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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

October 30, 1992

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

TO: Members, Reporter, and Secretary--Advisory Committee on Civil Rules
Chairman and Liaison Member--Standing Committee on Rules
Chairmen--other Advisory Committees

I hope that each member of the Advisory Committee on Civil Rules (which includes those whose terms are to expire this year, but whose replacements have not yet been made by the Chief Justice) will be able to attend our meeting in Denver, Thursday, November 12, 1992, through noon, Saturday, November 14, 1992. The meetings will be held in the Westin Hotel, and will begin each morning at 8:30 a.m. Considering the heavy agendas we have had in our recent meetings, I hope that we can end on Thursday and Friday no later than 4:00 p.m..

Enclosed are (1) a rough draft of possible changes in the FRCivP and (2) an analysis by Ed Cooper, our new reporter, regarding "sunshine" proposals. You should also be receiving by separate mailings or fax (1) materials from Ed Cooper relating to the Litigation Section's proposals for amendment of Rule 64 and (2) a big package from the Style Subcommittee of the Standing Committee dealing with a stylistic re-write of all of the existing rules.

Be aware that the style revisions are based on existing language, and do not attempt to cover at this time the revisions being submitted to the Supreme Court. While some reservations regarding a stylist rewrite have been expressed, I hope that each of us can enter into this work with a sense of enthusiasm and excitement, recognizing the tremendous efforts that have already be put into this project.

The tentative agenda is:

I. Report on status of pending amendments.
II. Revisiting proposals previously considered:
    Rule 43
    Rule 83
    Rule 84
III. New Matters
    A. Written proposals
        Rule 23
        Rule 26(c) (sunshine/confidentiality)
        Rule 64
        Rule 68
    B. Other proposals--no written materials

Rule 4 (120 day service requirement--no written materials)
Rule 12 (time to answer--no written materials)
Rule 45 (expansion of trial subpoena jurisdiction)
Changes to facilitate federal-state coordination

IV. Style Revision. We may get into these materials during Friday afternoon if time permits, but our main discussions will be on Saturday morning, when Bryan Garner (special consultant to the Style Subcommittee) will be joining us.

V. Plans for future meetings, submissions to Standing Committee, etc.

I hope all of you share my pride in the work our Committee has accomplished over the past several years.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules
880 Federal Courthouse
Birmingham, AL 35203
(205)731-1709

POSSIBLE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

INITIAL DRAFT

FOR CONSIDERATION

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

Caution: These proposals have not been approved by the Standing Committee and are prepared as drafts for consideration by the Advisory Committee

NOVEMBER 1992

TABLE OF CONTENTS

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 and their attorneys are willing and able to ~~will~~ fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include:

(1) the extent to which the prosecution of separate actions by or against individual members of the class ~~would~~ create~~s~~ a risk of

(A) inconsistent or varying adjudications with respect to ~~individual~~ members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to ~~individual~~ members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; ~~or~~

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final~~ the extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole; ~~or~~

(3) ~~the court finds that~~ the extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members, ~~and that a class action is superior to other~~

~~available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:~~

(~~A~~4) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(~~B~~5) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(~~C~~6) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(~~D~~7) the difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) Determination by Order Whether Class Action to be Maintained; Notice and Membership in Class; Judgment; Actions Conducted Partially as Class Actions; Multiple Classes and Subclasses.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order

whether and with respect to what claims or issues it is to be so maintained.

(A) The court shall also determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include: (i) the nature of the controversy and the relief sought; (ii) the extent and nature of any member's injury or liability; (iii) the interest of the party opposing the class in securing a final resolution of the matters in controversy; and (iv) the inefficiency or impracticality of separately maintained actions to resolve the controversy. When appropriate, exclusion may be conditioned upon a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the

class from which exclusion is sought, and inclusion may be conditioned upon bearing a fair share of the expense of litigation incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) ~~In any class~~ When ordering that an action be maintained as a class action under ~~subdivision (b)(3)~~ this rule, the court shall direct that notice be given to the ~~members of the~~ class under subdivision (d)(2), concisely and clearly describing the nature of the action, the claims or issues with respect to which the class has been certified, any conditions affecting membership in the class ordered under paragraph (1)(A), and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider, in addition to the matters affecting its decision to certify a class under subdivision (b), the expense and difficulties of providing actual

notice to all class members and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(3) The judgment in an action ordered maintained as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3),~~ whether or not favorable to the class, shall ~~include and~~ specify or describe those ~~to whom~~

~~the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ who are found to be members of the class or have as a condition to exclusion agreed to restrictions affecting any separately maintained actions.

(4) When appropriate ~~(A)~~ an action may be brought or ordered maintained as a class action (A) with respect to particular claims or issues, or (B) by or against multiple classes or subclasses. Each class or subclass must separately satisfy the requirements of this rule except for subdivision (a)(1). ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, including pre-certification

determination of a motion made by any party pursuant to Rules 12 or 56 if the court concludes that such a determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action, or to be excluded from the class; (3) imposing conditions on the representative parties, class members, or ~~on~~ intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time

to time.

(e) Dismissal or Compromise. An ~~class~~ action filed as a class action shall not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for maintenance as a class action, or be compromised without the approval of the court~~, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs~~. An action ordered maintained as a class action shall not be dismissed or compromised without the approval of the court, and notice of a proposed voluntary dismissal or compromise shall be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action ordered maintained as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of subdivision (b) thereof.

(f) Appeals. A Court of Appeals may permit an appeal to be taken from an order of a district court granting or denying a request for class

action certification under this rule if application is made to it within ten days after entry of such order. Prosecution of an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals, or a judge thereof, shall so order.

COMMITTEE NOTES

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming and lengthy procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on the practicality of the case proceeding as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This becomes the critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard,

once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions--and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries--at least for some issues under subdivision (c)(4)(A), if not for the resolution of the individual damage claims themselves. The revision is not however a unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts, nor does the rule attempt to establish a system for "fluid recovery" or "class recovery" of damages. Such questions are ones for further case law development.

SUBDIVISION (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities owed to the class.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made the

controlling issue; namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) become factors to be considered in making this ultimate determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to be exclusive of other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7)--the consideration of the difficulties likely to be encountered in the management of a class action--is revised by adding a clause to emphasize that such difficulties should be assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs"--or, in some cases, require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class action remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion--the fact pattern described in subdivision (b)(1)(A)--a person might nevertheless be allowed to be excluded from the class if, as a condition, the person agreed to be bound by the outcome of the class action. The opportunity for imposition of appropriate conditions on the privilege of exclusion enables the court to avoid the unfairness that resulted when a putative class member elected to exclude itself from the class action in order to take

advantage of collateral estoppel if the class action was resolved favorably to the class while not being bound by an unfavorable result.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases when it may be impossible or impractical to give meaningful notice of the class action to all putative members of the class.

Under the revision, notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under paragraph (4), some claims or issues may be certified for resolution as a class action, while other claims or issues are not so certified. For example, in some mass tort situations it may be appropriate to certify as a class action issues relating to the defendants' culpability and general causation, while leaving issues relating to specific causation, damages, and contributory negligence for resolution through individual lawsuits brought by members of the class. Since the entirety of the class representative's claim will be before the court, there

is a "case or controversy" justifying exercise of the court's jurisdiction; and the rule is intended to eliminate the problems that might otherwise arise based on the splitting of a cause of action.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision when this will promote the fair and efficient adjudication of the controversy.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Revised subdivision (d)(2) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(2) contemplates that some form of notice to class members should be given in virtually all class actions. The particular form of notice, however, in a given case is committed to the sound discretion of the court, keeping in mind the requirements of due process.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for

class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of these proposals conducted by independent counsel can be of great benefit to the court. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. If denied, the plaintiff, in order to secure appellate review, may have to incur expenses wholly disproportionate to any individual recovery. If the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potential ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not

stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. As authorized by 28 U.S.C. § 2072(c), the rule has the effect of permitting the appellate court to treat as final for purposes of 28 U.S.C. § 1291 an otherwise conditional and interlocutory order.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * *

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * * *

COMMITTEE NOTES

Draft--Amendments to Federal Rules of Civil Procedure

No changes are shown. The Committee should discuss possible "sunshine" changes, considering materials submitted by Ed Cooper.

Rule 43. Taking of Testimony

(a) **Form.** In all trials the testimony of witnesses shall be taken ~~orally~~ in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. Subject to the right of cross-examination, the court, in a nonjury trial, may permit or require that the direct examination of a witness, or a portion thereof, be presented through adoption by the witness of an affidavit signed by the witness, a written statement or report prepared by the witness, or a deposition of the witness. The contents are admissible to the same extent as if the witness so testified orally. The court may also permit testimony of a witness located outside the state in which the trial is conducted to be presented by electronic transmission.

* * * *

COMMITTEE NOTES

Rule 43 is revised to dispel any doubts as to the power of the court under Rule 611(a) of the Federal Rules of Evidence to permit or require in appropriate circumstances that the direct examination of a witness, or a portion thereof, be presented in the form of an affidavit signed by the witness, a written statement or report prepared by the witness, or a deposition of the witness. Presentation of direct

testimony in this manner can greatly expedite trial and may make the testimony more understandable without sacrifice to the benefits of the adversarial system, since the witness will be subject to cross-examination in the traditional manner with respect to the written statement.

This procedure is not appropriate for all cases or for all witnesses. The amendment applies only in nonjury cases, and even in such cases the primary usage will be with expert testimony or with "background" testimony from lay witnesses concerning matters not in substantial dispute.

The revision of Rule 43 is not intended to limit by implication the powers of the court under Rule 611(a) of the Federal Rules of Evidence, such as having a witness testify in a narrative fashion rather than in question-and-answer form.

The rule is also revised to authorize a court to permit examination of a witness located in another state to be conducted by teleconference or other electronic transmissions. This has sometimes been done by treating the examination as a deposition that is simulataneously being recorded and presented.

Draft--Amendments to Federal Rules of Civil Procedure

Rule 64. Seizure of Person or Property

[To be considered is a proposal for changes offered by the Litigation Section of the A.B.A. Ed Cooper is gathering materials.]

Rule 68. Offer of Judgment

(a) Offers. At any time [after joinder of issue] [after the meeting of the parties under Rule 26(f)] ~~more than 10 days before the trial begins~~, a party ~~defending against a claim~~ may serve upon ~~the~~ an adverse party an written offer to allow judgment to be ~~taken against the defending party~~ entered for the money or property or to the effect specified in the offer, with costs then accrued. If within ~~10~~ 21 days after the service of the offer [or such other time as the court may on motion prescribe] the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon the clerk, or the court if so required, shall enter judgment. An offer not accepted within such time shall be deemed withdrawn, and evidence thereof is not admissible except in a proceeding to determine costs and attorney's fees under Rule 54(d). ~~If~~ Unless the judgment finally obtained ~~by the offeree~~ is ~~not~~ more favorable to the offeree than the unaccepted offer, the offeree must pay the

costs incurred by the offeror, including (to the extent exceeding the monetary difference between the offer and the judgment obtained, but not to exceed the monetary amount of the judgment) the reasonable fees of the offeror's attorneys for services performed, after the ~~making of~~ expiration of the time for accepting the offer. A court may reduce the award of costs and attorney's fees to avoid the imposition of undue hardship on a party. The fact that an offer is made but not accepted does not preclude a subsequent offer by the offeror or by the adverse party; and a subsequent offer, if not accepted, does not deprive a party who made an earlier offer of the benefits under this rule resulting from that offer. ~~When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to~~

~~determine the amount or extent of liability.~~

(b) Non-monetary Relef. A judgment which includes non-monetary relief shall not be considered more favorable to an offeree than was an offer unless the terms of the offer included substantially all such non-monetary relief.

(c) Non-applicability. This rule does not apply if the case is certified as a class or derivative action under Rule 23, 23.1, or 23.2 or if the disputes between an offeror and offeree are resolved by acceptance of an offer under this rule or other settlement; nor does it authorize the award of costs or attorney's fees against a party if it is the prevailing party under a statute providing for an award of attorney's fees to such a party.

COMMITTEE NOTES

The former rule has been properly criticized as one-sided and largely ineffectual. It was available only to parties defending against a claim, and not to parties making a claim. Moreover it provided little inducement to make or accept an offer since in most cases the only penalty suffered by declining an offer was the imposition of taxable costs subsequently incurred by the adverse party, typically a relatively insignificant amount. It should be noted that since 1985, with the Marek v. Chesney decision, greater incentives existed in cases brought under a statute authorizing fee awards to a prevailing party since a plaintiff rejecting a Rule 68 offer would lose its

ability to recover fees incurred after rejecting the defendant's Rule 68 offer if it failed to obtain a more favorable judgment.

