COMMENTS OF DIVISION 18 (LITIGATION), DISTRICT OF COLUMBIA BAR, ON AUGUST 1983 PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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SUMMARY OF COMMENTS

The August 1983 Proposed Amendments to the Federal Rules of Civil Procedure are a combination of laudable improvements and controversial new procedures. We endorse the proposed changes to Rules 5 and 6 with specific suggestions for minor amendments to add clarity. We also find few difficulties with the changes proposed for Rule 45(d)(2) and Rule 83. Further, we support the significant improvement to Rule 52 to bring uniformity throughout the circuits on the standard of appellate review to be accorded district court findings of fact based entirely on documentary evidence.

The proposed amendments to Rule 68, however, are troubling in many respects. We have devoted extended discussion to this particular rule. On balance, we believe that, while the aim of the new rule is above reproach, adoption of the proposed language would have an effect opposite to what is intended, and it may operate to the unjust detriment of certain classes of litigants.

I. INTRODUCTION AND SUMMARY

Division 18 (Litigation), of the District of Columbia Bar, through the Subcommittee on Court Rules, of the Federal Practice Committee, has reviewed and drafted comments regarding the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure ("Proposed Amendments") published in August, 1983, by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The Subcommittee has confined itself to comments based on the litigating attorney's point of view and proffers concern or approval, as appropriate, regarding several of the proposed changes. The following proposed amendments are specifically addressed:

> Rule 5 service and exception from filing provisions for a Rule 68 offer of settlement;
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> Rule 6 provisions for computation of time, including an attempt to take account of weather conditions to determine filing deadlines;
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> Rule 45 provision to extend the forty-mile radius of the deposition subpoena to 100 miles without reference to the geographical boundaries of the district court out of which the subpoena issues;
>
> Rule 52 application of the clearly erroneous rule to findings of fact based on documentary as well as oral evidence;
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> Rule 68 provisions amending offers of judgment to offers of settlement that may be made by either party not less than 30 days prior to trial. A rejection of the offer followed by a judgment more favorable than the offer can subject the offeree to payment of costs, expenses, the offeror's attorneys fees and interest from the date of the offer;

Rule 83 provisions subjecting local rule-making by district courts to public notice and opportunity to comment and permitting local courts to experiment with rules inconsistent with the Federal Rules for a two-year period;

B, C, and E, Supplemental Rules for Admiralty and Maritime Claims amending the attachment and arrest procedures for in rem and quasi in rem proceedings to comport with constitutional requirements of due process for seizure of property.

II. COMMENTS

A. Rule 5. Service and Filing of Pleadings and Other Papers.

In order to conform the current language to the amendments proposed in Rule 68, see discussion infra at p. 8, two small changes are proposed. First, in paragraph (c), "judgment" is replaced by "settlement" in the list of pleadings and papers to be served on all parties. Second, an offer of settlement is specifically excluded from the filing requirements of paragraph (d).

The currently proposed amendments seem to strike a balance between the need to insure that offers of settlement will be carefully thought out and seriously made, and that offerors not be discouraged by the prospect of public disclosure. Thus, the parties to a particular proceeding must be informed of an offer, but it need not be made part of the record. This latter element, however, could lead to significant problems in the enforcement of new Rule 68.

If an offer of settlement is not filed with the court, a recalcitrant party could raise substantial issues over the precise time, place and terms of the offer. This could lead to a fact-finding mini-trial such as often occurs in the process of awarding attorney's fees under current fee-shifting statutes. See, e.g., 24 U.S.C. § 2412(d). This problem could be obviated by simply requiring an offeror to file an offer of settlement under seal with the clerk. In this way, there would be no doubt as to the relevant facts and circumstances surrounding an offer.[1]

B. Rule 6. Time.

The Advisory Committee has proposed to liberalize the computation of time under the Federal Rules of Civil Procedure in two significant ways. First, inclement weather is explicitly recognized as an automatic grounds for extension when it renders a clerk's office "inaccessible." There are, however, no guidelines or standards for determining when an office is "inaccessible." To prevent significant disputes over whether or not a clerk's office was accessible on a given day, the Rule should establish a mechanism whereby the presiding Chief Judge could declare, by Order, that the clerk's office is closed (and

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1. Of course, the district court may still need to conduct a fact-finding inquiry on other issues such as the "reasonableness" of the offer. See infra at p. 10.

therefore inaccessible) due to inclement weather. Otherwise, parties would be left at their own risk as to whether or not a deadline will be extended, and the provision will not be effective.

The second proposed change to Rule 6 would extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. This amendment is primarily aimed at providing additional working days to parties who must comply with 10-day time periods that cannot be enlarged by judicial decision. See Fed. R. Civ. P. 50(b) and (c)2, 52(b), 59(b), (d) and (e), and 60(b). It is a much-needed change that will benefit both bench and bar by allowing fuller research and exposition of the significant matters addressed under those rules.

C. Rule 45(d)(2). Subpoena For Taking Depositions; Place of Examination.

To its credit, the proposed amendment does away with the anomalous distinction between deponents who are residents and those who are nonresidents of the district in which the deposition is to be held. The amendment also incorporates, in part, the radius of the trial subpoena by extending the distance for required attendance from 40 miles to 100 miles of the place where the deponent resides, is employed, transacts business, or is served.

On the other hand, the rule continues an inconsistency between deposition and trial subpoenas in that the radius of the former does not extend to the geographic boundaries of the district court out of which the subpoena issues. Arguably the attendance limitation for deposition subpoenas is to protect against substantial inconvenience to non-party witnesses. However, there is no apparent reason for a distinction between non-party witnesses at deposition and non-party witnesses at trial. In any event, the proposed amendment narrows the inconsistency between deposition and trial subpoenas by expanding the county of residence/40 mile radius attendance requirement for depositions, to the 100 mile radius of a trial subpoena.

