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Advisory Committee on Civil Rules

The Advisory Committee on Civil Rules met on November 12, 13, and 14, 1992, at the Westin Hotel, Denver, Colorado. The meeting was attended by Judge Sam C. Pointer, Chairman, and committee members Judge Wayne D. Brazil; Carol J. Hansen Fines, Esq; Chief Justice Richard W. Holmes; Dennis G. Linder, Esq.; Dean Mark A. Nordenberg; and Judge Joseph E. Stevens, Jr. Judge William O. Bertelsman, Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Judge Robert E. Keeton, Chairman of the Standing Committee, also attended. Also present were Peter McCabe, Joseph A. Spaniol, and John K. Rabiej of the Administrative Office of the United States Courts; Joe Cecil of the Federal Judicial Center; Ted Hurt of the Department of Justice; Bryan Garner, Esq., of LawProse, consultant to the Standing Committee Style Subcommittee; and Edward H. Cooper, Reporter. Observers included Tripp Baltz, Alfred W. Cortese, Jr., and Joseph Womack.

The meeting began with a report on the progress of the recommendations that were submitted by the Advisory Committee to the Standing Committee at its June, 1992, meeting. The Standing Committee determined to hold Evidence Rule 702 for review by the reconstituted Advisory Committee on Evidence Rules, and made changes to Civil Rule 11 and some portions of Civil Rule 26. Civil Rules 83 and 84 were held back to provide an opportunity to achieve uniformity in the parallel submissions by several advisory committees. With these modifications, the recommendations of the Advisory Committee were submitted to the Judicial Conference. The Judicial Conference made changes in the Civil Rule 4 provisions affecting waiver of service by foreign defendants and determined not to send Civil Rule 56 to the Supreme Court. With these changes, the recommendations have been submitted to the Supreme Court.

Civil Rules 83, 84

Rules 83 and 84 were held back by the Standing Committee at its June meeting to seek uniform language for the parallel rules submitted by different advisory committees.

Rule 84 was discussed first. It was agreed that the draft, with changes in style to conform to the style system being developed by the Style Subcommittee of the Standing Committee, was in proper form for submission to the Standing Committee. The Chairman and Reporter were authorized to negotiate changes in language if appropriate to conform with the versions reported by other committees.

Discussion of Rule 83 focused first on subdivision (d).

Subdivision (d) of the draft rule would authorize district courts to adopt experimental local rules inconsistent with national rules adopted under 28 U.S.C. §§ 2072 or 2075. The experimental rules must be approved by the Judicial Conference and be limited to a maximum life of five years. Some concern was expressed about the length of time that might be required to secure approval by the Judicial Conference. It was suggested that the process would require review by the Advisory Committee and Standing Committee, leading to submission to the Judicial Conference. At the same time, it was believed that this process could be made to work rapidly. It was pointed out that the time required to secure approval need not diminish the five-year length of an experimental rule, since the rule could be made effective upon approval.

Discussion of the draft focused primarily on the tension between the local experimentation encouraged by the Civil Justice Reform Act and the provisions of the Rules Enabling Act, including the goal of national rule uniformity. Local plans adopted under the Civil Justice Reform Act are generating a wide variety of local practices that must soon be evaluated. That process will take some years yet, and it was recognized that national uniformity will not be attainable until that process is worked through. Discussion of the difficulty of fitting the experimental rules process proposed for Rule 83(d) with current local plans led to the conclusion that it would be better to defer consideration of the proposal to 1994 or 1995. A motion to defer consideration passed unanimously.

Attention then turned to proposed Rule 83(c), which protects against "forfeiture of rights as a result of negligent failure to comply with a requirement of form" imposed by a local rule. The discussion in part emphasized the narrowness of the "form" concept. As examples, a local rule specifying a particular place on a pleading for a jury demand would be a matter of form; a requirement that a witness list include a summary of testimony would be a matter of substance. The forfeiture of rights concept also was discussed, noting that imposition of financial sanctions on a party does not involve a forfeiture of rights. Other points made were that the rule is limited to negligent violations--the problem of deliberate flouting of local rules by counsel from other places is outside the rule; and that sanctions may be imposed on counsel for negligent violations.

With amendments of the Committee Note to reflect the discussion, a motion to send forward Rule 83 was adopted by vote of six to one.

Rule 43

The proposed amendment of Rule 43(a) would do two things. The first change would establish the power of the court to permit or require written presentation of part or all of the direct examination of a witness in a nonjury trial. This proposal reflects the fact that a number of courts have adopted this practice, particularly in bankruptcy proceedings. Some courts

believe that under Evidence Rule 611 a court can require written submission, but others are uncertain. It was pointed out that testimony at hearings on this proposal as published in August, 1991, reflected deep concern about the interest of litigants in presenting the living testimony of witnesses who are thought to be more effective in person. Some concern also was expressed that some judges might seize on written presentation of evidence as a means of expediting trials without giving adequate consideration to the advantages of oral presentation. It was agreed by consent that the problems are sufficiently complicated to warrant delay until the new Advisory Committee on Evidence Rules can be informed of the proposal.

The Rule 43(a) proposal also includes a provision, not previously published for comment, that would permit testimony of a witness located outside the state of trial to be presented by electronic transmission. It was observed that some courts are accomplishing this result now by conducting a deposition of the witness during trial. The witness is sworn by an officer at the place of trial, and the deposition testimony is presented at trial under the rules that permit use of depositions at trial. The judge can control the scope of the deposition to avoid presentation of inadmissible testimony. It was agreed that this proposal should remain on the agenda for further consideration at a future meeting.