Earlier proposals to amend Rule 68 to make it available to all parties and to increase the incentive for acceptance of offers through provisions authorizing the shifting of attorneys' fees were met with vigorous criticism. Opponents of these suggestions stressed the policy considerations involved in the "American" rule on attorneys' fees. They emphasized that the potential for all parties to shift their attorneys' fees could produce inappropriate windfalls and, though facially equitable, would often create unequal pressures and coerce unfair settlements because of disparities in the litigants' resources. This revision incorporates various changes suggested by Judge William W Schwartzer in Judicature, Vol. 76, No. 3 (Oct.-Nov. 1992) as a means to increase the efficacy of Rule 68 offers without the detriments of the earlier proposals.

The amended rule makes the procedure available to all litigants and provides an increased incentive both to make and to accept offers of judgment. A defendant's offer will in many situations act as a "cap" on its further outlays, in that its success in limiting the plaintiff to a smaller amount is not overshadowed by the additional attorney's fees in obtaining that result. A plaintiff can make an offer that in many situations will establish a "floor" for recovery, assuring that its success in obtaining a judgment larger than its offer is not defeated by its additional costs and attorney's fees in pursuing the litigation after its offer is rejected.

Faced with an offer by a defendant, a plaintiff must not only weigh the risk of obtaining a smaller amount by proceeding with the litigation, but also the risk that, if it fails to obtain a larger amount than what is offered, its judgment may be further reduced or even eliminated by the attorney's fees thereafter incurred by the defendant. Faced with an offer by a plaintiff, a defendant must not only weigh the risk of a larger amount being obtained by proceeding with the litigation, but also the risk that, if so, the judgment against it may be increased--possibly

doubling the amount of the judgment--based on the services thereafter performed by the plaintiff's attorney.

The rule does not call for a shifting of the full amount of a party's subsequent attorney's fees, but rather takes into account the extent to which the party benefits by a judgment that is more favorable to it than was the amount of its offer. Moreover, it places a limit on the amount of the fees subject to shifting; namely, the amount of the judgment. This limitation provides some incentive on the other party to keep its fees under control.

The rule can be illustrated by several examples.

Example 1. (No shifting) After its offer to settle for $50,000 is not accepted, the plaintiff ultimately recovers a judgment of $25,000. Rejection of this offer would not result in any shifting of costs or attorney's fees under the rule because the judgment was more favorable to the offeree than the offer. Similarly, there would be no shifting of costs or fees based on an offer of $50,000 by the defendant and a recovery by the plaintiff of $75,000. Shifting of costs or fees does not occur under the rule if the judgment is more favorable to the offeree than the offer.

Example 2. (Shifting on rejection of plaintiff's offer) After the defendant rejects its offer to settle for $50,000, the plaintiff ultimately recovers a judgment of $75,000. If the reasonable fees for services performed by plaintiff's attorney in pursing the litigation after lapse of the offer was $40,000, the judgment would be increased from $75,000 to $90,000-- the amount of subsequent fees ($40,000) reduced by the amount the plaintiff gained ($75,000 - $50,000) by not having its offer accepted. The plaintiff is placed in essentially the same position as if its offer had been accepted. Note that, if the additional fees of plaintiff's counsel had been less than $25,000, there would be no adjustment in the amount of the judgment (since the plaintiff actually benefited by not having its offer accepted) and that, if those additional fees had been $100,000, the judgment would be increased to $150,000 due to the maximum limitation placed by the rule.

Example 3. (Shifting on rejection of defendant's offer) After rejecting defendant's offer of $75,000, the plaintiff ultimately recovers a judgment of $50,000. If the reasonable fees of defendant's attorney incurred after lapse of the offer were $40,000, the judgment would be reduced from $50,000 to $35,000--the amount of subsequent fees ($40,000) reduced by the amount the defendant gained ($75,000 - $50,000) by not having its offer accepted. The defendant is placed in essentially the same position as if its offer had been accepted. Note that, if the additional fees of defendant's counsel had been less than $25,000, there would be no adjustment in the amount of the judgment (since the defendant actually benefited by not having its offer accepted) and that, if those additional fees had been $100,000, the judgment would be reduced to $0 (rather than a judgment entered for defendnat) due to the maximum limitation placed by the rule.

Example 4. (Repetitive offers) After its offer to settle for $50,000 lapses, the defendant makes an new offer of $60,000, which also is not accepted by the plaintiff. A judgment of $50,000 or less will be subject to reduction based on the fees incurred by the defendant after its first offer lapsed; a judgment between $50,001 and $60,000 will be subject to reduction, but only with respect to the fees incurred after its second offer lapsed. The rule provides an incentive to a party to make supplemental offers more attractive to an adversary than the earlier offers.

Example 5. (Counteroffers) The effect under the rule of each offer is to be determined independently of other offers. Ordinarily, even when counteroffers are made, there will be only one party entitled to a shifting of costs and fees, or perhaps neither (i.e., the judgment is more than the plaintiff's demand and less than the defendant's offer). In unusual circumstances, however, the making of counteroffers can result in both parties being entitled to a shifting of costs and fees, which then must be compared to determine the net effect upon the judgment. For example, suppose the jury returns a verdict for $50,000 after the plaintiff had made a pre-discovery offer of $25,000 and the defendant had made a post-discovery offer of $60,000. If the plaintiff had incurred attorney's fees of $40,000

after its offer lapsed and the defendant had incurred attorney's fees of $15,000 after its offer lapsed, the plaintiff would be entitled to shift $15,000 of its fees to the defendant ($40,000 - ($50,000 - $25,000)) and the defendant would be entitled to shift $5,000 of its fees to the plaintiff ($15,000 - ($60,000 - $50,000), with the net result that the $50,000 verdict would be increased to a $60,000 judgment. Each side receives some benefit from its unaccepted offer, but neither receives the full benefit since its nonacceptance of the other's offer caused additional fees to the other party.

Example 6. (Counterclaims) The previous examples also provide a model for fee-shifting in cases in which a plaintiff is seeking declaratory relief and the defendant has a counterclaim for monetary relief. In such a case if the defendant offers to accept $50,000 and after the offer is rejected the defendant recovers $75,000, the defendant's post-offer fees of $40,000 will, as in example 2, serve to increase the judgment to $90,000. Of course, often there will be both monetary claims by the plaintiff and monetary counterclaims by the defendant, and in such cases the determination of the difference between an offer and the judgment will depend upon who was to be paid under the offer and who recovers the judgment. If the defendant's offer to pay plaintiff $10,000 is not accepted and, after the defendant incurs additional fees of $35,000, the jury returns a verdict of $15,000 in favor of the defendant on its counterclaim, its post-offer fees are to be reduced by $25,000 (the difference between paying $10,000 and receiving $15,000) and the excess of $10,000 is added to the judgment, resulting in a total judgment in defendant's favor of $25,000. The defendant is placed in essentially the same position as if the plaintiff had accepted its offer.

Contingent Fees.

Costs.

Non-monetary relief. (Also include explanation regarding property.)

Nonapplicability; class actions; settlements; fee-shifting statutes.

Rule 83. Rules by District Courts; Orders

(a) Local Rules. Each district court, by action of a majority of the judges, thereof may, from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice, not inconsistent with Acts of Congress and consistent with, but not duplicative of, these rules adopted under 28 U.S.C. §§ 2072 and 2075. A local rule so adopted shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States, and shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(b) Orders. In all cases not provided for by rule, the district judges and magistrates judges may regulate their practice in any manner not

~~in~~consistent with Acts of Congress, with ~~those~~ rules ~~or~~ adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules ~~those~~ of the district in which they act.

(c) **Enforcement.** Rules and orders ~~pursuant to this rule shall~~ be enforced in a manner that ~~protects all parties against forfeiture of rights as a result~~ of negligent failure to comply with ~~a~~ requirement ~~of form imposed by such a local rule or order.~~

(d) **Experimental Rules.** With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with rules adopted under 28 U.S.C. §§ 2072 and 2075 if it is otherwise consistent with Acts of Congress and is limited in its period of effectiveness to five years or less.

COMMITTEE NOTES

SPECIAL NOTE: *Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (d). Should this limited authorization for adoption of rules inconsistent with national rules without Supreme Court and Congressional approval be rejected, the Committee nevertheless recommends adoption of the*

balance of the rule. The Committee Notes would be revised to eliminate references to experimental rules.

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and the nationally-promulgated rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar explicit authorization in other rules should not be viewed as precluding by implication the adoption of other local rules subject to the constraints of this Rule 83.

Subdivision (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules as to such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Subdivision (b). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to

authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a "standing order") if the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (c). This provision is new. Its aim is to protect against loss of rights in the enforcement of local rules and standing orders against by who may be unfamiliar with their provisions. words missing?

Local rules and standing orders have become quite voluminous in some courts. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by proliferation of local rules and standing orders enforced so rigorously that attorneys might be reluctant to hazard an appearance or parties might be reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local directives poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the rights of the parties.

Subdivision (d). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in

recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with the national rules should be permitted only with approval of the Judicial Conference of the United States, and then only for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Rule 84. Forms; Technical Amendments

(a) Forms. The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement ~~which~~ that the rules contemplate. The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.

(b) Technical Amendments. The Judicial Conference of the United States may amend these rules or the explanatory notes to make them consistent in form and style with statutory changes, to correct errors in grammar, spelling, cross-references, or typography, and to make other similar technical changes of form or style.

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to these changes, which would eliminate the requirement of Supreme Court and Congressional approval in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other, and from other proposed amendments to the rules.

The revision contained in subdivision (a) is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by the terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of

Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

Similarly, the addition of subdivision (b) will enable the Judicial Conference, acting through its established procedures and after consideration by the appropriate Committees, to make technical amendments to these rules without having to burden the Supreme Court and Congress with such changes. This delegation of authority, not unlike that given to Code Commissions with respect to legislation, will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on non-controversial non-substantive matters, at the risk of diverting attention from items meriting more detailed study and consideration. As examples of situations where this authority would have been useful, one might cite the numerous amendments that were required to make the rules "gender-neutral," section 11(a) of P.L. 102-198 (correcting a cross-reference contained in the 1991 revision of Rule 15), and the various changes contained in the current proposals in recognition of the new title of "Magistrate Judge" pursuant to a statutory change.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

ASSOCIATE DEAN

October 23, 1992

Hon. Sam C. Pointer, Jr.
Chief Judge, United States
District Court
882 United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

Re: Sunshine in Discovery--Civil Rule 26(c)

Dear Sam:

I am enclosing a memorandum on the "sunshine in discovery" questions raised by H.R. 2017 and the ways in which Civil Rule 26(c) might be amended to address these questions. There is no proposed rules language because I think drafting is premature. I also enclose a clean copy of the memorandum on this subject that Paul Carrington provided for the November, 1991 meeting of the Committee.

The memorandum is wordprocessed in WordPerfect 5.1 for DOS; I enclose a disc in the thought that this may facilitate incorporation in the agenda materials.

There are other things that could be included with the agenda materials if you wish--most notably H.R. 2017 itself, full copies of the state enactments, Judge Weis' testimony, or whatever. I can have these sent by FAX, despite the reduction in reproduction quality, if that seems desirable.

I have asked Ronald Sturtz to send a set of the ABA Civil Rule 64 materials; I will have a look at it on Monday, I expect, and will go ahead with as brief a memorandum as seems appropriate. Time is closing in, so I expect to fax that as soon as possible.

Best regards,

Edward H. Cooper

EHC/lm
encls.

SUNSHINE IN LITIGATION: RULE 26(C)

Rule 26(c) protective orders may impede or prevent access to discovery information by nonparties. It has been suggested that the Committee should consider amending Rule 26(c) to permit greater access. Contemporary discussion and reform efforts focus on two concerns: that privacy in discovery can defeat the public interest in knowledge about threats to public health and safety, and that successive litigants involved in factually related disputes should not be forced to costly efforts to discover information already gathered and provided in earlier litigation. Earlier discussion focused on a broader assertion that discovery, as part of the judicial process, is inherently a public event that should be open to the public.

