

Advisory Committee on Civil Rules
Summary of Meeting of May 27-28, 1982

Rule 68/Offer of Judgment

Judge Mansfield observed that the rule is a "dead letter," in that it is seldom used and is of one-sided value. One proposal would strengthen it by entitling the offeror to obtain both the costs and reasonable expenses from the moment the offer was made and turned down. The other proposal would allow the plaintiff to make an offer to accept a judgment in his favor for a certain amount and, if refused and the judgment is more favorable, to receive costs and reasonable expenses. Presently, Rule 68 does not allow the defendant to recover costs when the plaintiff's action is dismissed after an offer. The proposal would exclude from the scope of Rule 68 class action suits and cases in which Congress has decided to allow courts to decide whether to award fees. It provides for an award only when the plaintiff prevails. The rule would also apply to counterclaims.

Mr. Liman has suggested a qualification that if the judgment is not more favorable than the offer, then the offeree must pay costs incurred after the making of the offer, unless the court finds the offer was unfair or not made in good faith. Judge Mansfield said that he liked the idea but would like to see the language changed. A second qualification is that the rule could not be invoked when the offeror refused to furnish the offeree with information necessary to evaluate the reasonableness of the offer.

Mr. -- raised the question of whether there is a difficulty with plaintiffs' offers early on in the litigation. Is it practical to respond to an offer made early on, perhaps before necessary information is available to the defendant? Judge Mansfield replied that in such cases the defendant could turn around and offer to accept a judgment in the amount the plaintiff offered. Mr. Patrick said that the proposals answer the difficulty. -- observed that this may not be true in more complex cases, even though 30 days is better than 10 days. Mr. Liman said that could be dealt with if the court were given some discretion to extend the 30 day period.

Mr. Liman questioned the logic of the proposal. If the defendant prevails, he should be entitled to costs and fees. The rule should give him protection by giving the court some discretion, such as in frivolous cases. Judge Mansfield reported Justice Stevens as saying that offers in theory are made only when there is some merit to the case. Judge Weis said that this is not realistic. Judge Mansfield said that it might be better to omit the necessity of the plaintiff prevailing, either as offeror or offeree, and to allow the court some discretion to prevent abuses of the procedure.

Mr. Kirby questioned the application of Delta Airlines to the rule--does it apply only to sham offers? Judge Skinner said that it does not. Judge Mansfield explained in more detail the meaning of the decision.

Mr. Wiggins said that tinkering with a bad rule won't help. He suggested working with Rule 54, which is a

discretionary rule, instead. Judge Mansfield said that rule would not be as likely to prohibit litigants from going to trial as a Rule 68 with teeth would. Mr. Wiggins replied that such incentives were probably a marginal factor.

Mr. Wiggins asked if the offeror must implicitly admit liability. Judge Mansfield said that he believed that was so. Mr. Kintner asked if the committee thought the rule would actually be used in the future.

-- raised the policy question of whether the committee should encourage settlement in this manner. The expenses are very substantial. Should we move toward the English settlement? Fees could wipe out a small judgment. Judge Christenson thought we should go in this direction, but wondered what court activities would go on during the waiting period for acceptance of the offer.

Prof. Rosenberg asked about requests to admit and contingent fees under the rule. He said that he didn't think that Rule 68 will work. Its objectives are to speed up settlements and to increase the number of settlements. He thinks the costs of achieving these objectives are too high for the courts. For example, who prevails in multiparty litigation? The rule will also create satellite litigation. The question of who prevails will be far more complex than that which the committee has been basing its discussion on. Judge Mansfield said that the rule is not offered as a panacea to all problems and will probably not cause a sudden spate of offers. Very few problems will come up since so few cases go to trial. -- expressed concern about

making such a fundamental change without a real endorsement and through an advisory committee not truly representative. It needs more open discussion first. -- was also unsure of the committee's power to make such substantive changes. Judge Oberdorfer also questioned the legitimacy of making a legislative proposal through the Judicial Conference. Judge Mansfield said such judgments are tricky and urged going ahead since the public is well-protected by the rulemaking process. -- agreed and -- said it becomes congressional legislation in the end.