Rule 23

The proposal to revise Rule 23 has received brief consideration by the Committee over the last year. The proposal would eliminate the present sharp distinctions between class actions certified under paragraphs (1), (2), and (3) of Rule 23(b), bringing these paragraphs together as considerations to be evaluated in determining whether to certify a class. This melding would directly affect the provisions for opting out and for notice to class members. The opt-out provision would be supplemented by a provision for opting in; the court could determine whether to permit opting out in any form of class action, or whether to limit the class to those who opt in. Explicit conditions could be imposed on the opportunity to opt out or in. A common approach to notice would be taken to all class actions, authorizing consideration of the expense and difficulties of providing actual notice and of the extent of the adverse consequences that might follow failure to accomplish actual notice. The proposal would make explicit the power to certify a class limited to one or more common issues, but would not address more directly the question of class action treatment of mass tort cases. Other changes would make clear the power to act on motions to dismiss or for summary judgment before determining whether to certify a class; require that a class representative be willing to represent the class; and support the free use of masters to evaluate proposed settlements.

The current draft is based in large part on a 1986 report of the Litigation Section of the American Bar Association, and follows the basic format adopted by the National Conference of Commissioners on Uniform State Laws. One source of encouragement for revisiting Rule 23 has been provided by the Task Force on Asbestos Litigation, which found Rule 23 -- as limited by the Committee Note to the 1966 amendments and by current practice -- too narrow in approaching tort litigation. Other problems found with the current rule include concern that the cost of providing the individual notice now required in Rule 23(b)(3) class actions can be prohibitive, defeating any opportunity for class relief; management of civil rights cases under Rule 23(b)(2) so as to defeat any opportunity to opt out; the effect of Rule 23(b)(1) and (b)(2) class actions in forcing members of a class to remain as unwilling plaintiffs; and difficulties in identifying the proper role for defendant classes.

The basic format of the proposed rule was supported by several members of the Committee. The conflation of (b)(1), (2), and (3) class actions was welcomed.

One question not touched by the draft is the need to enforce the provision for a prompt determination whether to certify a class. It was agreed that delayed determinations can cause significant problems in handling a putative class action. Thought will be given to setting a time for a required motion for certification by a party seeking to represent a class.

The opt-in provision was discussed as an important means of addressing tort class actions and defendant classes. It was suggested that in many circumstances opt-in classes will be more appropriate than opt-out or mandatory classes for these settings. The provisions for establishing conditions on opting out or opting in also were discussed briefly.

The more flexible notice provisions also were discussed. These provisions could work in both directions, helping to reduce the costs of notice required in actions that now are certified under Rule 23(b)(3), but perhaps increasing the costs of notice in actions that now are certified under Rule 23(b)(1) or (2). Costs would increase, however, only upon a finding that the expense was justified in light of the potential adverse consequences to class members who did not get actual notice.

Other aspects of the proposal were discussed briefly. The proposed reference to representation as a "fiduciary duty" in Rule 23(a) was described as a first attempt to emphasize the nature of the representation responsibility. The new requirement in Rule 23(a)(4) that representative parties be willing to represent class members was suggested in response to the problem of certifying a defendant class with no willing representative. It was noted that

Rule 23 is used in many different settings, and that it is difficult to define more specific categories of class actions that might support more detailed rules provisions.

It was agreed that revision of Rule 23 is a complex task that must not be rushed to completion. After discussing the costs and benefits of pushing toward official publication of a draft for public comment, it was concluded that it would be better to begin with a reasonably broad request for informal comment. There is much practical experience with administration of Rule 23 that may be useful in shaping a draft that can survive official publication without need for substantial revisions that might require a second official publication. In seeking comments it will be made clear that the present draft is tentative; suggestions will be solicited as to matters not addressed in the draft as well as those that are addressed. The function of the provisions for opting out and opting in will be addressed in more detail than the draft Committee Note provides.

Rule 26(c)

Concern has been expressed in recent years that protective orders have blocked access to discovery information about significant continuing public health hazards, and have caused unnecessary expense as litigants in related cases wastefully repeat discovery efforts. Some states have enacted rules to address these concerns, and similar rules are being actively considered in many states. Representatives of the judiciary have testified in Congressional hearings on such legislation, urging that the question should be addressed through the regular rulemaking process. The Committee agreed that the question must be considered.

As an initial matter, several members of the Committee expressed doubt whether actual practice under Rule 26(c) in its present form actually closes off public access to information about significant public health hazards, or whether wasteful duplicating discovery efforts are often required. Some recent academic studies have suggested that in fact there are no significant problems in these areas. The Federal Judicial Center is considering the task of seeking information about the frequency of protective orders and their impact, and will attempt to design a study. The task, however, is a very difficult one. If a study in fact shows widespread concealment of important information, it will be easy to feel confident of the results. If a study fails to find widespread difficulties with protective orders, on the other hand, it will be much more difficult to be confident that there are no problems.

Discussion also focused on the impact that protective orders have on the actual conduct of discovery. Parties now often stipulate to blanket protective orders that ease the exchange of

information and avoid the need for judicial rulings as to specific matters. Insistence on specific motions and orders to protect each category or even item of potentially protectable information could significantly impede discovery and add unnecessary burdens for the courts. Restricting the availability of protection, moreover, could drive some parties to exchange information outside the formal discovery process, avoiding the impact of rules requiring disclosure of discovery responses.

Discussion also reflected the difficulty of drafting detailed rules to control specific categories of information. Experience with protective orders involves many different problems that cannot readily be catalogued and resolved.