The argument that Rule 26(c) amendments are necessary has been rejected by at least three recent studies: The Federal Courts Study Committee, Report pp. 102-103 (1990); Marcus, The Discovery Confidentiality Controversy, 1991 U.Ill.L.Rev. 457; and Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv.L.Rev. 427. The basic conclusions are that there is no evidence that protective orders in fact create any significant problems in concealing information about public hazards or in impeding efficient sharing of discovery information; that discovery is intended only as a means of improving litigation, not as a source of public information, and should not become a means of invading privacy for other purposes; that discovery would become more burdensome and costly if reliable protective orders could not be made; and that administration of a rule creating broader rights of public access would impose great burdens on the court system. These conclusions are summarized at greater length below.

The first question to be addressed must draw from the collective knowledge of the committee. If in fact protective orders do not often impede public knowledge of public hazards, and do not often interfere with efficient utilization of earlier discovery efforts in related litigation, there seems to be little reason to tinker with Rule 26(c). Contemporary discussion of these problems should be an effective means of encouraging careful administration of Rule 26(c) without amending the Rule.

If, on the other hand, Rule 26(c) is in fact being administered in ways that defeat significant opportunities to protect public safety or the rights of those who have been injured, or that force wasteful duplication of discovery in related litigation, it must be decided whether improvements are practicable. Much of the discussion that follows is designed to illustrate the problems that must be addressed if amendments are to be considered. It may be noted at the outset, however, that the problems are not likely to be changed by adoption of the pending proposal to amend Rule 26 to provide for disclosure as a prelude to discovery.

Background

Current interest in the problems of access to discovery materials has resulted in expanded access by statutes in Florida and Virginia and by court rule in Texas. Similar proposals have been advanced in many states. Federal legislation has been suggested.

The immediate impetus for consideration by this Committee is provided by H.R. 2017,

102d Cong., 1st Sess., the "Federal Sunshine in Litigation Act." The bill, described in detail below, would prohibit issuance of a Civil Rule protective order "that has the purpose or effect of concealing information about a public hazard." Judge Joseph F. Weis, Jr., testified on the bill on September 10, 1992. His testimony focused in part on the importance of relying on the formal rulemaking procedure for considering the questions raised by the bill. The course of the hearings makes it appropriate to consider the question now.

A somewhat similar bill, H.R. 3803, the "Federal Court Settlements Sunshine Act," would add a new § 1659 to the Judicial Code. Section 1659 would require clear and convincing evidence of a compelling public interest to justify sealing "any settlement made of a civil action to which the United States, an agency or department thereof, or an official thereof in that official's official capacity, is a real party in interest." This bill does not touch directly on the Civil Rules and will not be explored further in this memorandum.

Discovery as Public Event

Discovery under the Civil Rules has been viewed by most courts and lawyers as a means of improving litigation and decision of individual disputes. Only the need to resolve a dispute about other matters justifies a system that compels parties and nonparties to reveal information that otherwise would be private. In upholding a protective order that barred a newspaper from publishing information gained by discovery in a defamation action, the Supreme Court observed that "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, * * * and, in general, they are conducted in private as a matter of modern practice." Seattle Times Co. v. Rhinehart, 1984, 467 U.S. 20, 33, 104 S.Ct. 2199, 2107-2108. Lower courts have repeated the refrain; see U.S. v. Anderson, 11th Cir.1986, 799 F.2d 1438, 1441.

This traditional view of discovery is an essential component of protective order doctrine. Protective orders may prohibit any discovery of specified information because the interest in privacy outweighs the needs of the litigation. Quite commonly, protective orders allow discovery but seek to ensure that information is used only for the litigation needs that justify production.

The traditional view has been challenged on broad theoretical grounds. It is argued that litigation is a public event, and that the public should enjoy a right of access to discovery comparable to the right of access to a civil trial. Access is required in part because public resources are devoted to the court system and in part because government processes must be open to public scrutiny.

Adoption of a general public access perspective would require dramatic changes in protective order practices. At the logical limit, all parties would be required to produce complete copies of all discovery materials for public filing and inspection, even though the materials otherwise would not be put in reproducible form for purposes of the litigation.

For present purposes, it seems more realistic to pursue the traditional view that discovery is no more than a device for resolving a specific dispute between identified parties. This approach does not prevent use of discovery materials to give warning of public hazards or to avoid wasteful duplication by repeated discovery of the same information. This approach does, however, require development of a workable system to reconcile interests in access to information with the complicating interests in privacy, smooth working of discovery, and effective judicial management.

Privacy

Discovery casts a wide net, gathering information that often proves irrelevant even to the immediate dispute. Information is gathered from parties about their own affairs, from parties about the affairs of others, and from nonparties. Hearings on the proposed disclosure rule provided graphic testimony on the breadth of the information that may be sought from commercial entities. Discovery may reach business information that is protected as a technical trade secret, is of vital competitive importance, is "sensitive," or is simply embarrassing. Discovery also may reach personal information that is intensely private--in malignant hands, indeed, there is a risk that discovery may be conducted for the very purpose of intimidating and discouraging an adversary. Significant or even crippling damage can be done by public disclosure of the fruits of discovery.

It seems likely that effective protection against public disclosure is accomplished for most litigation by established practices. These practices may involve such informal acts as failure to arrange transcription of a deposition or failure to file discovery responses with the court. More formal devices may include court orders not to file discovery materials or protective orders. It also seems likely that much litigation in federal courts, and in state courts that have adopted federal discovery practices, involves matters that would interest others only as a matter of itching curiosity. There is little reason to doubt that for most litigation, most of the time, the present system works well. Privacy is protected without any sacrifice of worthy public interests.

Privacy is not as readily protected in all cases, nor should it be. A protective order is likely to be necessary if discovery materials are routinely being filed under Civil Rule 5(d). Materials used in support of a summary judgment motion may be treated as if trial materials. More important, there may be cogent reasons to limit protection to serve the needs of other litigation or the public.

Protective Order as Discovery Facilitating Device

Proponents of present practice urge that consent and umbrella protective orders are an essential lubricant to effective management of discovery by the parties. Relying on the opportunity to designate information as confidential, parties are said to produce voluntarily large amounts of information that would provoke discovery contests if reliable protection required item-by-item judicial consideration. In addition to adding to the judicial burdens of supervising discovery, the increased discovery contests would lead to orders refusing to compel disclosure

of some information now disclosed under shield of a protective order, would add to the pressures that encourage some parties to pursue nonpublic means of dispute resolution, and would force some parties--both plaintiffs and defendants--to abandon the litigation.

Public Hazards

These arguments for protecting privacy are met in one direction by arguing that private interests must yield to the need for public information about circumstances that pose a risk of further injury. The common illustrations involve dangerous products or toxic contamination of a natural resource. Defendants are thought to buy the right to continue injuring consumers or poisoning their neighbors by protective orders that conceal, and settlement agreements that destroy, information needed to protect the public. It hardly need be said that if such concealment actually happens, it would be desirable to find a practicable means of accomplishing disclosure.

As noted above, one response to this fear is that it is chimerical. There is no indication that the fruits of private discovery are a necessary means of accomplishing public information. The existence of the litigation and the underlying claims can be made public, and there are many alternative means of gathering information about dangers to public health and safety. If in a rare case disclosure of discovery material is the only means of accomplishing an important addition to public knowledge, Civil Rule 26(c) does not stand in the way. If this response is correct, nothing further need be done.

If Rule 26(c), as written or administered, does raise obstacles to disclosure of important public information, it is important to consider the challenges that must be met in reducing the scope of protection to an appropriate level. The spirit of the discovery rules is to delegate responsibility initially to the parties and then to confide in the broad discretion of the district court. In keeping with this spirit, amendment of Rule 26(c) would involve an open-ended admonition that in framing and considering modification of a protective order, the court should weigh the public interest in disclosure. A more pointed version would specify the public interest in avoiding injury to person or property.

More specific rule amendments may have unintended consequences, and will generate added litigation over matters of interpretation. The provisions of H.R. 2017 provide ample illustration.

The central provisions of H.R. 2017 bar protective orders that have "the purpose or effect of concealing information about a public hazard," and define public hazard to "mean[] any condition, circumstance, person, or thing whatsoever that has caused damage and is likely to do so again." This definition of public hazard is an abbreviated form of the definition in the Florida Sunshine in Litigation Act, Fla.Stat.Ann. § 69.081(2). At least three opportunities for dispute arise under this language--what counts as "damage"? Has damage been caused? Is it likely that the same thing will cause damage again? One popular illustration involves an action for professional malpractice: at what point must information be revealed about the lawyer or doctor? Has the defendant caused damage even though there was no liability for malpractice? Is

information about the client or patient information about the public hazard, because it helps to understand the nature of the risk? How does a court determine whether the same defendant is likely to cause damage again? Another popular illustration is the party, whether plaintiff or defendant, who tests HIV-positive. Others are easy to imagine--a newspaper sued for defamation or invasion of privacy (would the statute require production of the information about members and contributors of the Aquarian Foundation protected by the order in the Seattle Times case?); an employer sued for discrimination or sexual harassment (are facts involving the plaintiff again part of the information about the "public hazard"?); a large firm sued for breach of contract on allegations that its purchasing agent arbitrarily rejects conforming goods. Beyond these problems, the breadth of the definition seems to defeat any protection even for true trade secrets.

The definition problem is reduced if there is discretion whether to require disclosure of public hazard information. Alternative formulations also can reduce the problem of definition, but may create other problems. Rule 76a of the Texas Rules of Civil Procedure provides that "court records * * * are presumed to be open to the general public." Court records for this purpose include all documents filed in any civil court, and discovery materials "not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government," except for trade secrets. The Virginia statute, which provides for sharing between attorneys rather than general public access, is limited to materials "related to a personal injury action or action for wrongful death." Va. Code Ann. § 8.01-420.01. This phrase is likely to yield few problems of interpretation, but may not reach as far as should be to protect public interests.

The procedures for relief from a protective order also will require careful attention. Again, H.R. 2017 provides a useful illustration.

Standing to seek protected information is accorded by H.R. 2017 to "any person who is substantially affected by" a prohibited order. "[T]he news media" are, without more, substantially affected. "In any proceeding to enforce the prohibitions of the act, the Court shall examine the disputed information in camera." Definition of the "news media" may create some difficulties: an application by the newsletter of a trial lawyers association, for example, would likely provoke litigation of this issue. Deeper difficulties would arise from litigating the circular question whether an applicant is "affected" by an order that is "prohibited" because it relates to a "public hazard." The only way to preserve a protective order that is not in fact prohibited would be to interpret the "in camera" examination process to require a complete review of the protected material by the court. Adversary presentation would be limited to identifying the nature of the interest advanced by the applicant--a general media interest in public hazards, or a more specific private interest, and perhaps to offering surmises about the content of the protected material. The burden of substantially ex parte investigation of this sort could be staggering. If the applicant were allowed access to the protected materials under a conditional protective order, on the other hand, the effects of a proper order could be undone. The risks might be particularly acute with respect to matters of professional competence, sensitive personal information, or competive information sought by a business rival.

Finally, H.R. 2017 touches on a problem that cannot be addressed by amending Rule 26(c). It provides that copyright cannot be used to prevent disclosure or use of information about a public hazard. Apparently some lawyers have taken to copyrighting written discovery responses on the theory that any publication of the material would infringe the copyright. Whatever support copyright law may give this tactic, the question surely involves matters of substance outside the scope of the Enabling Act.

Discovery Sharing

At least two distinct questions arise from efforts to share discovery information with other lawyers. The simpler question involves the need of the lawyer who has discovered information to consult with other lawyers about the most effective way of using the information in pursuing the case at hand. In most circumstances this need should be readily accommodated by protective orders. Somewhat more complex questions involve attempts to reduce the burden of discovery in related actions by sharing the fruits of discovery.

The value of avoiding repetitive discovery of the same information in successive actions growing out of the same "conduct, transaction, or occurrence" is manifest. Many observers believe that even if discovery works well in most cases, grave problems remain in a relatively small proportion of cases. Even when all parties cooperate fully and set realistic limits, a "big" case can generate awesome volumes of discovery material. Consolidation on a local basis, and multidistrict consolidation, are undertaken in substantial part to reduce the risk of multiplicitous discovery. Similar motives underlie current proposals to expand the opportunities for consolidation. It would be foolish not to do everything possible to pursue the same ends by providing for sharing discovery between related actions that are not consolidated. The provisions of the Virginia statute noted above afford a good illustration: a protective order "shall not prohibit an attorney from voluntarily sharing [discovery] materials or information with an attorney involved in a similar or related matter, with the permission of the court, * * * provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order." Va.Code Ann. § 8.01-420.01.

