees, but required to enforce its right to their destruction through an order requiring defendant to recall the same. Jewelers' Circular Pub. Co. v. Keystone Pub. Co., D.C.N.Y.1921, 274 F. 932, affirmed 281 F. 83, certiorari denied 42 S.Ct. 464, 259 U.S. 581, 66 L.Ed. 1074.

6. —— Fourth Amendment considerations

Assuming arguendo that U.S.C.A. Const. Amend. 4 was applicable to the seizure of the duplicating material of defendants, against whom music publishing companies brought an action for infringement of their respective copyrighted musical works by the unauthorized manufacture and sale of tape recordings serving to reproduce the same mechanically, the writs of seizure issued as a judicial process following presentation to a "neutral magistrate" of the supporting affidavits, thus vitiating defendants' claim that a violation of U.S.C.A. Const. Amend. 4 arose from the seizure. Jondora Music Pub. Co. v. Melody Recordings, Inc., D.C.N.J.1973, 362 F.Supp. 494, 179 U.S.P.Q. 542, vacated on other grounds 506 F.2d 392, 184 U.S.P.Q. 326, certiorari denied 95 S.Ct. 2417, 421 U.S. 1012, 44 L.Ed.2d 680, 186 U.S.P.Q. 73.

7. —— Notice

District court's issuance of ex parte order of inventory and impoundment and subsequent refusal to vacate that order in copyright infringement action was abuse of discretion, where crash test dummy manufacturer failed to demonstrate why notice should not have been required. First Technology Safety Systems, Inc. v. Depinet, C.A.6 (Ohio) 1993, 11 F.3d 641, 29 U.S.P.Q.2d 1269.

8. —— Vacation of writs

Plaintiffs in copyright infringement action, by their misstatements, practiced a fraud on the court on their ex parte application for a writ of seizure, and order would be entered vacating the writ of seizure and dissolving the injunction that the court had issued. Jondora Music Publishing Co. v. Melody Recordings, Inc., D.C.N.J.1972, 351 F.Supp. 572, 176 U.S.P.Q. 110.

9. Articles subject to seizure—Generally

A district court has no discretion to determine what to impound or what to destroy on complaint by copyright propri-

etor that right is being infringed; the process Congress granted the agreed copyright proprietor is a summary one and it is duty of the court to impound everything the proprietor alleges infringes his copyright. Duchess Music Corp. v. Stern, C.A.9 (Ariz.) 1972, 458 F.2d 1305, 173 U.S.P.Q. 278, certiorari denied by 93 S.Ct. 52, 409 U.S. 847, 34 L.Ed.2d 88, 175 U.S.P.Q. 385.

10. —— Devices and means for making copies

Ex parte order of inventory and impoundment which permitted crash test dummy manufacturer who sued competitor for copyright infringement to seize allegedly infringing computer software and various business records, was too broad to fall within statutory authorization for seizure of items which allegedly infringed upon copyright, where seized business records were not alleged to have infringed on manufacturer's copyrights and were not means by which infringing goods could be copied; seizure was not meant to be means for preserving evidence generally. First Technology Safety Systems Inc. v. Depinet, C.A.6 (Ohio) 1993, 11 F.3d 641, 29 U.S.P.Q.2d 1269.

Items which may be impounded on complaint of a copyright proprietor are not limited to general class of plates, molds, and matrices, that is, to items embodying an identifiable impression of the copyrighted work alone, but includes devices and means for making the alleged infringing copies. Duchess Music Corp. v. Stern, C.A.9 (Ariz.) 1972, 458 F.2d 1305, 173 U.S.P.Q. 278, certiorari denied by 93 S.Ct. 52, 409 U.S. 847, 34 L.Ed.2d 88, 178 U.S.P.Q. 385.

Rule 5

The marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond by delivering the same to him personally, if he can be found within the district, or if he can not be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person can not be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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NOTES OF DECISIONS

Persons entitled to seize articles
Generally 1
Private persons 2
Service of affidavit, writ, and bond 3

1. Persons entitled to seize articles—Generally

Search and seizure of allegedly infringing merchandise was properly conducted by a United States Marshal or other law enforcement officer, not by copyright owner's attorneys and their agents; "discovery" of alleged infringers' documents and records without notice was not authorized by copyright law or federal rules of civil procedure. Warner Bros. Inc. v. Dae Rim Trading, Inc., C.A.2 (N.Y.) 1989, 877 F.2d 1120, 11 U.S.P.Q.2d 1272.

2. —— Private persons

Copyright Act's impoundment provisions for infringing goods did not authorize court to direct private person employed by copyright owner's attorney to search alleged infringer's premises, seize specified materials and deliver them to attorney as well as all books, records, correspondence or other documents related to allegedly infringing materials or which could provide information in respecting vendors or purchasers of materials. Warner Bros. Inc. v. Dae Rim Trading Inc., C.A.2 (N.Y.) 1989, 877 F.2d 1120, 11 U.S.P.Q.2d 1272.

3. Service of affidavit, writ, and bond

District court corrected any problem that might have been caused in copyright infringement action by crash test dummy manufacturer's failure to serve copy of bond supporting inventory and impoundment order on competitor alleged to have competed unfairly, where it ordered manufacturer to submit copy of bond to competitor. First Technology Safety Systems, Inc. v. Depinet, C.A.6. (Ohio) 1993, 11 F.3d 641, 29 U.S.P.Q.2d 1269.

Rule 6

A marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the court.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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NOTES OF DECISIONS

Persons entitled to retain items 1

1. Persons entitled to retain items

District court did not abuse its discretion in copyright infringement action brought by crash test dummy manufacturer when it allowed law firm to hold items seized by manufacturer pursuant to ex parte order of inventory and impoundment in trust for court, where order authorized law firm to hold items in trust for court, because marshals lacked space to store items. First Technology Safety Systems, Inc. v. Depinet, C.A.6 (Ohio) 1993, 11 F.3d 641, 29 U.S.P.Q.2d 1269.

Rule 7

Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the court, the property to be returned to the defendant.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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NOTES OF DECISIONS

Remedies within rule 1

1. Remedies within rule

Where an alleged infringing article is seized and the defendant afterwards asks that the complainant's bond be increased under rule 7 of these rules, he is not in a position to complain of the seizure, or demand a return of the alleged infringing articles, but his remedy is to defeat the complainant on a trial on the merits. Universal Film Mfg. Co. v. Copperman, D.C.N.Y.1913, 206 F. 69.

Rule 8

Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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Rule 9

The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13

supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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NOTES OF DECISIONS

Affidavits 1

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1. Affidavits

The court cannot entertain a motion for an order to show cause why articles impounded as alleged infringements of a copyright should not be returned, unless a showing is made by affidavit that the articles seized are not infringing copies. Crown Feature Film Co. v. Bettis Amusement Co., D.C.Ohio, 1913, 206 F. 362.

Rule 10

Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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NOTES OF DECISIONS

Discretion of court 1

1. Discretion of court

If articles seized on complaint of copyright proprietor are infringing copies or infringing means, the district court has no discretion to return them. Duchess Music Corp. v. Stern, C.A.9(Ariz.) 1972, 458 F.2d 1305, 173 U.S.P.Q. 278, certiorari denied 93 S.Ct. 52, 409 U.S. 847, 34 L.Ed.2d 88, 175 U.S.P.Q. 385.

Rule 11

Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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Rule 12

Any service required to be performed by any marshal may be performed by any deputy of such marshal.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

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Rule 13

For services in cases arising under this section the marshal shall be entitled to the same fees as are allowed for similar services in other cases.

ADVISORY COMMITTEE NOTES

The Copyright Act contains a general provision (17 U.S.C. § 101(c) [former section 101(c) of this title]) authorizing "impounding" during the pendency of an infringement action. [See, now, section 503 of this title.] Copyright Rules 3–13 supplement the statute by setting out a detailed procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

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 [Title 28, Judiciary and Judicial 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.

CROSS REFERENCES

Collection of fees by marshal, see 28 USCA § 567.
Marshal's fees, see 28 USCA § 1921.

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Agenda Item VII-A

Reporter's Note: Service by Electronic Means or by Commercial Carrier

The attached materials begin with a Memorandum about a proposal for electronic service of motions that is working through the Bankruptcy Rules Advisory Committee. The immediate question is whether the Civil Rules Committee should prepare a proposal that might be submitted to the Standing Committee next June, to keep in tandem with the Bankruptcy Rules. (A related question is whether the Civil Rules might take the more modest step of permitting service by commercial carrier wherever service by mail is permitted. Commercial carrier service correspondence with John P. Frank, Esq., of the Arizona bar is attached, along with a "miscellaneous rules" memorandum on the question.)

The Civil Rules Committee has considered electronic service twice in recent years.

At the October, 1993 meeting, the Committee discussed at length the efforts that were under way to draft Judicial Conference standards for filing by facsimile transmission. At the end of that discussion, facsimile service was considered. The full text of the minutes, p. 5, reads as follows:

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

At the April, 1995 meeting, the Committee reviewed public comments on the amendments to Civil Rule 5(e) that the Supreme Court has now sent to Congress. The minutes, p. 7, note the suggestion from the Eastern District of Pennsylvania

> 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 Bankruptcy Rules proposal presents a familiar conflict of considerations. It is useful to maintain as much consistency as possible between the separate sets of rules. And as more and more business is transacted by electronic means, judicial reluctance to

move with the times takes on the air of 8.5" by 14" paper and green eyeshades. At the same time, there may be good reasons for differences and for moving slowly with rules changes. Throughout the recent rules amendments dealing with electronic filing, the Bankruptcy Rules Committee was confident that bankruptcy courts and practitioners could meet the challenges of electronic filing, whatever the case might be with respect to the more general run of civil litigation. It may be better to allow the Bankruptcy Rules to get out ahead of the Civil Rules, so that experience with the potential pitfalls of electronic service can be gained in a setting that is less risk-prone.

LEONIDAS RALPH MECHAM
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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief
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WASHINGTON, D.C. 20544

August 26, 1996

MEMORANDUM TO JUDGE ALICEMARIE H. STOTLER

SUBJECT: *Service of Papers by Electronic Means Proposed by Bankruptcy Subcommittee*

The Bankruptcy Rules Subcommittee on Litigation is recommending that Rules 9013 and 9014, which deal with motion practices, be amended. Both rules would be amended to permit service of motions on the other party "by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States." Motions under Rule 9013 are time-sensitive, but Rule 9014 motions are not.

Service of papers on other parties by facsimile transmission means was considered and rejected by the Civil Rules Committee in 1990 and the same proposal was not accepted by Appellate Rules Committee in 1994.

Two issues arise. First, what type of coordination needs or should be pursued on this issue among the rules committees? Second, when should we advise the Committee on Automation and Technology that such a proposal is being considered? That committee has already prepared standards on the electronic filing of papers with the court.

If approved by the full Bankruptcy Rules Committee the amendments would be published no earlier than August of next year, which gives us a little time. This is the type of issue that a Standing Committee subcommittee on technology could address. At the June Standing Committee meeting, volunteers were requested. We should now consider requesting each rules committee chair to appoint a member along with its reporter to serve on a Technology Subcommittee.

John K. Rabiej

cc: Professor Daniel R. Coquillette

Rule 9014. General Motions

(a) General Motion Practice. This rule governs any request for an order, other than a request for relief of the type described in Rule 7001 or 9013(a) or a motion made in an adversary proceeding.

(b) Motion Papers. Every motion shall:

(1) be filed, unless made orally at a status conference pursuant to § 105(d), or at a hearing, at which all parties entitled to notice of the motion are present;

(2) state with particularity the relief or order sought and the grounds therefor;

(3) be accompanied by proof of service, unless the motion is made orally;

(4) be accompanied by a proposed order for the relief requested;

(5) unless the movant is an individual debtor whose debts are primarily consumer debts, be accompanied by:

(A) one or more supporting affidavits;

(B) a memorandum of law;

(C) a statement of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the movant if there is a hearing on the

motion, and a summary of the testimony that the person is likely to give; and

(D) if the value of property is at issue and a valuation report has been prepared, a copy of the valuation report, and the name, address, and telephone number of the person who prepared the valuation report, unless the valuation report will not be introduced as evidence at any hearing on the motion.

(c) Service of the Motion and Notice of Hearing.

(1) Except as provided in subdivision (i)(1), not less than 25 days before the hearing date, the movant shall serve a copy of the motion, a copy of any paper filed with the motion, and notice of the hearing on any entity against whom relief is sought, any entity that has a lien or other interest in property that is the subject of the motion, the debtor, the attorney for the debtor, the trustee, and any committee elected under § 705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d).

(2) Service shall be in accordance with Rule 7004, except that the court by local rule may permit

service by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. The notice of the hearing shall include:

(a) the date, time and place of the hearing;

(b) the time for filing a response; and

(c) a statement that, unless a response opposing the motion is timely filed, the court may grant the motion without a hearing.

(d) Responsive Papers.

(1) Any entity may file a response to the motion not later than 10 days before the hearing date.

(2) Not later than the time when a response is filed, the responding party shall serve a copy of the response on the movant, any other entity against whom relief is sought, any entity that has a lien or other interest in property that is the subject of the motion, the debtor, the trustee, and any committee elected under § 705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d). Service of the response shall be in

accordance with Rule 7004, except that the court by local rule may permit service by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States.

(3) Every response shall be accompanied by proof of service and, unless the respondent is an individual debtor whose debts are primarily consumer debts, by:

(A) a proposed order for the relief requested;

(B) one or more supporting affidavits;

(C) a memorandum of law;

(D) a list of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the respondent if there is a hearing on the motion, and a summary of the testimony that the person is likely to give; and

(E) if the value of property is at issue, and a valuation report has been prepared and is likely to be introduced by the respondent at any hearing on the motion, a copy of the valuation report and the name, address, and telephone number of the appraiser or evaluator.

(e) Affidavits. Affidavits shall be made on personal

Agenda Item VII B

Miscellaneous Rules

Rule 5(b): Service by Commercial Carrier

John P. Frank, Esq., has written to draw attention to the decision in Video Yesteryear, 9th Cir.1996, 85 F.3d 1424, 1429-1431. The defendant delivered a Rule 68 offer of judgment to the plaintiff by facsimile and by Federal Express. After trial, the district court awarded costs to the defendant under Rule 68. The Ninth Circuit reversed. Rule 68 requires that an offer of judgment be served. Rule 5(b) provides for service by delivery or by "mailing," and that "[s]ervice by mail is complete upon mailing." "Mail" does not include Federal Express. Treating Federal Express as mail would create a direct problem in applying Rule 6(e), which provides additional time to respond to a notice or paper served by "mail." It might create indirect problems with the Rule 4 provisions that allow service of summons and complaint by mail.

The Ninth Circuit did not consider the possibility that commercial carriers could be treated as agents of the serving party, so that actual delivery could count as service by delivery. This possible interpretation of Rule 5(b) would not mean that delivery by commercial carrier is treated the same as delivery at the same time by the United States Postal Service, since it would not invoke the additional-time provision of Rule 6(e).

The Appellate Rules Advisory Committee has struggled with the problem of service by commercial carriers. Its resolution is set out in proposed Appellate Rule 25(c):

> Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. * * * Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

The Committee note to Rule 25(c) is attached. The related time provision is set out in proposed Appellate Rule 26(c):

> When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

The Supreme Court has gone part way in its own Rules. Rule 29.2 provides that a document "is timely filed if it is forwarded through private delivery or courier service and is actually received by the Clerk within the time permitted for filing." This approach is equivalent to treating delivery by a commercial carrier as delivery by a party.

John Frank thinks it "lamentable" that delivery by commercial carrier does not count the same as delivery by mail. Certainly the

popular perception is that the well-known commercial carriers provide delivery services at least as speedy and accurate as the Postal Service. District court practice, however, is more likely than appellate practice to involve service in circumstances that are truly time sensitive and important. The fact that service by commercial carrier has been found suitable for the Appellate Rules does not foreclose discussion of the issue for the Civil Rules.

There seems little reason to rush to publication of a proposal for Rule 5 service by commercial carrier. The idea can be considered at the October, 1996 meeting. If service by commercial carrier seems as inevitable an idea after discussion as it seems at first blush, the Appellate Rules may provide a good model for discussing detailed implementation. There are increasing pressures to adopt identical language for parallel provisions in the different sets of Rules; perhaps the Appellate Rule language can be incorporated into Rules 5(b) and 6(e) without change. A detailed draft can be considered at the next meeting.

APPELLATE RULE 25(c)

Committee Note

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner -- meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

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August 14, 1996

John P. Frank, Esq.
Lewis & Roca
40 N. Central Avenue
Phoenix, Arizona 85004-4429

Re: Service by Commercial Carrier

Dear John:

A few days late, I have turned to your question about service by private carrier under Civil Rule 5(b).

The Appellate Rules Advisory Committee has devoted some time to this topic, and is proposing that service by "commercial carrier" be treated the same as service by mail, so long as delivery is scheduled within 3 calendar days. The additional 3-day time period is allowed for all modes of service "unless the paper is delivered on the date of service stated in the proof of service." See Appellate Rules 25(c) and 26(c) as published in the April, 1996 Request For Comment.

What works for Appellate Rules may not always work as well for Civil Rules. My impression, however, is that most of the world views the well-established commercial carriers as better than the Postal Service. If problems of access remain in more remote sections of the country, so what? Mail will continue to be an equal alternative.

I am recommending that the topic be put on the calendar of the October meeting, but not on a "rush" basis because I do not see the point of publishing a commercial-carrier service proposal as a stand-alone item. Better to draft a rule after the Committee has thought of the practical problems that may elude me. Meanwhile, I would have ruled in the 9th Circuit that delivery by commercial carrier is delivery when it actually happens. What difference should it make whether the 18-year kid messenger carries it in, or a neatly uniformed and experienced Federal Express driver?

Best,

EHC/lm

Edward H. Cooper

LEWIS AND ROCA LLP LAWYERS

Memorandum July 29, 1996

To	From	Phoenix
Margaret Russell	John P. Frank	

Re: **Service by Private Company Instead of by Mail**

Thanks for alerting us to the Ninth Circuit opinion in *Magnuson v. Video Yesteryear*, 85 F.3d 1424 (9th Cir. 1996). This opinion has an extensive discussion of whether Federal Express or any other service by private company meetings the requirements of Rules 4 and 5 and holds that it does not.

This is lamentable. The United States Supreme Court has amended its own rules in recent years so that under 29(2) filing by private carrier instead of by mail is satisfactory. Only the other day, the Supreme Court authorized filing by electronic mail where local rules permit. (This would appear to be in direct conflict with the 1994 amendment to the State Rule 5(c) which expressly precludes facsimile service "absent a court order or agreement of the parties.")

I am sending copies of the *Magnuson* opinion to Judge Paul Niemeyer of the Fourth Circuit Court of Appeals, the new chairman of the Committee on the Rules of Civil Procedure, and to Professor Ed Cooper at the University of Michigan, the reporter for that committee, along with a copy of this note. I hope the topic will commend itself to their consideration.

John P. Frank

JPF:cc
cc: Judge Paul V. Niemeyer w/enc.
Professor Edward H. Cooper w/enc.

APP19B96

Agenda Item VIII

INTRODUCTORY NOTE: ADMIRALTY RULES B, C, and E

These proposals to amend the Admiralty Rules come from the Maritime Law Association. The Department of Justice is responsible for Rule C(1), which reflects an effort to adapt the Supplemental Rules to the special circumstances presented by forfeiture proceedings.

The proposals have been on the agendas for earlier meetings, but in circumstances that have prevented adequate drafting review by the Reporter or any study by the Committee. The drafting nits have now been picked, at least in part. The mood of the proposals, so far as drafting is concerned, is to avoid the temptation to improve the opaque drafting of the original rules. The MLA committee resists unnecessary departures from the familiar. The ever-present risk that style revisions may bring unanticipated consequences supports this approach. Some style questions are reflected in the drafts and in the notes that follow.

The substance of these proposals reflects the judgment of the MLA committee and the Department of Justice.

Only the most recent correspondence is attached, and it may not be necessary. The draft Committee Notes are intended to describe the changes and the underlying purposes.

REPORTER'S NOTES: RULES B, C, E

Style Note

Material presented in brackets is meant to indicate an option. Most of the brackets surround material in the present rule that might be simplified. Some brackets are in pairs; ordinarily the second item in the pair is preferred. In some places the bracketed material is also overstruck; this indicates apparent agreement on the alternative.

Rule B

Lines 25-26: The bracketed reference to supplemental process might be deleted. The MLA people, however, prefer to retain it for fear that an unadorned reference to "process" might not include supplemental process.

Lines 49-50: The Note states that the reference to issuance of summons by the clerk in the present rule was deleted, see line 19, because not necessary. The Notes provided by Robert J. Zapf, Esq., state that a summons is not needed "where the property being seized forms the basis for jurisdiction," and that a summons must be issued if the plaintiff "ALSO wishes to sue the defendant in personam." Rule B begins by referring "to any admiralty or maritime claim in personam." I take it that we are here wandering in the confusing language of in rem, quasi-in-rem, and in personam jurisdiction, and blending them in obscure fashion. I am not sure whether the comment is meant as a suggestion for the Note. I think it better not to open these topics in a Note that must necessarily be cryptic.

Rule C

Lines 3-19: Subdivision 2 has been broken down into lettered paragraphs (a) through (e). Zapf expresses concern that this separation may cause confusion as researchers seek in vain references to paragraph designations that did not exist in pre-amendment decisions. I think this is as good a time as any to start; in the long run, it will help not only in reading the rule but also in searching out references to each paragraph in decisions that follow the amendment. (The same question is raised by Zapf with respect to subdivision (3).

Lines 71-78: Simply on reading the rule, it seemed to me that there is a gap: Property is released more than 10 days after execution of process, but before the plaintiff has effected public notice. Must notice still be given? The comments by Philip A. Berns, Esq., and Zapf say there is no gap, that notice is intended to afford owners an opportunity to secure release, that there is no point in providing notice when release has occurred, and that it is desirable to avoid the expense of publication when release has occurred. This remains a puzzle to me: the rule does not say that the plaintiff can terminate efforts to effect notice if the property is released more than 10 days after execution of process. But to the extent that this undertaking is a response to problems identified by the MLA and the Department of Justice with these

Rules, it seems better to accept their inclination to leave this possible gap as it is.

Lines 86 ff.: A major purpose of these changes is to add new paragraph (a) dealing with Civil Forfeitures. The Department of Justice is particularly anxious that the forfeiture procedure include those who have a "claim against the property" as well as those who assert a right of possession or ownership. The major distinction between the forfeiture provisions of new (a) and the admiralty provisions carried forward from the current rule and designated as (b) is in the treatment of lien-holders and like claimants. Under (a), applicable to forfeiture proceedings, they are to file an appearance and statement identifying the claim against the property within the defined period. Under (b), applicable in admiralty, they are to intervene. The drafting of (a), carried forward with little change from the Department of Justice proposal, remains awkward. A stylized version is attached as an appendix; it is a first pass at stating the same things more clearly, but has not been reviewed by the Department of Justice because it was submitted as a "frolic" of the Reporter. Probably we are stuck with the drafting of the proposal.

Lines 89, 114: This one is a potentially serious question. The MLA draft refers to an "equity ownership interest." My concern is a blend of style and substance: what about a legal ownership interest? They assure me that "equity ownership" implicitly but clearly includes "legal" ownership, and express the deep fear that a simple reference to "ownership" would not include equitable ownership. Equitable ownership is important in admiralty, including such things as bareboat charters. A mere Note reference to this is not enough for them. There are several choices: (1) Refer only to ownership, trusting to courts and litigants to figure out that ownership means ownership of any shade. (2) Refer only to equity ownership, trusting to the expert knowledge of the courts and admiralty bar to adhere to the proposition – surprising in any other setting – that equity ownership includes legal ownership. (3) Refer to "an equity or legal ownership" interest. Zapf is willing to follow this choice "if necessary."

The most recent letters are attached, but probably are not worth reading. They are from the Reporter to Advisory Committee Member Mark Kasanin, and from Berns and Zapf with reactions to the draft and to the questions raised in the letter to Kasanin.

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 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 a 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 [or any supplemental 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, (a) * * * or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4 (~~d~~e), (f), (g), or (h), ~~or (i)~~, or (c) * * *.

Committee Note

Supplemental Rule B(1) is amended in three ways.

The service provisions of Supplemental Rule C(3) are expressly adopted, 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. The reference to issuance of summons by the clerk is deleted as unnecessary. Ordinarily it is the clerk, not the court, that issues the summons.

Rule B(2) is amended to reflect the 1993 amendments of Rule 4. Former subdivision 4(d) gathered together many provisions for service on individuals, infants, corporations, the United States, agencies of the United States, and states or local governments. The provisions for service on individuals, infants, and corporations are now set out in subdivisions 4(e), (g), and (h), which are incorporated. Former subdivision 4(i) provided for service in a foreign country; it has been replaced by subdivision 4(f), and by parts of subdivisions 4(g) and (h). The provisions of former subdivision (d) for service on the United States, agencies of the United States, and states or local governments have been replaced by new subdivisions 4(i) and part of 4(j). These provisions have been deleted from Rule B because of the problems of sovereign immunity that obstruct efforts to serve process of maritime attachment and garnishment on federal or state property. The provisions of Rule 4(j) for service on a foreign state or its agency or instrumentality also have not been incorporated. Although the Foreign Sovereign Immunities Act allows attachment or garnishment in some circumstances, Rule B has not referred to these problems in the past and it has not seemed appropriate to address them now.

Rule C. Actions in Rem: Special Provisions

* * * * *

(2) Complaint. In an actions in rem the complaint shall:

(a) be verified [on oath or solemn affirmation];

(b) ~~It shall~~ describe with reasonable particularity the property that is the subject of the action;

(c) ~~and~~ in an admiralty and maritime proceeding, state that the property is within the district or will be within the district during the pendency of the action~~.~~;

(d) in a forfeiture proceeding, if the property is located outside the district, state the statutory basis for the court's exercise of jurisdiction over the property; and

(e) ~~I~~in an actions ~~for the enforcement of~~ to enforce a forfeitures for violation of a[ny] statute of the United States, ~~the complaint shall~~ state the place of seizure and whether it was on land or on navigable waters, and ~~shall~~ contain [~~such~~][the] allegations [~~as may be~~] required by the statute ~~pursuant to~~ under which the action is brought.

(3) Judicial Authorization and Process.

(a) In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a [summons and] warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances. In other actions ~~Except in actions by the United States for forfeitures for federal statutory violations~~, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order

so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. 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~~ warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) If the property is a vessel or ~~a vessel and~~ tangible property on board ~~the~~ a vessel, the warrant or[and?] any supplemental process shall be delivered to the marshal for service.

(c) If other property, tangible or intangible[,] is the subject of the action, the warrant shall be 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, 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.

(d) If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(e) 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 warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.~~

(4) Notice. No notice other than the execution of process is required when the property that is the subject of the action has been released ~~in accordance with~~ under Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. ~~Such~~ The notice shall specify the time within which a[ny] claim against the property seized, appearance, or ~~the~~ answer is required to be filed as provided by subdivision (6) [(a) or (b)] of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage ~~pursuant to~~ under the Act of June 5, 1920, ch. 250, § 30, as amended.

* * * * *

(6) ~~Claim and Answer~~ Responsive Pleading; Interrogatories

(a) **Civil Forfeiture[s].** In an[y] action in rem to enforce a forfeiture for violation of a federal statute, a[ny] person who asserts a right of possession or an equity ownership interest in the property or a claim against the property that is the subject of the action must file an appearance and statement identifying [~~their~~][the] interest or a claim against the property within 20 days after [the] receipt of actual notice of [the] execution of [the] process or the final publication of [such] notice as provided in [~~subsection~~][subdivision] (4),

whichever is earlier, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after [the] filing [of] the appearance and statement of interest or claim against the property. [Any such] [The] appearance and statement of interest or claim shall be verified [by oath or solemn affirmation]. If the appearance and statement of interest or claim against the property is made [~~on behalf of~~] [by] an agent, bailee, or attorney for the appearing party or claimant, it shall state that the agent, bailee, or attorney is [~~duly~~] authorized to file the appearance and statement of interest or claim against the property. At the time of answering the appearing party or claimant must also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

(b) Maritime Arrests and Other Proceedings. A[ny] person who asserts a right of possession or an equity ownership interest in ~~The claimant of~~ property that is the subject of an action in rem shall file ~~a claim~~ an appearance and statement identifying [~~their~~][the] interest within 10 days after process has been executed or within 10 days after the last date of publication [as provided by][under] subdivision (4) of this rule, whichever is earlier, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after [the] filing [of] the appearance and statement of interest ~~claim~~. The [appearance and] statement of interest ~~claim~~ shall be verified [on oath or solemn affirmation], and shall state the interest in the property by virtue of which ~~the claimant~~ [said party][the appearing party] demands its restitution ~~and~~ or the right to defend the action. If the ~~claim~~ appearance and statement of interest is made [~~on behalf of~~] ~~the person entitled to possession~~ [~~the appearing party~~] by an

agent, bailee, or attorney for the appearing party, it shall state that the agent, bailee, or attorney is ~~duly~~ authorized to ~~make~~ file the ~~claim~~ appearance and statement of interest. At the time of answering the ~~claimant~~ appearing party shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

[**(c) Interrogatories.** Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served at the time of answering under paragraph (a) or (b).]{This would replace the last two sentences of both (a) and (b).}

Committee Note

Subdivision (2). In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(b)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. § 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. § 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. § 1395 establishes venue of a civil proceeding for forfeiture in the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments to Rule E(3), bring the Admiralty rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been broken into separate paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b) is amended to make it clear that any supplemental process as well as the original warrant is to be served by the marshal.