Despite these difficulties, it was concluded that it may be desirable at least to codify good present practice in Rule 26(c), as a means of avoiding uncertainty and ensuring that courts are sensitive to the interests that must be weighed in determining whether to make, modify, or dissolve a protective order. A provision that makes explicit the power to dissolve or modify a protective order will resolve a question that has divided some courts. Explicit reference to protection of the public interest can reduce the opportunity enjoyed by a party who holds most of the information needed for an action to let it be known that discovery can work smoothly with a blanket protective order but will prove contentious otherwise.

A draft rule provision and Committee Note will be prepared for future consideration.

Rule 64

In 1986 the American Bar Association adopted a recommendation advanced by the Sections of Litigation and Torts and Insurance Practice that Rule 64 be amended and supported by enabling legislation. The proposal would retain present Rule 64 as subdivision (a), and add detailed provisions for prejudgment security orders as a matter of federal law. These provisions would reflect a proposed statute that would adopt a uniform national standard for actions in federal courts and permit enforcement of a federal prejudgment security order in any other federal court.

Brief discussion of the proposal reflected the fact that it raises complex questions. The desire to avoid the need for repetitive proceedings for prejudgment security in different courts, often adapted to the differing requirements of different state laws, is understandable. The questions that must be addressed in developing a federal rule, however, require careful integration with state systems. Many of the questions may demand solutions that go beyond the authority conferred by the Rules Enabling Act. Any federal prejudgment security order must be

integrated not only with other federal orders but also with security interests arising under state law. State law exemptions must be considered. The ABA proposal includes federal legislation, and it was felt that legislation probably is required to support any reasonable federal scheme that might be written into a civil procedure rule.

A separate matter addressed by the ABA proposal involves the question of pre-security notice. Constitutional decisions in the last two decades have required modification of many earlier notice practices. A uniform federal notice provision likely can be framed in ways that clearly involve only issues of practice and procedure, and that fit comfortably with state security devices adopted through present Rule 64.

These questions were left for further study, including a request to the people advancing the ABA proposal for a statement of current experience.

Rule 68

The Committee published proposals to amend Rule 68 for public comment in 1983 and 1984. The proposals reflected the belief that Rule 68 should be an effective means for encouraging early pretrial settlement, but has failed. Several reasons have been advanced for the perceived failure, including the facts that the rule is not available to parties making claims and that it has been held inapplicable when a plaintiff fails to accept an offer and then recovers nothing. The most important reason has been the belief that the sanction is inadequate. Academic discussion of Rule 68 was stimulated by the 1983 and 1984 proposals, and Judge Schwarzer, Director of the Federal Center, has published a new proposal designed to cure many of the defects perceived in the earlier proposals. The Department of Justice also has begun preliminary study of the Rule, and provided a tentative draft for review.

Discussion began with general agreement that Rule 68 should be studied. It has not been an effective tool for encouraging early pretrial settlement. The least ambitious program would be simply to correct possible flaws without attempting to enhance available sanctions. The rule can be extended to offers by parties advancing claims, and to apply when a defending party's offer is followed by judgment for that party. A more ambitious question is the relationship between Rule 68 and statutory attorney fee provisions. Under the decision in Marek v. Chesny, 473 U.S. 1 (1985), a plaintiff who recovers less than a Rule 68 offer loses the right to recover post-offer attorney fees authorized by a statute that describes fees as "costs." The dissenters protested that this use of Rule 68 defeats the policy of attorney fee statutes adopted to provide special incentives and support to plaintiffs in specific types of litigation. This question can be addressed without taking

on the question of more powerful sanctions. Beyond these more modest questions, the sanctions issue also deserves study.

Discussion then turned to a Rule 68 draft built on Judge Schwarzer's proposal. The central feature of the draft is a "capped benefit-of-the-bargain" attorney fee provision. If judgment is not more favorable to the offeree than an offer, the offeree must pay reasonable attorney fees incurred after expiration of the offer. The amount of the fee award is reduced by the difference between the offer and the judgment, reflecting the benefit gained by the offeror--if a defendant offers $40,000 and the plaintiff wins $25,000, for example, the judgment is $15,000 more favorable to the defendant than the offer and this amount is deducted from the post-offer fees of the defendant's attorneys. The amount of the award is further limited by the amount of the judgment: a plaintiff cannot be made to pay more than the judgment, protecting the plaintiff against any out-of-pocket loss, and a defendant likewise cannot be made to pay more than the judgment. If the judgment is that plaintiff take nothing, neither plaintiff nor defendant can be awarded attorney fees under the rule. Fee-shifting statutes are accommodated by a separate provision barring an award of costs or fees against a party that is the prevailing party under a statute providing for an attorney fee award to a prevailing party.

One question raised by the current proposal relates to a perspective emphasized in the 1984 proposal. The consequences for failure to accept an offer can be viewed as compensation for attorney fees, as an incentive to think about settlement, or as a sanction for failure to abide by reasonable procedural requirements. The sanction perspective can focus on reasonable settlement behavior or can focus instead on a simple comparison between offer and judgment. It may prove difficult to adopt a single view. The benefit-of-the-bargain approach, for example, seems to focus on compensation. A cap on liability, on the other hand, is much more a limit on sanctions than an evaluation of reasonable behavior or an attempt to effect compensation.