The value of sharing discovery should be so apparent that protective orders do not now stand in the way, or soon will not be allowed to stand in the way. As with the public hazard issue, the first question is whether actual practice under Rule 26(c) enforces protective orders in circumstances that force parties to related litigation to develop the same information by duplicating discovery efforts, or to suffer the even worse consequence of litigating at a disadvantage because they have not the financial or legal resources to uncover the same information.

If there is evidence of a persisting problem with Rule 26(c), the solution that best fits the structure of the rules again would be open-ended. Rule 26(c) would be amended to require consideration of the interest in avoiding duplicating discovery in separate actions. A more detailed amendment might add a provision similar to the Virginia statute, allowing sharing with court approval subject to the same protective terms.

More detailed rules might address questions ancillary to discovery sharing. One question is whether to draw a distinction between protective orders entered by consent of the parties and consent orders entered after adversary dispute. If the parties consent to an order that bars sharing, should reliance on the order be protected, in part because such agreements are an important means of facilitating discovery?

Another obvious question goes to the sale of discovery information. The information has value, and has been acquired at significant cost. Cost-sharing seems reasonable. It might be asked whether part of any price charged for the information should be paid to the party who provided the information in response to discovery requests, but that question seems beyond the pale of current discourse. This perspective, however, puts a different light on the question whether any attempt should be made to regulate the price of discovery materials--the prospect that a profit can be made by selling information provided at great expense by a party facing suits by multiple plaintiffs may seem unattractive.

If there are several actions growing out of the same fact setting, discovery sharing may work most efficiently through a central "bank" or "library." The most obvious questions that might be addressed involve access: should all plaintiffs be allowed to participate? Should the terms of participation turn on the value of the incremental information each new plaintiff can contribute? Should defendants be allowed to participate? What court should regulate continuing protection of private information to ensure that it is shared and used only for litigation purposes? Should an attempt be made to regulate the process by which the library is formed, to reduce the risk that some lawyers may rush to bring the first action for the purpose of advantageous position in selling discovery information?

Even apart from the library question, is there a need to address the risk that actions will be brought primarily for the purpose of engaging in sweeping discovery-for-sale?

Settlement: Return or Destruction of Discovery

Settlement agreements may provide for the return or destruction of discovery information. This practice raises questions different from limits imposed by protective orders. The limitation arises from private agreement, and reflects the wishes of all parties. H.R. 2017 would address such agreements in part by providing that any agreement "that has the purpose or effect of concealing information about a public hazard is void and may not be enforced." If enacted, this provision would not reach settlements that do not involve a public hazard, and does not seem to have any direct effect once the materials have been returned or destroyed.

There are strong reasons for permitting settlements that include bargaining about discovery information acquired at significant cost to all parties. The purpose may include the reasonable need to ensure protection of material that is not discoverable in other litigation, or that would be discoverable only subject to effective protective orders. Disruption of the practice by rule, indeed, might be challenged as an interference with the "substantive right" to make a settlement agreement.

Agreements to return or destroy discovery information, on the other hand, also have an unpleasant aura. The purpose may be to deter other adversaries by forcing them through wasteful repetition of the full discovery process. Even worse, the purpose may be to bury information in ways that may elude future discovery.

One relatively straight-forward response by rule would be to require any party that has responded to a discovery request to retain a copy of the discovered information for a defined period. This provision could be elaborated by developing a system for requiring production of any part of the information that meets a test of likely relevance to subsequent litigation. One possibility, for example, would be to add this material to the list of matters that must be covered by the initial "disclosure."

More complicated responses also are possible, including provisions that direct the court to determine whether return or destruction of discovery information is a reasonable settlement term. The complications are apparent.

Summary

The first question is conceptual: Should all discovery be treated as a public event, akin to the admission of evidence at trial? An affirmative answer would require at least a drastic revision of Rule 26(c), and more likely a complete rethinking of the scope of discovery. It does not seem likely that this path will be followed.

If the basic current approach to discovery is retained, the next question is whether present practice frequently raises undesirable obstacles to sharing information about public hazards and parallel litigation. This question is a practical one. If recent commentary is right, there is not yet sufficient evidence of practical problems to justify revision of Rule 26(c).

If actual practice is in fact going astray, revision of Rule 26(c) could go in several directions. Choice among the directions will depend on the nature of the problems identified and judgment about the ability to address them by detailed rule provisions. There are many questions, and little reason to hazard answers now.

ADVISORY COMMITTEE ON THE CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES
OFFICE OF THE REPORTER
DUKE UNIVERSITY SCHOOL OF LAW
TOWERVIEW AT SCIENCE DRIVE
DURHAM NC 27706

919-684-5593 *919-489-8668 (HOME)* *FAX: 919-684-3417*

MEMORANDUM TO CIVIL RULES COMMITTEE
RE: Public Access to Discovery Materials

In *Seattle Times Co. v. Rinehart,* 467 US 20 (1984), the Court held that the First Amendment is not a limitation on protective orders shielding discovery material from disclosure to non-parties desiring to use the information for extrinsic purposes. A book published in 1988 argued that confidentiality orders prevent needed consultations with other counsel sharing common litigation problems and impede protections against public hazards such as toxic torts. HARE, GILBERT & ReMINE, CONFIDENTIALITY ORDERS (1988). In response to these concerns, several states changed their procedure rules.

In January, 1990, the Federal Courts Study Committee recommended that the federal courts continue the practice of restricting dissemination of discovery information. It recommended that protective orders be entered "upon a minimal showing of good cause." Nevetheless, Congressional hearings were held in May, 1990 by a subcommittee of the Senate Judiciary Committee on the subject of "Court Secrecy." Witnesses, including the chair of the ABA Litigation Section opposed the recommendation of the Study Committee. Judge Weis has urged the Committee to consider the issue of confidentiality in discovery.

Insofar as the solution to any existing problem lies strictly in the field of toxic torts, it is at least questionable whether the Civil Rules Committee is authorized to apply an appropriately tailored result. It is the position several times urged by this Reporter that the Civil Rules must be generally applicable to all civil cases if they are to be above suspicion of being "substantive" and thus violative of

the Rules Enabling Act.

On the other hand, the problem may be perceived in more general terms appropriate to consideration by the Civil Rules Committee. The problem is related to the issue addressed by the new Rule 45, which accommodates the interest of the unretained witness who has valuable information claimed as intellectual property. Veteran members of the Committee may also recall earlier consideration by the Committee of a possible revision of Rule 5 to authorize the district courts to dispense with filing requirements. Among those protesting such a revision were the New York Times and Senator Kennedy, both of whom argued for a right of access for non-parties. The result of the protest was to leave in place a filing requirement that is widely dishonored in practice because there is no space in some districts to house all discovery material.

A thoughtful presentation of the present issue is Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457. Also worthy of attention on narrower aspects of the issue are Brazil, *Preserving the Confidentiality of Settlement Negotiations*, 39 HASTINGS L. J. 955 (1988); Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer*, 31 B. C. L. REV. 771 (1990); Miller, *Privacy in Discovery*, -- ABAJ --- (1991). As Marcus observes, the issue raises a fundamental question regarding the social and political function of the courts.

In extreme form, the proponents' plan for open discovery would apply the concept of FOIA to private enterprise. Most deny that they favor such general access, but, as Marcus notes, the concept of a "presumption of openness" can go a long way in that direction if not closely cabined, and the advocates of openness are not explicit regarding its limits.

Thus, if there were a general policy of openness, it seems likely that there would be many kinds of information having value to competing businesses that could become a major objective in litigation. We know that many FOIA requests, for example, result from one business's efforts to snoop on another, and have nothing at all to do with public safety or any other matter of genuine public interest and concern. As one court has noted, open discovery can make antitrust litigation a means of economic collusion. *Ball Memorial Hosp. v. Mutual Hosp. Ins.*, 784 F. 2d 1325, 1346 (7th cir. 1986).

It appears to be the case that confidentiality is a significant aspect of the settlement process. Some cases settle partly because one or both parties wish to avoid not merely publicity, but disclosure of information of valuable or harmful information. That is also an incentive driving some disputes out of courts altogether, and into ADR. If discovery

material were fully disclosed, the impulse to settle would operate at an earlier stage in the process. That might save expense, but it might also lead to settlements less responsive to the merits of the underlying claims. In some cases, the threat of exposure could be highly coercive. The issue raised by objections to confidentiality thus bears heavily on the settlement process.

On the other hand, the discernible trend away from trial to pretrial, court-annexed ADR, managerial judging, and incentives to settle, may tend to shroud more of the court's activity in secrecy. The trial often serves not only as an exposure of the contentions of the parties, but also to legitimate the process by exposing the court itself to public view and criticism. As public trials become fewer, the need for exposure of other proceedings may gain in importance. If only a very small tip of the iceberg of judicial activity is visible to public view, that may be over time erode public trust in the institutions.

A particular aspect of this consideration is the likelihood of exposure of perjured testimony. In at least one recent case, a perjurer was apprehended as a result of a comparison of his depositions. A deponent who knows that there is public access to the record of the deposition is arguably more likely to tell the truth than one who can be reasonably confident that the deposition will not see the light of day.

Insofar as they bear on the text of the Rules, several possible issues are presented by the confidentiality controversy:

1. Should confidentiality orders be a matter of right to a party who can make a minimal showing of a genuine privacy interest? If so, perhaps some revision of Rules 26(c) and 45(c) is in order to express a standard for a "minimal showing."

2. Or should the protective order perhaps be limited to "true" trade secrets, however these might be defined? This would entail deletion of language from Rules 26(c)(7) and 45(c)(3)(B)(i): "~~or other confidential research, development or commercial information~~." Marcus argues that trade secret law is a misfit, for it describes a property right based on secrecy and a fiduciary duty not to disclose. He also notes that the Restatement of Torts acknowledges that it is impossible to define a trade secret.

3. Or should a party be entitled or disentitled to view discovery material gathered in a parallel case, perhaps a similar one brought against the same defendant? Note that the

function of the trial preparation protection expressed in *Hickman v. Taylor*, and provided by Rule 26(b)(3), has been substantially served once the case has been settled or decided. Arguably any protective order should be unsealed, and even the work product protection set aside so that litigants in related cases can be spared the expense of duplicating prior discovery and gathering information that already resides in the files resulting from litigation that is no longer pending.

The importance of this latter issue is enhanced by increased occurence or recognition of the "mass tort" problem. Is there or should there be a right of plaintiffs in mass tort cases to consult and share information? Should the answer to the question depend on whether there has been a consolidation? Should one plaintiff be permitted to sell information to other plaintiffs suing the same defendant? If one plaintiff secures information gathered by another at great expense, and uses it to obtain a favorable judgment, should the first plaintiff get a share of the recovery?

4. It is argued that "umbrella" protective orders that protect against disclosure without need of court scrutiny of the materials are especially objectionable. Such orders are subject to challenge based on the Court's holding in *Seattle Times Co. v. Rinehart,* which presumes that any protective order is limited to material that has been examined by the court. The current argument, however, proceeds not from First Amendment concerns, but from the concern that the order isolates plaintiff's counsel and thereby disables an effective presentation. On the other hand, the umbrella order shields the court from the daunting task of examining each document protected, and obviates the need for making partial disclosures sufficient to illuminate an argument about the proper scope of a carefully tailored protective order. The Manual for Complex Litigation (Second) favors such umbrella orders in big cases.

5. Should protective orders providing for confidentiality be subject to modification? If so, under what circumstances? Some parties have made claims of reliance on confidentiality orders and insisted that they cannot be revised after reliance has been induced. Should such reliance be encouraged? One court has held not. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F 2d. 1424 (10th cir., 1990). But others have suggested that reliability may be an appropriate reward for parties who are forthcoming with confidential material.

6. Should parties be free to contract on the issue of confidentiality? It is argued that a party should not be permitted to settle a case by a guarantee of confidentiality,

at least where the information to be shrouded is valuable to non-parties who did not participate in the settlement. The recent Florida statute, for example, invalidates promises not to disclose.

Professor Marcus regards the present rule as satisfactory and recommends against change. Nevertheless, given the currency of the issue, the questions stated above seem worthy of the Committee's serious consideration.

Post-it™ brand
Fax Transmittal Memo 7672

To Peter McCabe
Company
Location
Fax # 202 273 1808 Telephone # 2022731800
Comments

No. of Pages 13 Today's Date 11/6 Time
From Edward Cooper
Company U Mich
Location Law Dept. Charge 110.00 LSC
Fax # 313 7648309 Telephone #
Original Disposition ☐ Destroy ☑ Return ☐ Call for pickup

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR MICHIGAN 48109

ASSOCIATE DEAN

November 6, 1992

To: Members, Civil Rules Advisory Committee

From: Ed Cooper EC

Re: Rule 68 Proposal

Judge Pointer has suggested that I send to each of you my memorandum on the current proposal to amend Rule 68. Here it is.