References to issuance of "summons" by the clerk in the provisions now relocated in paragraph (a) have been deleted as unnecessary. Ordinarily it is the clerk, not the court, that issues the summons.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a claim or appearance. Rule C(6) requires both an appearance or claim and an answer. Subdivision (4) is amended to require that both times be stated.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeitures and to in rem admiralty proceedings. These proceedings are distinguished by adopting a new paragraph (a) for civil forfeitures and recasting the present rule as paragraph (b) for in rem admiralty proceedings. [The provision for interrogatories and answers is carried forward as paragraph (c).]

Paragraph (a) provides more time for filing an appearance or claim than paragraph (b) provides for filing an appearance. In forfeiture proceedings governed by paragraph (a), the time is 20 days from actual notice of execution of process or 20 days from final publication of subdivision (4) notice. In maritime in rem proceedings, the time is 10 days from execution of process or 20 days after the last date of publication. Paragraph (b) provides a shorter time because admiralty cases frequently involve great expense both in diverting arrested property from its ordinary use and in caring for the arrested property.

Paragraph (a) provides for filing claims in forfeiture proceedings. There is no parallel provision in paragraph (b), which reflects a decision to adhere to t he traditional practice in maritime in rem proceedings. An appearance and statement of interest is required and appropriate in a maritime proceeding only as to those who assert ownership or a right to possession. Other claims should be raised by a motion to intervene under Civil Rule 24, as it may be supplemented by local admiralty rules.

Paragraph (b) does not limit the right to make a restricted appearance under Rule E(8).

Rule E. Actions in rem and Quasi in Rem: General Provisions

* * * * *

(3) Process.

(a) Territorial Limits of Effective Service. In admiralty and maritime proceedings, Pprocess in rem, ~~and~~ or of maritime attachment and garnishment, shall be served only within the district. This provision does not apply in forfeiture cases governed by 28 U.S.C. § 1355 or by any other statute providing for service of process outside the district.

* * * * *

(7) Security on Counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant, ~~or~~ claimant, or a person making an appearance under Rule C(6) in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; * * * * *

(9) Disposition of Property; Sales.

* * * * *

(b) Interlocutory sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may

order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant, ~~or~~ claimant, or a person making an appearance under Rule C(6), order delivery of the property to ~~the defendant or claimant~~ the movant, upon the giving of security in accordance with these rules. * * * * *

(10) **Preservation of Property.** When the owner or occupant remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on motion of a party or on its own, shall enter any order necessary to prevent removal of the property and to preserve the property and its contents, value, and income.

Committee Note

Subdivision (3). Subdivision is amended to reflect the distinction drawn in paragraphs (c) and (d) of amended Rule C(2). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivisions (7) and (9). Subdivisions (7) and (9) are amended to reflect the distinctions between appearances and claims made in revised Rule C(6).

Subdivision (10). Rule E(4)(b) allows attachment or arrest of tangible property without taking physical possession. The advantages of this procedure may be offset by concern that owners or occupants who remain in possession may allow the property to be removed, destroyed, or damaged. Subdivision (10) is amended to encourage attachment or arrest without taking possession by directing entry of any order necessary to prevent removal and to preserve the property.

As a lark, let me offer a revised version of C(6)(a) to illustrate the style variations that might improve the rule:

(a) Civil Forfeiture. In an in rem action for forfeiture under a federal statute:

(1) a person who asserts a right of possession or an ownership interest in the property that is the subject of the action must file an appearance and a verified statement identifying the interest:

(A) within 20 days after the earlier of (i) receipt of actual notice of execution of process, or (ii) the final publication of notice as provided in subdivision C(4), or

(B) within such additional time as may be allowed by the court;

(2) a claim against the property that is the subject of the action must be verified and be filed within the time prescribed in subparagraph (1);

(3) an agent, bailee, or attorney must state the authority to make an appearance and statement of interest or a claim on behalf of another; and

(4) a person who asserts a right of possession, an ownership interest, or a claim must file an answer within 20 days after filing the appearance and statement of interest or claim.

(b) Maritime Arrests and Other Proceedings. * * * * *

(c) Interrogatories. Interrogatories may be served with the complaint in an in rem action without leave of court. Answers must be served at the time of answering.

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August 12, 1996

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by FAX: 415.393.2286 Two pages

Re: Supplemental Rule C

Dear Mark,

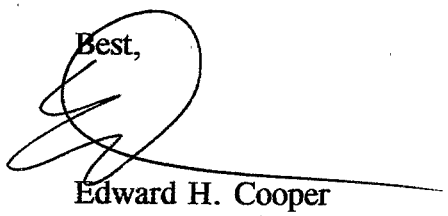
I'm sorry about the glitch in the facsimile transmission, however it came to be.

Here is the missing page with lines 64 through 96, which includes part of the deleted portion of Rule C(2), all of C(4), and the beginning of C(6)(a).

Thank-you for getting the first, although incomplete, set of these materials on to Berns and Zapf. I am taking the liberty of asking you to send along this missing page; my secretary is not here today, and finding a new FAX number for Zapf is enough to try my capacities.

I look forward to the responses of the learned to this draft. I think we are coming close to a form that can be included in the agenda for the October Advisory Committee meeting.

Best,



EHC/lm
attach

Edward H. Cooper

THE UNIVERSITY OF MICHIGAN
Ann Arbor, Michigan 48109-1215

Edward H. Cooper
Thomas M. Cooley Professor of Law

Hutchins Hall
(313) 764-4347
FAX: (313) 763-9375

August 8, 1996

11 pages

Mark O. Kasanin, Esq.
McCutchen, Doyle, Brown
& Enersen
Three Embarcadero Center
San Francisco, California 94111-4066
by FAX: 415.393.2286

Re: Supplemental Rules B, C, & E Amendments

Dear Mark:

I attach slightly revised versions of the proposed amendments to Supplemental Rules B, C, and E. Committee Notes are included.

The bracketed items may need explanation. When bracketed items appear next to each other, one is suggested as a substitute for the other. The preferred alternative is the one not in the drafts prepared by the Maritime Law Association or the Department of Justice. When there is no suggested alternative, the brackets indicate that the enclosed words should be deleted as unnecessary.

My most recent and guaranteed complete marked-up version of Rule C(2) does not mark as new the material that I have placed in paragraph (d). It is all new. I am not clear on the reasons for drafting it as an item separate from the sentence that I have marked as paragraph (e). The evident difference is that (d) applies to every forfeiture proceeding, while (e) applies to a proceeding to enforce a forfeiture for violation of a federal statute. Is this a difference? What forfeitures are not for violation of a federal statute? If all forfeitures are for violation of a federal statute, it would be better to combine (d) and (e).

The same question arises with C(3). I have rearranged the material now in C(3) so related provisions are brought together, and have added paragraphs to make it more intelligible. The first sentence of (3)(a), lines 21 - 22, is taken from the final sentence of present (3). Here, the present rule refers to "forfeitures for federal statutory violations." Unless there is a reason for these differences, should we try to find a single formula while we're at it?

In line 23, I have bracketed "summons and." It was not deleted from the MLA draft, but the reason for deleting it in line 37 (as well as in Rule B, line 19)

seems to apply here as well.

In C(4), I do not think we need to add "(a) or (b)" in line 81.

C(4) presents a separate question. The first two sentences in the rule are carried forward without change. The first says that no notice is required when the property is released under Rule E(5). The second says that notice is required if property is not released within 10 days of execution of process. On the face of things, this seems to leave a middle ground: property is not released within 10 days, but is released during the time allowed for the plaintiff to give notice promptly or within the time ordered by the court. Am I missing something? If there really is a gap, should we try to address it?

C(6) raises several questions. Let me begin with one addressed in Philip Berns's helpful letter. Although he has explained his concern about "equity" ownership, I will resist this phrase unless a better explanation is provided. "Ownership" should do it. The Note can say that it includes both legal and equitable ownership. Rule text that refers to an equity ownership interest will seem to many to exclude legal ownership interests.

The first sentence of C(6)(a) may need further drafting. It seems to connect ownership and possessory interests with the appearance and statement of interest, and to connect claims with other interests. The contrast with (b) can seem puzzling, although the draft Note states that people asserting claims that do not arise from ownership or a right of possession should intervene as plaintiffs. I take it to be the MLA position that intervention is a better procedure than claiming, at least for admiralty proceedings, and they do not want to interfere with the Department of Justice position for forfeiture proceedings. It would help to have a better understanding of the differences between admiralty and forfeiture proceedings that may support this difference of procedure.

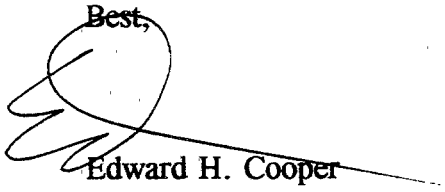
The C(6)(b) material on agents, bailees, or attorneys, lines 129 to 135, is drafted differently than the corresponding provisions in lines 103 to 108 of C(6)(a). The (a) version seems considerably better — I have carried forward the (b) drafting, but it is confusing. Is the agent appearing on behalf of the appearing party, or what? It is clear to me if it reads "If the appearance and statement of interest is made on behalf of the appearing party by an agent, bailee, or attorney * * *." (It is even clearer to me in the version set out as (a)(3) in my stylized draft, noted below.)

The MLA draft Committee Notes describe the differences in time for filing an appearance set by C(6)(a) and C(6)(b). They do not offer any reason for the differences. I have marked this simply as "Fill in" at line 206 of the draft Note. We should have a reason not only for the difference between 10 and 20 days, but also for the differences in the events that trigger these periods.

Finally, I have attached a little frolic that redrafts Rule C(6)(a) in a style that seems to me clearer than the style of the present rule. I have not worked hard on it, but my intent was to capture all of the provisions in C(6)(a) in a form that is easier to follow. I am not sure whether there is any use in considering it, but here it is as an example of the kind of editing that the Supplemental Rules need. Shades of the deferred Style Project!

I look forward to your continuing help with this project. As you know, I am working from the face of the drafts without any understanding of the subject. You, the MLA folks, and Philip Berns have taken a lot of trouble to get things this far along. A little more help now and we should be able to present this material to the Advisory Committee with confidence.

Best,



EHC/lm

Edward H. Cooper

FACSIMILE COVER LETTER

Please deliver the following pages to:

1. **Name:** Professor Edward H. Cooper
   Firm/Company: The University of Michigan
   Facsimile No: (313) 763-9375

2. **Name:** Mark O. Kasanin, Esq.
   Firm/Company: McCutchen, Doyle, Brown & Enersen
   Facsimile No: (415) 393-2286

3. **Name:** Philip A. Berns, Esq.
   Firm/Company: U.S. Department of Justice - Civil Division
   Facsimile No: (415) 436-6632

From: Robert J. Zapf, Esq.

Re: Supplemental Rules B, C, and E

Total number of pages including this cover sheet: 7

Date: September 13, 1996 **Time:** _____pm

If you do not receive all pages, please call (213) 680-1010.

When replying, please include a cover sheet indicating to whom the facsimile is to be delivered, total number of pages transmitted, and phone number to call if all pages are not received. Thank you.

LANE
POWELL
SPEARS
LUBERSKY LLP

Law Offices
333 South Hope Street
Suite 2400
Los Angeles, California 90071

(213) 680-1010
Facsimile:
(213) 680-1784

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Client number: 999999.15

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September 13, 1996

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333 South Hope Street Suite 2400 Los Angeles, CA 90071

(213) 680-1010

Facsimile: (213) 680-1784

VIA FACSIMILE

Professor Edward H. Cooper
Hutchins Hall
The University of Michigan
Ann Arbor, Michigan 48109-1215

Re: Supplemental Rules B, C, and E

Dear Professor Cooper:

I am sorry that due to the press of business commitments, I will be out of the country for the next three weeks. However, I have reviewed your fax of August 8 and the draft of the proposed amendments to Supplemental Rules B, C and E. I prepared a memorandum of comments on the revised version, which was circulated to Officers and Members of the MLA Practice and Procedure Committee. They have approved my notes as the comments of our Committee on your draft. A copy of my notes are attached for your review.

While I will be travelling abroad in the next three weeks, if you have any additional comments or drafts that you would like me to review, please fax them to my office and they will be able to forward them to me. I do hope that we will be able to have a version on the agenda for the October meeting of the Advisory Committee, so that this project can move forward.

Anchorage, AK
Fairbanks, Ak
Los Angeles, CA
Mount Vernon, WA
Olympia, WA
Portland, OR
San Francisco, CA
Seattle, WA

London, England

Thank you for your assistance and cooperation in this project.

With best regards,

Sincerely,

Robert J. Zapf

Robert J. Zapf
Chair
Maritime Law Association Practice and
Procedure Committee

RJZ:sla

cc: Mark O. Kasanin, Esq. - (Via Fax)
Philip A. Berns, Esq. - (Via Fax)

LPLA J:\CL1\RJZ\10080RJZ.LTR

RJZ Notes Re. Cooper Draft of Admiralty Rules and Advisory Notes

Rule B:

B(1): Professor Cooper's version deletes the reference to supplemental process being served by the Marshal (compare MLA/AFO version, line 21 with Professor Cooper version, line 23). This is OK, if the word "process" is deemed to include "supplemental process", but I would prefer to include the additional phrase for the sake of clarity. The phrase is retained in Professor Cooper's draft of Rule C(6)(b).

B(2): Professor Cooper's version makes references to the Rule 4 subsections out of order ("Rule 4 (e), (f), (g), or (h), or (c) ***" (emphasis added). The final MLA/AFO version reordered the references to put (c) first.

Notes: The reference to the issuance of a summons by the clerk is deleted because you do not need a summons where the property being seized forms the basis for jurisdiction. The process of maritime attachment and garnishment, just as the warrant of arrest under Rule C, takes the place of the summons with respect to the property. If the plaintiff ALSO wishes to sue the defendant *in personam*, as opposed to merely *quasi in rem*, then a summons must be issued, but it is not essential for a Rule B proceeding.

Rule C:

C(2): I am concerned about the renumbering of the provisions of the rule into sub-paragraphs. While I don't have any particular objection to the substance of the subparagraphs, the text version proposed by the MLA/AFO was more faithful to the original rule, as changes were intended to be minimalist. I am concerned that such renumbering may result in some confusion and difficulty in researching the origin and rationale of the rules, a problem which has required the changes in the references to "claim" and "claimant" in the first place. Is this a form of "Stylistic Revision"? . If we are going to make such revisions, wouldn't it be better to have a wholly separate forfeiture rule, or at least a separate forfeiture section? (Query whether such would entail major statutory and regulation revision, as many statues and regulations refer to the Admiralty Rules for procedures). I leave to Phil Berns comments on the substance of the forfeiture provisions.

C(3)(a): I leave to Phil Berns comments on the forfeiture provisions. I agree with the wording of the balance. Parenthetically, the MLA version did indeed delete the words "summons and" from the rule - does Professor Cooper have the latest MLA/AFO version of these rules?

only in lines 37; not in line 23 (here transposed from line 64

C(3)(b)-(e): No substantive changes are made requiring comment, but see comment under C(2) re. renumbering in general.

C(4): I would not delete the words "other than the execution of process". The deletion implies that there has been no notice whatsoever, whereas notice is required, and is provided by the warrant. I would hate to have some "brilliant" counsel argue that the deletion of the words was intended somehow to affect the notice requirements. A recent Canadian Federal Court decision had to wrestle with the argument that the service (and hence, notice) was defective because the sheriff hadn't actually affixed the warrant to the mast!

I don't see any gap problem with respect to the timing of the release of the vessel. The purpose of the notice requirement is to ensure that the vessel interests are aware of the arrest. If they become aware after ten days, but before the notice is actually published, there is no problem - either they will arrange for release of the vessel or they won't.

? but is publication required nevertheless?

C(6): While I am more interested in focusing on the maritime arrest section of Rule C(6)(b), my comments here of necessity also apply to the forfeiture sub-section, as the same wording is used in the first sentence of both sub-sections. I'm afraid that I strongly disagree with Professor Cooper's elimination of the phrase "equity ownership interest". "Ownership" alone implies only legal ownership, whereas it is necessary to bring in all ownership interests. Many foreign jurisdictions use the phrase "beneficial ownership" in connection with arrest actions, especially in the context of sister-ship arrests. Our law doesn't recognize "beneficial ownership" in this context, but does recognize "equity" interests, such as the mortgagee's interest. The legal owner will always have not only a legal interest but also an equity ownership interest. He may not have a present possessory interest, if, for example, he has bareboat chartered the vessel. The phrase "right of possession or equity ownership interest" is more inclusive than simply "ownership", with the latter's implied limitation. Similarly, a bareboat charterer has both a right of possession and an equity "ownership" interest, as the "owner pro hac vice", although not necessarily a legal ownership interest. If necessary, I would amend the phrase to say "any person who asserts a right of possession or a legal or equity ownership interest in the property..."

Leaving it to the Note alone will not do the trick - the Notes are only explanations, they are not the law.

Professor Cooper is correct that the MLA does not wish to interfere with the DOJ position on forfeiture proceedings. Rule C(6)(b) defines who can appear to defend the property in a maritime case. In maritime cases, intervention for

those with claims against the property is the MUCH preferred method, because it avoids the problems created by the use of the phrases "claim of owner" and "claimant" in the existing version of the rules to define who can appear to defend the property, on the one hand, and those who have claims against the property on the other.

The AFO/DOJ interest is quite different - they want anyone having not only an ownership (legal, equitable or beneficial) interest in the property to appear, but also anyone having a claim against the property (such as a lien holder - hence the use of the additional phrase "any person who asserts ... a claim against the property" in subsection (a)). Thus it is essential to retain the phrase "against the property", which I gather Professor Cooper would delete in lines 104 and 108 of his draft.

I'm not exactly sure which language Professor Cooper would retain and which he would delete in lines 103 - 108 regarding the material on agents, bailees, and attorneys. I think the re-draft should read:

> "If the appearance and statement of interest or claim against the property is made by an agent, bailee, or attorney for the appearing party or claimant, it shall state that the agent, bailee, or attorney is authorized to file the appearance and statement of interest or claim against the property."

Similarly, I think redrafted lines 129 - 135 in subsection (b) should read:

> "If the appearance and statement of interest is made by an agent, bailee, or attorney for the appearing party, it shall state that the agent, bailee, or attorney is authorized to file the appearance and statement of interest."

Again, the difference between subsection (a) and (b) is in the deletion of any reference to "claim against the property" from subsection (b), which only deals with the person seeking to defend the property, not attack it.

I have no problem with the proposed new subsection C(6)(c) to replace the final two sentences of subsections (a) and (b), except my general antipathy noted above with respect to subsectioning, and my desire to make minimalist changes in the existing rules.

Notes to Rule C:

I believe the difference in timing of the filing of appearances for forfeiture and maritime proceedings arises out of the time periods set forth in forfeiture statutes or regulations, but Phil can better answer this. As far as maritime cases are concerned, arrest warrants usually are issued against vessels. It is very expensive to maintain a vessel under arrest, and a shorter time frame for appearance by the person asserting a right of possession (or legal) or equity ownership interest, i.e., the right to defend the property, is desirable. It's not like taking the automobile to the pound. In addition, as the AFO/DOJ want all persons asserting a claim against the property to also appear, a longer time frame for filing a claim against the property is appropriate, so that the interests of such persons are not adversely affected.

Rule E and Notes:

I have no problems with Professor Cooper's draft.

U. S. Department of Justice

Civil Division

September 13, 1996

Via Fax and Hardcopy
(313-763-9375)
PAB:jam

Telephone:
(415) 436-6630

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Post Office Box 36028
450 Golden Gate Avenue
San Francisco, California 94102-3463

Professor Edward H. Cooper
University of Michigan
Ann Arbor, MI 48109-1215

Re: Amendments to Supplemental Rules B, C & E

Dear Professor Cooper:

As you know, Mark Kasanin had previously forwarded your proposals and comments relating to the Department of Justice/ Maritime Law Association proposed amendments to Supplemental Rules B, C, and E. I have reviewed your proposals and comments and, further, discussed them with Bob Zapf, the Chairman of the MLA Practice and Procedure Committee. We are in basic agreement on these comments and Bob will be forwarding his specific comments to you. Hopefully we will now be able to get the proposals on the Committee agenda for the next meeting.

I will attempt to present our views specifically to a particular rule and its subdivision, as well as answer the related questions that you posed in your cover letter.

Rule B

Subdivision B(1) -- Deletion of the phase "supplemental process" could lead to ambiguous interpretation. "Process" does not necessarily include "supplemental process" within the understanding of admiralty practitioners or other litigators. By leaving the phrase in the proposed rule, as contained in our proposals, there will be clarity and not ambiguity.

The remainder of the Rule B provisions are acceptable. You might wish to change the alphabetical order in Rule B(2) where references are made to Rule 4.

Rule C

C(2) -- In reference to the subdivisions (d) and (e), there is a distinction between the requirements of those two parts. The forfeiture statute may not state within that legislation that it is necessary to set out the statutory basis for the court exercise of jurisdiction. At the same time there may be other allegations required by this statue. Thus, the two sections providing for each serve a different purpose and should be retained. The other proposals in C(2) are acceptable.

C(3) -- In reference to your question pertaining to C(3)(a), occasionally an action may be brought for a forfeiture under a State statutory violation. The remainder of your proposals are acceptable.

C(4) -- Your proposed deletion in brackets in the first sentence would leave one with the thought that no notice was required so long as the vessel was released under Rule E(5). The fact is that the execution of process itself is the actual notice that admiralty courts have long recognized. Thus there is notice and the intent of the subsection is to provide that no <u>further</u> notice is needed where the vessel has been released. Obviously, if the vessel is released, then the owner had the necessary notice and has been well protected in that aspect. If it is not released within ten days, and it must be remembered a release under E(5) may take place anytime after the arrest, other additional notice is required. That notice is by publication and also as required under the Ship Mortgage Act. The basic premise is that the <u>in rem</u> action starts only with the physical service on the vessel.

but do you still have to publish?

Another aspect to be considered is that if the vessel is released there is no necessity to incur further financial expenditures for an unnecessary publication.

C(6) -- As we previously attempted to explain, there are distinctions in the meaning of the word "owner" as recognized in the courts and the industry. There are also maritime industry practices which create relationships pertaining to the operation of a vessel, most often pertaining to the chartering of vessels. Certain charters establish more of a relationship to the vessel than others. In a "bareboat charter" the possessor of the vessel acts in every aspect like a true titled owner while exercising only an "equity ownership interest". Again, since these Rules are not only for the purpose of providing requirements in the practice of admiralty law, they are also aids and should be clear as to what is being achieved or required. Since "owner" does not unqualifiedly encompass "equity ownership interest," in both (a) and (b) it is recommended that the phrase be retained as proposed by us previously.

C(6)(a) -- It is also important that the phrase "against the property" be retained as this subdivision requires filing not just by persons claiming the "ownership" rights "to" the property but, also, by those claiming liens "against" the property. That is the distinction between this subdivision and subdivision C(6)(b) -- the traditional admiralty and maritime lien claim -- wherein the requirement is only for those claiming the ownership/ possessory rights "to the property". In the latter they are not proceeding against the property. This distinction should be clearly made as originally proposed by us.

Further, the distinction is important and, basically, it is the crux of the reason why recommendations were made to amend these Supplemental Rules. As was initially provided to you the courts in forfeiture actions were requiring certain notice be given in forfeiture matters which would not apply in the traditional admiralty matters. It was necessary to clarify and distinguish between the two phases.

Further, as to the distinction between (a) and (b), the different filing times required are reflective of the problems that each encounters. In the traditional admiralty matters, the usual arrest involves a vessel with operating machinery, cargo thereon, a crew, the need to load or discharge perishable cargo, insurance costs, and large expenditures of money to protect and preserve the res. Notice, filings, and immediate action are required. In forfeiture matters, although large expenditures may be faced, the usual procedure -- pursuant to statutory authority, is for personal property such as automobiles or small boats, etc., to be seized and turned over to a contract company who performs the services on behalf of the Government agency. All of this usually relates to criminal matters which are also proceeding at the same time. Thus, other time factors must be taken into account as well as the fact, as discussed above, that more people have to file initially and not just the ownership interests. The Asset Forfeiture Office has determined that more time is needed for this filing. It is a practical resolution of the different needs between the two types of actions.

C(6)(c) -- Is acceptable.

In the Proposed Commentary for Rule C reference is made to a restricted appearance under Rule E(8) and whether it should apply to both paragraphs (a) and (b). The right to make a restricted appearance under Rule E(8) presently applies solely to the traditional admiralty and maritime matters. It never applied to forfeiture actions. Further, as a practical matter and as previously stated since there are usually criminal actions proceeding at the same time as a forfeiture, it is unlikely that the owner who has fled the jurisdiction will attempt to make a restricted appearance. Even if that person did make such attempt

it would not preclude a criminal action resulting from that appearance.

RULE E

Your proposed language for Rule E(3), (7), (9)(b), and (10), are acceptable.

Finally, I have not reviewed your redraft of Rule C(6)(a) which you describe in your letter as a "little frolic" to determine whether or not it is consistent with our proposals. I hope that the matter which I have presented herein is of help to you.

Very truly yours,

PHILIP A. BERNS
Attorney in Charge
Torts Branch, Civil Division
West Coast Office

cc: Frank Hunger, Assistant Attorney General
Mark Kasanin, McCutchen, Doyle, Brown & Enersen
Robert Zapf, Lane Powell

Agenda Item IX

Expert Testimony Proposals

A number of proposals have been made with respect to expert witness testimony. All are in the stages of early experimentation. All are interesting. All may be premature. This Note sketches some of the proposals and some related possibilities, with an eye to stimulating discussion of possible Committee approaches.

Common Grounds

All of the proposals spring from common concerns about the use of adversary expert testimony. None of them advances an agenda for dramatic reform. All assume that adversary-selected, adversary-coached, adversary-paid expert witnesses will continue as the primary source of expert assistance to judges and juries.

One concern is that the most expert of experts are not willing to appear as expert witnesses because of the time and disruption required to appear at trial.

A closely related concern is that these best experts may not be willing to appear on behalf of a party in the role of sworn advocate.

Both of these first concerns arise with respect to one-shot litigation arising from unique events. They also may arise with respect to regularly repeated litigation. Product-liability actions offer a common example of a setting in which the same basic events may be tried again and again, presenting the same experts on wheel-rim design, quality control measures in drug manufacturing, the carcinogenic or teratogenic qualities of a product, and so on.

Proposals

The concern arising from demands on the expert witness' s time can be addressed by adopting a rule that allows presentation of expert witness testimony by deposition. The deposition can be scheduled at the convenience of the witness. The obvious place for such a provision would be in Civil Rule 32. This is the simplest proposal. It would have to be decided whether the trial deposition could be noticed only by the party calling the witness, or by any party. Probably the rule should provide that the purpose of using the deposition at trial should be included in the notice. Perhaps provision should be made for use against parties added after the notice or after the deposition.

Although it would complicate the revisions made when Rule 26(a)(2) was adopted to require disclosure of expert witness testimony, it also would be possible to provide for two depositions if the opportunity to take one deposition after disclosure does not seem a sufficient safeguard. A "discovery" deposition could be scheduled first, followed by a "trial" deposition. This approach might best be implemented by working through both Rule 26(b)(4) and 32.

