Report to Standing Rules Committee of Advisory Committee on Civil Rules

December 1, 1993

The minutes of our October meeting are attached. The minutes were prepared by Dean Cooper and reviewed by me. They supply much of the detail behind this report.

Action Items

(1) Facsimile filing and service occupy an uncertain ground. (See minutes pp. 2-5). We understand that the Standing Committee is working on Judicial Conference standards on filing, in cooperation with the reporters for the several Advisory Committees. Our minutes reflect strong feelings about some points. If facsimile filing standards are on the Standing Committee agenda in January, we ask that our views be considered. We agreed that if the Appellate Rules Advisory Committee publishes for comment a rule authorizing service by facsimile transmission, the notice and request for comment can include an observation that similar changes may be made in other national rules. We did not face the question whether publication of a draft appellate rule and comment would be sufficient to support adoption of a civil rule without a separate period for public comment.

(2) The Court Administration and Case Management Committee recommended in September that the Judicial Conference approve the concept embodied in pending offer-of-judgment legislation. The recommendation included consideration by the Standing Committee of the choice between recommending legislation and recommending action

through the Rules Enabling Act process. This committee is studying possible amendments of Civil Rule 68, which provides for offers of judgment. We believe that it is premature to endorse legislative action. The Court Administration Committee sought endorsement of the legislation. We replied that the Civil rules Committee had not decided whether the topic should be approached by legislation or rule. The Court Administration Committee reframed its recommendation to endorse the concept, recognizing the need for the Rules Committee to consider the rulemaking question.

(3) Section 6 of the Civil Justice Report Act of 1993, S. 585, 103d Cong., 1st Sess., would limit the use of expert witnesses in civil actions by requiring a showing of good cause for use by any party of more than one witness on the same issue. This question should be addressed through the Rules Enabling Act process, not by legislation.

Information Items

Matters that remain on the agenda for further action:

(1) Rule 23. (See minutes at pp. 11-14). There have been some style refinements in the version presented to the Standing Committee in June 1993. This Committee concluded that Rule 23 should be considered further at its April 1994 meeting to give several new members full opportunity to review the proposal. The proposed changes are important, complex, and likely to prove controversial.

(2) Rule 53. (See minutes at pp. 15-19). Rule 53 was drafted with an eye to trial uses of special masters. We have begun to study the use of special masters for pretrial purposes, and perhaps for decree-enforcement purposes as well. There is a strong sense that Rule 53 does not support many uses now being made of special masters. Specific draft proposals will be considered at the April 1994 meeting.

(3) Rule 68. (See minutes at pp. 20-25). Rule 68 has been before the Committee at recent meetings. Dean Cooper has prepared a thoughtful paper treating the subject at a recent symposium on Civil Rules at N.Y.U. We received many helpful observations from trial lawyers, judges, and academics. Further action has been postponed pending completion of a study of settlement experience by the Federal Judicial Center. The information gained by this study may be useful in determining whether action should be taken on Rule 68. The current proposal would provide limited attorney fee remedies for rejection of an offer that is better than the judgment. It raises many questions beyond the prediction whether it is possible to stimulate earlier settlements. Once the study is completed, the Committee will again consider this proposal, the possibility of adopting alternative incentives to bolster Rule 68, the possibility of doing nothing, and the possibility of recommending that Rule 68 be abrogated.

(4) Sealing orders. (See minutes at pp. 28, 29). The Committee reviewed a proposal that orders sealing court records be limited to a period of 25 years unless cause can be shown for a

longer period. Although the Committee decided not to take action on this proposal, it also decided that it should continue to study the use of orders that seal court papers. Present practices seem to vary widely. The Civil Rules now address the topic only with respect to discovery protective orders. The Standing Committee offered changes to Rule 26(c) for public comment on October 15, 1993. The topic is vast, and it may prove difficult to separate orders that seal papers from orders that limit access to trial. This project will be long-term and may conclude without recommending new rules.

(5) CJRA and the Federal Rules. We are examining the tension between plans filed under CJRA and the Federal Rules as part of a larger concern over the difficulty of accommodating national and local rulemaking in our federal system.

Matters that have been dropped for the time being: Amendment of Rule 4(m) to shorten the 120-day period allowed for service of summons and complaint was discussed. It was concluded that the period allowed should be at least 90 days, and that any possible gain from such a tinkering change would not repay the effort of determining whether the change might be desirable.

Matters that remain on the agenda for possible further action:

(1) Particularized pleading rules. (See minutes at pp. 6-9). We considered the decision in Leatherman v. Tarrant Cty. Narcotics Intell. & Coord. Unit, 113 S.Ct. 1160 (1993), and concluded that it

would be premature to suggest new rules requiring more particularized pleading. One reason for deferring action was a desire to see the effects of new Civil Rule 11 and the interactive effects of Rule 26(f) meetings and Rule 26(a)(1) disclosure with their possible incentives for more particularized pleading.

(2) Style. (See minutes at pp. 31-34). The Committee continued to work on the Style Subcommittee draft of restyled rules. Much important work has been done. Collective examination of these successive drafts absorbs much time. The Committee will meet again in February for three days to work on the draft. The goal is to improve the style of the rules without making any substantive changes in meaning apart from those required to resolve ambiguities. Our work today makes plain that this is a difficult task requiring multiple reviews by different persons. Once a completely reviewed draft is available, the Committee will form recommendations as to the best use to be made of the draft. Our present plans include a limited and informal distribution for comment of the draft after the February meeting, or thereafter when practicable.

Patrick E. Higginbotham
Chair, Advisory Committee on Civil Rules
December 1, 1993