As you will see, the memorandum represents a rather hurried attempt to review the history of earlier efforts to amend Rule 68. There are a lot of issues presented both by the changes made in the current proposal and by the changes not made. I hope this helps us think about them.

RULE 68 PROPOSAL

Summary of Proposal

The current proposal would amend the offer-of-judgment provisions of Rule 68 in several ways. By far the most important change is adoption of a "capped benefit-of-the-bargain" rule for shifting attorney fees. At least a dozen additional changes are made, to be described briefly after explaining the fee-shifting rule.

Fee-shifting

Rule 68 now provides that a plaintiff who rejects an offer of judgment and then obtains a judgment that is "not more favorable" must pay the costs incurred after the offer was made. Under the decision in Marek v. Chesny, 1985, 473 U.S. 1, a plaintiff who obtains a positive judgment less than the defendant's Rule 68 offer loses the right to collect attorney fees provided by a statute as "costs" to a prevailing plaintiff. The offer was $100,000; the plaintiff won $60,000 at trial, and was denied fees under 42 U.S.C. § 1988. Statutory fees that are not characterized as costs, and fees available under the limited exceptions to the "American" rule, are not affected by this decision. Despite the language of Rule 68, it is possible to avoid requiring a prevailing plaintiff to pay attorney fees as costs after rejecting a Rule 68 offer more favorable than the judgment, see Crossman v. Marcoccio, 1st Cir. 1986, 806 F.2d 329, 333-334, certiorari denied 481 U.S. 1029. The Marek v. Chesny rule does not affect a plaintiff who loses after rejecting a Rule 68 offer, given the decision that Rule 68 does not apply when judgment is not "obtained" by the offeree. Since plaintiffs cannot make offers under present Rule 68, defendants are not exposed to fee shifting for rejecting such offers.

The proposal allows any party to make an offer, and adopts a "capped benefit-of-the-bargain" rule for shifting attorney fees. The benefit-of-the-bargain aspect of the rule reflects an effort to put the offeror in as good a position as if the offer had been accepted. If a defendant's offer of $50,000 is followed by judgment for $25,000, for example, the defendant should be compensated for post-offer fees only to the extent that the fees exceed the $25,000 difference between offer and judgment. The cap aspect reflects an effort to limit the impact of liability for fees on risk-averse parties. A plaintiff's judgment cannot be reduced below 0, and a defendant cannot be required to pay more than twice the amount of the judgment.

The proposal attempts to integrate Rule 68 with fee-shifting statutes by providing that neither costs nor attorney fees may be awarded against a "prevailing party under a statute providing for an award of attorney's fees to such a party."

The proposal does not shift expenses other than costs and attorney fees.

Other changes

(1) Any party: Rule 68 now applies only to offers made by "a party defending against a claim." The proposal permits any party to make an offer.

(2) Written offer: The proposal specifies that the offer must be in writing.

(3) Time for offer: Rule 68 now allows an offer to be made at any time more than 10 days before trial begins and provides 10 days to accept. The proposal provides alternative starting times: the offer may be made [after joinder of issue]{after the meeting of the parties under Rule 26(f)}. There is no explicit cut-off, but one may be implied from the 21 day period provided for acceptance.

(4) Time to accept: Rule 68 now provides for acceptance within 10 days. The proposal changes the period to 21 days "or such other time as the court may on motion prescribe." Neither version speaks to withdrawal of an offer. It has been asserted that by providing a specific period for acceptance the rule bars withdrawal of the offer, unless perhaps a court approves withdrawal before acceptance.

(5) Plaintiff takes nothing: Rule 68 now provides that the offeree must pay post-offer costs "if the judgment finally obtained by the offeree is not more favorable than the offer." In Delta Air Lines, Inc. v. August, 1981, 450 U.S. 346, the Court concluded that costs are not to be paid by a plaintiff who rejects an offer and then loses, since the plaintiff has not "obtained" a judgment. The proposal undoes this anomalous result by deleting "by the offeree."

(6) Post-offer costs: Rule 68 now provides for payment of costs after the making of the offer. The proposal changes to payment of costs after expiration of the time for accepting the offer. Extension of the time to accept to 21 days increases the significance of this change, and the offeree is likely to attempt to gather as much information as possible during this period. The change clearly reflects a belief that the offeree should have the full benefit of the offer period to decide.

(7) Forgive sanctions: Rule 68 now provides that the unsuccessful offeree "must pay" post-offer costs of the offeror. The proposal permits a court to reduce the award "to avoid the imposition of undue hardship."

(8) Multiple offers: Rule 68 now provides that failure to accept an offer "does not preclude a subsequent offer." The proposed rule continues this provision, and adds an explicit provision that "a subsequent offer, if not accepted, does not deprive a party who made an earlier offer of the benefits under this rule resulting from that offer."

(9) Bifurcated trial: The final sentence of Rule 68 provides for an offer made after a determination of liability and at least 10 days before hearings to determine the amount or extent of liability. The proposal strikes this sentence. Other changes in the rule appear to make the sentence redundant. Under the proposal an offer can be made at any time [after joinder of issue] or {a Rule 26(f) meeting} without an express cut-off time. If a limit is implied in the 21-day period for acceptance, that limit can be applied to an offer before hearings on damages, and the court can reduce the time limit if that is desirable.

(10) Nonmonetary relief: Rule 68 now provides for an offer "for the money or property or to the effect specified in the offer," a phrase that is continued in the proposal, but does not provide guidance for determining whether a judgment is more favorable than an offer. Subdivision (b) of the proposal provides a test. It seems to be intended to say that a judgment is more favorable if it includes substantially all the nonmonetary relief proposed by the offer, and something more. If that is the intent, the language may need some revision.

(11) "Rule 23" exception: Rule 68 does not now refer to actions under Rules 23, 23.1, or 23.2. The proposal makes the rule inapplicable to such actions. The proposal apparently responds to frequently-voiced concerns that Rule 68 is inappropriate in actions that require court approval of any settlement, that class representatives should not be made liable for Rule 68 sanctions, and that exposure to sanctions might generate a conflict of interest between representatives and the class. The proposal apparently excludes offers of settlement by representatives of a class as well as offers by a party opposing the class; to this extent it seems supported only by the requirement that settlement be approved by the court.

(12) Other settlement: The proposal makes Rule 68 inapplicable to disputes "resolved by acceptance of an offer under this rule or other settlement." The reference to acceptance of an offer under Rule 68 might well be deleted. The reference to other settlements may protect offerees who forget to include potential Rule 68 liability in the terms of a settlement.

Background: 1983-1984 Proposals

After studying Rule 68 for a few years, the Advisory Committee published a proposed revision in 1983. Various details of the proposal are noted in the discussion of technical questions. The Committee stated that Rule 68 had been ineffective, in large part because liability for costs was not a sufficient sanction to encourage settlement. Imposition of liability for attorney fees, interest, and expenses was recommended as the way to give force to the rule. Discretion was given to reduce an award of expenses and interest found to be "excessive or unjustified." The proposal generated extensive comment, much of it unfavorable. Many of the objections rested on the assertion that the Rules Enabling Act does not authorize attorney fee-shifting provisions. Parallel objections were that automatic fee shifting under Rule 68 is inconsistent with many statutory fee provisions. It also was feared that liability for fees would "have an inhibitive impact on impecunious parties."

The 1984 proposal reacted to criticism of the 1983 proposal in dramatic ways. At the outset, the Committee chose to emphasize that the purpose of Rule 68 is not so much to encourage settlement as to encourage early settlement. The rule was transformed into one designed to encourage reasonable settlement behavior. Rather than provide for automatic liability for costs, expenses, and fees, the 1984 proposal authorized a court to impose an "appropriate sanction" if "an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation." It was thought that a discretionary sanction is clearly within the scope of the Enabling Act, avoiding arguments about the validity of automatic fee shifting. The determination whether to impose any sanction was to be based on

> all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

Similar discretion was given in determining the amount of any sanction, considering the additional attorney fees incurred after rejection of the offer as one factor. This proposal was tabled in 1986.

Frequency and Time of Settlement

The purpose ascribed to Rule 68 has been to expedite settlement. It has been thought a failure even though no more than a small fraction of cases persist to trial. If this is the purpose, revision of the rule can be undertaken either to enhance its effects on settlement or to correct deficiencies that seem unfair without regard to the frequency or timing of settlements. Revision could serve other purposes instead. The most obvious purpose would be to soften the American rule on attorney fee shifting, a purpose that more severely tries the limits of Enabling Act authority.

Rule 68 can improve the results of a purely autonomous settlement process in two ways. It can increase the number of cases that settle, and it can produce earlier settlements. The purpose behind the 1983-1984 proposals emphasized the goal of producing earlier settlements. If it really is desirable to increase the number of settlements, or to speed settlement, perhaps amendment of Rule 68 can help. Each of these three subjects is open to debate.

More frequent settlement. It always is convenient for courts to increase the number of settlements. Settlement often may seem intrinsically better than resolution through litigation under rules that usually purport to require "all or nothing" answers on liability and uncompromised assessment of damages. Settlements reached because one or more parties are intimidated by the coercive effect of rules designed to promote settlement, however, may not be desirable. Rules designed to promote settlement must be drawn carefully to avoid undue coercion. Settlement, moreover, cannot accomplish the goals of many parties. Public interest litigants may wish to resolve new matters of public importance. Professional malpractice defendants may seek official vindication. Yet other objectives may be served better by judgment than settlement, including public information about litigation and its results. Rule 68 carries with it an implication, brought to sharp focus by the 1984 proposal, that there is a procedural duty to engage in "reasonable" settlement behavior and to accept a settlement offer that is objectively reasonable in light of the risks and costs of further litigation as measured by money and specific relief. This perspective could lead to the conclusion that trials happen only when at least one party is behaving unreasonably, or when both parties prefer litigation to settlement. There is

substantial support for the contrary view that settlement reflects only private interests in arranging human affairs, and that courts should remain open to provide official public dispute resolution when private means cannot satisfy the desire of any party for official decision.

The effect of increasing Rule 68 sanctions is not limited to the obvious incentives to settle. The stakes of litigation are increased once an offer is made and not accepted--both parties recognize that the offeror now stands to gain sanctions in addition to the predicted judgment. This effect can make it more difficult to reach settlement after an unsuccessful offer. A rule that permits successive offers can make the strategy of the parties, and calculus of effect, even more confusing. Although it is difficult to measure the actual effects of present Rule 68, and would be difficult to measure the actual effects of an amended rule, it does not seem likely that the overall effect of augmented sanctions would be to reduce the frequency of settlement. Hopes for a significant improvement in the frequency or time of settlement, however, must face up to the complicated nature of any prediction.

The effect of even limited fee shifting also may be more complicated than often assumed. It is possible that general fee shifting will increase the expenditures of both parties because the stakes are increased for both parties. Post-offer fees, for example, might be increased because the offeror hopes to recover them, knows that the offeree may be intimidated by this prospect, or fears that the offeree will undertake still greater efforts to avoid the risk of fee shifting.

Early settlement. Early settlement reduces the pretrial transaction costs incurred by the parties, and often shared by the court system. More full pretrial proceedings, however, might have illuminated the nature of the dispute in ways that would produce a better-informed settlement. Again, it is important that a rule designed to encourage early settlement not coerce ill-informed and unfair early settlements.

Improvement possible. It may be possible to revise Rule 68 in ways that encourage earlier or more frequent settlements without creating undue pressure. All of the suggestions for improvement, however, rely on increased sanctions. Increased sanctions generate substantial pressure, and the pressure is apt to bear more forcefully on some groups of litigants than others. Increased sanctions also invite litigation about sanctions; the most effective way to curb satellite litigation is to reduce or eliminate discretion as to the imposition and extent of the sanctions. It is not easy to achieve a sound balance that encourages fair settlements without imposing intimidated surrender. It is not obvious that Rule 68 can be made significantly better as a means of encouraging settlement.

ADR: The widespread development of alternate dispute resolution devices may bear on the wisdom of seeking to rely on Rule 68 to encourage early settlement. One common form of sanction for rejecting the proposal of court-annexed arbitration schemes is to impose liability for attorney fees if the judgment does not match the arbitration recommendation within some margin of error. As such devices become more common, it may make more sense to rely on the evaluation of the case by neutrals acting under aegis of the court than to rely on the strategic manipulation of offer and counter-offer by the parties.