Some thought might be given to the desirability of providing

for a presiding officer at a trial deposition. It is difficult to guess whether an explicit trial deposition procedure would encourage such frequent obstructive deposition behavior as to justify a provision for a neutral presiding officer. The broadest likely provision would allow any party to request designation of a judicial officer (including a special master) before the deposition begins. Narrower provisions would tail down to one that simply reminds the parties that actual bad behavior will be met by sanctions and completion of the deposition before judge, magistrate judge, or other appointed officer.

Unwillingness to appear as an adversary expert can be addressed by expanding Evidence Rule 706, or perhaps by encouraging more active use of Rule 706 as it stands. In combination with a provision for trial depositions rather than living trial testimony, it might be possible to encourage testimony by many experts who now decline the opportunity.

Repeated litigation of the same issues suggests a special role for trial depositions. The important task would be to define a procedure that is a satisfactory substitute for examination and cross-examination by the parties to each actual action. The problem would arise with respect to defendants as well as plaintiffs — in a product-liability action, for example, successive actions would involve not only different plaintiffs, but often different defendants as well. It may be easier to develop persuasive safeguards with respect to court-appointed experts than with respect to adversary experts. Cross-examination by a set of experienced and representative plaintiffs and defendants might be protection enough; initial examination by the court might be possible as well, and indeed less of a problem than it is when trial examination of an expert witness is conducted by the court that appointed the expert for one specific trial. Current MDL procedures may support this practice in many of the situations that make it most attractive.

Attached are Orders Nos. 31 and 31B entered by Judge Sam Pointer in the silicone gel breast implant litigation. They provide both an illustration of a way in which an inventive judge has begun to address problems like these in very large-scale litigation and a basis for thinking about related problems. They also suggest a related topic that is on the "holding" agenda of this committee. A committee of special masters is used to help the court with the process of selecting expert witnesses; it may be that a nonexpert will be appointed, probably also under Civil Rule 53, to help the expert witnesses perform their witnessing functions. This is but one illustration of the myriad ways in which the use of special masters has grown beyond the limits contemplated when Rule 53 was drafted. The illustration may be some stimulus for bringing Rule 53 back closer to the agenda of topics for active consideration.

Other Witnesses

Multiple depositions of the same witnesses affect fact

witnesses as well as expert witnesses. Both state and federal courts have been devising means to get around the limits of discovery and evidence rules to facilitate "once-for-all" deposition practice. It is proper to ask whether the time has come to take on this topic as well. Fact witnesses should be approached more cautiously than expert witnesses. They play an unquestionably central and legitimate role that cannot be claimed by expert witnesses. Unfettered individual adversary opportunity to engage in discovery is accordingly more important. There also may be greater problems with individual witnesses whose fact knowledge overlaps common and indidivudal issues.

The purpose of joint depositions could be aimed, as the expert proposals, at trial use. It could be limited more narrowly to discovery, leaving use at trial to present rules. The distinction might be confounded by summary judgment practice, however, and in any event may be more difficult to draw than appears at first sight.

The first step to take in considering joint deposition practice that reaches across the boundaries of separate actions is simple. Information should be gathered on the means that have been used by adventurous federal and state judges. It should not be difficult to identify a reasonable number of judges to ask for help.

Once practical information is in hand, it will be easier to begin thinking about the obvious questions. A conservative practice, for example, would limit joint depositions to use in actions that were pending when the deposition was taken, and would allow use of the depositions over objection only as to parties who had been given notice and an opportunity to participate. Managing depositions on that scale might prove challenging. Less conservative methods likely would require parallel amendments of Civil and Evidence rules. It might be possible to think of "class" depositions that are not incident to a class action — it would be an interesting question whether the Enabling Act would support a federal class deposition that would be usable in any state action on terms dictated by the federal rule, or on the same terms as a deposition taken under state practice for that specific action.

The threshold for allowing joint depositions also would demand attention. Should it be enough that two parallel actions are pending, or should the procedure be reserved for more dramatic settings? How much overlap of fact should be required, and how important should the common issues be to the individual actions?

The inevitable overlap between joint and individual discovery also must be confronted. Some witnesses will have information that bears on common issues, and other information that bears on individual issues. The simplest approach would be to limit the joint deposition to common issues, leaving the witness for as many individual depositions as may be useful on individual issues. This approach would be essential if the joint deposition were to be available for use against litigants who were not notified of it.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:	)	
SILICONE GEL BREAST IMPLANT	)	Master File No. CV 92-P-10000-S
PRODUCTS LIABILITY LITIGATION	)	
(MDL 926)	)	This Order Applies to All Cases

ORDER No. 31
(Appointment of Rule 706 Expert Witnesses)

Several federal Transferor Courts[1] have, after remand, indicated the desirability of designating one or more court-appointed experts under Fed. R. Evid. 706 to evaluate and critique pertinent scientific literature and studies bearing on issues in breast implant litigation pending in, or to be remanded to, such courts. It is likely that other federal courts will also wish to take advantage of Rule 706 for such purposes and that some state courts may likewise wish to utilize state-law counterparts of Rule 706.

Before this Court is a motion by the National Plaintiffs' Steering Committee ("PSC") requesting that, given the objective of coordinated pretrial proceedings under 28 U.S.C. § 1407, this Court assume responsibility for the appointment on a national basis of such Rule 706 experts as may be appropriate. Although expressing reservations about the utility and role of such experts at least at the present time, the PSC argues that, in the interest of avoiding potentially redundant or even conflicting results in potential testimony arising from multiple Rule 706 appointments by different courts, it would be preferable to have a single set of nationally-appointed experts, whose testimony might be potentially usable in the many federal courts to which breast-implant cases have been (or in the future may be) remanded,[2] as well as in state courts in which there are state-law counterparts of Rule 706. There is also the potential that such

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1. In an order dated April 3, 1996, Judges Weinstein and Baer of the United States District Courts for the Eastern and Southern Districts of New York, concurred in by Judge Lobis of the state Supreme Court for New York County, appointed a three-person panel to assist those federal courts in selecting an appropriate panel of knowledgeable and neutral experts pursuant to Rule 706. Judge Jones of the United States District Court for Oregon has also begun efforts to locate appropriate experts for appointment under Rule 706.

2. Over 21,000 cases have been transferred to this Court under 28 U.S.C. § 1407 from 92 of the 94 federal districts, no cases having yet been transferred from Guam or the Northern Marianas. Over 300 cases have already been remanded by this Court to 45 separate district courts.

appointments and resulting testimony might be of value in the bankruptcy proceedings involving Dow Corning now pending in the Bankruptcy Court for the Eastern District of Michigan. The defendants say they object to formation of a Rule 706 Panel.[3] Upon consideration, after reviewing the parties' written and oral submissions—and after consulting with, and receiving encouragement from, Judges Baer, Jones, and Weinstein, as well as other state and federal judges—this Court concludes that the motion should be granted, and conditionally, as indicated in paragraph 5, orders as follows:

1. Procedure. Appointments will be made on a national basis by this Court, for potential use in all federal courts and as permitted in state courts, in a two-step process patterned after the procedures adopted in the New York federal courts: first, by utilizing a "Selection Panel" to assist in the selection process, as described in paragraph 2; and second, by then appointing persons to serve under Rule 706 as court-appointed experts and as members of a "Science Panel," as described in paragraph 3.

2. Selection Panel.

(a) As an initial step, this Court, acting under Rule 706 and under the supervisory powers conferred by Fed. R. Civ. P. 16(c)(4),(8), (12), and (16), hereby designates the following to act as Special Masters under Fed. R. Civ. P. 53 and Rule 706, collectively referred to as the "Selection Panel"—

(1) the persons previously designated by the Eastern and Southern Districts of New York; namely,

Professor Margaret A. Berger (Chair), Brooklyn, New York,
Dr. Joel E. Cohen, New York, New York, and
Dr. Alan Wolf, New York, New York; and,

(2) as additional members, suggested by federal or state judges in other parts of the country, the following—

Dr. Judith L. Craven, Houston, Texas,
Dr. Richard Jones, Portland, Oregon, and
Dr. Keith Marton, San Francisco, California.

(b) This Court requests that the Selection Panel provide it with names of neutral, impartial persons who have the indicated expertise, who would be able to communicate effectively with judges and jurors, and who, if selected, would be willing to serve under Rule 706 on the Science Panel as outlined in paragraph 3. The Selection Panel should not solicit, or receive, suggestions from the parties regarding the names of potential nominees for appointment to the Science Panel, but may receive general suggestions from the parties respecting criteria, qualifications, and possible areas affecting bias or conflicts.

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3. It is unclear whether the defendants are mimicking Br'er Rabbit or are concerned about courts receiving testimony from impartial experts.

(1) The Selection Panel should recommend to this Court one to three neutral persons with appropriate expertise in each of the following four fields (and, to the extent needed, in statistics): epidemiology, immunology, rheumatology, and toxicology. After receiving the advice of the Selection Panel and hearing from the parties, the Court will determine whether to accept from the parties "challenges for cause" or, if three such persons are recommended by the Selection Panel for such a position, to allow each side a "peremptory challenge."

(2) The Selection Panel need not wait to communicate its recommendations until its nominees for all three fields have been determined. As the Selection Panel determines the person(s) whom it will nominate for appointment as an expert in any of the indicated fields, it should submit such recommendation(s) to this Court so that, upon appointment, the expert may receive additional instructions as indicated in paragraph 3(b) and then commence his or her work under Rule 706 even if the full Science Panel has not been appointed.

(3) The Selection Panel may also recommend one or more persons with special expertise in the interrelationship between the forensic sciences and legal processes and procedures, for appointment as Chair of the Science Panel and to be of assistance to other members of the Panel in performing their responsibilities. The Court anticipates that such a person, if appointed, would not be called upon to submit findings, be deposed, or present testimony as indicated in paragraph 3, but would rather perform administrative, coordinating, and consultative services for the Science Panel.

(4) As an interim measure, the Court directs the plaintiffs (acting jointly through the PSC) and the defendants (acting jointly) to each provide to this Court by June 17, 1996, the designation of a rheumatologist who has not been retained (and will not be) retained by any parties to provide testimony in this litigation. These party-designated rheumatologists are to be available to members of the Selection Panel for joint consultation in identifying neutral rheumatologists for possible appointment to the Science Panel. While the parties are not precluded from designating for this purpose a rheumatologist with known and strong views concerning potential issues or with whom they may have previously consulted, they are cautioned that the members of the Selection Panel are likely to give less attention and weight to suggestions expressed by rheumatologists who themselves appear to be partisan or lacking in objectivity. The Court hopes that, with the special assistance of these party-designated rheumatologists, the Selection Panel will be able to identify, for potential court-appointment under Rule 706, one or more rheumatologists whose credentials, objectivity, and impartiality could not be reasonably questioned by plaintiffs or defendants.

(5) The Court will welcome suggestions from the Selection Panel regarding the composition, responsibilities, compensation, operation, procedures, and utilization of the Science Panel, including appropriate modifications or additions to this Order.

(c) Members of the Selection Panel may, from time to time, be assigned additional duties by this Court, such as providing guidance to the Science Panel with respect to preparation of reports and preparation for providing testimony that would be acceptable under Rules 702, 703, 705, and 706.

(d) Although the Court has no plans to appoint any members of the Selection Panel to the Science Panel, membership on the Selection Panel does not automatically disqualify a person from such appointment.

3. Science Panel.

(a) It is anticipated that on the Science Panel there will be one person whose principal area of expertise is in epidemiology, one whose principal area of expertise is in immunology, one whose principal area of expertise is in rheumatology, and one whose principal area of expertise is in toxicology—each having also such familiarity with statistics as may be needed or desirable to perform their functions and responsibilities—and perhaps an additional person to serve as Chair of the Panel, whose primary field of expertise would be the interrelationship between forensic sciences and legal procedures and processes. This Court reserves the right to appoint additional persons with special expertise in the same disciplines or in other fields and disciplines if that appears appropriate in the future.

(b) After this Court has appointed an expert in a field under Rule 706, the parties will be afforded the opportunity under Rule 706(a) to participate at a conference in which this Court will delineate the duties of the expert and indicate any topics on which the expert should, at least initially, commence reviews of the existing scientific research. Subject to further modification as may be appropriate, the following principles will serve as preliminary guidelines under Rule 706(a) for such duties.

(1) The primary function of the court-appointed experts, as presently contemplated, will be to review, critique, and evaluate existing scientific literature, research, and publications—addressing such matters as the meaning, utility, significance, and limitations of such studies—on topics as, from time to time, may be identified by the Court as relevant in breast-implant litigation, particularly on issues of "general causation." The parties may submit to the Court requests for reviews by the Science Panel relating to particular issues, indicating and describing the literature and research relied upon—or criticized—by the parties' experts when testifying on such issues.

(2) At the present time, and subject to further directions, these court-appointed experts will not be asked to conduct any independent research, to evaluate the credentials or expertise of persons who may be called by the parties to provide expert testimony, or to assess the particular claims of individual plaintiffs.

(3) The present contemplation is that—

(A) each of the Rule 706 court-appointed experts will, as appropriate to such expert's areas of expertise, individually conduct such reviews, critiques, and evaluations, and will then, after consultation with other members of the Science Panel, present written findings pursuant to Rule 706(a),[4] drawing upon other panelists' expertise in related disciplines as appropriate and to the extent permitted under Rule 703;

(B) these findings would be made and presented on particular topics and issues as they are completed (*i.e.*, without delaying until findings are completed on all topics and issues that may be referred to the Panel);

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4. Subject to further modification, it is anticipated that the written report would contain a relatively complete statement of the opinions to be expressed by the expert; the basis and reasons therefor; the data or other information relied on in forming such opinions, and any exhibits to be used as a summary of or support for such opinions. Additionally, the first report submitted by a court-appointed expert should summarize the expert's qualifications, including a list of all publications authored within the preceding ten years and a list of any other cases in which the expert has testified at trial or by deposition within the preceding four years.

(C) a particular issue presented to the Science Panel may be reviewed (with findings made) by only one of the court-appointed experts, or the issue may be reviewed by more than one such expert, with findings made by each as appropriate to that expert's discipline and expertise; and

(D) the Science Panel may conclude that, because of the insufficiency of reported research[5] or because of research in progress, they should decline to review, or postpone review of, research with respect to particular issues or topics. It is further anticipated that the Science Panel would, through a preliminary and informal report to the Court, indicate the general nature of the expected findings by the court-appointed experts so that the Court could determine whether such findings would have sufficient probative value to justify preparation of a formal report, triggering the provisions of paragraph 3(c) and 3(d) below.

(4) Until such time that the Court appoints a rheumatologist to the Science Panel, panel members, when needing special help on rheumatological subjects, may consult on a joint basis with the rheumatologists designated by the parties under paragraph 2(b)(4) above. They may also utilize the services of other persons with special expertise in related fields and disciplines as, from time to time, may be appropriate and permissible under Rule 703, such as applied mathematics, biology, biomedicine, polymer chemistry, hematology, internal medicine, neurology, oncology, plastic and reconstructive surgery, radiology, and statistics.

(c) After receiving the report of findings of a court-appointed expert, the parties will, as provided in Rule 706, be afforded the opportunity to conduct a "discovery-type" non-videotaped deposition of the expert, subject to appropriate guidelines and limitations imposed by this Court, which may include direct supervision of the conduct of the deposition by this Court or by another judicial officer designated by this Court and which would, taking into account the details provided in the written report, limit examination to that needed by the parties to fairly prepare for the trial-perpetuation deposition described in paragraph 3(d) below. The Court hopes that the parties may agree that, before such a trial-perpetuation deposition commences, they engage in an informal discussion with the expert regarding his or her potential testimony, rather than take a formal discovery-type deposition.

(d) It is anticipated that, after the opportunity for a discovery-type deposition or informal discussion, the trial testimony of the court-appointed expert will be perpetuated by means of a videotaped deposition at which this Court (or another judicial officer designated by this Court) will preside. It is further anticipated that this Court (or the judicial officer designated by this Court) may conduct the initial direct examination of such expert, with the plaintiffs and defendants then being allowed to cross-examine the expert. Experts retained by the parties may attend the deposition in order to assist counsel in examining the court-appointed expert.

(e) Except for good cause shown to this Court, plaintiffs and defendants will not be permitted to depose a court-appointed expert except as provided in paragraph 3(c) and 3(d) above or to subpoena a court-appointed expert to testify in person at a trial. These restrictions are essential to protect court-appointed experts from potential demands for attendance at depositions or trials in the hundreds or perhaps thousands of cases in which their testimony might be deemed desirable by the trial judge presiding over such cases or by one of the parties.

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5. Insufficiency of research on an issue should not necessarily, however, result in the Panel's declining to approve issuance of findings, since, on some topics, a determination that no pertinent research exists could itself be a significant finding.

(f) This Court finds that, by analogy to Fed. R. Civ. P. 32(a)(3)(D) and (E), the videotaped trial-perpetuation deposition (or an edited version of such deposition) will be usable in all federal courts (and in all state courts to the extent permitted by applicable state law) as determined to be relevant by the judge presiding over such trial. As provided in Rule 706(a), the expert may be called to testify (by means of the deposition) either by the trial court or by a party. As provided in Rule 706(c), the trial court will determine, in the exercise of its discretion, whether or not the fact that the deponent is a court-appointed expert should be disclosed to the jury (and, as needed, to direct appropriate editing of the deposition consistent with that determination).

(g) As provided in Rule 706(d), neither the appointment of the Science Panel nor the findings by members of the Science Panel will preclude the parties from calling expert witnesses of their own selection.[6] This Court does not view entry of this Order as calling for the delay or rescheduling of any trials that may have been set by other courts; it will be for the trial judge before whom a case is pending to determine whether the pendency of any review by the Science Panel should affect the trial setting of that case.

4. Compensation and Funding.

(a) As provided in Rule 706, the persons appointed to the Selection Panel and to the Science Panel will be entitled to reasonable compensation for their services, together with reimbursement for reasonable expenses, as this Court may from time to time allow. This will include compensation and reimbursement for services already undertaken by the persons named in paragraph 2(a)(1) under appointment from the Eastern and Southern Districts of New York. The fees and reimbursement of the consulting rheumatologists named under paragraph 2(b)(4) shall be borne by the parties designating such persons.

(b) This Court will seek at least partial funding of these costs from the Administrative Office of the United States Courts. To the extent these costs exceed any funds so available, they shall be paid (1) one-half by the plaintiffs, through a charge against the National PSC and against the Common Benefit Fund established under Order No. 13, and (2) one-half by the national defendants in a manner to be agreed upon by them.

5. Effect. Under Rule 706, the parties in MDL 926 are directed to show cause to this Court by June 10, 1996, why this order should not take effect on June 12, 1996. Although, pending consideration of any such responses, this order is conditional and, based on such responses, might be vacated or modified prior to June 12, 1996, the persons appointed in paragraph 2(a) to the Selection Panel may, and are encouraged to, proceed with preliminary efforts to identify appropriate persons for possible nomination as members of the Science Panel.

This the 30th day of May, 1996.

United States District Judge

Service on: National Liaison Counsel
Members of Selection Panel

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6. Findings by the court-appointed experts may, however, be relevant to, and be considered by trial courts in ruling on, issues raised under Rules 104, 403, 702, 703, and 803(18) regarding admissibility of expert testimony and published research offered by the parties.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:	)	
SILICONE GEL BREAST IMPLANT	)	Master File No. CV 92-P-10000-S
PRODUCTS LIABILITY LITIGATION	)	
(MDL 926)	)	

ORDER No. 31B
(Confirming Order No. 31)

In Order No. 31 the parties were directed to show cause why the terms of that order should not be made effective. No opposition to the terms of that order has been submitted by plaintiffs. Responses have been filed by certain of the settling defendants; namely, Baxter, Bristol-Myers, and 3M.[1]

As a fundamental matter, the settling defendants question whether this court, acting under 28 U.S.C. § 1407 on pretrial matters, has authority to appoint "trial" experts under Fed. R. Evid. 706. The short, but correct, answer is that any implementation of Rule 706 procedures must be commenced during the pretrial stage of a case and that many, if not most, of the pretrial activities of a transferee judge under §1407—such as supervision of depositions and production of documents—are undertaken for the very reason that such matters may be needed at a trial. Nor, given the procedures tentatively established under Order No. 31 and the modifications that may be made at the time of assigning specific responsibilities to panel members, should there be any impermissible infringement on the powers of the trial judge before whom a particular case may be

1. Additionally, counsel for Dow Corning has filed a response regarding the potential use in the bankruptcy proceedings involving Dow Corning of findings by members of the national Science Panel. Questions raised in that response are ones that would be presented and considered by the Bankruptcy Judge and District Judge before whom the bankruptcy is pending.

set for trial.

The defendants raise a series of specific concerns, which are listed below, followed by the Court's evaluation of such concerns:

(1) "The parties and the Court may have too much influence in the front end of the process" (*e.g.*, selection of experts and subjects). Court: Rule 706 contemplates, and effectively mandates, such involvement by parties and the court.

(2) "There is not enough influence from lawyers and the trial courts at the back end of the process" (*e.g.*, presentation of findings at a trial). Court: Under Order No. 30 (and further details may be developed as the process continues), trial courts will have ample powers to control how, and to what extent (if any), findings would be usable at trial.

(3) Party-designated rheumatologists should be used as consultants to the Selection Panel only as a last resort and should never be used, even jointly, as consultants to the Science Panel. Court: The order contemplates this "last resort" use by party-designated rheumatologists in helping the Selection Panel find appropriate rheumatologists who might be appointed to the Science Panel by the Court. Only if no such rheumatologist can be located would the party-designated rheumatologists be available—if needed—to consult jointly with the court-appointed experts serving on the Science Panel.

(4) The parties should have the opportunity to depose court-appointed experts on more than one occasion. Court: Should it be shown to this Court that there is a need to redepose a court-appointed expert, that could be done. However, it would not be appropriate to permit each of the potentially hundred of judges around the country to authorize such additional depositions, and, instead, if it were shown to another judge that an additional deposition was necessary, that judge could rule that, absent such additional deposition, the video-taped trial deposition could not be used.

(5) There should be no preliminary report by court-appointed experts on the basis of which the court could determine whether the expected findings would have sufficient probative value to justify preparation of a formal report (and implementation of the deposition procedures). Court: This is a matter that is more appropriately considered at the time a particular issue is to be referred to the Science Panel.

(6) The Science Panel should produce a joint report. Court: Under the rules of evidence there would be significant problems of admissibility if findings were submitted as joint findings of the panel, rather than as findings by an individual expert (albeit after consultation with other panel members and considering their views and opinions to extent permitted under

Rule 703).

(7) The court should not conduct the direct examination of the court-appointed experts. Court: The order indicates only that this "may" occur; it certainly can be reconsidered further along in the process. However, initial examination by the court has the advantage of avoiding the appearance that the court-appointed expert has, because of the content of the findings, become an expert for the plaintiffs or for the defendants.

(8) Parties should be allowed to present in camera questions of competency and bias before appointments are made by the court. Court: This is a matter that will be further explored before any appointments are made.

(9) The portion of costs chargeable against plaintiffs should not be paid from the Common Benefit/Expense Fund. Court: It appears highly unlikely that this fund will ever be sufficiently large to pay all of the common benefit expenses incurred by plaintiffs' counsel, and charging the costs of the Rule 706 process against that fund is an equitable method for assessing those costs among all plaintiffs and claimants.

(10) The court should not appoint a non-scientist Chair of the Science Panel. Court: Whether or not such an appointment may be made is problematic, and the court is seeking the advice of the Selection Panel as to whether such an appointment should be made and, if so, who should be appointed. The Court rejects the defendants' implications that knowledge of judicial processes and procedures would taint the integrity of findings by members of the Science Panel.

After considering the responses, the Court concludes that the appointment process under Rule 706 should proceed and that Order No. 30 should therefore be treated as effective, but with appropriate reserved power in the court to make appropriate changes and modifications as the process continues.

This the 13th day of June, 1996.

Chief Judge Sam C. Pointer, Jr.

Agenda Item X

Reporter's Note: Evidence Rule 103

The attached materials show proposed new Evidence Rule 103(e) that was published for comment in September, 1995. Comments were mixed. The Evidence Rules Advisory Committee has requested advice from the Civil and Criminal Rules Advisory Committees. This short introductory note is only a preliminary indication of the questions raised by the full materials provided by the Evidence Committee.

The published proposal is:

> (e) **Effect of Pretrial Ruling.** A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

In limine motion practice has grown substantially since the Evidence Rules were adopted. The circuits have adopted different rules on the obligation of a party who lost an in limine ruling to renew a proffer of evidence, or an objection to evidence, at trial. There are four obvious alternatives: (1) Do nothing, leaving the decisional process to play out. (2) Adopt a presumption that neither an unsuccessful proffer nor an unsuccessful objection need be renewed at trial, unless the court specifically indicates that the in limine ruling is tentative. (3) Adopt a presumption that both an unsuccessful proffer or an unsuccessful objection must be renewed at trial, unless the court specifically indicates that the in limine ruling is final. (4) Adopt different rules that require a proffer to be renewed at trial, because the evidentiary context may have changed, but that do not require an objection to be renewed at trial.

Several objections were made to the published proposal. The most fundamental were that it is undesirable to have to make objections at trial, and that the decision to excuse renewal at trial if "the context clearly demonstrates" that the in limine ruling is final will provoke much unnecessary litigation when lawyers inadvertently or deliberately omit a trial objection. "Trap for the unwary" and "waste of time and trial delay" arguments were common variations. It also is urged that the proposal is contrary to the spirit of the "no formal exceptions" provisions in Civil Rule 46 and Criminal Rule 51, and that it will thwart the purpose to encourage pretrial motions reflected in Criminal Rule 12(b). And it has been argued that there would be an inconsistency with the pretrial objection requirements of the pretrial disclosure provisions in Civil Rule 26(a)(3), which adopt a waiver rule for objections to the use of depositions, documents, and exhibits disclosed by pretrial disclosure and not objected to in the time allotted.

The objections would suggest a reversal of the published proposal, excusing renewal of proffer or objection unless the court expressly states that the pretrial ruling is not final.

There is another concern that does not seem to have been captured in the comments. In limine rulings may rest on rulings that resolve disputes about the substantive law, not merely matters of evidentiary admissibility. An illustration that happened to fall to hand is *Aerotronics, Inc. v. Pneumo Abex Corp.*, 8th Cir.1995, 62 F.3d 1053, 1066-1067. On motion in limine, the trial court ruled that the claim was governed by a 10-year statute of limitations, not the 5-year statute urged by the defendant. At trial, the defendant did not object to introduction of evidence of damages during the period more than 5 years before filing. The court of appeals ruled that the failure to object did not waive the defendant's contention that the 5-year statute controlled. The court explained:

> [i]n contrast to the typical motion in limine, the district court's ruling on the applicable statute of limitations was made as a matter of law, it was not based upon a hypothesis as to how evidence would be presented at trial. The actual presentation of facts at trial has no impact on the court's ruling. Therefore, an objection * * * at trial is similar to a formal exception, which is not required.

It is not entirely clear whether proposed Rule 103(e) would treat the motion as "[a] pretrial objection to * * * evidence" that must be renewed at trial unless the court states, or "the context clearly demonstrates," that the ruling is final. Presumably the rule should be interpreted to limit its effects to considerations of evidentiary admissibility. It may be useful to consider whether this answer is so clear that there is no occasion to amend the Committee Note or even the text of the rule.

FEDERAL RULES OF EVIDENCE*

Rule 103. Rulings on Evidence

* * * * *

(e) Effect of Pretrial Ruling. A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on pretrial motions to raise issues about the admissibility of evidence. As enacted, Rule 103 did not specifically address whether a losing party had to renew its objection or offer of proof at trial in order to preserve an issue for appeal.

Subdivison (e) has been added in order to clarify differing approaches that spell uncertainty for litigants and create unnecessary work for the appellate courts. See, e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"),

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

cert. denied, 488 U.S. 965 (1988); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider."); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear").

Subdivision (e) states as a default rule that counsel for the losing party must renew any pretrial objection or proffer at trial. Renewal is not required if "the court states on the record, or the context clearly demonstrates," the finality of the pretrial ruling. Counsel bears the responsibility for obtaining the requisite ruling or renewing the objection and bears the risk of waiving an appealable issue if these procedures are not followed. The Committee considered but rejected an alternative general rule that would not require renewal of a motion at trial.

Rule 103(e) does not excuse a litigant from having to satisfy the requirements of Luce v. United States, 469 U.S. 38 (1984) to the extent applicable. In Luce, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment. Some circuits have extended the Luce rule beyond the Rule 609 context. See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (Rule 608(b)), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992) (same); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (same), cert. denied, 474 U.S. 860 (1985); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987) (Rule 403), cert. denied, 484 U.S. 844 (1987).