Judge Mansfield brought the discussion back to the basic policy consideration of whether the committee wanted to encourage settlement by increasing the stakes. The committee discussed similar state rules. Prof. Miller said the sole objective of the current proposal was to strengthen Rule 68 and make it a more vital procedure. Mr. Kintner asked if it would be possible to get reaction from the bar. Judge Mansfield preferred to send a concrete proposal rather than a sense. The committee voted 10-5 to approve in a general sense the idea of upping the ante and then discussed specifics. The committee unanimously voted in favor of including provisions allowing plaintiffs to also make offers, so as to make the rule a "two-way street." It voted 12-1 to favor the principle that a defendant who has made an offer and had it refused should be permitted to recover costs unless the court finds the offer was a sham. The committee voted to exclude cases where statutes provide for attorney fees fixed by the court.

-- expressed the desire to present the proposal as modified, asking the Judicial Conference to determine whether it is within their power and to make an empirical study. Judge Mansfield indicated that he would prefer not to do so. Congressman Wiggins moved that the proposal be tabled and that the reporter submit a proposal recasting Rule 68 from an offer of judgment rule to an offer of settlement rule complementing Rule 16 with appropriate safeguards and sanctions. The committee voted against the motion. Judge Christenson moved that the reporter be requested to revise the proposal in light of the discussion and votes. The committee voted unanimously to accept the motion. The committee passed a second motion by him to request as well an alternative draft of a rule with an interest consideration disincentive as penalty for not recovering better than the offer. The committee voted to eliminate the obligation in an offer to pay accrued costs up to the date of the offer. The committee voted to ask the Federal Judicial Center for empirical information concerning the proposal.

Rule 83/Rules of District Courts

Prof. Miller summarized the basic philosophy behind the proposal. Judge Mansfield then asked for the expression of general views so they would have directions as to where to go. He asked if Rule 83 should be strengthened, the language made more strict, to ensure that districts not create local rules inconsistent with those of more general application (FRCP). Judge Gignoux said that some central control must be taken so as

to shape a truly national court system but suggested that the committee might ask district courts to experiment with the proposal, which could take 2 years to enact. The committee then discussed the degree of uniformity necessary and the ways to achieve it, such as by having the circuit Councils watch over. Mr. Kintner suggested bypassing the bureaucratic mess of having some entity examine inconsistent local rules by providing needed rules. -- questioned the need for "uniform local rules." Why not have a federal rule in cases where there is a need for uniformity? -- suggested the problem of defining the word "inconsistent." Judge Muecke moved that the committee proceed by adopting a general standard as to what constitutes inconsistency in Rule 83 rather than try to define differences between rules that might be inconsistent with it and other types of rules that are local or administrative in nature. The motion was amended so as not to include preemption. The vote was 5-4 against the proposal. The committee voted 8-3 to pass a motion that there be an overarching body with the power to nullify or disapprove local rules inconsistent with the federal rules. -- said he felt the system as it was was adequate to protect against serious deviances--for example, the Montana 6-person jury rule case which went to the Supreme Court. The committee discussed what body might perform this function and Prof. Rosenberg suggested that they might get on paper the options so they could study them more carefully. The committee voted 9-5 to ask for permission to experiment inconsistent with the rules. The committee voted 9- to give its sense that it prefers the circuit Councils be the

body with power to nullify. Judge Mansfield asked the committee what it thought of the idea of requiring a district court before it adopts a new rule to give reasonable notice of the text of the rule to the legal profession, invite comment and hold a public hearing with respect to the proposal. The committee unanimously agreed with the idea of notice and comment and voted against the idea of the public hearing, preferring to handle it by other means. Judge Mansfield raised the question of rules differing by district but not inconsistent with the federal rules--should the committee do anything?