Fee Shifting

Attorney fee shifting has occupied center stage in Rule 68 debates. The emphasis has tended to be placed on the need to attach significant consequences to rejection of a Rule 68 offer. Payment of the offeror's attorney fees can be a significant sanction, and is likely to seem significant even in a capped benefit-of-the-bargain approach. Fee shifting has the added benefit that it relates directly to the costs entailed by rejection of the offer. Even though automatic fee shifting may fall on an offeree who behaved reasonably, compensation of the offeror does not seem arbitrary. Alternative sanctions have been considered, including a multiple of statutory costs or a fixed percentage of the difference between offer and judgment, but they have an obviously punitive element.

One way to approach fee-shifting sanctions is to begin with the question whether the Enabling Act authorizes wholesale abandonment of the "American" rule against fee shifting. If the answer seems uncertain, close attention must be paid to the cogency of the reasons offered for distinguishing a particular sanction from the general rule.

Another perspective on fee-shifting sanctions is provided by the relationship between Rule 68 and fee-shifting statutes. Rule 68 now clearly means that a prevailing plaintiff who is entitled by federal statute to recover fees as costs may lose the statutory fee recovery for winning less than a Rule 68 offer. (It is not clear how this rule relates to state attorney fee statutes.) There are powerful arguments that this result thwarts the purpose of statutes adopted to encourage assertion of particular types of claims. Proposed Rule 68(c) provides that the Rule does not "authorize the award of costs or attorney's fees against a party if it is the prevailing party under a statute providing for an award of attorney's fees to such a party." This language seems to mean at least two things: (1) the right to recover under the statute remains unaffected; (2) the statutory award may not be offset by reducing a plaintiff's judgment on the merits under the capped benefit-of-the-bargain provision of proposed Rule 68(a). If that is the meaning of the proposal, it goes a long way toward reducing the impact on statutory fee rights. Even then, some impact on statutory fee provisions may remain. 42 U.S.C. § 1988 allows recovery of attorney fees by prevailing defendants only if the plaintiff pursued an unfounded claim. Rule 68 would allow recovery within its limits even though § 1988 would not. This result may seem to interfere with the balance struck by Congress.

Open-ended fee shifting could have a staggering impact on litigants who have assets to lose. The prospect that a plaintiff may wind up paying the defendant could deter many plaintiffs who now rely on contingent fee representation, forcing acceptance of offers that seem clearly inadequate for fear of the risks of litigation. The capped benefit-of-the-bargain approach is meant to respond to this problem. The plaintiff's maximum fee and costs exposure is limited by the amount of the judgment. A crude parallel is offered to defendants, who are protected against paying more than double the amount of the judgment. Although the provision seems driven by the desire to protect plaintiffs against out-of-pocket losses, the lack of any parallel reason for limiting defendant exposure may justify the seeming symmetry of this provision. The

extent to which this package approach reduces the risk of intimidating plaintiffs through Rule 68 offers is perhaps the most important question raised by the proposal.

"Sanction" or "Fee-Shifting"

The 1984 proposal provided for an imposition of sanctions rather than an award of attorney fees. Sanction terminology was supported by providing for sanctions only if an offer was "rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation." Determination of the amount of the sanction, however, was to include consideration of post-offer attorney fees. It was thought that this approach avoided the argument that court rules should not attempt to change the American Rule on attorney fees. Instead, Rule 68 would create a procedural duty to behave reasonably in settlement, and provide for sanctions just as many other procedural rules provide for sanctions.

It may be that Enabling Act concerns are reduced in some measure if Rule 68 incentives are framed as sanctions. The word, however, accomplishes little. The effect of this strategy diminishes as the standard of liability becomes more automatic, as by simply comparing the offer with the judgment.

The sanction concept touches another issue raised by the 1984 proposal. It is possible that both parties may behave unreasonably, or do worse than their final Rule 68 offers. The plaintiff's offer is $65,000, the defendant's offer is $60,000, and the judgment is $62,500. It is easy to imagine a finding that both behaved unreasonably. Payment of sanctions from each to the other seems awkward, although the open-ended nature of the 1984 proposal provided many opportunities for adjustment. Under the current proposal, the judgment is less favorable to each offeree. Fee liability is imposed on each and netted out; see Note, Example 5. This result may seem more sensible if it is viewed as compensation for unnecessary attorney fees than if it is viewed as a sanction.

Rule 11 Comparison

The proposals to amend Rule 11 pending before the Supreme Court offer a contrast with the current Rule 68 proposal. Rule 11 would be amended by abolishing a mandatory sanction requirement, and by providing that sanctions ordinarily are paid to the court rather than paid as compensation to the party injured by the violation. Proposed Rule 68, on the other hand, requires that sanctions be imposed, that payment be measured by injury to the opposing party, and that liability be imposed without regard to the reasonableness of the decision not to accept the offer.

Part of the dissatisfaction with Rule 11 arose from the burden of satellite litigation and the temptation to use the threat of Rule 11 sanctions as a strategic device. If Rule 68 is expanded to include significant sanctions, whether attorney fees or something else, it is safe to predict that it will be used for strategic purposes. The burden of satellite litigation may be reduced if the standard of liability rests on an essentially automatic comparison of the judgment

with the offer, but even then courts may not welcome an additional source of encounters with the determination of reasonable attorney fees. If the standard of liability were shifted to some variation of the reasonableness standard proposed in 1984, the burden of satellite litigation could be increased exponentially.

Standard of Liability

Rule 68 and the proposal impose sanctions based on the actual result of litigation without regard to the reasonableness of the decision not to accept an offer. As noted above, this approach avoids the need to make retrospective determinations of reasonableness. The administrative advantages of strict liability may well be sufficient to justify the approach taken in the proposal.

It would be possible to combine a standard of strict liability with a provision that allows a court to exempt a specific case from Rule 68, either before or after an offer is made. One illustration would be a provision allowing a court to exempt any case or claim that presents novel and substantial questions of law or complicated questions of fact, or that presents issues that substantially affect nonparties.

Nonmonetary Relief

Rule 68 now does not provide any guide for comparing an offer and judgment that include nonmonetary relief. The proposal includes a new subdivision (b):

> A judgment which includes non-monetary relief shall not be considered more favorable to an offeree than was an offer unless the terms of the offer included substantially all such non-monetary relief.

(At least on first reading, the wording seems likely to have been twisted around: the more obvious wording would be: "A judgment that includes nonmonetary relief is not more favorable [to the offeree] than an offer unless the judgment includes substantially all the nonmonetary relief offered.")

The great virtue of this proposal is that it avoids any need to evaluate differences in nonmonetary relief. The price is that Rule 68 sanctions will less often be available in actions for nonmonetary relief. If one result is effectively to remove institutional reform litigation from Rule 68, that may be more a benefit than a cost. This standard of comparison also may reduce the incentive to make Rule 68 offers in cases that involve a prospect of reasonably complex specific remedies. Again, that effect may be more benefit than cost.

Extent of liability

The proposal allows a court to reduce an award of costs and attorney fees to avoid undue hardship. This approach ties in to the decision to retain strict liability; alternative grounds of reduction are likely to emphasize the reasonableness of the decision not to accept the offer. Liability is further limited by the cap.

"Technical" Questions

Offers Mandatory: It would be possible to require all parties to make Rule 68 offers to all other parties, perhaps assigning responsibility for the first offer to any party defending against a claim for relief, and requiring any party who does not accept an offer to make a counter-offer. There is little reason to force the parties through this process, and mandatory resort to Rule 68 could exacerbate the problems presented by adopting more significant penalties.

Plaintiff Offers: Parties asserting claims should be able to make Rule 68 offers. If the sanctions are limited to post-rejection costs, however, there is little incentive to make an offer. Plaintiffs who prevail can expect to recover costs; invoking Rule 68 would help only to the extent that Rule 68 narrows the court's discretion to deny costs to a prevailing party. Extending Rule 68 to all parties, however, seems desirable even if payment of costs remains the only sanction.

Duration of offer: The present rule sets a period of 10 days for accepting the offer. The proposal extends the period to 21 days. Withdrawal of the offer may be prohibited by the provision that if the offer is accepted within 21 days, the clerk or court "shall enter judgment" when either party files the offer and acceptance. The 1983 proposal set a 30-day period, and expressly provided that an offer withdrawn before the end of the 30-day period would not support Rule 68 sanctions. The 1984 proposal set a 60-day period, permitted withdrawal, and again made it clear that withdrawal foreclosed sanctions. The longer the period allowed, the easier it is for institutional litigants to accept an offer--insurance companies and government agencies were noted as examples of the need for more time. A longer period also makes it easier to evaluate the offer, including use of discovery. The longer the period, however, the longer the cycle of offer and counter-offer. Unless withdrawal is permitted, moreover, a long period for acceptance is likely to discourage realistic offers until the offeror is reasonably confident about its assessment of the case. Withdrawal also may seem fair because the new information uncovered by discovery during a long offer period may make the offer seem unwise. Choice of a 21-day period, apparently without opportunity to withdraw, may be supported by the new disclosure provisions of Rule 26, particularly if the period for making offers begins only after a Rule 26(f) meeting.

Cut-off of offer period: Rule 68 requires that an offer be made more than 10 days before trial begins. The 1983 proposal extended this to 30 days, and the 1984 proposal to 90 days. The theory behind the 1984 proposal was that Rule 68 is designed to encourage early settlement; settlement offers will be made on the eve of trial whether or not Rule 68 applies. The present proposal deletes any cut-off point, but provides for acceptance within 21 days or such other time as the court prescribes. If it is implied that the offer must remain open for 21 days, there should be a strong practical deterrent to eve-of-trial offers.

Rule 68 now provides for an offer made after a determination of liability but a reasonable time of at least 10 days before hearings to "determine the amount or extent of liability." The proposal deletes this language. Since the proposal also deletes the requirement that an offer be

made 10 days before trial, an offer apparently can be made after a bifurcated trial, even if damages are tried before liability. The 1984 proposal apparently was intended to eliminate any provision for offers after commencement of any phase of trial, reasoning that the opportunity for early settlement has passed and that Rule 68 is not needed to encourage settlement at this stage.

Multiple Offers: Rule 68 now provides that an offer does not preclude a subsequent offer. The proposed rule makes it clear that all parties may make offers after the first offer, and provides that "a subsequent offer, if not accepted, does not deprive a party who made an earlier offer of the benefits under this rule resulting from that offer." Example 4 in the Note supports the apparent meaning--the defendant offers first $50,000 and then $60,000. If the judgment is $50,000 or less, the defendant recovers sanctions based on costs and fees after the first offer; if the judgment is more than $50,000 but not more than $60,000, sanctions are limited to costs and fees after the second offer. This provision encourages subsequent offers by preserving the potential advantages gained by early offers. It also may encourage unrealistic early offers designed to shift costs and fees in the unlikely event of a highly favorable outcome. There is no apparent reason, indeed, to refrain from an unrealistic initial offer, to be followed by one or more better offers. A second offer can be made 22 days after the first, reducing substantially the risk that substantial fees and costs will be incurred that could have been recouped by making a realistic initial offer; an unrealistic offer is not likely to spur the offeree into intensive efforts to gather information to evaluate the offer. Attention may focus in some cases on the strategy of Rule 68 as much as realistic negotiations. The hope for early settlements may be frustrated, moreover, by encouraging unrealistic early offers. There may be something to be said for allowing only one Rule 68 offer, a limit that does not seem likely to interfere with serious settlement negotiations. The hope for increasing the frequency of settlements nonetheless may justify the provision for successive offers. Some help might be found in refusing to impose sanctions based on sham offers.

Sham Offers: In Delta Airlines v. August, 1981, 450 U.S. 346, the Court ruled that a verdict for the defendant is not a "judgment obtained by" the plaintiff for purposes of Rule 68. The result is that if the plaintiff recovers something less than the offer, Rule 68 sanctions can be imposed; if the plaintiff recovers nothing, sanctions cannot be imposed. The dissenters and many subsequent observers have found this result anomalous. The present proposal deletes "by the offeree," apparently ending this anomaly. It continues to provide for an offer of judgment "to the effect specified," which seems to allow a defendant's offer for judgment in favor of the defendant. This approach forces attention back to the sham offer. It is easy to make an unrealistic offer as a means of invoking Rule 68 sanctions should the offeror prevail. This tack is even more attractive when serial offers can be made under Rule 68, as provided by the current proposal. An initial unrealistic offer can be made, to be followed by a realistic offer. The lower courts in the Delta Airlines case concluded that an unrealistic offer does not trigger Rule 68 sanctions--that Rule 68 requires an offer sufficient "to justify serious consideration by the plaintiff." The more severe the sanctions available under Rule 68, the more important this question becomes. At the outset of the litigation the plaintiff could demand its highest expectation of judgment, and the defendant offer a vanishingly small amount, hoping to recover

sanctions from that point on. If attorney fees are available under Rule 68 even though otherwise not available, routine resort should be made to extreme offers in every case.