April 8, 1996

To: Members, Advisory Committee on the Federal Rules of Evidence

From: Margaret A. Berger, Reporter

Re: Comments on Proposed Amendments

This memorandum summarizes the comments that were received about possible amendments to the Federal Rules of Evidence. The discussion is organized as follows: Part I reviews responses to the amendments proposed by the Committee; Part II examines additional suggestions, unrelated to the Committee's proposals, for amending the rules discussed in Part I; Part III reports on recommendations for amending rules not presently under consideration by the Committee.

I Comments on the Proposed Amendments. The reaction to each proposed amendment is summarized, as are the principal arguments of the commentators. All suggestions for alternative language are set forth. The number in parentheses following the author's name is the identification number assigned the comment by the Rules Committee Support Office. (Comments EV19 and EV23 are identical comments submitted by different members of the Federal Magistrate Judges Association.)

Rule 103(e).

Summary. The Committee received 19 comments with regard to the proposed amendment, not counting comments from members of the Evidence Committee, comments from members of the Standing Committee, or comments made by Professor Friedman at the public hearing. The commentators agree that a uniform default rule ought to be codified, but disagree on how it should be formulated. Eight comments supported the Committee's formulation, and eleven supported an opposite default rule. Since there was no controversy about the need for a rule, I am only abstracting comments that relate to the substance of the rule.

Comments supporting the proposed rule.

The Commercial and Federal Litigation Section of the New York State Bar Association (EV24) found that the proposed amendment "makes sense."

> Where the court feels renewal at trial would serve no purpose, it retains the option to make clear that its pretrial ruling is final, thereby relieving the parties of any obligation to revisit the issue. By otherwise requiring the renewal of pretrial proffers or objections at the appropriate time during the trial, the proposed rule provides the trial judge a "last clear chance" to avoid error and to make evidentiary decisions in the context of all trial developments to that point.

The Section pointed out that its "last clear chance" concern is particularly relevant in districts in which the magistrate judge rules on pretrial motions so that the district judge has no occasion to consider evidentiary rulings prior to trial. Furthermore, it found the proposed rule consistent with current practice by careful trial attorneys.

The Federal Magistrate Judges Association (EV10, EV22) supported the proposed rule because it would provide trial judges an opportunity to correct pretrial error before it is subjected to scrutiny on appeal. The Association suggests that the Advisory Committee Note indicate the

provision is not intended to override or modify Fed.R.Civ.P. 72(a) or (b) or 28 U.S.C. §636 with respect to appeals and review of pretrial decisions by magistrate judges.

The proposed version of Rule 103(e) was also endorsed by the Seventh Circuit Bar Association (EV23) as it "clarifies existing procedure [and] adds certainty to the litigation process;" the Executive Committee of the Litigation Section of the State Bar of California (EV39); the Federal Legislation and Procedures Committee of the Arkansas Bar Association (EV21); the ABA Section of Intellectual Property Law (EV33) and Frank E. Tolbert, Esq. (EV3) of Logansport, Ind.

While the Federal Bar Association (EV34) recommended the Committee's version with limited reservations, because it "provides judges with a straightforward and easily applied uniform rule," the chair of one of its sections expressed a personal preference for the competing default rule.

Comments endorsing the reverse formulation.

Two federal judges criticized the Committee's formulation.

Judge Prentice H. Marshall (EV13) suggested the following amendment:

> "A.[sic] Pretrial objection to or proffer of evidence need not be renewed at trial unless the court states on the record that it must be."

Judge Marshall objected to the Committee's proposed amendment on a number of grounds: 1. it fails to encourage pretrial objections or proffers; 2. in-trial objections "are an anathema;" 3. the proposed amendment denigrates the mandatory in limine motion practice prescribed by Fed.R.Civ.P 26(a)(3) -- "why are trial counsel burdened with pretrial objections if they must renew them at trial?"

Judge Edward R. Becker (EV15) also questioned the proposed change: 1. it will make more work for trial judges; 2. the "escape hatch" in the proposed rule will lead to satellite legislation, and 3. the proposal contravenes Fed.R.Civ.P. 46 which provides that formal exceptions to a court's rulings are unnecessary.

A number of attorneys objected to the Committee's default formulation. J. Houston Gordon, Esq. of Covington, Tenn. (EV5) thought the rule change would prolong litigation.

Mike Milligan, Esq. of El Paso, Texas (EV7) argued that counsel lose face when they have to raise a losing issue before the jury, and that this formulation supports "the Judiciary's tendency to make preservation of error difficult." He added that he didn't "expect anybody but trial lawyers to be on my side of this issue."

Daniel A. Ruley of Steptoe & Johnson, Parkersburg, W.Va. (EV18) questioned whether the proposed rule is "another trap for an unwary lawyer."

The American Intellectual Property Law Association (EV25) used much the same language in expressing its opposition to the proposed rule. It also deemed the necessity of having to re-raise fully briefed and carefully decided issues a waste of time, and expressed fears that the "context clearly demonstrates" exception is an open invitation to secondary litigation.

The National Association of Railroad Trial Counsel's Executive Committee (EV28) commented that "the changes would complicate and disrupt existing in limine procedures because all rulings made prior to trial will have to be revisited at the trial itself. This does not appear to promote judicial economy or efficiency." The Tort & Insurance Practice Section of the American Bar Association (EV38) opposed the change because 1. the finality of pretrial rulings shortens trials, and 2. the proposed amendment does not clarify matters because of the provision

making a pretrial ruling final if "the context clearly demonstrates." The Kansas Association of Criminal Defense Lawyers (EV17) feared 1. that counsel might forget to renew an objection (leading to move ineffective assistance of counsel claims); 2. that if counsel has to make an objection, jurors will wonder why counsel is seeking to hide evidence; 3. that the rule will prove burdensome with regard to Fourth and Fifth Amendment objections, and 4. that the proposed rule is contrary to the spirit of Fed.R.Crim.Pro. 12(b).

The reverse formulation was also supported by the State Bar of Arizona (EV29), concerned that uncertainty about a ruling's finality will produce non-uniformity and appeals; the National Association of Criminal Defense Lawyers (NACDL) (EV36) and Professor Bruce Comely French (EV16).

Professor Myrna Raeder, writing on behalf of a group of evidence professors who favor the reverse formulation, (EV35) pointed out that judges have the option of telling lawyers that they must renew an objection at trial; that litigants can be warned that the ruling is final unless evidence introduced at trial substantially contradicts the in limine showing, and that a pro forma renewal creates an unnecessary technical hurdle to appellate review. She suggested the underlined changes in language:

> A pretrial objection to or proffer of evidence does not have to be renewed at trial, unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is not final.

Public hearing. Professor Richard Friedman expressed concern that the proposed rule would become a trap for lawyers who forget to mouth the right words, or that the "context" language would get a lot of use, in which case little will have been accomplished.

Rule 103. Rulings on Evidence

* * * * *

(e) Effect of Pretrial Ruling. A pretrial objection to or proffer of evidence ~~must~~ need not be ~~timely~~ renewed at trial unless the court states on the record, or the ~~context~~ record clearly demonstrates, that a the ruling on the objection or proffer is not final.

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on pretrial motions to raise issues about the admissibility of evidence. As enacted, Rule 103 did not specifically address whether a losing party had to renew its objection or offer of proof at trial in order to preserve an issue for appeal.

Subdivison (e) has been added in order to clarify differing approaches that spell uncertainty for litigants and create unnecessary work for the appellate courts. See, e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), cert. denied, 488 U.S. 965 (1988); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider."); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear").

Subdivision (e) states as a default rule that counsel for the losing party must renew any pretrial objection or proffer at trial. Renewal is not required if "the court states on the record, or the

context clearly demonstrates," the finality of the pretrial ruling. Counsel bears the responsibility for obtaining the requisite ruling or renewing the objection and bears the risk of waiving an appealable issue if these procedures are not followed. The Committee considered but rejected an alternative general rule that would not require renewal of a motion at trial.

Rule 103(e) does not excuse a litigant from having to satisfy the requirements of Luce v. United States, 469 U.S. 38 (1984) to the extent applicable. In Luce, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment. Some circuits have extended the Luce rule beyond the Rule 609 context. See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (Rule 608(b)), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992) (same); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (same), cert. denied, 474 U.S. 860 (1985); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987) (Rule 403), cert. denied, 484 U.S. 844 (1987).

Brooklyn Law School

Margaret A. Berger
Professor of Law

TO: Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter

DATE: September 30, 1004

Rule: Rule 103

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Suggested Redraft of Rule 103

Add after Rule 103(a)(1):

(a) The making of a motion in limine does not relieve the losing party from having to renew its objection when the evidence is offered at trial,

1) unless the court specifically states on the record at the hearing of the motion or at trial that its ruling is final, or

2) the evidence not excluded by the motion in limine is offered at trial by the losing party.

(b) Subdivision (a) does not preclude the court from reconsidering at trial any ruling made on a motion in limine.

[Add to Rule 103(a)(2):

An offer of proof made at a motion in limine does not have to be renewed at trial unless the court orders otherwise.

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Previous consideration by the Committee. After discussing Rule 103 at our May 1994 meeting, the Committee decided not to revise the Supreme Court's ruling in Luce v. United States, 469 U.S. 28 (1984) that requires a defendant to take the stand in order to preserve for appeal a trial court ruling admitting defendant's prior convictions for impeachment.[1] The Committee reserved decision on the more general question of amending Rule 103 in order to state whether, and in what circumstances, a party must renew an objection at trial in order to preserve for appeal the trial court's refusal to exclude evidence pursuant to a motion in limine. The rule is silent about the need for a contemporaneous objection when the issue was previously raised through a motion in limine.[2] We did not discuss at our prior meeting the need to cover in Rule 103 the related issue of whether a pretrial offer of proof has to be renewed at trial. The proposed amendment adds a provision dealing with this issue. Since it is considerably less controversial than the amendment to Rule 103(a)(1) it is discussed first.

Amending Rule 103(a)(2). The courts do not seem to have encountered difficulties in reconciling pretrial offers of proof

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[1] As indicated in the earlier memorandum on Rule 103, some courts have extended Luce beyond the Rule 609 context. This memorandum assumes that a disputed issue will not be preserved for appeal in the absence of testimony by the party who moved in limine or his witness whenever the circuit so requires. This memorandum is concerned solely with cases in which the movant testified at trial, or was not required to testify.

[2] Rule 103(a)(1) provides that rulings admitting evidence cannot be assigned as error on appeal unless "a timely objection or motion to strike appears of record."

with the motion in limine procedure. The only reason for amending Rule 103(a)(1) is to ensure that no erroneous conclusions will be drawn from the amendment to Rule 103(a)(1). Unlike the general rule proposed for overruled objections to evidence -- requiring a renewal of the objection at trial -- the amendment to Rule 103(a)(2) operates to relieve a party from having to renew an offer of proof at trial unless the court directs otherwise. The reasons for distinguishing between the two situations were well stated by the First Circuit in Fusco v. General Motors Corp., 11 F.3d 259, 262 (1st Cir. 1993):

> Where an objection to evidence has been overruled in limine, it makes sense to require that the objection be renewed at trial. However definite the denial of the motion to exclude prior to trial, it is child's play for the opponent of the evidence to renew the objection when the evidence is actually offered, and requiring this renewal gives the trial judge a change to reconsider the ruling with the concrete evidence presented in the actual context of the trial.
>
> On the other hand, where the motion in limine is granted, and the proponent of the evidence is told that the evidence will not be admitted, the situation is different. To require that the evidence be offered again at trial would certainly give the trial court a second chance, but doing so can hardly be described as easy: on the contrary, the proponent would have to engage in the wasteful and inconvenient task of summoning witnesses or organizing demonstrative evidence that the proponent has already been told not to offer. Indeed, in many cases the prior grant of the in limine motion would make it improper to call such witnesses without prior permission. All the proponent could do would be to line up the witnesses at trial and then ask permission.

Reasons for revising Rule 103(a)(1). After looking at numerous cases that discuss the interface between the contemporaneous objection rule and motions in limine, I believe

that we should amend Rule 103(a) as suggested above so as to deal explicitly with numerous problems that arise in connection with in limine motions. The proposed amendment seeks to strike a balance that recognizes that in most instances an evidentiary appeal should be based "on the actual form and timing of the attempt to introduce the evidence, rather than on an essentially hypothetical situation suggested by the pretrial motion in limine."[3] On the other hand, "[p]retrial motions are useful tools to resolve issues which would 'otherwise clutter up' the trial."[4] An amendment is needed for the following reasons, which are discussed in greater detail below:

1. One extremely important function of Rule 103 is to put attorneys on notice as to what they must do in order to preserve a right to appeal. In reading opinions that deal with Rule 103 and motions in limine it is often difficult to disentangle a circuit's statement of its general rule from its statement of the exceptions to the rule, and to separate holding from dictum.

For instance, the general rule in a majority of the circuits is that an objection must be renewed at trial in order to preserve an issue for appellate review. The Seventh Circuit, however, has declared on more than one occasion that "the law in this circuit is that an unsuccessful motion in limine does

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[3] Palmerin v. City of Riverside, 794 F.2d 1409, 1412 (9th Cir. 1986).

[4] Id.

preserve [an] issue for appeal."[5] In these cases the Seventh Circuit's conclusion is either dictum or is uttered in the context of facts that in other circuits give rise to an exception to the general rule. If the Seventh Circuit really means what it is saying about "the law in this circuit" then we should consider amending Rule 103 because there is a conflict in the circuits. If the Seventh Circuit would modify its language if presented with other fact patterns, then we ought to amend the rule because it fails to warn attorneys of forfeiting a right to appeal.

Furthermore, even though a good deal of inter-circuit consistency is visible with regard to the actual results in cases when all of the circuits' opinions are considered in conjunction with their underlying facts, there is considerably less consistency in how courts phrase various exceptions to the general, majority rule. The formulation is often phrased in terms of subjective elements that make it difficult for a litigant to predict what the outcome would be in a particular case. This uncertainty may cause difficulties in some cases because the attorney for the losing party may prefer not to repeat the objection before the jury. The existence of these exceptions suggests, however, that courts are willing to forgo an objection at trial when the objectives of the contemporaneous objection rule are satisfied. The proposed amendment seeks to achieve the

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[5] Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) (D failed to preserve objection where it made no motion in limine but objected in trial brief). See other cases discussed below.

objectives sought by the exceptions while ensuring predictability.

2. The circuits disagree on whether a party who made an unsuccessful motion in limine waives its right to appeal when for tactical reasons it introduces at trial the evidence it unsuccessfully sought to exclude. See discussion, infra.

3. Adding to the confusion in present practice is the somewhat uncertain relationship between Rule 103 and Rules 46 of the Federal Rules of Civil Procedure and Rule 51 of the Federal Rules of Criminal Procedure. Courts sometimes rely on the language in these rules making [formal] exceptions unnecessary when they conclude that an objection at trial was unnecessary to preserve the error.[6]

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[6] See, e.g., American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324-325 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the courts' attention to a matter it need consider."); Sprynczynatyk v. General Motors Corp., 711 F.2d 1112, 1119 (8th Cir. 1985) (under the circumstances an objection would have been in the nature of a formal exception unnecessary under Rule 46). Although both the civil and criminal rules were last amended in 1987, they are not completely identical. The criminal rule makes "exceptions" unnecessary while the civil rule makes only "formal exceptions" unnecessary.

Rule 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Rule 46 provides:

> Formal exceptions to rulings or orders of the court are

4. Revision is not inconsistent with the Committee's reluctance to disturb well-established practice under the Rules. Although minor improvements are not worth the confusion that may result if attorneys have to learn new ways of proceeding, there is no well-established practice set forth in the Rules with regard to the appealability of issues decided on motions in limine. Instead, a gap exists which an amended Rule 103 would now cover.

5. The need for a rule covering motions in limine is probably more pressing now than when the Rules of Evidence were enacted. More motions in limine are undoubtedly being made than in 1975 when the Rules became effective. Developments with regard to evidentiary doctrine such as hearsay and expert testimony have increased the need for preliminary motions, as has the growth of judicial management and greater dependence on pretrial conferences. Had motions in limine been as prevalent in the early 1970's as they are now, the original Advisory Committee might have mentioned them in Rule 103.

6. At our last meeting, some members stated that good lawyers always figure out a way in which to protect their right

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unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

to appeal. This Committee may, however, owe some obligation to bad lawyers' clients. Careless lawyers who have never read the cases may be lulled into surrendering a client's right to appeal because Rule 103 does not alert them to the necessity of renewing an objection at trial. The creation of this Committee -- after close to twenty years in which no Evidence Committee existed -- indicates a felt need to reconsider whether evidentiary matters are being handled well. The problems listed above and discussed in more detail below suggest the desirability of clarifying when an objection must be renewed at trial.

Practice in the circuits a. The majority rule. The proposed amendment is in accord with the thrust of the rule voiced in a majority of the circuits -- an objection must ordinarily be renewed at trial in order to preserve an issue for appellate review. Most opinions in the First,[7] Third,[8] Fifth,[9] Sixth,[10]

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[7] See e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is fatal), cert. denied, 488 U.S. 965 (1988); United States v. Griffen, 818 F.2d 97, 104-05 (1st Cir.) (party must renew objection on Rule 403 grounds in context of trial), cert. denied, 484 U.S. 844 (1987); United States v. Reed, 977 F.2d 14, 16 (1st Cir. 1992)(dictum; appellant had not raised issue in question at in limine hearing)

[8] While the Third Circuit states as its rule a formula that other circuits characterize as an exception to the general rule, the result is in accordance with the majority since the court is concluding that the objection that would otherwise have to be made is excused under the particular circumstances. See American Home Assur. v. Sunshine Supermarket, 753 F.2d 321, 324-325 (3d Cir. 1988).

[9] The court states its general rule as requiring an objection at trial unless good cause is shown. See e.g., Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994); Rojas v. Richardson, 703 F.2d 186, 188 (5th Cir.) (appellant did not lodge an objection by making a motion in limine and failed to show good

Eighth,[11] Tenth,[12] and Eleventh[13] circuits state as the general rule that the losing party waives an error created by the in

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cause, but court found plain error), opinion set aside on other grounds at rehearing, 713 F.2d 116 (5th Cir. 1983); Petty v. Ideco, Division of Dresser Industries, Inc., 761 F.2d 1146, 1150 (5th Cir. 1985). The court finds that good cause exists when the losing party offers the testimony at trial in order to remove the sting. See, e.g., Reyes v. Missouri Pacific RR Co., 589 F.2d 791, 793, n.2 (5th Cir. 1979), infra.

[10] Dictum in cases in this circuit suggest adherence to the majority rule. See, e.g., Burger v. Western Kentucky Navigation Inc., 1992 WL 75219 (6th Cir. 1992) at **3 (although court rested its holding on failure of the district court to rule on the motion in limine, the court indicated that the motion would not have counted as an objection even if the court had ruled); Boyle v. Mannesmann Demag Corp., 1993 WL 113734 (6th Cir. 1993) at **1 (failure to object at trial generally results in waiver but in this instance court led party to believe that motion in limine sufficed to preserve record). See also Polk v. Yellow Freight System, Inc., 876 F.2d 527, 532 (6th Cir. 1989) (D failed to preserve objection when motion in limine was denied and D "did not appeal this denial;" no mention of Rule 103).

[11] See e.g., United States v. Neumann, 867 F.2d 1102 (8th Cir. 1989); United States v. Kandiel, 865 F.2d 967, 972 (8th Cir. 1989); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1333-34 (8th Cir. 1985)(hearsay objection at trial did not preserve objection made at motion in limine to same evidence on Rule 401/403 grounds); Northwestern Flyers Inc. v. Olsen Bros. Mfgs., 679 F.2d 1264, 1275, n.27 (8th Cir. 1982). See also Stars v. J. Hacker Co., Inc., 688 F.2d 78 (8th Cir. 1982); United States v. Roenigk, 810 F.2d 809 (8th Cir. 1987) (dictum; defendant made objection at trial).

[12] The Tenth Circuit, albeit in dictum, has rejected the rule being advocated here. It would not excuse renewing an objection at trial even if the trial court's ruling on the motion in limine was "explicit and definitive." See McEwen v. City of Norman, Okla., 926 F.2d 1539, 1544 (10th Cir. 1991) (losing party failed to make motion in limine part of the record on appeal so that court concluded that it had nothing to review). See also United States v. Sides, 944 F.2d 1554, 1560 (10th Cir.), cert. denied, 112 S. Ct. 604 (1991).

[13] See e.g., United States v. Khoury, 901 F.2d 948, 966 (11th Cir. 1990). See also Hendrix v. Raybestos-Manhattan Inc., 776 F.2d 1492, 1503-04 (11th Cir. 1985).

limine ruling unless it objects at trial when the evidence is introduced.

b. Other circuits. Numerous cases in the Seventh Circuit state that the circuit's rule is that once a motion in limine is made no further objection must be made at trial to preserve the error.[14]

The Ninth Circuit's position is "unclear."[15] In a number of cases the court has suggested that an in limine motion may suffice to preserve an objection.[16] Other cases are to the

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[14] See Thronson v. Meisels, 800 F.2d 136, 142 (7th Cir. 1986); Sherrod v. Berry, 827 F.2d 195, 203 (7th Cir. 1987) (objections relating to Rule 401/403 evidentiary issues were preserved for appellate review when they were raised in motions in limine, treated in the district judge's opinion overruling the new trial motion, and were argued on the first day of trial; "under the circumstances, it was unnecessary under [Fed. R. Civ. P. 46] for defendants to review their objection at the time the evidence was admitted); Harris v. Davis, 874 F.2d 461, 464, n.5 (7th Cir. 1989), cert. denied, 493 U.S. 1027 (1990). See also Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("[w]hile the law in this circuit is that an unsuccessful motion in limine does preserve [an] issue for appeal," D failed to preserve its objection by objecting in a trial brief and failing to make a contemporaneous objection at trial). But see United States v. York, 933 F.2d 1343 (7th Cir.) (requires objection at trial; cites United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987) without discussion) cert. denied, 112 S. Ct. 321 (1991). York has been ignored in subsequent 7th Circuit cases. See e.g., Favala v. Cumberland Engineering Co., 17 F.3d 987 (7th Cir. 1994); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992).

[15] Palmerin v. City of Riverside, 1794 F.2d 1409, 1411 (9th Cir. 1986).

[16] See, e.g., United States v. Khan, 993 F.2d 1368, 1377 (9th Cir. 1993) (court held that defendant's objection to testimony of a particular witness in motion on limine on which judge never ruled did not constitute a pending or continuing objection to all like evidence, but suggests that he could have availed himself of the benefit of a continuing objection if he had requested that his earlier objection apply to all other like

contrary.[17]

The District of Columbia and the Second and Fourth Circuits do not seem to have dealt with this issue.

b. Rationale supporting the general rule. The courts have advanced the following reasons for the majority rule that requires a contemporaneous objection to be made at trial in order to preserve an issue for appellate review:

1. objections are best assessed in the context of the actual trial;[18]

2. unnecessary appeals should be avoided in order to preserve judicial resources;[19] and

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evidence); Sheey v. South Pacific Transp. Co., 631 F.2d 649, 652-653 (9th Cir. 1980) (losing party made no objection when evidence was introduced at trial, but attorney had objected during pretrial arguments to the court's ruling and the court held that "under
these circumstances" the objection was adequate to preserve the issue on appeal).

[17] See United States v. Traylor, 656 F.2d 1326, 1333, n.6 (9th Cir. 1981) (in holding that a contemporaneous objection to hearsay statements was required, court cited to Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980) without discussion). See also Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986)(excusing objection under certain conditions; see discussion below).

[18] Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980) contains a lengthy discussion of this rationale which courts cite to frequently).

[19] When a movant makes a contemporaneous objection at trial, it allows the court to either avoid the evidentiary violation or give an instruction to cure the harm. Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980). Furthermore. the rule "discourage counsel from refraining from making an objection at trial in order to reserve the opportunity to assert reversible error on appeal." U.S. v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987).

3. requiring a contemporaneous objection does not place any great burden on the movant.[20]

c. Exceptions to the general rule. The circuits have stated a number of different exceptions to the general majority rule. Just as with the statement of the rule itself, the statement of the exception often constitutes dictum in the setting of the particular case.[21] In formulating exceptions courts have singled out situations in which the evidentiary issue was handled at the motion in limine proceeding in a manner consistent with how it would be treated at trial. The conduct of the parties, the type of evidentiary issue, and the nature of the judge's ruling are all factors that courts have considered. Opinions in some of the circuits, like the amendment proposed above, excuse renewing the objection at trial when the judge has ruled definitively.[22] Other exceptions, however, also contain subjective elements, such

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[20] The rule requiring a contemporaneous objection at trial is justifiable because "[d]enial of a motion in limine rarely imposes a serious hardship on the requesting party since the affected party can make a subsequent objection if the evidence is ever offered at trial." Rojas v. Richardson, 703 F.2d 186, 188 (5th Cir. 1983), opinion set aside on other grounds at rehearing, 713 F.2d 116 (5th Cir. 1983). Another court referred to the burden of a contemporaneous objection as "child's play." See Fusco v. General Motors Corp., 11 F.3d 259, 262 (1st Cir. 1993).

[21] See, e.g., Freeman v. Package Machinery Co., 865 F.2d 1331, 1337 (1st Cir. 1988) ("[t]o be sure, there may be instances where a trial court's ruling on an in limine motion, taken in context, is definite enough to excuse omission of an objection on the point at trial.").

[22] Greger v. International Jensen, Inc., 820 F.2d 937, 941 (8th Cir. 1987) (objection at trial excused where trial judged had "ruled definitively).

as whether the issue was fully briefed,[23] or whether the trial court treated the motion in detail[24] that make predictability difficult.

Consequently, the proposed amendment proposes an objective standard. The losing party must obtain a definitive on-the-record ruling in order to avoid having to renew its objection at trial. By putting this requirement into Rule 103 courts will on notice of the consequences of making such a ruling. Courts are likely to rule finally only when they are satisfied that the parties have treated the matter adequately, and when the exclusion of evidence rests on an issue of law rather than on an exercise of discretion best made in the context of the trial.[25] For instance, Rule 403

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[23] American Home Assurance Co. v. Sunshine Supermarket Inc., 753 F.2d 321, 324 (3d Cir. 1985) (objection excused when motion in limine fully briefed and the trial court is able to make a definitive ruling); Spryczynatyk v. General Motors Corp., 771 F.2d 1112, 1118-19 (8th Cir. 1985) (trial court made a definite pre-trial ruling and thee "matter was fully briefed and argued"); Palmerin v. City of Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986) ("where the substance of the objection has been thoroughly explored during the hearing on the motion in limine, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve or appeal the issue of admissibility of that evidence.").

[24] United States v. Kerr, 770 F.2d 690, 698, n.8 (11th Cir. 1985) (dictum)

[25] Cf. United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir.) (holding that the motion in limine preserved the evidentiary issue for appeal because a three-part test was satisfied: 1) the issue was fairly presented to the district court at the time of the pre-trial hearing; 2) the issue could be finally determined at the hearing, a requirement that was met because a Rule 609(a)(2) question is essentially a question of law; and 3) the trial judge ruled unequivocally, cert. denied, 114 S. Ct. 334 (1992).

determinations are not going to be made definitively. Consequently, in practice, the proposed amendment would accommodate some of the more subjective factors that some of the circuits have included in their discussion of exceptions to the general rule. Even if the court makes a "final" ruling at the motion in limine, the last sentence of the proposed amendment recognizes that a court may always reconsider its ruling at trial.

The losing party offers the evidence the court refused to exclude. There is a definite split in the circuits as to whether the losing party waives its right to appellate review when it elicits the evidence at trial which it previously unsuccessfully sought to exclude at the motion in limine. In the Fifth[26] and Seventh[27] Circuits, the movant at the motion in limine does not forfeit its objection when it introduces the evidence for tactical reasons in order to lessen the sting. The Second Circuit has dealt with this issue only at the district court level.[28] The Tenth Circuit has not actually discussed this issue but has

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[26] Reyes v. Missouri Pacific RR Co., 589 F.2d 791, 793, n.2 (5th Cir. 1979) ("[a]fter the trial court refused to grant Reyes' motion in limine ..., he had no choice but to elicit the information on direct examination in an effort to ameliorate its prejudicial effect."); Petty v. Ideco, 761 F.2d 1146, 1152, n.3 (5th Cir. 1985).