The choice between compensation and sanction views may bear on the Enabling Act questions that arise from attorney fee awards. Discussion repeatedly addressed the question, framed by the dissent in the Marek case and elsewhere, whether attorney fee sanctions are within the scope of the Enabling Act. Fee sanctions are accepted readily when used to enforce rules with obvious procedural purposes. The procedural purpose of Rule 68 is to encourage early settlements that reduce the need to invoke other procedures, a purpose that may seem tangled with arguably substantive issues. It was agreed that these questions deserve further consideration.

The impact of Rule 68 on attorney fee statutes also was considered. Three approaches were suggested in discussing the

Marek case--to adopt it in the text of the rule, to extend it to allow an award of attorney fees under the rule in circumstances outside a statute that applies to the litigation, or to overrule it. A simple means of overruling would be to provide that the rule, or the fee-shifting provision, does not apply to any claim that invokes a statute providing for an award of attorney fees. No decision was reached as to the best approach. The view was expressed, however, that the rule should not authorize an award of fees against a party who prevails in a case covered by a fee-shifting statute.

The purpose of capping potential fee awards was discussed at length. It was noted that even with a cap, a considerable risk is faced by a plaintiff who may lose all benefit of a substantial judgment that falls below an expired offer. This risk may prove especially complicated with contingent-fee representation, since counsel shares the risk with the client. In many cases the risk also will be enhanced by the fact that the defendant controls access to most of the evidence--a plausible offer early in the litigation may deter a plaintiff who is unable to make a reasonable prediction of the eventual trial result. It was noted that many cases in federal court involve demands in a range between $100,000 and $200,000. The cap may help to hold down fee expenditures in such cases because of the prospect that large fees cannot be recovered. Many committee members thought that the cap is an important feature of any proposal. At the same time it was noted that the cap reduces the settlement incentive created by Rule 68, and adds one additional complication to calculation of a Rule 68 award.

Earlier proposals had included awards of post-offer "expenses" as well as attorney fees and costs. This history was discussed, leading to the conclusion that expenses should not be included in the calculation of Rule 68 awards. The Note to any revised rule should make this decision explicit.

The basis for making and excusing Rule 68 awards also was discussed. There was general agreement that the main test should be as automatic as possible, relying on comparison between the offer and the judgment. The 1984 proposal that sanctions should turn on a determination whether it was reasonable to fail to accept an offer would entail great administrative burdens. There should be some opportunity for excusing sanctions, however; the current proposal allows a court to reduce sanctions to avoid imposition of undue hardship. It was suggested that this phrase might justify relief if a change of law occurred between offer and judgment. The problem of substantial changes in knowledge between offer and judgment also was noted. Comparison of offer and judgment also presents problems when relief extends beyond a simple award of money. It was agreed that Rule 68 should be available in cases involving nonmonetary relief, and that a judgment need not

correspond precisely with an offer in such circumstances. The basic concept should be one of substantial correspondence between offer and judgment. Application of this test may require special comment for cases in which a claimant seeks the vindication of official judgment: the proposal is framed as an offer of settlement. A defendant might offer $50,000 for a dismissal with prejudice; the claimant might prefer to spend the further resources needed to win a judgment for $50,000, or perhaps even less. The proposal does not seem to take account of the vindicating values of judgment. So long as closed transactions are involved, a straight monetary comparison seems the most likely approach. If declaratory relief is appropriate with respect to possible future events, however, the comparison becomes more confused. Difficulty also may arise from judgments that include amounts to be determined or paid in the future, or from offers made to groups of parties. The initial reaction was that such cases cannot be addressed in specific terms. The offeror can determine the terms of the offer, and the judgment must be compared to the offer actually made.

Comparison of offer and judgment also can become complicated by failure to make explicit the terms of the offer with respect to costs, statutory or other fee awards, and interest. It was agreed that the basic principle should be that the offeror controls the terms of the offer. The Rule, however, should provide a clear standard of comparison for offers that are not explicit. The provision in the present rule that the offer should be for specified relief "with costs then accrued" has been a source of possible confusion, and it was suggested that it should be dropped. One possibility is to compare the actual judgment terms--including any interest and fees--to the amount offered, including any interest and fees that would have been awarded had the offer been accepted.

The question whether some margin of excusable difference should be built into the rule also was explored. The Department of Justice proposal would allow an award only if a judgment is at least 10% more favorable to the offeror. Some support for this approach was voiced, as a means of protecting impecunious litigants and reasonable decisions not to accept an offer. Many cases involve quite uncertain amounts. It was pointed out, however, that other cases involve quite certain amounts--if a defendant sued on a note offers judgment for the full amount of the note, and the plaintiff wins judgment for that amount, the plaintiff's failure to accept the offer should not be excused. To take advantage of a ten percent-leeway rule in such a case, the defendant would have to offer 110% of the amount owing. It also was noted that allowing a margin of error increases the complexity of the rule.

Sequential offers also led to substantial discussion. The proposal allows a party to make successive offers without losing the benefits of an earlier offer. A defendant, for example, could

begin by offering a small amount as a means of ensuring recovery of costs should the plaintiff win nominal damages or nothing. A series of escalating offers could be made as the case progressed. The purpose is to encourage offers that may lead to settlement as continuing discovery and preparation brings about a convergence in the parties' views of the case. Concern was expressed that this and related aspects of the proposed rule could lead to an elaborate new area of attorney strategy. At the extreme, claims that now are settled without instituting suit might be filed for the purpose of making a Rule 68 offer and then undertaking serious settlement negotiations against the backdrop of potential fee liability. Short of that possibility, increased attorney time will be devoted to the strategy of Rule 68 offers, perhaps in conjunction with non-Rule 68 offers. There may be a risk that some attorneys or clients will be tempted to increase fees in hope of a fee-shifting award. These dangers are met in part by the cap on fee awards. A defendant's small offer followed by a still smaller judgment would yield an equally smaller fee award. A different consequence of multiple offers arises from the provision for allowing plaintiffs as well as defendants to make offers. So long as both plaintiff and defendant are allowed to make offers at different times, it is possible that a final judgment will be less favorable to each than an offer that each had failed to accept. The draft rule accepts this possibility.