Supplementary Rules for Certain Admiralty and Maritime Claims

Judge Mansfield introduced David Owen, President of the M.L.A., who presented the position of his association in favor of amending Rules B, C, and E to guarantee the defendant a prompt post-seizure hearing at which the plaintiff bears the burden of making a prima-facie case to satisfy the court of probable cause. This will be workable and adequately protect the defendants' rights in practice, he said. Judge Mansfield asked Prof. Miller to supplement these remarks. Upon question, Mr. Owen indicated that not everyone feels this procedure is necessary in Rule C cases, though M.L.A. does. He explained that the reason he opposes getting judicial approval before seizure or attachment is that it serves no useful purpose, but is rather purely pro forma. He said that there should be at the least an exception for cases in which the circumstances are so exigent that failure to get approval is excusable. After Mr. Owen had

left, Prof. Miller stated that he did not think judicial scrutiny was as useless as Mr. Owen had claimed. Judge Mansfield asked the committee how it felt about Mr. Owen's prompt hearing proposal. The committee was unanimously opposed. Judge Mansfield then asked what the committee would favor proposing in addition to that. Judge Pratt said he preferred to go all the way and have pre-seizure review by a judicial officer and particularity. Judge Weis indicated that he saw no need to anticipate Supreme Court action regarding the Shafner case. Judge Mansfield asked the committee to indicate its feelings on a rule requiring judicial scrutiny of the application before attachments of seizures. The committee favored a rule in both cases. The committee also favored allowing magistrates to perform the scrutiny. The committee discussed emergency situations and voted to accept in principle that some sort of exception procedure should be developed to handle them. -- suggested authorization by telephone. Judge Mansfield asked the committee how it felt about permitting an exemption from any judicial scrutiny in "dire emergencies" or "under exigent circumstances" when it is impossible to contact a judicial officer and the committee voted 5-5. Judge Mansfield suggested the problem of identification over the telephone. -- said that this was a minor problem since any damage would not be irreparable. -- raised the question of who would issue the order. The committee agreed to postpone resolution of these issues until the next meeting, by which time Prof. Miller would

have completed further study. The committee agreed to leave the bond question as it is, that is, at the judge's discretion.

Rule 51/Instructions to Jury

Judge Mansfield told the committee of the request from Judge Hoffman. Mr. Liman moved that the committee leave the rule as it is. Judge Muecke, at Judge Mansfield's request, explained the background of the resolution, which came out of a meeting over which he presided. The committee voted to approve Mr. Liman's motion.

Minor Corrections of Certain Rules

-- moved that the committee authorize Judge Mansfield and Prof. Miller to present the committee's views to the Standing Committee. The committee agreed without further discussion.

Rule 23/Class Actions

Prof. Miller presented his study to the committee and discussed possible directions. Judge Mansfield mentioned past difficulties with attempts to revise Rule 23. Prof. Miller brought up current developments in Congress and the courts. Mr. Liman said he favored that the committee do nothing now, but rather allow sentiment to develop from organizations such as the Panofsky Commission. He said that if we really tried to do something meaningful we would run up against the Enabling Act, for it would require legislation. Prof. Rosenberg mentioned the difficulty in obtaining information and agreed with Prof. Miller

that the committee hold off. Judge Weis said that we need to get some evidence. Various members discussed their experience with class action cases. Judge Mansfield said that at most they could make procedural changes while what is needed are basic changes. Various members discussed the opt-in procedure. -- said he thought the courts and the bar would solve the problem on their own. Judge Mansfield asked for a vote on the question of whether the committee should do nothing, but let the matter simmer until the next meeting. The committee agreed.

Rule 52(a)/Findings of Fact

Prof. Rosenberg gave the background of the problem. The committee discussed the rule, especially the problem of interpreting the language. Prof. Rosenberg moved that either this committee's or the appellate rules committee's reporter do a study of the rule and submit it. The committee passed the motion.

Rule 71(a)/Qualifications of members . . .

Judge Mansfield gave the background of the problem and said that the committee had been urged to work on it by the Comptroller General's Office. After short discussion, the committee voted to go ahead and investigate it further with the idea of eventually coming up with a proposal.

Rule 47/Alternate Jurors

Judge Mansfield discussed the background and possible amendments. Prof. Miller suggested the committee take a fresh

look at his memo of 2 years before and place it on the agenda of the next meeting.

Rule 59(d)/Motions for New Trial

After a short discussion the committee agreed in principle to extend the 10-day period by weekends and holidays and put that item on the agenda of the next meeting. -- brought up a point about motion for counsel's fees, proposing that Rule 59 require that a motion for counsel's fees be made within the same period as a motion for a new trial to alter or amend judgment. The committee discussed the matter and then voted in principle to permit an extension of time on separate judgment and to fix the amount of time in which motions for counsel's fees can be made.