[27] Cook v. Hoppin, 783 F.2d 684, 691, n.2 (7th Cir. 1986)(ruling on motion in limine is law of the case). Accord, Harris v. Davis, 874 F.2d 461, 464, n.5 (7th Cir. 1989).

[28] See United States v. Muscato, 534 F. Supp. 969, 973 (E.D.N.Y. 1982) (Weinstein, J.) (party did not waive a hearsay issue by introducing the evidence after the court denied his motion in limine to exclude).

allowed a losing party to raise an evidentiary issue on appeal after bringing out the evidence on direct.[29]

The Sixth,[30] Eighth,[31] and Ninth[32] Circuits have held that waiver of the evidentiary issue results when the movant introduces at trial the evidence which he previously sought to exclude.

The proposed draft would permit the losing party at the motion in limine to preserve the issue for appeal even though it introduces the disputed evidence at trial. Although this approach has been criticized for permitting a party to adopt a trial strategy that is in his best interest and then complaining about it, two considerations support such a rule. The first which pertains to objections made pursuant to Rule 609 in particular is

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[29] See U.S. v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1992) (discussed supra at note 25).

[30] U.S. v. Leon, 1992 WL 133039 at **2 (6th Cir. 1992) ("[a] motion in limine is merely a request for guidance from the court on an evidentiary question which the parties can utilize to guide their trial strategy." Thus "the denial of the motion in limine does not insulate the defense from the adverse effects of its trial strategy ...").

[31] The Eighth Circuit has consistently held that a movant's trial tactic of introducing disputed evidence precludes review of the evidentiary issue on appeal. See United States v. Brown, 956 F.2d 782 (8th Cir. 1992); United States v. Brimberry, 779 F.2d 1339 (8th Cir. 1985); Nicholson v. Layton, 747 F.2d 1225 (8th Cir. 1984) United States v. Dahlin, 734 F.2d 393 (8th Cir. 1984); United States v. Cobb, 588 F.2d 607 (8th Cir. 1978), cert. denied, 440 U.S. 947 (1979).

[32] See Williams v. United States, 939 F.2d 721, 723-25 (9th Cir. 1991) ("by not making an objection to the admission of past crimes evidence at trial, defendant waived his right to appeal the district court's in limine ruling that the evidence was admissible under Rule 608(a)(1).").

that the 1990 amendment to Rule 609 specifically

> remove[d] from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment.

Advisory Committee Note to 1990 Amendment.

It seems unfair to suggest that defendant's right to introduce evidence of the conviction on direct has been recognized without warning defendant that he will forfeit appellate review of the district court's pretrial ruling, especially since the rule in Luce, which is not being changed, will force him to testify in order to preserve an error.

More generally, a rule that conditions appellate review on not putting one's best foot forward with the jury seems harsh. Courts have expressed concerns that a rule such as the one here proposed encourages the losing party to proffer the evidence, thereby precluding the trial court from changing its in limine ruling.[33] However, the losing party is unlikely to offer the evidence if it believes that there is a realistic chance that the court will reverse itself and exclude the evidence at trial.

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[33] Williams v. United States, 939 F.2d 721, 724 (9th Cir. 1991) ("even if the court rules that the disputed evidence is admissible, it can later change its mind based on D's testimony or it my appear, as the trial proceeds that there is less of a need to impeach than previously thought ....").

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TO: Advisory Committee on the Federal Rules of Evidence

FROM: Margaret A. Berger, Reporter MAB

DATE: April 26, 1994

RE: Amending Rule 103

==========

1. Prior Committee action. At its fall meeting, the Committee expressed interest in further exploration of problems posed by the Supreme Court's opinion in Luce v. United States, 469 U.S. 38 (1984). Luce prohibits a defendant from raising on appeal a claim pursuant to Rule 609 unless the defendant testified and raised the objection at trial. Luce means that a defendant who is unsuccessful in having a prior conviction excluded through a motion in limine cannot have that determination reviewed on appeal unless he takes the stand. The Committee agreed that any modification of Luce's policy should be accomplished via Rule 103 rather than Rule 609 because opening Rule 609 to Congressional review might well be counter-productive.

Rule 103 does not presently contain any provision dealing with in limine motions. Drafting such a section requires the resolution of a number of issues that lie beyond the scope of the

Luce opinion itself. Accordingly, this memorandum first discusses Luce and the Supreme Court's rationale. It then considers the extent to which Luce has been applied outside the Rule 609 context, the contemporaneous objection rule, and possible changes to Rule 103.

2. Luce. In Luce v. United States, 469 U.S. 38, 43 (1984), the Court held "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." The Court justified its holding by stressing the difficulty a reviewing court encounters in ruling "on subtle evidentiary questions outside a factual context." Id. at 41. This is particularly a problem in view of the balancing test the court must apply pursuant to Rule 609(a)(1) to determine the admissibility of a prior conviction. The court needs to know the precise nature of the defendant's testimony which is, however, unknowable at the motion in limine stage before the defendant testifies. The Court found speculative any possible harm flowing from a district court ruling allowing impeachment and voiced concern that appellate review without requiring the accused's testimony would encourage defendants to make in limine motions "to 'plant' reversible error in the event of conviction." Furthermore, the Court expressed concern that allowing appeals from adverse rulings on motions in limine would promote a windfall of automatic reversals, since error which presumptively kept the defendant from testifying could not logically be called harmless.

Critics of Luce have pointed primarily to the decision's effect in keeping defendants off the stand for fear that they will be convicted once the jury hears of their prior convictions. That fear, coupled with the appellate courts' extensive reliance on harmless error, means that a defendant may conclude that the lesser danger is to forgo testifying in his own behalf. Consequently, if the trial court was wrong in its in limine determination, or refuses to make one, the defendant forfeits the protection of Rule 609(a) which was specifically drafted to protect defendant against the danger that prior crime evidence offered to impeach will be misused on a propensity inference. See Advisory Committee Note to 1990 Amendment ("the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice").

Critics have also argued that appellate courts can take into account the fact that defendant's proffer may be self-serving and can still apply a harmless error test even if they assume that the erroneous ruling caused defendant not to take the stand. Furthermore, exclusion of a conviction may be conditioned on defendant's trial testimony being consonant with the terms of a proffer made at the in limine hearing.

The states are split on adopting the Luce approach. See Annot., 88 A.L.R. 4th 1028. Some states that do not follow Luce have added special provisions to their rules of evidence (see below); others have reached this result via court decisions. The

opinions indicate some disagreement about the record that defendant must make at the in limine hearing.

3. Extensions of Luce. Justice Brennan's concurring opinion in Luce stated: "I do not understand the Court to be deciding broader questions of appealability vel non of in limine rulings that do not involve Rule 609(a)." The Second, Sixth and Eleventh Circuits have, however, extended Luce to impeachment pursuant to Rule 608(b). See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (per curiam) (defendant failed to testify), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson, 966 F.2d 184, 189-90 (6th Cir. 1992); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (witness failed to testify), cert. denied, 474 U.S. 860 (1985). The First Circuit has refused to review a Rule 403 determination in the absence of testimony by the accused (United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987), cert. denied, 484 U.S. 844 (1987). And the Eighth Circuit has stated that Luce applies to a Rule 404(b) determination, and refused to review a claimed error pursuant to that rule when defendant failed to testify. See United States v. Johnson, 767 F.2d 1259 (8th Cir. 1985) (court ruled that evidence would be usable for rebuttal and cross-examination).

4. The contemporaneous objection rule. Rule 103(a)(1) provides that rulings admitting evidence cannot be assigned as error on appeal unless "a timely objection or motion to strike appears of record." Does this rule require a party to renew its objection at trial when the evidence is offered if the court

previously denied the party's motion in limine to exclude the evidence? See Catherine Young, Should a Motion in Limine or Similar Preliminary Motion Made in the Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection? 74 Ky. L. J. 177 (1990) (reporting a split among the circuits).

In the case of prior conviction evidence, the contemporaneous exception rule intersects with the Luce rule and may cause additional problems for the defendant. If the defendant testifies at trial, thereby satisfying Luce, a rigid view of Rule 103(a) precludes appellate review if the defendant brings out the conviction on direct, as permitted by Rule 609, in order to remove its sting. See Williams v. United States, 939 F.2d 721, 723-25 (9th Cir. 1991).

5. Possible amendments to Rule 103.

a. Should a motion in limine provision be added with an exception to the contemporaneous objection rule? A number of different solutions are possible.

1) Do not add a motion in limine provision. This resolution does not mean that a failure to renew an objection at trial after an adverse in limine determination will always be fatal to appellate review. Some of the circuits have carved out limited exceptions. See, e.g., United States v. Mejia-Alarcon, 996 F.2d 982 (10th Cir. 1992) (defendant brought out conviction on direct after judge found at in limine hearing that defendant's prior conviction for the unauthorized acquisition and possession of food stamps involved dishonesty or false statement and was

therefore automatically admissible pursuant to Rule 609(a)(2); appellate court found that under these circumstances the motion in limine preserved the objection because it satisfied a three-part test: 1. the issue was fairly presented to the district court at the time of the pre-trial hearing; 2. the issue could be finally determined at the hearing, a requirement which was met because a Rule 609(a)(2) question is essentially a question of law; and 3. the judge ruled unequivocally).[1] Courts have also sometimes excused the need for a contemporaneous objection when it obviously would have been useless. See United States v. Lui, 941 F.2d 844 (9th Cir. 1991) (court threatened defendant with sanctions for moving in limine to exclude drug courier profile evidence).

The disadvantage with this approach is that the party who fails to object can never be sure that the circuits' various exceptions will apply in a particular case. Consequently, a number of suggestions have been made for codifying the circumstances in which a prior motion in limine will excuse further objection at trial.

2) Amend the rule to require the judge to specify at the in limine motion whether a further objection must be made at trial. One possible version of such an addition to Rule 103 was proposed by the ABA Criminal Justice Section, Committee on

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[1] For other cases in which courts applied a similar test see Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986); Greger v. International Jensen, Inc, 820 F.2d 937 (8th Cir. 1987); Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986) (thoroughly explored and definitive ruling).

Rules of Criminal Procedure and Evidence, Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299 (1987). It suggested adding to Rule 103(a)(1):

> (a) A ruling on a motion in limine that evidence subject to the motion is admissible shall be sufficient to preserve the issue for appeal without any further objection by the losing party during trial, unless the court specifically notifies the parties that its ruling is tentative and the motion should be renewed at trial.
>
> (b) During trial, the court can change any in limine ruling for good cause shown.

It would of course also be possible to draft such a rule in the reverse, eliminating the need to make an objection at trial if the court advises the losing party that it need not renew the objection. The advantage of either approach is that the losing party will know when to renew the objection at trial. It will not, however, always allow a defendant to preserve his right to raise the issue on appeal when he introduces evidence on direct of a conviction which the court admitted pursuant to Rule 609(a)(1).

3) Amend the rule to eliminate the need for an objection at trial if the issue was explored fully at the in limine hearing. Kentucky added a subdivision (d) to its version of Rule 103 that not only makes contemporaneous objections unnecessary under some circumstances but also simultaneously overcomes Luce when the provision applies:

> (d) Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. the court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A

> motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

The Commentary to the provision first explains the value of motions in limine and expresses the hope that the provision will encourage more widespread use of the device. The Commentary then discusses the second and last sentence of subdivision (d):

> The second sentence is intended to recognize that such motions might frame issues which can only be resolved properly in the context of developments at trial and that the trial judge must be given great latitude to make or refuse to make advance rulings on admissibility.
>
> In some jurisdictions the case law leaves doubt about the extent to which motions in limine may be used to preserve errors for review. . . Subdivision (d) eliminates this doubt by providing that motions in limine resolved by order of record are sufficient to preserve error for appellate review. By requiring that such motions be resolved by "order of record," an adequate record for the appeals court should be assured. it should be noted that a motion in limine would not be sufficient to preserve errors for appellate review unless it provided the trial court with the type of information which would be required to preserve errors raised at trial (i.e. information sufficient to satisfy the requirements of subdivision (a) --the specific ground for any objection being made and the substance of any evidence being offered).
>
> The last sentence of the provision merely recognizes aa right in the trial court to reconsider advance rulings on evidence issues in the light of developments at trial. the provision does not attempt to define the circumstances under which reconsideration would be appropriate. But it could be expected that reconsideration would only be necessary in unusual situations, for a trial judge should not provide advance rulings on admissibility in situations which might call for reconsideration at trial.

Kentucky's formulation leaves somewhat uncertain when defendant can risk not making an objection at trial. See

discussion of United States v. Mejia-Alarcon, supra. The rule does not indicate when the record will be adequate to overcome the timely objection requirement and the Luce ruling. Must the defendant proffer his testimony at the in limine hearing?

4) Other formulations. The ABA Criminal Justice Section's Committee suggested a number of additions to Rule 103 specifically responsive to the Luce opinion. See discussion infra. The proposal also preserves the right to an appeal if the defendant brings out the evidence of his prior conviction on direct provided certain conditions are met. Such a provision could be drafted independently of provisions aimed at overruling Luce.

One might also seek to codify the test in Mejia-Alarcon. The result would be a provision stressing both an explicit ruling by the trial court and an adequate exploration of the issue at the limine hearing, i.e. somewhat of a cross between the ABA Criminal Section's proposed subdivision(a)(1) and Kentucky's subdivision (d).

b. Overruling Luce. Instead of, or in addition to, dealing with motions in limine in general, the Committee might wish to address the issues posed by the Court's holding in Luce. State judicial decisions which have declined to follow Luce can be divided into two broad categories: 1. defendant need not testify at trial in order to preserve for appeal an adverse ruling that admits a prior criminal conviction for impeachment; 2. defendant's failure to testify at trial preserves for appeal

an adverse ruling concerning the admissibility of prior convictions only if the defendant created an adequate record to permit appellate review. Compare State v. Whitehead, 517 A.2d 373 (N.J. 1986) (found that appellate court could review the trial court's decision without requiring a proffer from defendant and that requiring a proffer exposes the defendant to the tactical disadvantage of prematurely disclosing his testimony) with State v. McClure, 692 P.2d 579 (Ore. 1984) (in order to preserve issue for appeal defendant must establish on record that he will in fact take the stand and testify if convictions are excluded, and must outline sufficiently the nature of his testimony so that appellate court can effectively balance). These solutions and others are discussed below.

1) Restricting Luce's impact to the facts of the case. Courts have gone beyond the specific holding of Luce: 1. by extending the ruling to rules of evidence other than rule 609; 2. by foreclosing the non-testifying defendant from raising the propriety of the trial judge's ruling with regard to the admissibility of prior convictions even when the court finds the conviction automatically admissible pursuant to Rule 609(a)(2) so that it does not have to engage in any balancing; 3. in Luce, the defendant had made no proffer as to what his testimony would be 469 U.S. at 462. A provision could be drafted requiring defendant to testify in order to raise a Rule 609(a)(1) issue on appeal unless he made an adequate proffer at the motion in limine, and providing that other situations would be handled by some version

of a motion in limine rule as suggested above.

2) Requiring defendant to make an adequate proffer of evidence at the motion in limine in order to preserve the right to appellate review. A provision that relieves defendant from testifying at trial but conditions appellate review on the adequacy of defendant's proffer is consistent with the Luce opinion's basic premise that appellate courts cannot review the trial court's balancing in the absence of an adequate record. The Kentucky provision quoted above is one example of a rule that would require defendant to offer some information, although it is very vague as to what is required.

A more detailed provision was suggested by the ABA Criminal Justice Section's Committee. It proposed that the following two sections be added to Rule 103 (in addition to the general provision on motions in limine set forth above):

> (2)(a) If the in limine motion concerns impeachment of the criminal defendant, the court shall rule (and the ruling shall be made subject to later evidentiary considerations) as early as practicable, and no later than when the defendant is called as a witness. (b) Any ruling made at the time the defendant is called as a witness shall be subject to change only if he or she testifies in a manner so differently from that indicated to the court at the time of the ruling that it would have affected the ruling.
>
> (3) if the ruling in limine admits impeachment concerning a criminal defendant's wrongdoing or conviction of crime, the merits of the evidentiary issue shall be preserved for appeal even if the witness-defendant personally testifies to the impeaching facts on direct examination, or does not testify at all, as a result of the ruling, if he or she:
>
> (a) indicated to the court an intention to testify at trial; and
> (b) made known the substance of his or her

proposed testimony on the record before the court ruled on the admissibility of the impeachment.

c. Relieving defendant of any obligation to testify at trial or to make a proffer in order to preserve for appellate review a ruling that admits evidence of a prior conviction. As indicated above, some state courts have rejected the Luce rationale that an appellate court cannot properly review the trial court's decision absent testimony or a proffer of testimony by the accused. See also Commonwealth v. Richardson, 500 A.2d 1200 (Pa. 1985); State v. Ford, 381 N.W.2d 534 (Minn. 1986). This had been the rule in some federal circuits prior to Luce.

Tennessee has incorporated this approach into its version of Rule 609:

> (a)(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. if the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

See also Kentucky's Rule 103(d) discussed at 5.a.(3), supra.

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Rules Committee Support Office

October 15, 1996
Via Facsimile

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Rule Changes Needed Because of New Legislation*

On October 3 and 4, the Congress passed the *Federal Courts Improvement Act of 1996* (S. 1887). It now awaits the President's signature. Section 207 of the Act amends the appeal provisions contained in 28 U.S.C. § 636(c) and (d), which deal with civil cases tried by magistrate judges. The amendment eliminates an optional appeal route to the district judge and a further discretionary appeal to the circuit court. (See attachment.)

Rule 73(d) of the Federal Rules of Civil Procedure refers to the optional appeal route. Rules 74, 75, and 76 set out the procedures governing the optional appeal route to the district judge. The *Courts Improvements Act* may obviate the need for the provision and the rules. Under our procedures, "the Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming (statutory) amendment, it determines that notice and comment are not appropriate or necessary."

I am attaching a memorandum from Professor Edward H. Cooper reflecting his preliminary views on this topic. It will be discussed at the meeting.

John K. Rabiej

Attachments

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

S. 1887

One Hundred Fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, one thousand nine hundred and ninety-six

An Act

To make improvements in the operation and administration of the Federal courts, and for other purposes.

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1996".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

Sec. 101. New authority for probation and pretrial services officers.

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

Sec. 201. Duties of magistrate judge on emergency assignment.
Sec. 202. Consent to trial in certain criminal actions.
Sec. 203. Registration of judgments for enforcement in other districts.
Sec. 204. Vacancy in clerk position; absence of clerk.
Sec. 205. Diversity jurisdiction.
Sec. 206. Removal of cases against the United States and Federal officers or agencies.
Sec. 207. Appeal route in civil cases decided by magistrate judges with consent.
Sec. 208. Reports by judicial councils relating to misconduct and disability orders.

TITLE III—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

SEC. 207. APPEAL ROUTE IN CIVIL CASES DECIDED BY MAGISTRATE JUDGES WITH CONSENT.

Section 636 of title 28, United States Code, is amended—

(1) in subsection (c)—

(A) in paragraph (3) by striking out "In this circumstance, the" and inserting in lieu thereof "The";

(B) by striking out paragraphs (4) and (5); and

(C) by redesignating paragraphs (6) and (7) as paragraphs (4) and (5); and

(2) in subsection (d) by striking out ", and for the taking and hearing of appeals to the district courts,".

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October 13, 1996

John K. Rabiej, Esq.
Chief, Rules Committee Support Office
Administrative Office of the United States Courts
by FAX: 202.273.1826 Six Pages

Re: Abolition of district court appeals from magistrate judges

Dear John:

Thank-you for sending along § 207 of S.1887, the Federal Courts Improvement Act of 1996. The revisions of 28 U.S.C. § 636(c) and (d) do indeed appear to abolish the opportunity for parties who have consented to trial on the merits before a magistrate judge to consent also to take the initial appeal to the district court.

This is the sort of thing I hate to act on at a moment's notice. Part of my difficulty is residual concern that Congress may have acted too quickly in abolishing the opportunity to appeal to the district court. This doubt keeps getting in the way. At any rate, I have read and reread the provisions of Civil Rules 73, 74, 75, and 76 to see what changes are required to conform to the new statute. I *think* I have it right, but want other eyes to look at it.

To conform with the deletion of this alternative appeal path, Civil Rules 73(d), 74, 75, and 76 should be abrogated. Rule 73(a) must be amended to conform to the new paragraph numbering in § 636(c). Rule 73(c) must be revised; there is a fair argument that it would better be deleted, but I am not sure that is an appropriate step to take without further deliberation.

I attach pages that illustrate my understanding of the amendments to § 636(c) and the changes that should be made in Rule 73(a), (c), and (d).

In addition, I attach the November, 1995 version of the Note on possible revision of Rule 73(b). It is updated to reflect one additional Seventh Circuit decision. If we decide in favor of immediate action on the conforming parts of Rule 73, and abrogation of Rules 74, 75, and 76, I think we should not attempt to add Rule 73(b) to the mix. This is something more than a conforming amendment, although perhaps not much more. I also do not think that the

possibility of amending Rule 73(b) affords a particularly strong argument for slowing down on the other changes.

The case for going forward immediately with conforming amendments is strong, particularly if informal soundings indicate that the Supreme Court would not be reluctant to act by the end of April on proposals transmitted by the Judicial Conference in March. The most effective alternative is to point out to the various publishers in print and space that a caveat should be added to Rules 73 through 76. That might work well enough, but in all it looks very strange to have a process that takes not one year but two to conform the rules to a statutory amendment like this.

I am sending a copy of these materials to Judge Carroll in the hope that he can lend an expert eye before the meeting later this week. If we can all agree that the task is as straightforward as it first appears, I will be much comforted.

Best,

Edward H. Cooper

EHC/lm
attachs
FC: Hon. Paul V. Niemeyer, 410.962.2277
Hon. John L. Carroll, 334.223.7114

Rule 73 Conforming Changes

Rule 73. Magistrate Judges; Trial by Consent ~~and appeal Options~~

(a) Powers; Procedure. When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(~~5~~).

* * *

(c) ~~Normal~~ Appeal Route. In accordance with Title 28, U.S.C. § 636(c)(3), ~~unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule,~~ appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

~~**(d) Optional Appeal Route. In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge of the court and thereafter, by petition only, to the court of appeals.**~~

Subdivision (c) might be deleted entirely. Or it might be revised to conform to the provisions of 28 U.S.C. § 636(c)(1) and (3). Section 636(c)(1) provides that when a magistrate judge is authorized and the parties consent, the magistrate judge "may * * * order the entry of judgment in the case * * *." Section 636(c)(3) provides that: "The consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure."

Rule 73(c) could be revised to read:

(c) ~~Normal Appeal Route.~~ <u>Entry of Judgment[; Appeal]</u>. <u>A magistrate judge trying a case under this rule may enter a judgment of the district court [under these rules]. [Appeal from a judgment entered by a magistrate judge lies to the court of appeals.]</u>

28 U.S.C. § 636 — as amended by S. 1887 October 3, 4 1996

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. ~~In this circumstance,~~ the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

~~(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.~~

~~(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgement. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.~~

4 (6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

5 (7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter ~~and for the taking and hearing of appeals to the district courts~~ shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

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. And in Smith v. Shawnee Library System, C.A.7th, 1995, 60 F.3d 317, 320-321, the court accepted consents given by the later-added parties following argument in the court of appeals. At the same time, it observed that if any of them had failed to consent, "that would be an end of it" – the appeal must have been dismissed. It further suggested that this approach opens up obvious opportunities "to play strategy games," but that these opportunities flow from the earlier circuit decisions.)

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.

U. S. Department of Justice

Civil Division

October 2, 1996
6:41 pm
1 Page

TO : MARK KASANIN
MCCUTCHEON

Fax No : 914153932286

From : BERNS

Subject : ADMIRALTY RULES B, C, AND E

Comments :

Mark: In the Introductory Note the professor seems to indicate that the MLA made all of the proposals as to everything except Rule C(1). This may indicate to the Committee that Justice had no interest in them. To the contrary, as the Marshal Service and the United States as a major ship operator and preferred ship mortgagee are most affected by these changes, we recommended many of the changes and worked with the MLA from the beginning in making all of the proposals and agreeing on the language. Further, we jointly replied to the professor's queries.

Insofar as the professor's comments re Rule C(6)(a) ["lines 86 ff."]--I am quite puzzled in his characterizing it as "awkward". The attempt was made to track both (a) and (b) together while following the professor's forwarded comments. A reading of both proposals establishes that was accomplished, the only difference being the specific references to the interests who were affected in each.

I would appreciate your passing these comments on to the professor.

1996 OCT -2 PM 3:52

Other Recipients:

TO: BOB ZAPF LANE POWELL

S. 1887

One Hundred Fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, one thousand nine hundred and ninety-six

An Act

To make improvements in the operation and administration of the Federal courts, and for other purposes.

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1996".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—CRIMINAL LAW AND CRIMINAL JUSTICE AMENDMENTS

Sec. 101. New authority for probation and pretrial services officers.

TITLE II—JUDICIAL PROCESS IMPROVEMENTS

Sec. 201. Duties of magistrate judge on emergency assignment.
Sec. 202. Consent to trial in certain criminal actions.
Sec. 203. Registration of judgments for enforcement in other districts.
Sec. 204. Vacancy in clerk position; absence of clerk.
Sec. 205. Diversity jurisdiction.
Sec. 206. Removal of cases against the United States and Federal officers or agencies.
Sec. 207. Appeal route in civil cases decided by magistrate judges with consent.
Sec. 208. Reports by judicial councils relating to misconduct and disability orders.

TITLE III—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

Sec. 301. Senior judge certification.
Sec. 302. Refund of contribution for deceased deferred annuitant under the Judicial Survivors' Annuities System.
Sec. 303. Bankruptcy judges reappointment procedure.
Sec. 304. Technical correction related to commencement date of temporary judgeships.
Sec. 305. Full-time status of court reporters.
Sec. 306. Court interpreters.
Sec. 307. Technical amendment related to commencement date of temporary bankruptcy judgeships.
Sec. 308. Contribution rate for senior judges under the judicial survivors' annuities system.
Sec. 309. Prohibition against awards of costs, including attorney's fees, and injunctive relief against a judicial officer.

TITLE IV—JUDICIAL FINANCIAL ADMINISTRATION

Sec. 401. Increase in civil action filing fee.
Sec. 402. Interpreter performance examination fees.
Sec. 403. Judicial panel on multidistrict litigation.
Sec. 404. Disposition of fees.

TITLE V—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

Sec. 501. Qualification of Chief Judge of Court of International Trade.

(B) in the second sentence by inserting "judge" after "magistrate" each place it appears;

(C) by striking out the third sentence and inserting in lieu thereof the following: "The magistrate judge may not proceed to try the case unless the defendant, after such explanation, expressly consents to be tried before the magistrate judge and expressly and specifically waives trial, judgment, and sentencing by a district judge. Any such consent and waiver shall be made in writing or orally on the record."; and

(D) by striking out "judge of the district court" each place it appears and inserting in lieu thereof "district judge".

(2) Section 3401(g) of title 18, United States Code, is amended by striking out the first sentence and inserting in lieu thereof the following: "The magistrate judge may, in a petty offense case involving a juvenile, that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction, exercise all powers granted to the district court under chapter 403 of this title. The magistrate judge may, in any other class B or C misdemeanor case involving a juvenile in which consent to trial before a magistrate judge has been filed under subsection (b), exercise all powers granted to the district court under chapter 403 of this title.".

(b) AMENDMENTS TO TITLE 28.—Section 636(a) of title 28, United States Code, is amended—

(1) by striking out ", and" at the end of paragraph (3) and inserting in lieu thereof a semicolon; and

(2) by striking out paragraph (4) and inserting the following:

"(4) the power to enter a sentence for a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction; and

"(5) the power to enter a sentence for a class A misdemeanor, or a class B or C misdemeanor not covered by paragraph (4), in a case in which the parties have consented.".

SEC. 203. REGISTRATION OF JUDGMENTS FOR ENFORCEMENT IN OTHER DISTRICTS.

(a) IN GENERAL.—Section 1963 of title 28, United States Code, is amended—

(1) by amending the section heading to read as follows:

"§ 1963. Registration of judgments for enforcement in other districts";

(2) in the first sentence—

(A) by striking out "district court" and inserting in lieu thereof "court of appeals, district court, bankruptcy court,"; and

(B) by striking out "such judgment" and inserting in lieu thereof "the judgment"; and

(3) by adding at the end thereof the following new undesignated paragraph:

"The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.".