The starting time for making an initial offer is related to the successive offer question. The proposal suggested two alternatives: that an offer could be made at any time after joinder of issue, or after the meeting of the parties under the version of Rule 26(f) that is now pending in the Supreme Court. Difficulties were found with each alternative. Issue may not be joined for a long time while Rule 12(b) motions are pending. The Rule 26(f) conference may be reached several weeks after the action is commenced. Tying the offer to the scheduling conference could encounter similar delays. At the same time, it was thought desirable to have some delay before an offer can be made. In some situations, the plaintiff may be in a far better position than the defendant to evaluate the claim at the outset. After discussion it was concluded that it would be proper to impose a delay for 30 days after a defendant is served with process.

The delay at the beginning of the litigation was coupled with the provisions governing the duration of the offer--21 days, allowing the court to extend the time for accepting an offer, and allowing the offeror to withdraw the offer. If the offeree reasonably needs more than 21 days to evaluate an offer, an extension should be available to protect against the consequences of failure to accept. If the extension seems unfair to the offeror, the offeror can withdraw the offer before it is accepted, losing the potential benefits of the offer but avoiding the risk of acceptance.

The start-up and duration issues tie directly to the question whether to continue provisions that close off the offer period at some point before trial. The discussion suggested that there was no need to impose a cut-off. The requirement that an offer remain open for 21 days unless the court orders a different period will provide as much discipline as may be needed--if any is needed--to discourage last-minute offers.

It was accepted that Rule 68 should state explicitly that offers are not to be filed with the court. It was noted that this provision, present Rule 68 practice, and some other rules do not fit well with the filing provisions of Rule 5(d). It was concluded that Rule 5(d) should be modified to fit the other rules.

There was discussion of the probable effects of the rule in encouraging early offers. Views differed, with several members expecting that a rule with significant sanctions can be effective. Other members were less confident.

Evidence Rule 412

The Criminal Rules Advisory Committee has drafted a proposed revision of Evidence Rule 412. The revision responds to Congressional concerns with admission of evidence of the past sexual behavior of victims of sexual misconduct. The present rule does not apply to civil cases, and in criminal cases is not as clear or broad as could be. Congress has been informed that the Judicial Conference would examine the question promptly. The Standing Committee hopes to be able to publish a proposed rule for public comment on a schedule that will enable a final recommendation to be made to the Judicial Conference next summer. Because of this schedule there is little opportunity for immediate study by the Evidence Rules Advisory Committee that is being formed.

Committee deliberations focused on the draft rule and note prepared by the Criminal Rules Advisory Committee.

Discussion of the proposal focused in part on questions of substance. The reach of a rule that focuses on "an alleged victim of sexual misconduct" may not be clear. Sexual harassment in many forms seems to fall into the rule. A claim for loss of consortium seems to fall outside the rule. More difficulty may be encountered, however, with hostile workplace claims. A claim that a plaintiff was discriminated against because of a sexual relationship between a superior and another employee, for example, may present uncertain questions as to the identity of the victim reached by the rule.

The distinction between criminal and civil cases drawn in the draft caused some puzzlement. It provides for admitting evidence

of specific instances of sexual behavior if exclusion would violate the constitutional rights of a defendant in a criminal case, or in a civil case would deprive the trier of fact of evidence essential to a fair and accurate determination of a claim or defense. It was surmised that perhaps the constitution requires admission in a criminal case of any evidence essential to a fair and accurate determination, and at times requires admission of evidence that is not essential to a fair and accurate determination. The distinction then would make sense -- evidence essential to a fair and accurate determination is admitted in both civil and criminal cases, and evidence that is not essential may be admitted in a criminal case if the constitution requires. It was concluded, however, that the provision for criminal cases should include other evidence of past sexual behavior, since the constitution may require admission of evidence that is not limited to specific instances of past sexual behavior. This change will ease a related question. The draft further provides for admission of evidence of reputation or opinion evidence in a civil case when exclusion would bar evidence essential to a fair and accurate determination. The absence of any comparable provision for criminal cases might reflect a conclusion that the constitution never requires admission of reputation or opinion evidence. Rather than attempt to resolve that question by rule, however, it seemed better to draft the rule so that reputation or opinion evidence can be admitted as "other" evidence if the constitution requires admission. In this form the rule will not purport to determine constitutional questions, much less to direct exclusion of evidence that must be admitted as a matter of constitutional compulsion.

Matters of style also attracted discussion. The word "fair" in the phrase "fair and accurate determination" was noted. It was suggested that the concern for fairness reflects the need to avoid undue embarrassment through a process that weighs competing concerns for reaching an accurate decision and for protecting privacy values.

The draft begins with a subsection (a) declaring the evidence is not admissible except as provided in subsection (b). It was concluded that combining the two subsections would achieve the same result more economically and with greater clarity. The provision that evidence "may be admitted" should be changed to "may be admitted only if it is otherwise admissible under these rules," to make it clear that the evidence must satisfy the requirements of admissibility of the other rules.