The problem of pro forma offers made solely to pave the way for Rule 68 sanctions could be addressed by denying sanctions for unrealistic offers. This alternative would impose significant costs of administration. One form is suggested by the 1983 proposal: "Costs, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith."

"Costs then accrued": Rule 68 and the proposed revision both require that the offer be for specified relief "with costs then accrued." This term may cause some confusion, and the confusion may be particularly dangerous when attorney fees are treated as costs. As the term is read in Marek v. Chesny, 1985, 473 U.S. 1, 6-7, an offer that says nothing about costs complies with the rule, leaving costs to be set by the court as an additional amount. The offer instead can either specify a single sum that includes both damages and costs, or can specify separate amounts for damages and costs; acceptance of the offer forecloses an award of additional costs by the court. The 1983 proposal deleted the reference to costs, fearing confusion with respect to the treatment of attorney fees as costs, and preferred that an offer for a single amount be treated as including costs and attorney fees.

Costs and fees as element of comparison: The 1983 proposal provided that the costs and expenses of the parties were excluded from the determination whether a judgment is more favorable than the offer. The Note stated that this provision was designed to eliminate confusion. The problem is easily identified: after a defendant offers $50,000 as a single sum that includes an undifferentiated amount for costs then accrued, the plaintiff wins $49,000 and would be entitled to costs of $2,000, and perhaps attorney fees as well. The most accurate standard of comparison would compare the judgment to the amount of the offer as diminished by the costs accrued at the time of the offer, but determination of the cost component might prove complicated. Perhaps the question should be addressed in the Rule or in the Notes.

Cap with overlapping claims: The proposal seems to work reasonably well in cases in which plaintiff and a counterclaiming defendant each seek damages. As one testing illustration, at different stages of the litigation each might offer judgment of $30,000 to the other. After trial claim and counterclaim each are found worth $30,000. The apparent effect of the rule is that the monetary amount of the judgment is 0 and there is no fee shifting, even if one party incurred far greater costs after the earlier offer than the other party incurred after the later offer.

Effect of Cap on Public Interests: The cap on fee shifting leaves cost shifting as the only sanction in cases in which fees are exceeded by the difference between offer and judgment. A defendant's offer of $100,000, for example, could be followed by attorney fees of $20,000 and a judgment for the defendant. The plaintiff may have been remarkably foolish in rejecting the offer. It might be argued that there should be some provision for sanctions payable to the court. There is an obvious analogy to Rule 11.

Sanctions on counsel: Sanctions are imposed on "the offeree." Ordinarily evaluation of the offer will depend heavily on the advice of counsel. Imposing sanctions on counsel, however, could create a conflict of interest that is better avoided.

Contingent fees: If the sanction includes fees, how should a contingent fee be allocated? Do contingent fee attorneys have any incentive outside of Rule 68 to keep track of hours, so allocation can be made by the proportion of work done before and after expiration of the offer?

Expenses: The 1983 proposal provided that the offeree must pay post-offer expenses as well as costs and attorney fees. This proposal comes closer to giving the offeror the benefit of the proposed offer. It also expands the risk faced by the offeree, although a cap that applies to attorney fees and expenses together might substantially reduce the margin of risk. Courts would have to struggle with the burden of determining yet another dimension of dispute. In many types of litigation the opportunity to recapture expenses might prove a more powerful tactical weapon for defendants who can engage in more expensive trial preparation.

Time for award: Some of the drafts offered in the 1983-1984 discussion included a requirement that a motion for a Rule 68 be made within 10 days of judgment. The current proposal treats the award as a matter of costs, governed by Rule 54(d), making it unnecessary to have a separate time limit.

U.S. Department of Justice

Washington, D.C. 20530

November 9, 1992

TO: Members, Reporter and Secretary -- Advisory Committee on Civil Rules
Chairman and Liaison Member -- Standing Committee on Rules

With Rule 68 on the agenda for our Denver meeting, I advised Judge Pointer that we have been doing some thinking and drafting concerning the Rule. Judge Pointer suggested that I send your our draft, which is not a final proposal, but merely reflects our present thoughts. I hope it will contribute to our discussions.

I'm looking forward to seeing you in Denver.

Very truly yours,

DENNIS G. LINDER
Director
Federal Programs Branch
Civil Division

Enclosures

cc: Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules
880 Federal Courthouse
Birmingham, AL 35203

Peter G. McCabe
Secretary to the Committee on
Rules of Practice and Procedure
Administrative Office of U.S. Courts
One Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

DRAFT

PROPOSED AMENDMENT TO RULE 68

Rule 68. Offer of [Judgment] Settlement

At any time more than [10] 20 days [before the trial begins, a party defending against a claim] after the service of the summons and complaint on a party but not less than 60 days (or 50 days if it is a counter offer) before trial, either party may serve upon the [adverse party an offer to allow judgment to be taken against the defending party] other party, but shall not file with the court a written offer, denominated as an offer under this rule, to settle a claim for the money, [or] property or [to the effect] relief specified in the offer [with costs then accrued.] and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. [If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.] The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude [a] subsequent offers. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule. When the complaint sets forth a claim for money, if the offeree rejects the offer and the judgment entered is not at least ten percent more favorable to the offeree than the last offer, the offeree shall pay the reasonable costs and reasonable attorney's fees incurred after the rejection of the last offer. When the complaint sets forth a claim for property or other non-monetary relief, if the offeree rejects the offer and the judgment entered is not more favorable to the offeree than the last offer, the offeree shall pay the reasonable costs and reasonable attorney's fees incurred after rejection of the last offer. However, where applicable law provides for the award of attorney's fees to the prevailing party, an offeree who is the prevailing party shall not be required to pay the offeror's attorney's fees unless, taking the offer into account, the offeror would be

entitled to compensation for its post-offer attorney's fees under the standards for determining liability for attorney's fees under the applicable law. [When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.]

This rule shall not apply to class or derivative actions.

COMMITTEE NOTE

The purpose of Rule 68 as adopted in 1938 was to encourage settlements and avoid protracted litigation. That was accomplished by taxing a claimant with costs if he should recover no more after trial than he would have received if he had accepted the defending party's offer to enter judgment in the claimant's favor for a specified amount of money or property, or other relief. The rule, which has since been amended three times but only in minor respects, has rarely been invoked and has been considered largely ineffective as a means of achieving its goals.

The principal reasons for the rule's ineffectiveness are (1) that "costs," except in rare instances in which they are defined to include attorney's fees, see, Marek v. Chesny, 473 U.S. 1 (1985), are too small a factor to motivate parties to use the rule; and (2) that the rule is a "one-way street," available only to those defending against claims, and not to claimants.

Rule 68 has been amended to remedy these weaknesses and enhance its effectiveness as a means of accomplishing its original goals. It has been recaptioned to refer to "Settlement" to indicate it is that process, rather than entry of judgment, that is being fostered. Accordingly, the rule now authorizes a dismissal pursuant to an agreement, and no longer requires the formal filing of the offer and acceptance and the entry of a judgment. Also, an offer under this rule need not be served on all adverse parties.

The first sentence of the rule has been revised to permit all parties, including claimants, to make offers of settlement. The earlier requirement that the offer be made at least 10 days before trial, has been revised to not less than 60 days before trial or to not less than 50 days before trial if the offer is a counter offer. This change reflects the view that parties should be encouraged to consider settlement seriously at a reasonably

early stage in the litigation after enough discovery has been had to appraise the strengths and weaknesses of a claim or defense. The first sentence also delays the Rule 68 procedure to at least 20 days after the service of summons and complaint on a party to an offer in order to guard against premature offers that a defending party is unable to evaluate properly.

The first sentence of the rule also has been revised to eliminate the former provision that the offeror add to his offer the "costs then accrued." The offeror controls the scope of the offer, and may specify that the offer includes the total relief to be provided, including costs and attorney's fees, but the offeror may also specify that the amount of costs and attorney's fees, if any, are to be determined by the court applying the appropriate law.

The second sentence of the rule has been revised to give the offeree 60 days instead of 10 days (as formerly provided) within which to decide whether to accept. The 10-day period was thought to be too short to enable many offerees to act upon offers made to them, particularly when authority from others (for example, insurers or the government) had to be obtained before action could be taken on an offer or when the offeree needed additional information to which it would be entitled by way of discovery under the rules to appraise the fairness of the offer. The offer remains open throughout the 60-day period unless it is withdrawn by a writing served on the offeree prior to acceptance. A written counter offer does not constitute a rejection unless it expressly so states. Offers that are neither withdrawn nor accepted within 60 days are deemed rejected. Only offers that are rejected are affected by the remaining provisions of Rule 68.

A party may make more than one offer to another party. However, only the last offer made by a party to another is admissible in determining costs and fees under this rule. A party cannot gradually make its offers more favorable over time, and then, when relief is ordered, demand payment of its fees from the date of the first applicable offer. Instead, a party should closely evaluate the claims and defenses in the case and make a reasonable offer at the first opportunity. If that offer later appears to be too low or high, the offeror can submit a new, more reasonable offer which takes the place of the old offer.

Evidence of any offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule. This provision is designed to encourage the making of offers under the rule by assuring that the offeror will be protected against prejudicial use of an offer. The provision is consistent with Fed. R. Evid. 408, which provides that offers of compromise are not admissible to prove liability for or the invalidity of a claim or its amount.

The rule has been revised to provide that when an offer of settlement is not accepted and the judgment ultimately entered turns out not to have been (1) in the case of a claim for money, at least ten percent more favorable to the offeree than the last offer, or (2) in the case of a claim for property or non-monetary relief, more favorable to the offeree than the last offer, the offeree must pay not only the offeror's costs but also its attorney's fees from the date of rejection of the last offer. The "ten percent" to which the rule refers is ten percent of the offer, not the judgment. Therefore, for example, a judgment for plaintiff in the amount of $9,000 following an offer from that plaintiff in the amount of $10,000 is exactly ten percent more favorable to the defendant than the offer.

Cases involving non-monetary relief (or cases involving demands for both types of relief) will involve more complex considerations as to whether the judgment is more favorable than the offer. This must be addressed on a case-by-case basis, and is a matter for the court's discretion. The inquiry is to be objective, not subjective. For example, in a case in which the offer contained an agreement to an injunction against specific conduct by the defendant for a one year period and $10,000 in damages, and the court later awarded an injunction of far broader duration and $8,000 in damages, the court might determine that the judgment obtained by the offeree was a more favorable result than acceptance of the offer, and therefore deny fees and costs.

Since fees payable for attorney's services in the conduct of pretrial and trial activities often become sizeable, the increased risk faced by an offeree is expected to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases before the heaviest expenses have been incurred.

Sanctions may be awarded under the rule in defendant's favor even if the judgment is for defendant as to all matters, and in plaintiff's favor even if the judgment for plaintiff. This is intended to overrule the decision of the Supreme Court in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) (Rule 68 can be invoked only when plaintiff prevails as to some part of claim, but recovers less than amount or value of defendant's settlement offer).

A judge is to award only "reasonable" costs and attorney's fees. This provision is not intended to change current law on what attorney's fees are "reasonable," and provides the court with a measure of discretion to prevent injustice. The judge, however, does not have unbridled discretion, since that might destroy the rule's potential for leading parties seriously to consider settlement at an early stage.

The rule also operates to terminate a prevailing party's right, under an attorney's fee statute or other provision, to attorney's fees incurred after that party improperly rejects an offer of settlement. The Supreme Court has held that, in a case where the underlying fee-shifting statute provides for an award of attorney's fees as a part of costs, the current version of Rule 68 bars an award of attorney's fees to a plaintiff incurred after that plaintiff rejected an offer of judgment in excess of the relief obtained in the judgment. Marek v. Chesny, 473 U.S. 1 (1985). Similarly, under the language of the rule, as amended, even where the underlying fee-shifting statute does not provide for the award of attorney's fees as costs, an award of an offeree's post-offer attorney's fees and costs would be barred (even if the offeree were the prevailing party) because they would be incurred after rejection of an offer, so long as the requisites of the rule were met. The rule corrects some of inconsistencies resulting from Marek, under which the bar of Rule 68 depended on whether the fee-shifting statute awarded "fees and costs" or "fees as a part of costs." See Marek, 473 U.S. at 24-26 (dissenting opinion).