(1) in subsection (c)—

(A) in paragraph (3) by striking out "In this circumstance, the" and inserting in lieu thereof "The";

(B) by striking out paragraphs (4) and (5); and

(C) by redesignating paragraphs (6) and (7) as paragraphs (4) and (5); and

(2) in subsection (d) by striking out ", and for the taking and hearing of appeals to the district courts,".

SEC. 208. REPORTS BY JUDICIAL COUNCILS RELATING TO MISCONDUCT AND DISABILITY ORDERS.

Section 332 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(g) No later than January 31 of each year, each judicial council shall submit a report to the Administrative Office of the United States Courts on the number and nature of orders entered under this section during the preceding calendar year that relate to judicial misconduct or disability.".

TITLE III—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

SEC. 301. SENIOR JUDGE CERTIFICATION.

(a) RETROACTIVE CREDIT FOR RESUMPTION OF SIGNIFICANT WORKLOAD.—Section 371(f)(3) of title 28, United States Code, is amended by striking out "is thereafter ineligible to receive such a certification." and inserting in lieu thereof "may thereafter receive a certification for that year by satisfying the requirements of subparagraph (A), (B), (C), or (D) of paragraph (1) of this subsection in a subsequent year and attributing a sufficient part of the work performed in such subsequent year to the earlier year so that the work so attributed, when added to the work performed during such earlier year, satisfies the requirements for certification for that year. However, a justice or judge may not receive credit for the same work for purposes of certification for more than 1 year.".

(b) AGGREGATION OF CERTAIN WORK FOR PARTIAL YEARS.—Section 371(f)(1) of title 28, United States Code, is amended by adding at the end of subparagraph (D) the following: "In any year in which a justice or judge performs work described under this subparagraph for less than the full year, one-half of such work may be aggregated with work described under subparagraph (A), (B), or (C) of this paragraph for the purpose of the justice or judge satisfying the requirements of such subparagraph.".

SEC. 302. REFUND OF CONTRIBUTION FOR DECEASED DEFERRED ANNUITANT UNDER THE JUDICIAL SURVIVORS' ANNUITIES SYSTEM.

Section 376(o)(1) of title 28, United States Code, is amended by striking out "or while receiving 'retirement salary'," and inserting in lieu thereof "while receiving retirement salary, or after filing an election and otherwise complying with the conditions under subsection (b)(2) of this section,".

SEC. 308. CONTRIBUTION RATE FOR SENIOR JUDGES UNDER THE JUDICIAL SURVIVORS' ANNUITIES SYSTEM.

Section 376(b)(1) of title 28, United States Code, is amended to read as follows:

"(b)(1) Every judicial official who files a written notification of his or her intention to come within the purview of this section, in accordance with paragraph (1) of subsection (a) of this section, shall be deemed thereby to consent and agree to having deducted and withheld from his or her salary a sum equal to 2.2 percent of that salary, and a sum equal to 3.5 percent of his or her retirement salary. The deduction from any retirement salary—

"(A) of a justice or judge of the United States retired from regular active service under section 371(b) or section 372(a) of this title,

"(B) of a judge of the United States Court of Federal Claims retired under section 178 of this title, or

"(C) of a judicial official on recall under section 155(b), 373(c)(4), 375, or 636(h) of this title,

shall be an amount equal to 2.2 percent of retirement salary.".

SEC. 309. PROHIBITION AGAINST AWARDS OF COSTS, INCLUDING ATTORNEY'S FEES, AND INJUNCTIVE RELIEF AGAINST A JUDICIAL OFFICER.

(a) NONLIABILITY FOR COSTS.—Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney's fees, in any action brought against such officer for an act or omission taken in such officer's judicial capacity, unless such action was clearly in excess of such officer's jurisdiction.

(b) PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended by inserting before the period at the end thereof ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction".

(c) CIVIL ACTION FOR DEPRIVATION OF RIGHTS.—Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting before the period at the end of the first sentence: ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

TITLE IV—JUDICIAL FINANCIAL ADMINISTRATION

SEC. 401. INCREASE IN CIVIL ACTION FILING FEE.

(a) FILING FEE INCREASE.—Section 1914(a) of title 28, United States Code, is amended by striking out "$120" and inserting in lieu thereof "$150".

(b) DISPOSITION OF INCREASE.—Section 1931 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out "$60" and inserting in lieu thereof "$90"; and

(2) in subsection (b)—

SEC. 404. DISPOSITION OF FEES.

(a) DISPOSITION OF ATTORNEY ADMISSION FEES.—For each fee collected for admission of an attorney to practice, as prescribed by the Judicial Conference of the United States pursuant to section 1914 of title 28, United States Code, $30 of that portion of the fee exceeding $20 shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code. Any portion exceeding $5 of the fee for a duplicate certificate of admission or certificate of good standing, as prescribed by the Judicial Conference of the United States pursuant to section 1914 of title 28, United States Code, shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code.

(b) DISPOSITION OF BANKRUPTCY COMPLAINT FILING FEES.—For each fee collected for filing an adversary complaint in a bankruptcy proceeding, as established in Item 6 of the Bankruptcy Court Miscellaneous Fee Schedule prescribed by the Judicial Conference of the United States pursuant to section 1930(b) of title 28, United States Code, the portion of the fee exceeding $120 shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code.

(c) EFFECTIVE DATE.—This section shall take effect 60 days after the date of the enactment of this Act.

TITLE V—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

SEC. 501. QUALIFICATION OF CHIEF JUDGE OF COURT OF INTERNATIONAL TRADE.

(a) IN GENERAL.—Chapter 11 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 258. Chief judges; precedence of judges

"(a)(1) The chief judge of the Court of International Trade shall be the judge of the court in regular active service who is senior in commission of those judges who—

"(A) are 64 years of age or under;

"(B) have served for 1 year or more as a judge of the court; and

"(C) have not served previously as chief judge.

"(2)(A) In any case in which no judge of the court meets the qualifications under paragraph (1), the youngest judge in regular active service who is 65 years of age or over and who has served as a judge of the court for 1 year or more shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no judge of the court in regular active service who has served as a judge of the court for 1 year or more, the judge of the court in regular active service who is senior in commission and who has not served previously as chief judge shall act as the chief judge.

"(3)(A) Except as provided under subparagraph (C), the chief judge serving under paragraph (1) shall serve for a term of 7 years and shall serve after expiration of such term until another judge is eligible under paragraph (1) to serve as chief judge.

International Trade shall be filled in accordance with section 258(a) of title 28, United States Code.

TITLE VI—MISCELLANEOUS

SEC. 601. PARTICIPATION IN JUDICIAL GOVERNANCE ACTIVITIES BY DISTRICT, SENIOR, AND MAGISTRATE JUDGES.

(a) JUDICIAL CONFERENCE OF THE UNITED STATES.—Section 331 of title 28, United States Code, is amended by striking out the second undesignated paragraph and inserting in lieu thereof the following:

"The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit and shall serve as a member of the Judicial Conference of the United States for a term of not less than 3 successive years nor more than 5 successive years, as established by majority vote of all circuit and district judges of the circuit. A district judge serving as a member of the Judicial Conference may be either a judge in regular active service or a judge retired from regular active service under section 371(b) of this title.".

(b) BOARD OF THE FEDERAL JUDICIAL CENTER.—Section 621 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out paragraph (2) and inserting in lieu thereof the following:

"(2) two circuit judges, three district judges, one bankruptcy judge, and one magistrate judge, elected by vote of the members of the Judicial Conference of the United States, except that any circuit or district judge so elected may be either a judge in regular active service or a judge retired from regular active service under section 371(b) of this title but shall not be a member of the Judicial Conference of the United States; and"; and

(2) in subsection (b) by striking out "retirement," and inserting in lieu thereof "retirement pursuant to section 371(a) or section 372(a) of this title,".

SEC. 602. THE DIRECTOR AND DEPUTY DIRECTOR OF THE ADMINISTRATIVE OFFICE AS OFFICERS OF THE UNITED STATES.

Section 601 of title 28, United States Code, is amended by adding at the end thereof the following: "The Director and Deputy Director shall be deemed to be officers for purposes of title 5, United States Code.".

SEC. 603. REMOVAL OF ACTION FROM STATE COURT.

Section 1446(c)(1) of title 28, United States Code, is amended by striking out "petitioner" and inserting in lieu thereof "defendant or defendants".

SEC. 604. FEDERAL JUDICIAL CENTER EMPLOYEE RETIREMENT PROVISIONS.

Section 627(b) of title 28, United States Code, is amended—

(1) in the first sentence by inserting "Deputy Director," before "the professional staff"; and

(2) in the first sentence by inserting "chapter 84 (relating to the Federal Employees' Retirement System)," after "(relating to civil service retirement),".

(3) Section 1152 of the Northeast Rail Service Act of 1981 (45 U.S.C. 1105) is amended by striking out subsection (b) and inserting in lieu thereof the following:

"(b) APPEAL.—An order or judgment of the United States District Court for the District of Columbia in any action referred to in this section shall be reviewable in accordance with sections 1291, 1292, and 1294 of title 28, United States Code.".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—(1) Section 209 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719) is further amended—

(A) in subsection (g) by inserting "or Court of Appeals for the District of Columbia Circuit" after "Supreme Court"; and

(B) by striking out subsection (h).

(2) Section 305(d)(4) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 745(d)) is amended by striking out "a judge of the United States district court with respect to such proceedings and such powers shall include those of".

(3) Section 1135(a)(8) of the Northeast Rail Service Act of 1981 (45 U.S.C. 1104(8)) is amended to read as follows:

"(8) 'Special court' means the judicial panel established under section 209(b)(1) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(b)(1)) or, with respect to any proceedings that arise or continue after the panel is abolished pursuant to section 209(b)(2) of such Act, the United States District Court for the District of Columbia.".

(4) Section 1152 of the Northeast Rail Service Act of 1981 (45 U.S.C. 1105) is further amended by striking out subsection (d).

(d) PENDING CASES.—Effective 90 days after the date of enactment of this Act, any case pending in the special court established under section 209(b) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(b)) shall be assigned to the United States District Court for the District of Columbia as though the case had originally been filed in that court. The amendments made by subsection (b) of this section shall not apply to any final order or judgment entered by the special court for which—

(1) a petition for writ of certiorari has been filed before the date on which the special court is abolished; or

(2) the time for filing a petition for writ of certiorari has not expired before that date.

(e) EFFECTIVE DATE.—The amendments made by subsections (b) and (c) of this section shall take effect 90 days after the date of enactment of this Act and, except as provided in subsection (d), shall apply with respect to proceedings that arise or continue after such effective date.

SEC. 606. PLACE OF HOLDING COURT IN THE DISTRICT COURT OF UTAH.

(a) NORTHERN DIVISION.—Section 125(1) of title 28, United States Code, is amended by inserting "Salt Lake City and" before "Ogden".

(b) CENTRAL DIVISION.—Section 125(2) of title 28, United States Code, is amended by inserting ", Provo, and St. George" after "Salt Lake City".

(c) APPLICABILITY.—The amendments made by this section apply to cases pending on the date of the enactment of this Act and to cases commenced on or after such date.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

Cite as 96 C.D.O.S. 7430

MONICA VALENTINO; MICHAEL A. HACKARD; HUGO S. JENNINGS; WANDA S. O'CONNOR, individually and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

CARTER-WALLACE, INC.; WALLACE LABORATORIES, a division of Carter-Wallace, Inc., Defendants-Appellants.

No. 95-15935
United States Court of Appeals for the Ninth Circuit
D.C. No. CV-94-02867-EFL
Appeal from the United States District Court for the Northern District of California Eugene F. Lynch, District Judge, Presiding Argued and Submitted January 8, 1996—San Francisco, California Before: Mary M. Schroeder and Stephen S. Trott, Circuit Judges, and Edward C. Reed,* District Judge.

COUNSEL

Stephen R. Lang, Whitman, Breed, Abbott & Morgan, New York, New York, for the defendants-appellants.

Elizabeth J. Cabraser and William B. Hirsch, Lieff, Cabraser, Heimann & Bernstein, San Francisco, California; Arthur Sherman, Sherman, Dan & Portugal, Beverly Hills, California, for the plaintiffs-appellees.

Sheila L. Birnbaum, Skadden, Arps, Slate, Meagher & Flom, New York, New York; Hugh F. Young, Jr., Product Liability Advisory Council, Inc., Reston, Virginia, for the amicus.

Filed October 7, 1996

SCHROEDER, Circuit Judge:

This is an interlocutory appeal from a district court order under Fed. R. Civ. P. 23 conditionally certifying a nationwide plaintiff class and subclass in a products liability case against the manufacturer of a drug used for the treatment of epilepsy. The jurisdiction of the district court was grounded on diversity, and our jurisdiction is pursuant to certification under 28 U.S.C. § 1292(b).

The drug in question, known as Felbatol, is manufactured by defendants Carter-Wallace, Inc. and Wallace Laboratories (Carter-Wallace). Carter-Wallace began marketing the drug in August 1993 without giving any special warning of serious side effects. Between January 1994 and July 1994, Carter-Wallace received reports that some patients had developed aplastic anemia following use of the drug.[1] In August 1994, Carter-Wallace mailed letters to the physician community warning them of this risk. By September 1994, Carter-Wallace had also received reports of liver failure in connection with use of the drug. Again, Carter-Wallace mailed letters to the physician community warning them of this risk.

The district court determined that the prerequisites of Fed. R. Civ. P. 23(a) had been met.[2] The district court conditionally certified a plaintiff class consisting of "all persons who began using Felbatol prior to August 1, 1994." The district court also certified a "serious injury" subclass, defined as "all persons within the Felbatol user class who have developed or will develop aplastic anemia or liver failure, as a result of using Felbatol."

Pursuant to Fed. R. Civ. P. 23(c)(4)(A), the district court limited class certification to the issues of strict liability, negligence, failure to warn, breach of implied and express warranty, causation in fact, and liability for punitive damages. The district court stated that "[w]ith respect to these particular issues, common questions of law and/or fact predominate over any questions affecting only individual members and a class action is superior to other available methods for adjudication of the controversy." The court's order thus echoed the preponderance and superiority requirements of Fed. R. Civ. P. 23(b)(3).[3] The court specifically excluded the individual issues of proximate causation, compensatory damages, and the amount of punitive damages from certification.

In its certification order, the court did not discuss whether the adjudication of the certified issues would significantly advance the resolution of the underlying case, thereby achieving judicial economy and efficiency. Nor did the court discuss any alternative methods for adjudicating these claims.

According to the named plaintiffs, during the brief period involved in this litigation the drug was prescribed to over 100,000 patients, who were told that the drug was unlike other anti-epilepsy drugs in that this one had few adverse side effects. Plaintiffs claim that over 3,000 people have reported some adverse reactions from the drug to the United States Food & Drug Administration, and there have been over seventy reported cases of aplastic anemia or liver damage, including nearly twenty reported deaths. Withdrawal from the drug has also been difficult for many patients.

Plaintiffs contend, with considerable justification, that because the case involves only one manufacturer, only one product, only one marketing program, and a relatively short period of time, the case is more manageable for class action purposes than cases that involve multiple manufacturers, multiple products, multiple marketing programs, and a long period of time. It appears undisputed that the claims of all members of the class will raise some common issues concerning the knowledge and conduct of Carter-Wallace. Apparently, in recognition of these common issues, the Judicial Panel on Multidistrict Litigation (JPML) has consolidated pretrial proceedings in all federal Felbatol cases and transferred them to the Northern District of California.

Carter-Wallace argues, with at least equal justification, that the existence of common issues of law or fact is a necessary but not the sole requirement for class certification, and that the class certified here does not meet other Rule 23 requirements. Carter-Wallace places particular stress on the Rule 23(b)(3) requirements that the common issues of fact predominate over individual issues and that the class action be superior to other methods of adjudicating the claims. Specifically, Carter-Wallace contends that the numerous adverse reactions of each plaintiff are intertwined with the certified liability issues, and that the law on each liability theory varies widely from state to state. Additionally, Carter-Wallace notes that the problems with the numerous adverse reactions affect the Rule 23(a) prerequisites of typicality and adequacy of representation in that the drug has had a variety of different effects on different people and further, that the class does not contain any representative who has allegedly developed aplastic anemia from taking the drug. Carter-Wallace also contends that class adjudication will be unmanageable and inefficient and that alternative, superior methods of adjudication exist.

Carter-Wallace's threshold contention in this appeal is, however, even more sweeping. It is that, regardless of any specific problems

* Honorable Edward C. Reed, Senior United States District Judge for the District of Nevada, sitting by designation.

1. Aplastic anemia is a disease which interferes with the bone marrow's ability to produce blood cells, resulting in a decrease in blood cell counts.

2. Rule 23(a) states:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is 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 of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

3. Rule 23(b)(3) states, in pertinent part, that a class action may be maintained if:

. . . the court finds that the 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. Rule 23(c)(4)(A) states that when appropriate:

an action may be brought or maintained as a class action with respect to particular issues . . .

with this particular certification, class certification is never appropriate for multi-state plaintiffs asserting personal injury claims against manufacturers of drugs and medical devices. Carter-Wallace cites this circuit's opinion in *In re Northern Dist. of California, Dalkon Shield IUD Prods. Liab. Litig. (Dalkon Shield)*, 693 F.2d 847, 854-55 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), and recent cases from other circuits to support its broadside attack. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re In re American Medical Sys.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). Our review of the record suggests that a principal reason why the district court entered twin certifications, first to create class litigation, and then to secure appellate review of that creation, was to obtain a ruling from this court on whether the law of this circuit supports Carter-Wallace's threshold position.

We hold that the law of this circuit, and more specifically our leading decision in *Dalkon Shield*, does not create any absolute bar to the certification of a multi-state plaintiff class action in the medical products liability context. We decline to hold, at least at this early stage of the litigation, that there can never be a plaintiff class certification in this particular case. We do hold, however, on the basis of the record before us, that we must vacate this class certification order, because there has been no demonstration of how this class satisfies important Rule 23 requirements, including the predominance of common issues over individual issues and the superiority of class adjudication over other litigation alternatives.

ANALYSIS

I. *Class Actions in Products Liability Litigation*

The history of class action certifications and products liability cases in this circuit and elsewhere has not been luminous. Indeed the Advisory Committee on Civil Rules for the 1966 revision to Rule 23 cast doubt on the availability of class actions in mass tort cases. *See* Fed. R. Civ. P. 23, advisory committee's notes to 1966 amendment, Subdivision (b)(3) ("[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action"). Nevertheless, courts have generally proceeded on a case-by-case basis and considered the appropriateness of class action treatment under the particular circumstances presented. *See* 7B Charles Alan Wright et al., *Federal Practice and Procedure: Civil 2d*, § 1783 at 74-75 (2d ed. 1986); *see also* 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 17.05 (3d ed. 1992) (noting modern trend has been to expand use of class action litigation in mass tort context). The lead decision in this circuit was handed down in 1982 and vacated a nationwide punitive damages class and a statewide compensatory liability class of persons who had used allegedly defective intrauterine contraceptive devices. *In re Northern Dist. of California, Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

In rejecting the nationwide class certification under Rule 23(b)(1)(B), we were clearly troubled in *Dalkon Shield* by the problems that would arise in endeavoring to apply the varying punitive damage standards of fifty different jurisdictions. We did not, however, hold this commonality obstacle fatal. *Id.* at 850. There was in *Dalkon Shield* the added problem that no plaintiff, and no plaintiff's lawyer, had agreed to represent the class so that the requirements of typicality and adequacy of representation could not be satisfied. *Id.* at 850-51.

In considering the certification of the California liability class under Rule 23(b)(3), we commented in *Dalkon Shield* on the problems presented by products liability actions where, unlike the mass tort involving a single catastrophic event such as an airplane crash or cruise ship food poisoning, "[n]o single happening or accident occurs to cause similar types of physical harm or property damage." *Id.* at 853. We also discussed the inherent difficulties of proving proximate cause and a breach of a duty of care under a negligence theory, where there are different types of injuries and multiple defendants. *Id.* at 854-55. We were further troubled by the requirement that common issues predominate over individual issues in a certification of an entire case for class treatment; it appeared that only the underlying facts raised a common nucleus of issues, while the liability questions included highly individualized issues of damages and proximate cause. *Id.* at 856. Finally, we held that class adjudication would not be superior to individualized litigation given: first, the lack of any showing that class adjudication would save time or expense, and second, the management difficulties caused by the complexity and multiplicity of issues as well as the plaintiffs' hostility to the class action. *Id.*

We were careful in *Dalkon Shield*, however, not to preclude the future certification of more limited classes or subclasses pursuant to Rule 23(b)(3), or to rule out the possibility of broader class action certification in other products liability cases. *See id.* at 852-54, 856. Although *Dalkon Shield* pointed out many of the problems common to products liability litigation in meeting Rule 23's class certification requirements, we cannot conclude that *Dalkon Shield* creates an absolute bar to such certification in this circuit. As leading commentators have pointed out, the case was unusual in that there was simply no plaintiff or plaintiff's counsel ready, willing, and able to represent the class. *See, e.g.*, 3 Newberg & Conte, *supra*, § 17.12 at 17-31. In addition, *Dalkon Shield* involved multiple defendants and multiple marketing schemes, unlike the present case where a single manufacturer marketed one drug over a limited period of time. *Compare Dalkon Shield*, 693 F.2d at 856 (holding district court erroneously certified class where manufacturer advertised in various medical journals and trade-show advertisements to different doctors), *with In re Copley Pharmaceutical*, 158 F.R.D. 485, 487, 491-93 (D. Wyo. 1994) (certifying class where one manufacturer marketed four contaminated batches of one prescription drug).

The leading cases in other circuits in which class certifications have been approved are the "Agent Orange" litigation in the Second Circuit and the "School Asbestos" litigation in the Third Circuit. *See In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, *and cert. denied*, 479 U.S. 915 (1986). Those cases also had some unique features.

In *Agent Orange*, the Second Circuit made it quite clear that the common issue in that case that caused class litigation to be both appropriate and superior to other forms of litigation was the common existence of a government contractor defense.

> In our view, class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense. First, this defense is common to all of the plaintiffs' cases, and thus satisfies the commonality requirement of Rule 23(a)(2). Second, because the military contractor defense is of central importance . . . this issue is governed by federal law, and a class trial in a federal court is a method of adjudication superior to the alternatives. If the defense succeeds, the entire litigation is disposed of. If it fails, it will not be an issue in the subsequent individual trials. In that event, moreover, the ground for its rejection, such as a failure to warn the government of a known hazard, might well be dispositive of relevant factual issues in those trials.

Agent Orange, 818 F.2d at 166-67 (citations omitted).

In *School Asbestos*, the plaintiffs were school districts seeking compensation for property damages, not for personal injuries. The Third Circuit viewed that class action as much more manageable than a personal injury case would have been because, in essence, the effect of asbestos in different buildings is the same and the effect of asbestos on different people is not. *See School Asbestos*, 789 F.2d at 1010-11.

A leading decision in the Seventh Circuit has recently cast a pall on the future of class action certifications in products liability cases in that circuit. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995); *see also Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying national class of all nicotine-dependent persons, and expressing approval of *Rhone-Poulenc*). The Seventh Circuit in *Rhone-Poulenc* issued a writ of mandamus ordering the district court to decertify a class of plaintiff hemophiliacs who were allegedly infected by the human immunodeficiency virus (HIV) as a result of using blood solids manufactured by the defendants. The Seventh Circuit majority was heavily influenced by at least three factors.

First, the majority expressed a general distaste for requiring defendants to place high economic stakes in the hands of a single jury. *See Rhone-Poulenc*, 51 F.3d at 1299. The majority also noted that there was a great likelihood that plaintiffs' legal claims lacked merit, given that twelve of thirteen individual suits had resulted in ver-

dicts favorable to the defendants. *See id.* at 1299-1300. This concern does not appear to be in line with the law of this circuit that has not looked favorably upon granting extraordinary relief to vacate a class certification. *See, e.g., Arthur Young & Co. v. United States Dist. Court,* 549 F.2d 686, 698 (9th Cir.), *cert. denied,* 434 U.S. 829 (1977). There is also authority disapproving a separate hearing to consider the merits of the plaintiffs' claims when determining class certification. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974); *Blackie v. Barrack,* 524 F.2d 891, 901 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976); *see also* 7B Wright et al., *supra,* § 1785 at 125 (discussing *Eisen* and the Court's express rejection of a preliminary hearing to determine the merits of the litigation).

Second, the *Rhone-Poulenc* majority found that the class action would require a jury to determine "the negligence of the defendants under a legal standard that does not actually exist anywhere in the world." *Id.* at 1300. The court expressed concern with the ability of the district court to condense the law of the fifty states and the District of Columbia into a single jury instruction on negligence. *See id.* at 1300-02. The court thus focused on the district court's decision to create a hypothetical negligence standard. The district court in this case did not create such a hypothetical standard.

Third, the *Rhone-Poulenc* court perceived Seventh Amendment problems in the district court's bifurcation of class issues from individual issues, such as comparative negligence and proximate causation. *See id.* at 1302-03. The court determined that the district court's plan was inconsistent with the principle that the findings of one jury are not to be reexamined by a different jury. *See id.* at 1303. This constitutional concern of the *Rhone-Poulenc* court may not be fully in line with the law of this circuit, and constitutional issues were never squarely presented to the district court. *See Arthur Young,* 549 F.2d at 696.

We therefore do not accept Carter-Wallace's invitation in this case to adopt the principles of *Rhone-Poulenc* as the law of this circuit.

We are more sympathetic to the approach taken by the Sixth Circuit in *In re American Medical Sys.,* 75 F.3d 1069 (6th Cir. 1996). *American Medical* rejected class certification involving ten different models of penile implants that were implanted over a twenty-two year period. The court granted mandamus to decertify a nationwide class where the district court failed to identify common issues, explain why common issues predominate over individual issues, or make a finding of superiority. The court held that district courts must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. *See id.* at 1078-79. The Sixth Circuit has also recognized, however, that in the mass tort context, class adjudication of certain issues may be more efficient and expeditious than individualized litigation. *See Sterling v. Velsicol Chem. Co.,* 855 F.2d 1188 (6th Cir. 1988).

Our reluctance to close the door on class action litigation in products liability cases is reinforced by current legal developments that could make class litigation more manageable. There has, for example, been discussion of federal class action legislation. *See, e.g., Thomas D. Rowe, Jr.,* Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action, 71 N.Y.U. L. Rev. 186 (1996) (discussing several areas in which legislation might enhance federal class actions); William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts,* 73 Tex. L. Rev. 1529 (1995) (proposing amendments to the multidistrict litigation statute, 28 U.S.C. § 1407(a), to include state court cases). Further, the American Law Institute is now concluding its work on products liability in the Restatement of the Law of Torts. *See* Restatement (Third) of Torts: Products Liability (Tent. Draft No. 3, 1996); *see also* James A. Henderson, Jr. et al., *Optimal Issue Separation in Modern Products Liability Litigation,* 73 Tex. L. Rev. 1653, 1661-67 (1995) (discussing new Restatement as a reflection of current state of products liability law).

In addition, the Advisory Committee on Civil Rules is in the process of modifying Rule 23, and has proposed authorizing the possible certification of settlement classes that need not meet the requirements of Rule 23(b)(3). *See* Fed. R. Civ. P. 23(b)(4) (Draft Aug. 15, 1996); *see also Samuel Estreicher,* Foreword, Federal Class Actions After 30 Years, 71 N.Y.U. L. Rev. 1, 6 & n.26 (1996) (noting that proposed (b)(4) category would allow trial courts to certify class actions for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for trial); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process,* 71 N.Y.U. L. Rev. 13 (1996) (discussing proposed changes to Rule 23). We observe that this idea has met with substantial opposition from a number of quarters. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 786-94 (3d Cir.) (holding that under present rule settlement class must meet all Rule 23 requirements and expressing concern about dangers of overrewarding attorneys and undercompensating class members), *cert. denied,* 116 S. Ct. 88 (1995); *see also Georgine v. Amchem Prods.,* 83 F.3d 610, 624-25 (3d Cir. 1996), *petition for cert. filed,* 65 U.S.L.W. 3159 (Aug. 19, 1996) (No. 96-270); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343 (1995); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 Colum. L. Rev. 669 (1986). It is to be hoped that the debate on the proposed rule modification will add to our understanding of the appropriate role of class litigation in tort litigation.

For these reasons, we reject Carter-Wallace's position that the law of this circuit should prohibit any class certifications in products liability litigation. We therefore turn to the appropriateness of this particular certification order.