The subdivision dealing with procedures for offering evidence provides for hearing "in camera." There was extensive discussion of the meaning of this term and the difference between in camera and ex parte hearings. It was agreed that in camera proceedings are on the record, and that in practice they take a variety of forms. In the setting of this rule, the emphasis is on protecting

the privacy rights of the alleged victim of sexual misconduct. The question of privacy relates to the question whether multiple proceedings are contemplated by the draft provision that the court must permit any other party and the alleged victim to be heard in camera. It was concluded that the draft should be revised to make it clear that the court can tailor the hearings in chambers to the needs of the particular case. Often a single hearing opportunity for all parties and the alleged victim should be sufficient.

Other matters of style also were suggested for the subdivision dealing with the procedure for admission. It was urged that a motion for leave to admit Rule 412 evidence should state the purposes for which it is offered.

It was unanimously agreed that the changes suggested in the discussion should be incorporated in a revised draft Rule 412, to be shared with the Criminal Rules Advisory Committee and, if possible, with the Evidence Rules Advisory Committee. The Civil Rules Advisory Committee suggestion will be reported to the Standing Committee.

Rule 4

The process of developing civil justice expense and delay reduction plans has led to various recommendations for revision of the Civil Rules.

One suggestion from the Eastern District of Pennslyvania is that the 120 day period allowed by Civil Rule 4(j) for serving summons is too long. It was pointed out that the Northern District of California has a local rule that presumes service should be made within 40 days. The 120-day period provides a built-in front-end delay that often is seized upon. On the other hand, it was noted that setting a new period should take account of the proposed amendments of Rule 4 that include express waiver-of-service provisions.

It was concluded that a draft revision should be prepared for the next meeting.

On a different matter, brief discussion was devoted to the changes in the pending Rule 4 provisions for waiver of service by foreign defendants. Although the changes prevent imposition of sanctions for refusing to waive, it continues to make sense to allow a request for waiver. The defendant gains added time by waiving formal service, and waiver avoids the risk that the costs of service will be taxed if the defendant loses on the merits.

Rule 12

The Northern District of Georgia has observed that by

deferring the time to answer until disposition of Rule 12 motions, Rule 12 unduly extends the time for joining issue. Local rules require a preliminary statement 40 days after issue is joined; case processing often is delayed for months pending disposition of a Rule 12 motion. It has recommended that Rule 12 be revised to require that an answer be filed at the time the defendant files a Rule 12 motion.

Discussion pointed out that the court has power under Rule 12(a) to direct that an answer be filed before disposition of a Rule 12 motion. This power is exercised at times, particularly if it seems likely that a motion questioning service, personal jurisdiction, or venue will lead to transfer rather than dismissal.

It was suggested that the original purpose of deferring an answer remains. The defendant should not have to bear the burden of preparing an answer in an action that may be dismissed on any of the grounds specified in Rule 12(b). The risk that a deferred answer may defer other events can be met by picking a different event to trigger other events. Joinder of issue need not be chosen as the event.

It was agreed that Rule 12 should not be changed to require that an answer be filed with a motion.

The 20-day period for filing an answer also was discussed. It was recognized that often 20 days is not sufficient; some courts have local rules allowing an extension by stipulation. Although the period seems too short, the conclusion was that no changes should be proposed now.

Rule 5

The filing requirement of Rule 5(d) was discussed briefly. It was pointed out that the pending revision of Rule 11 requires that a proposed Rule 11 motion be served but not filed. Rule 68 offers are not filed when made, and revision of Rule 68 may include an express provision that prohibits filing.

No firm conclusion was reached. A proposal to revise Rule 5(d) may be brought to the committee.

Rule 45

Two questions were raised as to the provisions of Rule 45 governing trial witness subpoenas.

One question involved the possibility of authorizing nationwide trial subpoenas. The advantages of being able to compel live testimony weigh in favor of a national reach. There are many potential problems, however, including the length of notice;

setting the allowances that should be provided; determining whether to excuse attendance in light of the burdens involved and the importance of the testimony; avoiding repetitive subpoenas for trials that are repeatedly adjourned; preventing undue waiting periods while a trial is conducted; and doubtless other matters. The question also is affected by the prospect that Rule 43(a) may be amended to permit electronic testimony. It was concluded that amendment of Rule 45 may be desirable, but that the time has not yet come for undertaking the chore.

The other question turned on the fact that Rule 45 is written in terms of the places for serving a subpoena. It was suggested that the proper concern is with the distance a witness can be drawn from home, place of employment, or other base, not with the place in which service can be accomplished. It was agreed that the traditional equation of service with power seems outmoded. This aspect of Rule 45, however, again was thought better deferred.

Other Rules

It was noted that a question has been raised as to the drafting of Civil Rule 77(d). The rule was amended to reflect adoption of Appellate Rule 4(a)(6). It now provides that lack of notice of the entry of judgment by the clerk does not affect the time for appeal or relieve or authorize the court to relieve a party for failure to take a timely appeal "except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." New Appellate Rule 4(a)(6) provides that if a party did not receive notice of entry of judgment from the clerk or a party within 21 days of entry, a court may "reopen the time for appeal." It was concluded that the two rules fit well enough to avoid confusion. No change was proposed.

The American College of Trial Lawyers has pointed out that many rules provide that sanctions "shall" be imposed. It was suggested that it might be appropriate to reexamine the use of mandatory language in light of the change of Rule 11 from mandatory to permissive sanctions. After discussion, which included the observation that discovery sanctions often are not severe, and that there is much discretion built into many of the "shall" rules, it was concluded that the topic need not be addressed now.