In Marek, the Court found no inconsistency with the fee-shifting statute at issue, 28 U.S.C. § 1988. Instead, rule 68 implements a different policy -- encouraging settlements at the earliest possible time -- by imposing a sanction on conduct that is objectively unreasonable and that results in unnecessary delay or needless increase in litigation costs. This expansion of Marek also does not conflict with fee-shifting statutes. The policy of encouraging settlement advanced by the Rule does not conflict with congressional objectives to ensure that certain plaintiffs have effective access to the judicial process. "[S]ettlements rather than litigation will serve the interests of plaintiffs as well as defendants." Marek, 473 U.S. at 10. Of course, even under the former rule a court, in determining the reasonable value of the attorney's services, could take into consideration the prevailing party's refusal to accept a reasonable offer that was more favorable to it than the judgment entered and that, if accepted, would have eliminated the necessity for further legal services from the date of the offer.

Furthermore, the rule operates to require an offeree who improperly rejected a settlement offer to pay the offeror's reasonable post-offer attorney's fees. However, the last sentence of the first paragraph is included so that the rule does not conflict with the policy expressed in fee-shifting statutes providing for the award of attorney's fees to prevailing parties in certain types of cases. If a defendant's burden to show that it is the prevailing party is higher than plaintiff's, requiring a plaintiff to pay defendant's post-offer attorney's fees could be viewed as conflicting with the congressional policy inherent in fee-shifting statutes. Accordingly, courts have held that the current version of rule 68 does not require a plaintiff to pay a

defendant's post-offer attorney's fees, even if the plaintiff improperly rejected an offer of judgment, unless fees would be awarded to the defendant pursuant to the underlying statute. See O'Brien v. City of Greers Ferry, 873 F.2d 1115, 1120 (8th Cir. 1989) (defendants in civil rights action not entitled to post-offer attorney's fees unless plaintiff's action was frivolous, unreasonable, or without foundation); Crossman v. Marcoccio, 806 F.2d 329, 333-34 (1st Cir. 1986), cert. denied, 481 U.S. 1029 (1987) (same). The rule adopts the result of these cases, but makes clear that in applying the standards arising under the fee-shifting statute, the court must take into account the existence of the offer.

For example, in civil rights cases, plaintiffs are entitled to their fees if they prevail, but a defendant is not entitled to fees unless the plaintiff's action is frivolous, unreasonable, or without foundation. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). If a plaintiff who eventually prevailed were to improperly reject an offer of settlement, under the rule that plaintiff's post-offer fees and costs, and the defendant's post-offer costs, would be borne by the plaintiff. However, the plaintiff would have to pay the defendant's post-offer attorney's fees only if continued maintenance of the action after the offer, and given the content of the offer itself, was frivolous, unreasonable, or without foundation. Conversely, if a defendant had to show only that it prevailed to be entitled to its attorney's fees under the fee-shifting provision, the showing that the offer was more favorable to the plaintiff than the judgment would normally demonstrate that the defendant was the prevailing party for the post-offer portion of the case, and that the plaintiff was required to pay the defendant's post-offer attorney's fees.

The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative offeree with the risk of exposure to heavy liability for costs and expenses that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See Marek, 473 U.S. at 33 n. 49 (dissenting opinion); Gay v. Walters' & Dairy Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Calif. 1980).

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N W Suite 600 ■ Washington, D C. 20009 ■ 202/332-3224

November 10, 1992

The Honorable Sam C. Pointer, Jr.
Chief Judge, U.S. District Court
882 United States Courthouse
1729 5th Avenue North
Birmingham, AL 35203

Dear Judge Pointer:

I am writing on behalf of the Alliance for Justice, an association of public interest legal organizations, about the Advisory Committee's draft of proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. While the Alliance realizes the proposals are only in draft form and have not been circulated for public comment, we are concerned about some of the potential changes and wanted to ensure our views would be considered at the earliest possible time.

We believe that some of the revisions come at the expense of limiting access to the courts for underrepresented individuals. While enlarging the notice requirements may be appropriate under certain conditions, notice may, as the committee is well aware, also serve as an impediment to litigation itself. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Unless revised, the provision granting courts discretion in all class actions to require that notice be given is likely to impose such high costs that it will be difficult to proceed in many cases. The rule should explicitly provide that the imposition of notice should not be used to defeat the availability of class action relief.

Second, we are troubled by the requirement that there would be an inquiry into the willingness of a plaintiff to serve as class representative. The term "willing" invites needless discovery. Moreover, we do not believe the determination of "willingness" should be made legally relevant to the decision of whether a class action should be allowed.

Third, the court's ability under the draft to impose some conditions on "opt-outs" is confusing. What does it mean to say that a class member should not be allowed to opt out of a class without agreeing first to be bound by the outcome of the class action. Isn't that the same thing as being in the class? We are also troubled by the limited guidance given the judge to require class members to 'opt' in "rare" cases.

Finally, we are firmly opposed to the provision permitting a court to rule on summary judgment motions prior to certification of the class. Under such a provision, plaintiffs may often have to conduct substantial and expensive discovery before knowing whether certification will be granted.

We ask the Committee to proceed cautiously in proposing these revisions. A variety of cases, including employment discrimination, environmental, and consumer class actions could be greatly impeded by these changes, further increasing the burden and costs of access to the courts for public interest litigants. We look forward to discussing the proposed changes with the Committee at its earliest convenience.

Sincerely,

Nan Aron
Executive Director
Alliance for Justice

DRAFT

FEDERAL RULES OF EVIDENCE

Rule 412. Victim's Past Sexual Behavior or Predisposition

(a) Evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct is not admissible in any civil or criminal proceeding except as provided in subdivision (b).

(b) Evidence of the past sexual behavior or predisposition of a person who claims to be the victim of sexual misconduct is not admissible in a civil or criminal case except under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which 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 which is essential to a fair and accurate determination of a claim or defense; or

(4) in a civil case evidence of reputation or opinion evidence in a civil case in which exclusion would deprive the trier of fact of evidence which is essential to a fair and

FEDERAL RULES OF EVIDENCE

accurate determination of a claim or defense.

(b) Evidence covered by this rule may not be admitted unless the party offering it files a motion under seal, not less than 15 days prior to trial, or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purposes for which it is offered. The court shall permit any other party ~~as well as~~ and the alleged victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility, if admissible, and the form in which the evidence may be admitted. (c) The court may permit a motion to be made under seal during trial for good cause shown. The motion and the record of any in camera proceeding must remain under seal during the course of all further proceedings, including proceedings on appeal. ~~both in the trial and appellate courts.~~

COMMITTEE NOTE

~~The Advisory Committee proposes several changes in Rule 412 which~~ The changes are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to persons who claim to be victims of sexual misconduct. The expanded rule would exclude evidence of an alleged victim's sexual history in civil as well as criminal cases except in circumstances in which the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment ~~which~~ that always is associated with public exposure of intimate details of sexual history.

The amendment eliminates three parts of existing

FEDERAL RULES OF EVIDENCE

subdivision (a): the confusing introductory phrase, "[n]otwithstanding any other provision of law;" the limitation on the rule to "a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code;" and the absolute statement that "reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible." The Committee believes that these eliminations will promote clarity without refusing unnecessarily the protection afforded to alleged victims.

The introductory phrase in subdivision (a) was unclear and has been deleted because it contained no explicit reference to the other provisions of law that were intended to be overridden. The legislative history of the provision provided little guidance as to the purpose of the phrase. In eliminating it, the Advisory Committee intends that Rule 412 will apply and govern in any case, civil or criminal, in which it is alleged that a person was the victim of sexual misconduct and a litigant offers evidence concerning the past sexual behavior or predisposition of the alleged victim. Rule 412 applies irrespective of whether the evidence concerning the alleged victim is ostensibly offered as substantive evidence or for impeachment purposes. Thus, evidence, which might otherwise be admissible under Rules 404 (b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires and such evidence is concerns the past sexual behavior or predisposition of a person who is alleged to be the victim of sexual misconduct.

The reason for extending the rule to all criminal cases is obvious. If a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as a background, that the defendant sexually assaulted the victim, the rule in its current form is inapplicable. The need for protection of the victim is as great in the kidnapping case as it would be in a persecution for sexual assault. There is a strong social policy in protecting the victim's privacy and to encourage victims to come forward to report criminal acts, and that policy is not confined to cases that involve a charge of sexual assault. Although a court might well exclude sexual history evidence under Rule 403 in a kidnapping or similar case, the Advisory Committee believes that Rule 412 should be extended so that it explicitly covers all criminal cases in which a claim is made that a person is the victim of sexual misconduct.

The reason for extending Rule 412 to civil cases is equally obvious. A person's privacy interest does not disappear simply because litigation involves a claim of

damages or injunctive relief rather than a criminal prosecution.. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, in any civil case in which a person claims to be the victim of sexual misconduct, evidence of the person's past sexual behavior or predisposition will be excluded except in circumstances in which the evidence has high probative value as recognized by amended Rule 412.

As it currently stands, subdivision (b) excludes evidence of a victim's past sexual behavior in the limited category of criminal cases to which the rule applies unless the Constitution requires admission, the evidence relates to sexual behavior with persons other than the accused and is offered to show the source of semen or injury, or the evidence relates to sexual behavior with the accused and is offered to show consent. As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. The amended rule provides for the first time protection in civil cases and sets forth two categories of evidence that are admissible in civil but not criminal cases.

It should be noted that the amended rule provides that certain categories of evidence may be admitted, but does not require admission. In some cases, evidence offered under one of the subdivisions may be irrelevant and therefore excluded under Rule 402.

Under subdivision (b)(1) the exception for evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged is admissible if it is offered to prove that another person was the source of semen or injury. Although the language of the amended rule is slightly different from the language found in existing (b)(2)(A), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in this subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is relevant.

The exception in subdivision (b)(2) for evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged is admissible if offered to prove consent. Although the language of the amended rule is slightly different from the language found in existing

(b)(2)(B), the difference is explicable by the extension of the rule to civil cases. Evidence offered for the specific purpose identified in the subdivision is likely to have high probative value, and the probative value is likely to be the same in civil and criminal cases where the evidence is relevant.

Under (b)(3) evidence may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. Recognition of this basic principle is found in existing subdivision (b)(1), and is carried forward in subdivision (b)(3) of the amended rule. The treatment of criminal defendants remains unchanged. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988) (defendant in rape case had right to inquire into alleged victim's cohabitation with another man to show bias).

It is not nearly as clear in civil cases as it is in criminal cases to what extent the Constitution provides protection to civil litigants against exclusion of evidence that arguably has sufficient probative value that exclusion would undermine confidence in the accuracy of a judgment against the person whose evidence is excluded. The Committee concluded that exclusion of evidence that is essential to a fair determination of a claim or defense is undesirable and thus provided in subdivision (b)(3) of the amended rule that evidence otherwise excluded by the rule would be admissible when exclusion "would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense." This amendment provides a civil litigant with protection akin to that provided to a criminal defendant, but recognizes that some specific constitutional provisions may require admission of evidence in a criminal case that would not be admitted under the amended Rule 412.

Subdivision (b)(4) recognizes a limited class of civil cases in which exclusion of evidence of reputation or opinion would deprive the trier of fact of evidence which is essential to a fair and accurate determination of a claim or defense. An example is a diversity case in which a plaintiff alleges that a news story was defamatory and seeks damages for injury to reputation. It would be difficult in such a case to deny the defendant the opportunity to show that the plaintiff suffered no reputational injury.

Advisory Committee on Criminal Rules
Fall 1992
Fed. R. Evid. 412

FEDERAL RULES OF EVIDENCE

Amended subdivision (c) is more concise and understandable than the existing subdivision. The requirement of a motion 15 days before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. The amended rule requires that any motion be filed under seal and that it must remain under seal during the course of trial and appellate proceedings. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible.

The amended rule provides that the alleged victim and any party may be heard with respect to any motion, and that the court will rule on admissibility and the form in which any evidence will be received. Unlike the current subdivision (c)(3), the amended rule does not set forth a balancing test. The Advisory Committee intends that the court will proceed to make rulings under Rule 412 as it does under other evidence rules.

The single substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers schedules for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.