II. *The Class Certification Order in This Case*

This court reviews a district court's decision to grant class certification for abuse of discretion. *See Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1304 (9th Cir. 1990). In order for a class action to be certified, the plaintiffs must establish the four prerequisites of Fed. R. Civ. P. 23(a) and at least one of the alternative requirements of Fed. R. Civ. P. 23(b). *See* Fed. R. Civ. P. 23(b). An action may be maintained as a class action if the court finds that: (1) common questions of law and fact predominate over questions affecting individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Dalkon Shield,* 693 F.2d at 855-56.

The certification order which we review is brief and conclusory. The record reflects that it was entered with the express hope on the part of the district judge of encouraging settlement, and to trigger a ruling from this court on the more general issue of the viability of class certification in this circuit. The order is provisional and contemplates the possibility of future modifications, additions, or refinements of subclasses. The order was entered at an early stage in the proceedings, and the record simply does not reflect any basis for us to conclude that some key requirements of Rule 23 have been satisfied.

It is not clear that Plaintiffs have met either the typicality or adequacy of representation requirement. *See* Fed. R. Civ. P. 23(a)(3) and (4). The plaintiff-class representatives include two individuals who have had difficulty withdrawing from Felbatol and returning to prior medications, one alleging liver failure and one some unspecified type of liver damage. No named plaintiff has experienced aplastic anemia as a result of taking the drug, even though this condition is one of the most serious of the alleged adverse consequences. The named plaintiffs thus may not be able to provide adequate representation for those who have suffered different injuries. *See Dalkon Shield,* 693 F.2d at 854-55.

Additionally, notice may be problematic. The number of known users who have reportedly suffered actual injuries from the drug is relatively small in comparison with all the users of the drug, so that many potential members of the classes cannot yet know if they are part of the class. We therefore have serious due process concerns about whether adequate notice under Rule 23(c)(2) can be given to all class members to enable them to make an intelligent choice as to whether to opt out. *See* 7B Wright et al., *supra,* § 1786 at 197-98.

The first requirement of Rule 23(b)(3) is predominance of common questions over individual ones. Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy. *See* 1 Newberg & Conte, *supra,* § 4.25 at 4-86. Even if the common questions do not predom-

inate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues. *See Dalkon Shield,* 693 F.2d at 856; *see also Copley,* 158 F.R.D. at 491; 7B Wright et al., *supra,* § 1790 at 276; 1 Newberg & Conte, *supra,* § 4.25 at 4-81.

Here, the certification order merely reiterates Rule 23(b)(3)'s predominance requirement and is otherwise silent as to any reason why common issues predominate over individual issues certified under Rule 23(c)(4)(A). There has been no showing by Plaintiffs of how the class trial could be conducted. *See e.g., Castano,* 84 F.3d at 741-44. The district court abused its discretion by not adequately considering the predominance requirement before certifying the class. *See Dalkon Shield,* 693 F.2d at 856; *cf. Agent Orange,* 818 F.2d at 163-67; *School Asbestos,* 789 F.2d at 1010-11.

Last, but certainly not least, the district court must find that a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b). Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation. *See Dalkon Shield,* 693 F.2d at 856. A class action is the superior method for managing litigation if no realistic alternative exists. *See* Fed. R. Civ. P. 23(b)(3); 7A Wright et al., *supra,* § 1779 at 552. But here, as in *Dalkon Shield,* there has been no showing why the class mechanism is superior to alternative methods of adjudication, particularly when coupled with the discovery coordination that is made possible by the JPML consolidation. *See Dalkon Shield,* 693 F.2d at 856. Again, the certification order merely reiterates Rule 23(b)(3)'s superiority requirement but contains no discussion of alternatives or why class adjudication is superior.

The deficiencies in this certification are quite like those that caused the Sixth Circuit to reject the certification in *American Medical,* 75 F.3d at 1080-86. We similarly conclude that the district court abused its discretion by certifying particular issues for class adjudication. The district court's order is VACATED and the case is REMANDED for further proceedings.

VACATED AND REMANDED.

PEPPER, HAMILTON & SCHEETZ

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October 14, 1996

Via Federal Express

Hon. Paul V. Niemeyer
United States Circuit Judge
101 West Lombard Street
Suite 720
Baltimore, MD 21201

Re: Discovery

Dear Judge Niemeyer:

Enclosed is a copy of an article (J. Heaps and K. Taylor, The Abuser Pays: The Control of Unwarranted Discovery) reporting on reform proposals made by Master of the Rolls, Lord Woolf, some of which, I am told, already have been implemented.

The attached article and the Interim Woolf Report reflect dramatic changes in British pretrial procedure including:

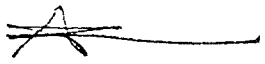
1. Greater judicial responsibility for litigation management and control via a three track system;

2. Early binding definition of issues in all cases which will control the scope of any discovery and further proceedings; and

3. Limits on discovery to include disclosure only of documents "relied on" by the party or those "materially adverse" to the party's position, with discovery of other documents available only on court order based on consideration of the benefits and costs of production.

I will try to obtain the final Woolf Report in time for this Thursday's Advisory Committee meeting.

Sincerely,



Alfred W. Cortese, Jr.

Enclosure

cc: Hon. Patrick E. Higginbotham
John K Rabiej, Esq.
Prof. Edward H. Cooper
(w/ encl.)

THE ABUSER PAYS:
THE CONTROL OF UNWARRANTED DISCOVERY

John Heaps and Kathryn Taylor

EVERSHEDS
The Business Lawyers

THE ABUSER PAYS:
THE CONTROL OF UNWARRANTED DISCOVERY

*John Heaps and Kathryn Taylor**

This paper looks at the crisis in the English civil justice system, with particular regard to the problems associated with discovery. It supports an English lawyer's contribution to a debate held in Washington in September 1996, entitled 'Modern Discovery Practice: Search for Truth or Means of Abuse?'[1]. Highlighting the key differences in discovery procedure between England and the US, and the contemporary problems in the discovery process in England, it looks at the proposals for reform made in July 1996 as a result of the Review of Civil Justice by Lord Woolf ('the Woolf Inquiry')[2]. The authors argue that the question of discovery abuse is inextricably linked to the question of costs. By recognising and using the potential which sophisticated costs orders have for influencing the conduct of litigants, courts in both England and the US can make substantial in-roads to curbing discovery abuse.

1. Introduction

The current debate about civil justice taking place in many common law systems is founded on the principle that a system of civil justice is essential to the maintenance of a civilised society. In the words of an eminent English jurist, a civil justice system " manifests the political will of the State that civil remedies be provided for civil rights and claims and that civil wrongs, whether they consist of infringements of private rights in the enjoyment of life, liberty, property or otherwise, be made good, so far as practicable, by compensation and satisfaction, or restrained, if necessary, by appropriate relief. It responds to the social need to give full and effective value to the substantive rights of members of society which would otherwise be diminished or denuded of worth or even reality."[3]

If an effective system of justice is essential to the maintenance of a civilised society, then English society is threatened. For the last two years, its civil justice system has been subject to scrutiny at the highest level. The Woolf Inquiry confirmed what many had suspected for some time: the

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[1] By John Heaps to delegates at the Civil Justice and Litigation Process Conference organised by the Federalist Society, in Washington DC, on 12 September 1996

[2] The Review of the Civil Justice System in England and Wales by The Right Honorable the Lord Woolf. Lord Woolf (now Master of the Rolls) was appointed by the Lord Chancellor on 28 March 1994 to review the current rules and procedures of the civil courts in England and Wales. The aims of the review were (1) to improve access to justice and reduce the costs of litigations; (2) to reduce the complexity of the rules and modernise technology; and (3) to remove unnecessary distinctions of practice and procedure. Two reports, both titled 'Access to Justice' were published: the Interim Report, published June 1995; and the Final Report published in July 1996, along with some draft Civil Proceedings Rules. More draft rules are expected later in 1996, and it is expected that the rules will be finalised in 1997. It is likely that they will be implemented in 1998, although this depends on Parliamentary time being made available.

[3] Sir Jack Jacob, *"The Reform of Procedural Law"*.

civil justice system is creaking - it is in a critical state - and this is threatening the rights of individuals and businesses, and the British economy. "The key problems facing civil justice today are cost, delay and complexity. These three are interrelated and stem from the uncontrolled nature of the litigation process."[4] Indeed, the costs of litigation in England are now so high that "...excessive costs deter people from making or defending claims. A number of businesses [say] that it is often cheaper to pay up, irrespective of the merits, than to defend an action....the diversion of executives and other employees from their normal activities...can have serious implications for [large corporations'] profitability .... for individual litigants, the unaffordable cost of litigation constitutes a denial of access to justice..."[5].

One leading international bank has considered changing the venue for resolving its legal disputes from London to New York[6]. Another international firm of civil engineers told the Inquiry that "[t]he risk of litigation and the costs of such litigation is higher in the UK (Scotland is an exception) than in any other country in which we operate in the world, except, *possibly*, the state of California. The cost of defending UK litigation, paid by our professional indemnity insurers, now exceeds our annual budget for training and development."[7]

US lawyers may take some comfort from the knowledge that England too faces an acute litigation crisis. Some of the problems, and indeed the solutions such as case management, proposed by Lord Woolf will sound familiar to US lawyers. Others, such as the modification of the English rule on costs, may be surprising. In any event, as England draws in part on US solutions such as case management, perhaps the US will borrow something in return. In this way, civil justice and the societies it serves on either side of the Atlantic might benefit.

The Report is wide-ranging. In its final form, excluding the draft Rules, it runs to 370 pages, and contains 303 separate recommendations. Before examining those which most closely relate to the curbing of the substantial problems associated with discovery, it may be helpful to look at the existing system, in order to high-light the differences between the respective systems for the administration of justice in England and Wales, and the US. The exchange of ideas without the benefit of a basic understanding of these differences would be wasted.

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[4] Interim report, Chapter 3

[5] Interim Report, Chapter 3, paras 13 - 15

[6] Interim Report, Chapter 3, para 28.

[7] Interim Report , Chapter 3, para 26.

2. Two common law systems divided by....

The key differences between civil litigation in the US and in England can be summarised by the following list:

- access to justice
- costs
- contingency fees
- juries
- punitive damages
- class actions / mass torts
- discovery.

Each bears closer examination.

(i) Access to justice

The number of cases filed each year in England and Wales is falling[8] . There may be a number of reasons for this, but as society becomes more complex, and its population increases, it seems specious to suppose that the number of disputes between its members actually declines. It is hard to believe that the disproportionate costs of litigation increasingly out of reach of more citizens, does not have a prohibitive effect on the issue of proceedings.

(ii) Costs

Although the decision as to who will bear the costs of an action are entirely within the discretion of the trial judge, a general principle almost invariably followed by English judges is that costs 'follow the event' - known as the English Rule. This means that the losing party will be ordered to pay the costs of the successful party[9], as well as his own legal costs. Moreover, until the conclusion of the case and often not before the successful party's solicitor has had his costs 'taxed' (ie approved by the court), the unfortunate party who has to bear all those costs will have no accurate idea of what the final bill may be.

This system of 'costs transfer' according to the outcome of the case is not without fault. It raises the stakes in litigation: once on the litigation treadmill, a party will reach a point where he can ill-afford not to spend whatever it takes to avoid losing and thus picking up two sets of legal fees. Thus, the litigant will use his lawyers to apply a sledge hammer to the cracking of a nut. The

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[8] In 1991, 3.7m plaints were entered in the county court This fell to 2.4m in 1995. In the Queens Bench, the number of writs and originating summonses reached a high - a little over 360,000 - in 1990, falling to 154,000 in 1995. In terms of growth areas, there has been an increase in delays, in the number of unrepresented litigants and in the number of actions against solicitors See *Judicial Statistics Annual Report of the Lord Chancellor's Department 1995*

[9] In fact, after costs have been taxed, the successful party will recover between one-half and two-thirds of the fees he actually pays to his lawyers. He may have won, but not without some cost to himself.

English rule is more frequently an incitement to indulge in excessive and disproportionate behaviour than it is a deterrent.

Furthermore, the loser-pays rule is relatively blunt and unweildy. It takes no account of the conduct of the parties during the course of the litigation. It means that rarely, if ever, is the question of the costs involved in each individual step in the litigation process ever brought into focus - the courts and therefore parties lump all costs together and look at them globally only at the end of the litigation.

In addition, the rule inhibits both the initiation and the defence of proceedings: a prospective litigant may do his calculations and conclude that he cannot afford, whether as plaintiff or defendant, to board the litigation ship in the first place, because of the added risk he assumes in having to meet two sets of legal fees in the event of losing.

Pressure is building in some quarters for the US to adopt the 'English Rule', but resistance is intense, and rightly so. The prospect of loser pays all calls in to question the availablity of justice. As one member of both the English and Californian bars has noted, Americans are concerned "that when the law ceases to be available for use by the public at large, this is the first sign of its decay"[10]. On this test, English law is in real jeopardy already. As this paper attempts to argue, the use of costs orders could provide a cure to the decay and a prevention for excessive behaviour, including abusive discovery demands. However, only if the courts are prepared to be more flexible and imaginative when using costs orders than the current English Rule permits is a significant improvement likely.

(iii) Contingency fees

Although contingency fees are well established in the US for PI cases and increasingly common in commercial cases, English lawyers were prohibited from charging on such a basis until very recently [11]. Change has now come[12] , but only in a very limited range of litigation[13] . Most significantly, such fee arrangements can be used in relation to personal injury litigation. Termed 'conditional fee agreements' they are puny compared to their transatlantic elder

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[10] Keith Evans *Commercial Lawyer* February 1996 p 59

[11] Contingency fees, in relation to contentious business, are unlawful on the grounds of public policy: "[I]t was suggested that the only reason why 'contingency fees' were not allowed in England was because they offended against the criminal law as to champerty; and that now that criminal liability is abolished, the courts are free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England." (Denning LJ *Trendtex Trading Corporation v Credit Suisse* [1980] 3 All ER 721 at 741). Not only were agreements as to contingency fees unenforceable, but a solicitor entering into such an agreement would breach Law Society Rules and thus run the risk of disciplinary proceedings

[12] Courts and Legal Services Act 1990, s58

[13] The classes of litigation in which conditional fee agreements can be used are set out in the Conditional Fee Agreements Order 1995 (SI 1995/1694). They are limited to PI, human rights cases, winding up and administration orders and proceedings by a liquidator, administrator or trustee in bankruptcy There was considerable pressure on the Government department responsible for drafting the secondary legislation (the Lord Chancellor's Department) to include debt recovery work. This was resisted. Lobbying on behalf of the profession and clients continues in an effort to extend the scope of conditional fee agreements to cover debt recovery.

brother, providing merely for a 'success uplift'[14] payable in the event of winning, on agreed fees which would be payable in any event. It has been said that more than 50% of the British public have no real access to the civil courts[15]. Too affluent to qualify for Legal Aid[16], and not affluent enough to pay lawyers themselves, they are caught in a legal poverty trap. Perhaps this is why the number of actions started each year is falling. In America, the civil law is seen as accessible by all - a laudable principle, and one very much endorsed by the Woolf Report. It is a principle which is given real meaning by the contingency fee principle. However, whether conditional fee agreements will contribute greatly to increasing access to the courts is doubtful: the 'success uplift' means the client is still required to find and to pay what may be a substantial sum, win or lose.

(iv) Juries

In England, the role of juries has for many years been limited to finding fact in criminal trials. The use of juries in any form of civil litigation is almost unheard of[17]. The only type of civil litigation in which they are cast as a player is in defamation cases. Even there, their use has come in for substantial criticism[18], as they have retained the power to award very substantial damages. On the face of it, these look remarkably like punitive damages, or, as they are generally referred to in England, 'exemplary damages'.

(v) Punitive damages

Other than in a very limited number of circumstances, exemplary or punitive damages are not available in England[19].

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[14] To a maximum of 100% of agreed fees which are payable in any event.

[15] " Civil Litigation is in a state of crisis....While criticism of the cost of legal services and delays in the court process are hardly new they have recently taken on a renewed urgency...The combination of increases in the cost of legal services and the lack of effective access to the courts for the vast majority of its citizens has created a crisis for the government, the judiciary and the profession." (Glasser,C.; *The Litigant* 1994).

[16] State-funded legal assistance. In 1991/92, the net cost of civil matrimonial proceedings was £241m. This rose to £350m in 1993/94, and continues to grow.

[17] Indeed their role in some criminal trials, particularly complex fraud cases, has been pressure for some time Although their use has been retained, it is once again coming under renewed pressure as questions about the manner in which complex fraud is dealt with by the justice system.

[18] In spite of calls for reform of the use of juries in defamation trials, the Defamation Act 1996 has not dealt with the principle problem of juries making erratic and often very large awards of damages. The Act contains no specific provisions to limit awards of damages. However, provision is made for the defendant to 'offer to make amends', by way of correction and/or compensation Whether or not such an offer is made, and the suitability and sufficiency of such, is a matter which the court can take into account, and may reduce or increase the amount of compensation accordingly

[19] Exemplary damages are only exceptionally permitted - eg where there is express statutory authority, oppressive behaviour by government servants or objectionable conduct calculated to result in profit. "Where a defendant ...with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity..." Devlin LJ, *Rookes v Barnard* [1964] AC 1129. In this case, the House of Lords took the

(vi) Class actions / mass torts

The English courts have no specific procedures for the conduct of complex class actions, although the judges claim "a broad and flexible power to adopt new procedures which will promote the ends of justice"[20]. As a result of major disasters such as the Kings Cross station fire and product liability problems, the courts have had to deal with increasing numbers of class actions. The infancy of this type of action makes it still something of a novelty, albeit less so with the passage of time.

(vii) Discovery

Unlike the Federal Rules of Civil Procedure governing discovery in federal cases, English procedural rules of discovery can be neither modified nor ignored by local courts. In England, two sets of court rules apply: County Court Rules to all smaller, less complicated matters proceeding in county courts; and the Rules of the Supreme Court for all the more complex issues pending in the High Court and higher appeal courts. There is substantial similarity in these rules and there is no need to distinguish between the two for current purposes.

Although in England the term 'discovery' means the disclosure of documents only, and in this sense has a much more restrictive meaning, English and American lawyers share several tools for discovering the facts relevant to a matter. For instance - disclosure and production of documents, interrogatories, notices to admit/requests for admissions are all tools used in England to get at the facts of a case. Depositions are known to English civil litigation, but are of such limited application as to be hardly used at all[21]. In an effort to limit 'trial by ambush', which is the evil to which all discovery weapons were originally directed, the use of witness statements was introduced in 1986[22]. Prepared by a party's own lawyers, and now exchanged with the other party before trial, they stand as evidence-in-chief. For fear that courts will allow neither amendment nor supplementation after exchange, a great deal of 'lawyering' goes into their preparation. The end product rarely bears much resemblance to the witness's own words. What was an attempt to reduce trial costs has resulted in the front loading of costs to a ridiculous degree in cases which are often settled before trial.

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opportunity to review the whole doctrine of punitive or exemplary damages. Such damages first made their appearance in England in the mid eighteenth century: *Huckle v Money* (1763) 2 Wils.K.B. 205 and *Wilkes v Wood* (1763) Lofft 1. They became a regular feature of tort actions, although never of contract. The House of Lards took the opportunity in *Rookes v Barnard* of removing "an anomaly from the law of England" (at 1221) from most cases The principle argument against punitive damages is that, confusing the civil and criminal functions of the law, they are anomalous in the civil sphere. It has ben said that to allow them 'contravenes every protection which has been evolved for the protection of offenders" (Reid LJ in *Broome v Cassell & Co* [1972] AC 1027, 1087 C-F).

[20] Steyn J. in *Chzranowska vGlaxo Laboratories Ltd. The Times March 16 1990.*

[21] RSC Order 39. The court can order examination on oath when necessary for the purposes of justice. The provision is used for witnesses who will be unable to attend trial or when evidence is sought abroad.

[22] The Rules of the Supreme Court were amended by The Rules of the Supreme Court (Amendment No 2) 1986 (SI 1986/1187), and subsequently amended by SI 1988/1340 and SI 1992/1907 to provide for the exchange of statements.

Although the tools of discovery may be similar, the scope and application of those tools is considerably wider in the US than in England. For litigants in England, the very existence and extent of a right of discovery currently depends against whom it is sought: a party, a prospective party or a stranger/third party.

A. The right to discovery of documents and facts

(i) Automatic discovery requires **discovery of documents** between the parties, without requests, once pleadings are closed[23]. It is worth noting that although amendments to pleadings are permitted, the consent of court is needed for all but the first amendment[24]. However, frequent and very late amendments are all too common.

(ii) **Pre-action discovery of documents** is available with the consent of the court, but only in cases of death and personal injury[25], and even then, only when the documents to be produced are necessary and described with care and precision . The result is that the use of pre-action discovery as a means of undertaking a fishing expedition is limited. Resort is rarely[26] had to pre-action discovery.

(iii) **Discovery of facts by interrogatories** is available only against parties[27]; interrogatories can be administered without leave of the court. They must relate to "any matter in question between [the parties] in the cause or matter which are necessary either (a) for disposing fairly of the matter, or (b) for saving costs."[28] Interrogatories are not be allowed where their object is to obtain an admission of fact which can be proved at trial by the attendance of a witness who will in any case be called at trial. Neither are they be allowed if designed to prove a cause of action or defence not yet pleaded, or to establish an action against a third party.

(iv) **Discovery of documents or facts against a stranger** is generally not available. It is available in very limited circumstances, such as in personal injury actions, against the treating hospital, as opposed to the defendant Health Authority; and in tort cases where the third party has provided facilities for the commission of the wrong but is himself not personally liable. If documents are required from a third party, it is necessary to issue a *subpoena duces tecum*[29] and require attendance at trial, or at a nominal trial date set in advance of the actual trial date.

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[23] RSC, Order 24 r.1

[24] RSC, Order 20 rr 1 & 3

[25] RSC Order 24 r. 7A; Supreme Court Act 1981 s33(2)

[26] This is a term used relatively

[27] RSC Order 26 r 1

[28] RSC Order 26

[29] RSC Order 38 rr14 - 19

(v) Oddly enough, **inspection, preservation and testing of property** is available both before and after commencement of proceedings, and against both parties and strangers[30].

(vi) There is **no duty to disclose the identity of individuals** likely to have discoverable information relevant to disputed facts alleged in the pleadings.

B. The obligation of discovery of documents

An on-going obligation

The obligation to give automatic discovery of documents[31] is ongoing throughout the litigation process. It requires the production of documents which are relevant, no matter at what time they come into the possession, custody or power of the party under the obligation[32]. This can mean that in an action which includes a claim for prospective loss of earnings, the plaintiff is under an obligation to tell his opponent if and when he obtains a lucrative contract of employment, at any time up to and including trial.

An obligation on whom?

The principle obligation to disclose relevant documents is on the party to the litigation. Failure to honour this obligation can result in the party's pleading being dismissed or struck out, and even in the party being committed for contempt[33].

However, his solicitor is under an onerous duty to ensure this occurs. Very early in the litigation process, clients must be advised of the duty and its breadth. They must be told of the importance of not destroying or tampering with material which might possibly be dicloseable[34], and of the need to take positive steps to ensure the material is preserved[35]. There is a duty to notify the court and in some circumstances to withdraw from acting in

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[30] RSC Order 29 r 2-7A

[31] This term is not limited to material written on paper. It includes anything upon which evidence or information is recorded in such a way as to be intelligible to the senses or capable of being made so by the use of equipment. The term also includes photocopies of documents, as well as their originals

[32] This principle contained in RSC Order 24 is linked to the principle in Order 18 rr 8 & 9 that a party must not seek to take his opponent by surprise or, in failing to disclose relevant documents, mislead the Court or his opponent into believing that full discovery has been given See RSC Order 24 r1.

[33] RSC Order 24 r16

[34] *Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaires) Ltd* [1968] 2 All ER 98

[35] *Infabrics Ltd v Jaytex Ltd* [1985] FSR 75 at 79: "It is not enough simply to give instructions."

cases where a client fails to comply with proper advice as to discovery.[36] "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their client to make sure, *as far as possible*, that no relevant documents have been omitted from their clients' [discovery]"[37]. Failure to comply with this duty can render the solicitor subject to disciplinary proceedings or to committal[38].

An obligation to disclose what?

A party to an action must[39] disclose all documents which are in his possession, custody or power and which 'relate to matters in question in the action'[40]. This goes to the *questions* in the action, and not to the subject *matter* of the action. However, the net is wider than might first be supposed.

Currently, four categories[41] of document have to be disclosed:
(1) the parties' *own documents* upon which they rely;
(2) *adverse* documents of which a *party is aware* and which affect his own case or support another party's case;
(3) other '*background*' documents, which though relevant , may not be necessary for the fair disposal of the case;
(4) '*train of inquiry*' documents, which may lead to a train of inquiry enabling a party to advance his own case or damage his opponent's, of the type referred to in *Peruvian Guano* [42].

On this test the range of potentially relevant and thus discoverable documents is almost unlimited. The disclosing party has to review and list all such documents, while the other party has to read them. In all probability, only a very small number of those documents will

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[36] *Myers v Elman [1940] AC 282* at pp 293-4, 300-301 & 322-3.

[37] *Woods v Martins bank Ltd [1959]1 QB 55, 60*

[38] RSC Order 24 r16

[39] This requirement applies automatically, unless the parties have agreed between themselves, or an application has been made to court and an order made, to limit or dispense with discovery

[40] RSC Order 24 rr 1, 2, 3 & 7 use slightly different terminology when referring to what material must relate for it to be discoverable. Thus, r.1 (mutual discovery of documents) says 'relating to matters in question in the action'; r.2 (automatic discovery without court order) says 'relating to any matter in question between them in the action'; r.3 (court order for discovery) - 'relating to any matter in question in the cause or matter'; r.7 (specific discovery) - 'relates to one or more of the matters in question in the cause or matter'.

[41] Identified in the Final report, chapter 12, para 38.

[42] The current test for relevance was established by Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55. It requires discovery of "...every document... which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* - not which *must* - *either directly or indirectly* enable the party [applying for discovery] either to advance his own case or damage that of his adversary... a document can properly be said to contain information which may enable [that party] either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences". Note that this test does not limit the discoverable material to that which is admissible in evidence.

ever be used in court to affect the outcome of the case. However, the test facilitates oppressive behaviour. It is from this broad definition of what is discoverable, and in particular the inclusion of documents which are indirectly relevant, that many of the real and perceived problems of excessive discovery in English actions stem.

4. Abuses of discovery in England

"By tradition, the conduct of civil litigation in England and Wales, as in other common law jurisdictions, is adversarial....The main responsibility for the initiation and conduct rests with the parties...The role of the judge is to adjudicate the issues selected by the parties when they choose to present them to the court....Without effective judicial control, however, the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. There is no effective control of [the parties'] worst excesses. Indeed the complexity of the present rules facilitates the use of adversarial tactics....The rules are flouted on a vast scale...The main procedural tools for conducting litigation effectively have each become subverted from their proper purpose...."[43]

The Interim Report lists, very succinctly, the major ills in England's civil procedure: "**pleadings** often fail to state the facts as the rules require. This leads to...the failure to establish the issues in the case at a reasonably early stage..... **Witness statements**, a sensible innovation aimed at a "cards on the table" approach, have in a very short time begun to follow the same route as pleadings, with the draftsman's skill often used to obscure the original words of the witness.... Instead of the [**expert witness**] assisting the court to resolve technical problems, delay is caused by the unreasonable insistence on going to unduly eminent members of the profession and evidence is undermined by the partisan pressure to which party experts are subjected.... The scale of **discovery**, at least in the larger cases, *is completely out of control.* The principle of full, candid disclosure in the interests of justice has been devalued because discovery is pursued without sufficient regard to economy and efficiency in terms of the usefulness of the information which is likely to be obtained from the documents disclosed.... In the majority of cases the reasons for **delay** arise from a failure to progress the case efficiently, wasting time on peripheral issues or procedural skirmishing to wear down an opponent....*Excessive discovery and the use of experts in heavy demand both contribute to this delay...*"[44]

The critical condition of the system is such that Lord Woolf believes "... there is no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts.... A change of this nature will involve not only a change in the way cases are progressed within the system. It will require a radical change of culture for all concerned...."[45]

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[43] Interim Report, Chapter 3, paras 4 to 8

[44] Interim Report, Chapter 3, paras 8 to 11.

[45] Interim Report, Chapter 4, para 2

With increased responsibility for management of cases, there will have to be an increased readiness to apply costs orders much more flexibly. The 'automatic exercise of discretion' in favour of the successful litigant, regardless of his conduct throughout the litigation process, will have to cease. Judges will have be more discriminating when applying costs orders so as to encourage a responsible and proportionate approach to litigation and to punish excessive and oppressive conduct aimed at wearing down an opponent.