It has been suggested that there is an ambiguous reference to "in this subdivision" in the pending revision of Rule 26(b)(4)(C). If the ambiguity seems significant, it will be corrected.

Long-Range Planning

The Long-Range Planning Committee has asked each advisory committee to help in the long-range planning process. It has developed a list of topics that may be of interest to each

committee and seeks comments. The planning process and areas of interest to this committee both were discussed.

After some initial discussion, a list of topics that might be placed on the committee agenda for future study was reviewed. The list included civil discovery; complex litigation; mass torts; coordination of state and federal proceedings; pro se filings; sanctions and incentives; standards for awarding fees; jury selection; peremptory jury challenges; juror competence and special juries; the right to jury trial; pleadings; discovery; summary dispositions; standards of appellate review; opinion writing; the rulemaking process; the relationship between uniform national rules and experimental local rules; the impact of technology on the trial process; reorganization of the Civil Rules and integration with other bodies of procedural rules; alternate dispute resolution devices; and requirements that some litigants pay the real costs of providing a public tribunal to resolve their disputes.

Discussion then turned to the means of sorting out the topics that might claim first priority. Standards of appellate review were discussed as an example of the areas that do not seem to involve pressing problems. Discovery was discussed as an illustration of a persisting problem that is addressed by proposed rules changes that should be given a chance to work before the topic is revisited.

Developments in technology that affect the trial process were identified as an area that should be followed by the committee, but that should be left primarily to other committees directly charged with the problem. Adaptation of court rules to the opportunities of new technology depends first on sound appraisal of the technology and on a determination of the point in the development process that makes new rules appropriate.

The relationship between uniform national rules and local rules is one of the topics that the committee placed high on its list of priorities. The discussion of Rule 83 early in the meeting, summarized above, sets out the reasons for continuing attention.

The rulemaking process itself is one that will be placed high on the committee's list. The process is deliberate, and must rely on resources volunteered from many sources. It deserves careful study.

The problems of complex litigation, and of coordinating federal and state litigation, also will receive careful attention. These problems were addressed separately as the next agenda item.

A final area of immediate importance to the committee is the settlement process, including alternate dispute resolution

techniques. The settlement process is addressed in part by the continuing study of Rule 68 discussed above. Other aspects of the process as well may prove amenable to rules provisions.

Coordinating Federal and State Litigation

Judge Schwarzer has suggested that state and federal courts should work to develop better means of coordinating parallel litigation. Discussion of the possible questions went in several directions.

One possible means of coordination is through joint appointment of special masters by state and federal courts. The discussion noted that Civil Rule 53 is old, and that a great many things now being done with special masters lack any clear support in the text of the rule. The Federal Judicial Center is studying the use of special masters, and may develop useful information in this direction. Use of special masters also might benefit from rules increasing the amount of deference that can be extended to their recommendations. Rule 16 may help supplement Rule 53 in some settings, but it too may deserve consideration in this area.

Another possible means of coordination involves discovery. The questions may involve an extension of the model used in Multidistrict Litigation. Support was expressed for the idea that discovery should be controlled by the court where an action is pending, not an ancillary discovery court. One question to be explored is whether rules changes can effect all desirable changes in this area, or whether supporting legislation may be required as well. The earlier discussion of Rule 45 and nationwide trial subpoena power was brought back into this discussion. Changes also might be made in the rules to facilitate use of state court discovery materials in federal courts; in addition to the civil rules, Evidence Rule 804(b) also may deserve study.

Other means of coordination may require statutory action. Congress has seriously considered legislation for single-event mass disasters, and the American Law Institute is finishing work on a Complex Litigation Project that includes detailed statutory proposals for consolidation in federal courts. The Committee may study these proposals as part of the process of determining the best means of addressing the problems.

It was agreed that more study should be given to the topics that might be pursued through specific rules proposals.

Style

The Style Subcommittee of the Standing Committee has retained Bryan Garner of LawProse to rewrite the Civil Rules and Supplemental Rules for Admiralty. The Style Subcommittee's draft of Mr. Garner's draft of the Civil Rules was submitted for study by the Advisory Committee. The style rules reflected in the draft were discussed at length, initially by the Committee and then by the Committee with Mr. Garner.

The first topic of discussion was the means of referring to parts of a rule within the rule. It was agreed that the order of increasing particularity within a rule is: subdivision (a); paragraph (1); subparagraph (A); item (i); and clause. In Rule 4(c)(2)(C)(ii), for example, it is proper to say: "service must follow subaragraph (A) or (B) of this paragraph."

No uniform practice has been used when a reference to one subdivision is made in another subdivision. Using Rule 4 as an example, a reference to subdivision (a) in subdivision (b) might be to "subdivision (a)," or to "(a)," or to "Rule 4(a)." The advantage of referring to "Rule 4(a)," as would be done in a different rule, is that many writers fail to introduce quotations -- instead of stating that Rule 4(a) provides something, they simply quote the rule without adequate designation. It was finally decided that when a designation is used, it is better to begin the reference with "Rule." It also was agreed that there can be no formula for determining whether a designation should be used, and that some departures may be appropriate.

References to subparts of a rule also were discussed. It was agreed that the prefix could be omitted when referring to different subparts at the same level of a rule: It is proper to refer to "Rule 4(d)(1) or (3)," or "Rule 4(c)(2)(A) or (B)," rather than "Rule 4(d)(1) or (d)(3)." By the same test, it is proper to refer to "Rule 4(c)(2)(B) and all other process under (c)(1)."