If Lord Woolf's recommendations are implemented, the landscape of civil litigation will be fundamentally different[46].

5. The Woolf proposals for reform

The bedrock on which all the reforms are set is that the civil justice system should enable the courts to deal with cases *justly*, according to the principles of[47]

- *equality* - between the parties
- *economy* - in the use of resources
- *proportionality* - with regard to the amount at stake, importance of the case, complexity of issues and the parties' financial position
- *expedition*; and
- the need to allocate court *resources* to other cases.

Rule 1 of the draft new Rules[48] imposes an obligation on the courts and the parties to further the overriding objective of dealing with cases justly, according to these principles.

Over this, certain features will dominate: litigation will be less adversarial and more cooperative, less complex, more responsive to the needs of litigants, and will encourage parties to avoid litigation wherever possible. Parties will be required to 'put their cards on the table early in disputes, often before litigation is started[49]. Pleadings will be simplified and made to cast the facts clearly and succinctly, so as to facilitate early definition of the issues.

Responsibility for the management of cases will shift from the parties, to the courts. Although the adversarial system will remain, it will have been denuded and eroded. Case management looms large in the new landscape: it is central to Lord Woolf's recommendations, and central to

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[46] Final Report, Overview, para 8

[47] See Draft Civil Proceedings Rules, July 1996

[48] Draft Civil Proceedings Rules, July 1996

[49] For some time, there has been provision for defendants to make formal offers to settle before a matter comes to trial. See RSC Order 22 for payments into court and 'Calderbank' letters, aimed at encouraging settlement. The rules are such that if the offer is not accepted, and at judgment its terms are not bettered, then the plaintiff is invariably penalised as to costs. Woolf proposes to make the rules more flexible. The ability to make an offer to settle will be extended to the plaintiff. Offers need not await the issue of proceedings: the rules will encourage either party to a dispute to make an offer before proceedings have been issued. To encourage the acceptance of reasonable offers, a party who fails to accept an offer which is not equalled or bettered at trial may face an award of enhanced costs and interest being made against him. Unreasonable behaviour will invite jeopardy.

controlling the expense of litigation[50].

As discovery is often the largest single cost factor in litigation, both in terms of legal expenses and the diversion of management resources, exercising control over the process will be central to successfully reducing both the apparent and hidden costs of litigation.

Crucial to managing the new landscape is the control of costs and the use of costs orders in a flexible and much more imaginative way than has previously been known in England. Costs will be used more directly and more often as a means not only of sanctioning parties, but of influencing them in advance of a particular course of action. The new regime will be supported by effective sanctions, including orders for costs in a fixed sum payable immediately.

- Case management

"[Case management will] ... include identifying the issues in the case; summarily disposing of some issues and deciding in which order other issues are to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence. These are all judicial functions. They are extensions backwards in time of the role of the trial judge."[51] Cases will be allocated to one of the three tracks: small claims, fast-track or multi track, depending on their value and complexity[52]. 'Procedural judges'[53] will take over responsibility for the management of cases. Case management conferences will be commonplace, where issues and evidential matters will be dealt with, and schedules drawn up for the efficient and proportionate management of cases.[54]

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[50] Woolf describes the introduction of judicial case management as crucial to the new system He has been significantly influenced by developments in the US, New Zealand and Canada. The Commercial Court in England has used case management, in for example the Lloyd's litigation. The regime which Woolf aims to introduce will be more extensive than this however, and will affect all courts.

[51] Final report Chapter 1 para 14

[52] Small claims - to value of £3000, Fast track for claims £3000 - £10,000, or more of not complicated; Multi-track for other matters. They can subsequently be transferred to another. One of the issues which the court will be bound to consider on either occasion is the wishes of the parties. However, it should be noted that the court can impose *conditions* as to the management of a claim *or as to liability for costs* when doing so.

[53] Of which Woolf says: "....the procedural judge is not a new type of judge. It is a function, not a title " Final Report, Chapter 8 para 13

[54] There will not, however, be a single judge assigned to each case: there will be no 'single docket' system, which at least ensures maximum continuity. Concerned that effecting this would be impossible without reducing flexibility in deployment of judges, Woolf recommends that judges will work in teams, and cases will be assigned to teams of judges, perhaps with a 'procedural judge' and the intended trial judge in the team on larger cases, and in smaller and fast-track cases, where it is unlikely to prove possible to identify intended trial judges sufficiently far in advance, teams will probably have to be bigger.

- Pleadings - a new breed

Currently, pleadings are often misused and frequently fail to serve their intended purpose[55]. Their basic function - to state succinctly the facts relied upon[56] - all too often disappears from view as parties obscure issues and deliberately obfuscate their opponents. Original pleadings are often superseded by amendments and further and better particulars. Courts routinely fail to police pleadings so as to encourage brevity and clarification of issues at an early stage. One of the effects of this is that, as issues remain ill-defined, the scope of discovery remains unbounded.

Woolf proposes to restore to primacy the basic function of pleadings. Clear and concise statements of facts will enable both the parties *and the court* to define the true issues at the heart of the dispute early on, with little or no need for further exchanges in the form of requests for further and better particualrs, notices to admit or interrogatories[57].

To this end, both the 'claimant' and the defendant will be required to set out in a single document all the material matters on which they rely, including facts, remedy sought and a list of documents necessary to the case[58].

Parties will be encouraged to produce a provisional list of issues in the matter. Case conferences will be used to clarify factual allegations. If possible, an agreed statement of issues in dispute will be produced at the case management conference, which will supercede the pleadings. Should further uncertainty about issues arise, perhaps out of discovery, parties should cooperate and failing this, seek assistance from the court. Equally, if a party is faced with a request which he considers vexatious, for example an array of questions whose quantity suggests they are intended merely to be burdensome, or a failure to respond to a reasonable request for information, he can seek an order from the court dispensing with his need to deal with it[59].

In this way, issues will be clarified early in the proceedings, which will enable the parties and the court to deal with the matters, including discovery, expeditiously and with economy

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[55] Interim Report , Chapter 20

[56] RSC Order 18 r.7

[57] Interim report Chapter 20, para 11

[58] Thus, the statement of claim will set out, succinctly, the nature of the claim, the facts relied upon and the remedy sought It will also identify any document necessary to the plaintiff's case, and include a certificate of belief in the truth of the contents of the statement, made by the claimant or his legal representative. Other optional matters may also be included, such as a specification of any matter of law relied upon, the identity of any witness he intends to call and short summary of the evidence such a witness will give. The defendant's statement must list the allegations admitted, denied or doubted, with reasons for this, and his own version of events if different from that of the claimant. He must say why he disputes the claimant's alleged right to a remedy, the claimant's assessment of value and damages. It too must contain a certificate of belief in the contents. See draft Rules 7 - 9.

[59] Interim report, chapter 20, para 13

- Discovery

Disclosure of documents

The bounds of discovery in each case should be made more readily discernible by the early definition of issues. The general scope of documentary discovery, both in terms of what may be sought and what must be disclosed, will be curtailed by new rules.

Of the four categories of document which currently have to be disclosed, in future only categories (1) and (2)[60] - documents relied upon or those of which a party is aware and are materially adverse - will be automatically available under 'standard disclosure'. Material which falls into categories (3) and (4) - 'background story' and 'train of inquiry' documents - will have to be sought by court order, by way of 'extra' or 'specific' disclosure. When considering whether to make an order for specific disclosure, the court must decide whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs. It must have regard (a) to the likely *benefit* of specific disclosure; (b) to the likely *cost* of specific disclosure; and (c) to whether the *financial resources* of the party against whom the order would be made are likely to be sufficient to enable the party to comply with any such order.

Note that the obligation to make standard disclosure will remain continuous during proceedings[61].

Pre-action discovery

Woolf proposes[62] to extend pre-action disclosure of documents by prospective parties to all cases[63]. It will not be automatic: application will have to be made to the court. Even then, it will be limited to specified documents which can be shown to be in the hands of the respondent, who must be likely to be the defendant in prospective proceedings. Furthermore, the applicant must show that the documents sought are relevant to a potential claim. In determining this question, the court will apply the same rigorous cost-benefit tests as in normal post-issue applications for specific disclosure. As for pre-action discovery against a stranger or third party, this will be available only in respect of personal injury and death-related claims[64].

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60 See page 9, above

61 Rule 27.12

62 Final Report Chapter 12 paras 47-50.

63 Currently it is available only in personal injury and death actions.

64 Final Report Chapter 12, para 51-52

Witness statements

To deal with the "overlawyering" of witness statements engendered by fear that witnesses will be permitted neither to depart from nor supplement the text, Woolf proposes to allow reasonable flexibility in amplifying witness statements. If this fails to restrain lawyers from 'gilding the lily' and 'grossly overdone drafting', wasted costs orders are likely: the lawyer will pay. Statements will be in the witness's own words, stated as such and signed[65].

- Costs & Sanctions[66]

In his interim report, Lord Woolf referred to the problems faced by the opponents of litigants funded by Legal Aid. In such cases, there is a virtual inability of the successful but unassisted party to recover costs from a legally aided party. The usual rules of 'costs transfer', or costs following the event, do not apply[67]. But he notes[68] that greater liability to costs orders could result in the Legal Aid Board being more discriminating as to how its funds are used (for example, when there is an offer of settlement). There is nothing to suppose that the principle of greater exposure to costs orders leading to a more discriminating approach in conducting litigation is applicable only to English legally aided persons. The authors would suggest that it is universally applicable. After all, it is merely a process to make litigants accept responsibility for their actions. But this basic social requirement seems to have got lost somewhere in the development of the English civil justice system. In administering civil justice, the English courts have largely chosen to ignore this simple principle . Wrapped up in obtaining the correct legal answer and providing a remedy for *legal* wrongs, the courts have ignored *procedural* irresponsibility encountered along the way. And in doing so, injustice and unfairness has been allowed to take root.

It is time that this oversight was remedied, and it is hoped that the Woolf reforms will facilitate this. They are certainly intended to: "[c]osts are of great importance to my Inquiry because the ability of the court to make orders as to costs is the most significant and regularly used sanction available. The court's power to make *appropriate* orders as to costs *can* deter litigants from behaving improperly or unreasonably and encourages them to behave responsibly. Costs orders can also have a salutary effect on members of the legal profession. Costs are central to the changes I wish to bring about."[69]

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[65] When the Civil Evidence Act 1995 comes in to force, hearsay evidence will become admissible, and thus witness statement will be able to refer to matters not within the direct knowledge or observation of the witness, although it should be clear what is the source of knowledge, information or belief upon which the witness relies.

[66] In the speech referred to Lord Woolf preferred to use the word "incentives".

[67] There is a very limited power for the court to make a costs order against the legally aided litigant personally (Legal Aid Act 1988 s17(1)) and an exceptional power to make a costs order against the Legal Aid Fund (Legal Aid Act 1988 s 18(2)). They are scarcely used.

[68] Interim report, chapter 25, para 27.

[69] Final report Chapter 7, paras 4 & 5.

Ironically, although Woolf sees costs as "the most serious problem besetting our litigation system"[70], he also sees costs as central to solving its problems: they afford a means of controlling the excesses of parties battling in an adversarial system.

To this end, Lord Woolf recommends a departure from the dual concepts to which English courts are wedded: that costs should be treated as a whole and should follow the event[71]. Instead, regard should be had to the manner in which the successful party has conducted the proceedings and the outcome of individual issues. Attention should be given to identifying areas where costs have been incurred unnecessarily and to excess[72]. Judges must be prepared to scrutinise the parties' conduct, adopt greater flexibility and make more detailed orders than they are accustomed to do now[73]. In short, they must abandon the clumsy, blunt instrument of the old rules, and take up a much finer, sharper and incisive tool - a tool which parties cannot ignore, which they will respect as having an immediate effect upon their pockets.

As yet, draft Rules on costs have not been published. However what is clear from the approach taken in the Final Report is that judges will be afforded the widest possible discretion as to costs in order to encourage the conduct of litigation in a proportionate manner and to discourage excess. Where one of the parties is unable to afford a particular procedure, the court, if it decides that procedure is to be followed, should be entitled to make its order conditional upon the other side meeting the difference in the costs of the weaker party, whatever the outcome. The court should be able to order payment of interim costs in cases where the opponent has substantially greater resources and where there is a reasonable likelihood that the weaker party will be entitled to costs at the end of the case[74]. The court may make a wasted costs order; it may assess costs or direct them to be taxed and may order them to be *paid immediately*; or it might order *interim costs* of an amount fixed by the court *to be paid within a specified time*[75].

Conclusion

In a speech[76] delivered between the publication of the Interim Report and this Final report, Lord Woolf said

> "In a situation where a streamline procedure is possible but where that procedure

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[70] Interim report, Chapter 25, para 1.

[71] The 'English rule'.

[72] Final Report, Chapter 7 , para 8, page 79

[73] Final Report, Chapter 7, para 24, page 83

[74] Final report Chapter 7, page 89

[75] Draft Rules, Rule 5.2

[76] The Child & Co Lecture, hosted by the Council for Legal Education, 19 February 1996: "The Future of Civil Justice" by Lord Woolf.

is only acceptable to one side and the other side has good reason for recommending a more complex process, then the court should be able to direct the complex procedure *on condition that the more powerful litigant pays the additional costs of both sides in any event. In this way the litigant with limited means will not be exposed to excessive costs which he cannot afford and the other party will have every incentive to keep the costs as low as possible*".

The reference to the 'powerful litigant' and 'the litigant of limited means' must be read in the light of one of the major problems in English civil courts: the powerful corporation using its greater resources to overwhelm the 'small man', the individual litigant of much smaller means. It is the US problem turned on its head, and it exists because most people in England do not have recourse to funding for litigation. The average English citizen does not have access to private capital or public subsidy to fund his fight. He has nothing approaching the credit provided for litigation by lawyers working on a contingency fee basis. With no funds, he is weak in the face of the corporation whose resources are undoubtedly greater and legal expenses tax deductible. The English problem is the abuse of power - that is the exercise of power without corresponding responsibility - by the 'big guns'.

The exercise of power with responsibility can be encouraged (and irresponsibility sanctioned) by attaching a price to the exercise of power. If the litigant with more muscle wants to seek more extensive discovery than seems warranted, then he should be allowed to do so on condition that he pays for the privilege at the time he puts his opponent to the trouble. If it transpires that the exercise was justified, then the costs order can be reversed. In this way, the parties' autonomy remains intact while judges cannot be accused of unfairly limiting a party's investigations on a superficial understanding of the case. With the right to litigate goes a responsibility for the manner in which the litigation is conducted. The effective use of costs orders, applied judiciously and early enough, should act as a brake on the activities of the more powerful litigant. Having to pay will generate a pause for thought, for reflection and evaluation of whether the steps proposed are necessary and consistent with the just, expeditious, economical and proportionate disposal of the case. In this way, the problems associated with automatic costs transfer - the encouragement of disproportionate and abusive behaviour, the inhibition of participation in the legal process - might be avoided.

The distribution of power between respective types of litigant may be different in the US. But the same principles can be used to control abuse of that power: it does not matter in whose hands it rests. The systems of civil justice in the US and in England have much in common. There are differences, from which lessons can be learned on either side of the Atlantic. As England learns from the US and borrows case management, perhaps in return a recommendation might be ventured. The English Rule on costs transfer is not to be commended. Its very rigidity encourages abuse and discourages citizens and corporations from exercising and protecting their rights. A system of costs transfer which takes account of the outcome of individual issues in a case and the conduct of the parties during the litigation process has much more to be said for it as a tool for serving justice.

* *John Heaps is a partner and Kathryn Taylor a solicitor in the firm of solicitors Eversheds, UK.*

Memorandum

June 10, 1996

To: The Committee on Rules of Practice and Procedure

From: Patrick E. Higginbotham, Chair
Civil Rules Advisory Committee

Re: Civil Rule 23 Proposal

I

The Advisory Committee on Civil Rules sent forward in late April requests to publish for comment various changes to Rule 23. This request came after more than four years of work, including participation in numerous conferences and institutes, most held at our urging and attended by hundreds of practicing lawyers, representatives of Congress, state and federal judges, and law professors. We have at every turn solicited the views of interested persons.

Now, on the eve of the meeting of the Standing Committee, a number of distinguished academics express concerns. With few exceptions, these concerns are addressed to the Standing Committee, and not to the Advisory Committee. We welcome this comment, late as it is, but its manner and timing of presentation raise serious questions of process and orderly rule making, giving the perception of a preemptive strike on the comment period. Open and candid discussion has been the hallmark of our work, and public comment is an essential part of that process, assuring that access extend beyond the small numbers of cognoscenti.

The effort taxes process all the more because it would deny public comment upon possible rule changes uniquely demanding of

experience for their assessments; uniquely demanding a keen awareness of real world effects and function. With respect, this Standing Committee has yet to hear from those with much to say about function, those with actual experience, the judges and lawyers who must administer the rules with the responsibility of decision making.

The issues attending class actions are difficult and divisive, exposing deep political differences. There are no easy choices. This difficulty magnifies the need for rational and considered judgment for which orderly process is essential. Our process can produce more understanding, clarity, and sounder rules, but it is a process that must be respected. Group petitions abuse process. The considered views of thoughtful persons facilitate the process. It is essential that petitions to deny public comment in this manner be viewed with caution. As I will explain, those who petition express nothing not considered by the Advisory Committee and those who attended its sessions, including representatives of the American College of Trial Lawyers and the American Bar Association.

II

We turn to the several letters to the Standing Committee addressing the Civil Rule Advisory Committee proposal to publish revisions of Civil Rule 23 for public comment.[1] They raise several

[1] The letters in hand at the time of drafting this memorandum include letters from Professor Paul D. Carrington (May 21); Professors Arthur R. Miller and David L. Shapiro (May 23); a

issues. These issues cluster around two aspects of the proposal: the Rule 23(b)(4) provision for "settlement classes" and the Rule 23(b)(3)(F) provision for weighing the probable relief to individual class members against the costs and burdens of class litigation. All of these issues have been considered by the Advisory Committee, usually in the same form. The deliberated conclusion of the Advisory Committee was that the proposed revisions would make useful improvements. More adventuresome proposals were put aside. The Committee also put aside the attempt to provide more detailed directions to district courts in the (b)(4) and (b)(3)(F) proposals. Detailed summaries of the Committee's views are provided in the Minutes for the last several Committee meetings. This response provides a brief summary of the Committee's conclusions as to the major issues raised by these letters.

First, a general observation: virtually all the concerns regarding "settlement classes" erroneously attack proposals the Advisory Committee does not make. Much of the comment offered is the familiar debate over the relative use of text and notes. Asserted lack of clarity of expression often reflects policy differences. This becomes clear when the desired detail requested in the letter simply urges that the proposal reach further, such as prohibiting futures classes. Again , the changes offered for public comment expressly do not address the difficult issues

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16-Professor Steering Committee (May 28); Professor Susan P. Koniak (May 28); and Professor Robert G. Bone (May 29).

attending "futures classes", nor do they dispense with the notice and opt out rights of (b)(3) nor the prerequisites of 23(a). The notes and text make this clear. Nonetheless much of the criticism makes the assumption that the proposals do some or all of these things.[2] Most of these issues are now before appellate courts. Laden as they are with difficult issues of case or controversy and other vexing social choices, the Advisory Committee was persuaded that they were best left to case development, encouraged by the provision for appeals of class certification contained in the package and largely ignored in these recent submissions to the Standing Committee.

III

Rule 23(b)(4): Settlement Classes

Most of the attention focuses on the Rule 23(b)(4) proposal to recognize settlement class practice. This proposal authorizes certification of a (b)(3) class for purposes of settlement, even though the same class might not be certified for purposes of litigation. It requires that the class meet all the prerequisites of subdivision 23(a), and also that the class satisfy the predominance and superiority requirements of subdivision (b)(3). All of the incidents of (b)(3) classes apply, including the notice and opt-out provisions of subdivision (c)(2). The proposal is further limited by the requirement that certification be sought by

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[2] See letters of Professors Sam Estreicher (attached) and Eric D. Green (earlier furnished).

"the parties to a settlement." It does not address settlement class certification under subdivisions (b)(1) or (b)(2).

The Steering Committee letter rests in part on the erroneous belief that proposed subdivision (b)(4) authorizes certification of a settlement class "when the requirements of (b)(3) are not satisfied." The intention of providing for "certification under subdivision (b)(3)" was to provide for certification of a (b)(3) class that meets all of the requirements for certifying a (b)(3) class. The only point of the proposal is to ensure that the prospect of settlement can be considered in determining whether a proposed class satisfies the prerequisites of subdivision (a) and the requirements of subdivision (b)(3). "Under" was used in place of "pursuant to" in keeping with Bryan Garner's Guidelines for Drafting and Editing Court Rules. If indeed clear communication requires that more words be used, it is easily remedied.

The most important issue raised by the several letters is the repeated insistence that the rule should provide more detailed direction to district courts. It is urged that the many difficulties that surround settlement class practice should not be left "to relatively unconstrained trial judge discretion" (Steering Committee, p. 3); that there are "controversial normative questions" that "should be resolved in a uniform and centralized way" (Steering Committee, p. 3); that the draft is cast in "minimalist terms" that do not provide necessary "limitations and conditions" (Miller & Shapiro, p. 1); and that the draft "is largely empty of content," and "cannot substitute for explicit

limits and guidelines" (Bone, p. 1).

The letters that so strongly suggest the need for detailed direction do not suggest any starting points. This omission may in part reflect the belief that "the notion of the settlement class is one that has only begun to make itself felt" (Miller & Shapiro, p. 2). Settlement classes, however, are not new. One clear but limited picture is provided by Willging, Hooper & Niemic, An Empirical Study of Class actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules, 45-46 (January 17, 1996 draft). In the four districts studied for a two-year period, 152 cases were certified as class actions. 93 (61%) were certified unconditionally; 59 (39%) were certified for settlement purposes only. Of the 59 settlement classes, 28 -- nearly half -- seemed to involve submission of a proposed settlement before or at the time of the first motion to certify. Limited acceptance of settlement classes was reflected in the 1985 Manual for Complex Litigation Second § 30.45, pp. 242-244; ten years later, greater acceptance -- reflecting continuing development -- is reflected in the Manual for Complex Litigation Third § 30.45, pp. 243-245.

Although settlement classes are not new, the Committee could not find any suitable basis to provide detailed directions that would distinguish certification of settlement classes from certification of litigation classes. This difficulty arises from the continuing evolution of all class action practices, including settlement class practices. It also arises from the fact that settlement classes may be used across the full range of class

actions. The problems that arise from settlement classes are different in different settings. If no member of a "small claims" class would undertake individual litigation, the comparison is to alternative modes of class disposition or complete nonenforcement. If many members of a mass torts class could undertake individual litigation, and indeed may have done so, the comparison is to individual litigation, consolidation on some nonclass basis, and alternative modes of class disposition. Rather than attempt to craft "factors specifically designed for settlement class actions" (Bone letter, p. 2), the Committee concluded that it is better to rely on the familiar prerequisites of subdivision (a) and the factors listed in subdivision (b)(3). These factors, as they would be amended by the proposal, focus attention on the concerns common to all class certifications. The only difference with a settlement class is that the prerequisites and factors must be viewed from the perspective of a specific proposed settlement.

The central question of settlement classes is in many ways the same question as arises on settlement of a "litigation" class action. The court must evaluate the fairness and adequacy of the settlement under Rule 23(e). The settlement class, however, may pose special dangers for the reasons pointed out in the letters. These same concerns were forcefully expressed to the Committee in several settings, including a Institute of Judicial Administration Symposium at New York University Law School where Professors Coffee and Koniak, members of the Steering Committee, presented papers on this topic. The Advisory Committee considered ways of addressing

these concerns, either by separate terms in a settlement class provision or by more general terms in an amended Rule 23(e). This consideration never progressed to the stage of an articulated draft. The problems are truly multifarious. Even a detailed rule would fail to reflect all the relevant concerns, much less capture and control them. In the end, it was feared that incomplete provisions would do more harm than good.

The difficulties of crafting substantially complete settlement class provisions could easily justify a decision to defer any action. The Committee hesitated at the threshold for these reasons. Proposed Rule 23(b)(4) has been advanced, however, to ensure that the benefits of settlement class practice are not obscured by the limit, clearly expressed in Georgine V. Amchem Products, Inc., 3d Cir. May 10, 1996, Nos. 94-1925 etc., that a class can be certified for settlement purposes only if the same class would be certified for trial. Georgine in fact limits current practice, because the proposal requires that there be a settlement agreement at the time certification is requested. This requirement serves several purposes. It avoids the risk that settlement terms may be influenced by the pressure of a class definition and an expectation of settlement. It reduces the risk that the same class definition may be carried forward for trial purposes without adequate reconsideration. And it ensures that there will be an opportunity to opt out of the class with knowledge of the proposed settlement terms. Thus limited, the proposal supports the benefits that may be reaped by settlement classes.

Among these benefits are reduced transaction costs, comparable treatment of those similarly situated, and protection of claimants against limited-fund risks that cannot be met by certification under subdivision (b)(1) (see, e.g., Bone letter, p. 1).

In addition to these issues addressed to the substance of the settlement class proposal, the letters suggest two additional sets of problems. The first set of problems may be described as the justiciability and due process problems. The Committee is satisfied that there are many uses of settlement classes that involve genuine cases or controversies for purposes of Article III, and that due process limits will be observed. The most troubling questions in these areas involve attempts to settle claims arising from "future injuries"; no attempt is made by the proposal to resolve these questions. The other set of problems addresses the limits of the Rules Enabling Act. Professor Carrington's letter is the most detailed exploration of these problems. The only way to avoid these problems entirely would be to declare that despite widespread current practice and in the face of subdivision 23(e), no class action may be settled. No one has advanced that conclusion. If a litigation class claim can be settled, the differences that characterize a settlement class do not change the Enabling Act conclusion. Members of a settlement class may indeed be better protected, because settlement of a litigation class may first arise after expiration of the opt-out period. A settlement class also may reduce transaction costs in ways that could not be achieved by a litigation class or smaller classes because of

differences in predominance, manageability, and like concerns.

IV

Factor (b)(3)(F)

The proposal adds a new factor (F) to the list of matters pertinent to the predominance and superiority findings required in certifying a (b)(3) class. This factor asks whether the probable relief to individual class members justifies the costs and burdens of class litigation.

The questions the letters address to factor (F) are, in brief compass, a replay of the Advisory Committee deliberations. The Committee recognizes the public enforcement values of small-claims class actions. Earlier drafts included explicit consideration of the public values of class enforcement among the matters pertinent to the (b)(3) findings. This provision was deleted because it seemed to approach, and perhaps to invite, judicial evaluation of the substantive policies underlying the class claim. The Committee also recognized that public enforcement resources are not always adequate, that failure to mount a public enforcement action may not reflect an official determination that enforcement proceedings would be unwise. The motives that drive class-action "enforcement," however, may not coincide with the public interest. Courts, the public, and other litigants pay a price when judicial resources are devoted to class actions. Defendants may find the costs of the proceedings and uncertainty as to the results so daunting as to surrender to settlement demands that may reflect

coercion, not disgorgement of the ill-gotten gains of lawbreaking. The Committee concluded that factor (F) is a desirable means of anchoring private enforcement through Rule 23(b)(3) in private benefits. When Congress has not authorized private enforcement in the public interest, and when public enforcement is not sought, factor (F) asks only that a court consider whether there is some color of private benefit that justifies private enforcement. Citizens generally do not have standing to enforce the requirements of the Constitution and of federal statutes against federal officials. Class counsel and representatives should not be able to claim standing to enforce public values absent the private remedial benefit that traditionally justifies private adversary litigation. This view is squarely and properly challenged by the letters. The choices are clear.

Conclusion

Professor Carrington points out (letter, p. 3) that for a quarter of a century, successive Advisory Committees believed that Rule 23 was not ripe for any consideration. In 1991, following a report from the ad hoc committee to study asbestos litigation, the Judicial Conference recommended that the Committee on Rules of Practice and Procedure consider Rule 23 through the Advisory Committee. The Advisory Committee has undertaken a lengthy study of Rule 23. The course of its work produced elaborate drafts that would have made far-reaching changes in Rule 23. Two quite different drafts have been discussed with the Standing Committee to keep it abreast of the Advisory Committee's deliberations. The

present proposals, advanced for publication and public comment, are more modest. The Committee believes that these proposals are ripe for meaningful public consideration.