The place of "otherwise" in relation to a verb also was discussed. Draft Rule 5(a) was used as an example. The first sentence begins "Except as these rules provide otherwise"; subsequent subparagraphs read "unless the court otherwise orders." Mr. Garner stated that the end of a clause or sentence is a place of emphasis. Otherwise is a word that bears emphasis and usually is placed at the end to emphasize the contrast. In the subparagraphs, "orders" is a stronger word than otherwise. Nonetheless, in this specific illustration it would be appropriate to write the rule as "orders otherwise." There is no firm rule, and placement of the word should depend on the context. It was decided that the convention should be that otherwise follows the verb.

Rule 5(a)(1) illustrates the use of "except" as an introductory warning that a general principle or set of examples is subject to exceptions. It was agreed that there is no firm rule on placing "except" at the beginning.

Rule 9(c) was used to raise the question whether a sentence can begin with "but." Mr. Garner stated grammarians know that a sentence can begin with "and" or "but," and that "but" works better than "however." But is shorter, sharper, and more direct; however is internal, and often should be discarded in favor of beginning a new sentence with but. But is used to connect the sentence with the sentence that went before. Mr. Garner agreed to write a memorandum on this question for consideration by the Style Subcommittee.

Use of the passive voice was noted briefly. Mr. Garner stated that ordinarily it is better to use the active voice, but in some situations the passive voice is better.

The difference between the phrases "under these circumstances" and "in these circumstances" was described as the difference between the 19th Century practice of using "in" and the more prevalent contemporary practice of using "under." It was agreed that "in" would be the style.

Use of "as follows" was described as one of the more important revisions of the Style Subcommittee, adopted "not without dissent." At times the draft says "as follows," which is a truncated version of "as it follows." "In the following circumstances" may be used instead. No firm style choice was made.

Rule 8(c) was used to illustrate use of "these" as an appositive in introducing a list--a party shall state an affirmative defense, "including these:". This rule illustrates the use of "bullets" to set off the items in a lengthy list. The style adopted follows each item with a semicolon, and prefaces the final item in the list with "and." This style creates a complete sentence.

The use of "if," "where," and "when" to create conditions was discussed. Mr. Garner stated what "where" is more legalistic, and "when" is easier. Some preference was stated for "if." The Style Subcommittee has not discussed this question. No resolution was reached.

Layout of the rules on the page also was discussed. "Hanging indents" for the various parts make a rule much more readable. Even the leading left edge of a rule is indented to create more "white space." Concern was expressed that it may not be possible to force all publishers to present the rules in this form. It was suggested that in promulgating the rules it should be stated that

meaning depends in part on form, and that the form is an official part of the rules. Anyone who chooses to publish in a different form would run the risk of changing meaning.

It was agreed that all parties are neuters, and can be referred to as "it." In places, however, "person" is used. Whenever possible, efforts should be made to avoid "he or she" and "his or her."

The uses of "shall," "may," "must," and "must not" were discussed. The Style Subcommittee draft uses "shall" as the mandatory word when an actor is the subject, and "must" as the mandatory word when an object is the subject. Mr. Garner observed that the consensus of professional American drafters is that "shall" means "has a duty to." In New Zealand and Australia, "shall" is not used; it is replaced by "must" in all settings. After discussion it was decided that "must" should be adopted as the style convention. It was suggested, however, that "shall" may be used to introduce a description. Draft Rule 4(b)(1) was used as an example. It begins: "The summons must:", then lists a number of characteristics of the summons. It was pointed out that a summons that fails to match all of these characteristics might still be effective for some purposes. There was concern that the more powerful command of "must" to introduce a list of descriptive characteristics might mislead courts into imposing inappropriate sanctions for departures.

Similar questions were raised about the use of "may not" to prohibit action. "May" is the appropriate permissive term, meaning "is allowed to." It is conventional to use "may not" to mean "is not allowed to." After discussion it was agreed that "must not" will be used to prohibit action. "May not" is not to be used.

The use of gerunds and nouns was explored. Mr. Garner noted that Bentham followed a "noun preferring principle," always coupled with "of." This principle leads to frequent use of abstract nouns. Many of the nouns are "buried verbs," made into nouns with "sion or tion," "ance," "ent," and so on. Clarity often is promoted by converting the noun to a verb form and dropping the preposition.

Use of "each" and every" was noted. "Every" is seldom used; in the draft of Rule 17(a), for example, "Every action" should have been changed to "An action." In related fashion, drafting should be done in the singular--the caption of Rule 17(c) should be "Infant," not "Infants."

The use of spaces separating dashes from the adjacent text was explained as a custom acceptable in American practice. It gives more white space, and avoids the risk that an unspaced dash may be mistaken for a hyphen.

There has been no uniform practice in designating Advisory Committee Notes. It was agreed that the Note affixed to each rule should be describe as a Note, no matter how many discrete topics it covers.

The use of bold and italic type was noted. The question was left for adoption of a uniform convention by the Style Subcommittee. Typefaces were explored, with the comment that Courier is an unattractive font. New York Times is a better font. Palentino was described as ideal.

The next step in reviewing the Style Subcommittee draft will require consideration of separate rules by subcommittees of the Advisory Committee. Mr. Garner undertook to provide a restyled draft of the rules now pending in the Supreme Court, to be completed by January 15, 1993. The subcommittees are expected to finish work on their assigned rules by mid-March. The chairman will undertake to return complete drafts to all members of the Advisory Committee by April 1.

The next meeting of the Advisory Committee was set for May 3 and 4 in Washington, D.C.

Respectfully submitted,

Edward H. Cooper, Reporter