The inconsistency between the reach of deposition and trial subpoenas is not warranted. It can be easily resolved by maintaining parallel provisions for deposition and trial subpoenas, or by simply merging the two rules into one, i.e., omit Rule 45(d) (2) and expand Rule 45(e) (1) to include deposition subpoenas as follows:

> Rule 45(e)(1): At the request of any party, subpoenas for attendance at a hearing, trial or deposition shall be issued by the clerk of the district court for the district in which the hearing, trial or deposition is held. A subpoena requiring the attendance of a witness at a hearing, trial or deposition may be served at any place within the district; or at any place without the district that is within 100 miles of the place of the hearing, trial or deposition specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a

> state court of general jurisdiction sitting in the place where the district court is held. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

D. Rule 52. Findings by the Court.

There is a current conflict in the circuits as to the appropriate standard of appellate review to be accorded a district court's findings of fact when they are based on purely documentary evidence. Some courts apply the traditional "clearly erroneous" standard. Others are less deferential, preferring to evaluate the documentary record de novo. They reason that, since there is no occasion to evaluate a witness' demeanor with respect to a credibility determination, an appellate tribunal is fully capable of weighing documentary evidence.

The proposed amendments eliminate the conflict by providing that all findings of fact, those based on live testimony as well as those based on purely documentary evidence, are to be reviewed under the clearly erroneous standard. In addition to bringing uniformity to the federal courts, this amendment will insure that adequate finality is accorded the decisions of the district courts. Parties will be encouraged to adequately and effectively present their cases to the trial courts. As a result, judicial stability and economy will be promoted. We heartily approve and endorse the proposed amendment to Rule 52.

E. Rule 68. Offer of Settlement.

Apparently as a response to the current "litigation explosion," and the resulting burden on judicial resources, the Advisory Committee has proposed extensive amendments to Rule 68 aimed at encouraging early settlements where possible. The new rule provides that, at any time more than 30 days prior to trial, any party may make an offer of settlement to an "adverse party," which offer must be in writing, refer to Rule 68, and remain open for 30 days. If the offer is not accepted during that time, it is automatically withdrawn.

The key element of the new rule is that a party who refuses a "reasonable" offer made in "good faith," and thereafter obtains a result less favorable than that which was offered, must pay the offeror its costs and expenses, including attorneys' fees, incurred since the date of the offer, plus interest calculated from the offer date to the date of final judgment, on the difference between the offer and the recovery. Multiple offers from the same or different parties are expressly allowed, and evidence of an offer is not admissible, "except in a proceeding to enforce a settlement or to determine costs and expenses."

Under the new rule, payment of costs and expenses is mandatory. The amount may be reduced by the district court only when it expressly finds that the sum sought is "excessive" or "unjustified." In determining whether the final judgment is more or less favorable than the offer, costs and attorney's fees will be excluded from consideration.

As currently drafted, new Rule 68 raises several significant issues that should be considered prior to final adoption.

1. Will it Reduce Litigation

The first question raised by new Rule 68 is whether it will, in fact, reduce the amount of litigation currently beseiging the federal courts. We believe it may not.

The quantum of litigation activities confronting federal courts may not be reduced, but merely shifted in focus from the merits of a case to the awardability of costs and expenses. As written, the rule permits a district judge to decrease a requested award if it is "excessive or unjustified under all of the circumstances." Although in its Note the Advisory Committee has listed several factors to be considered by a judge in making this determination, they are not part of the rule, nor are they exhaustive. The Advisory Committee also rightly points out that discovery should be available in this process.

As a result, whether or not an offer is "excessive" or "unjustified" is a significant factual issue that will need to be resolved in every attempt to enforce new Rule 68. Mini-trials will most likely have to be conducted to insure that the actual assessment is fair, just and reasonable. In close cases, the amount of judicial resources expended will most likely be

much greater than that which is already required inasmuch as a second round of proceedings will be necessary to assess costs and expenses.

2. Equitable Relief

The proposed rule, as does the current rule, permits an offer to be made for "money or property or to the effect specified in [the] offer." The Advisory Committee Note also refers to a Rule 68 offer as for a "specified amount of money or property, or other relief." This language suggests, but does not make clear, that an offer of settlement can be utilized in cases based on equitable as well as legal claims.

Indeed, the case giving apparent impetus to the current amendment, Delta Airlines, Inc. v. August, 450 U.S. 346 (1981), involved a Rule 68 offer of judgment made to settle equitable claims arising under Title VII of the Civil Rights Act of 1964 (job reinstatement, back pay, attorney's fees and costs). Perhaps because the offer referred only to a monetary amount for back pay and attorney's fees, the Supreme Court did not discuss application of the rule to equitable claims and, in particular, to equitable claims seeking non-monetary relief, i.e., injunctive relief.

Without a clear indication that the rule applies to equitable claims, and without some parameters as to application to cases involving non-monetary relief, utilization of the rule could be troublesome.

First, assuming application to only legal claims, would a court, in a case with both legal and equitable claims, be required to apportion costs and expenses to only the legal claims for award under Rule 68?

Second, assuming application of the rule to equitable claims as well as legal claims, there would be little problem resolving the more favorable offer/less favorable judgment comparison for equitable money awards such as Title VII back pay or Securities and Exchange Act disgorgement of monies fraudulently obtained. A more difficult comparison, however, is the offer and judgment involving an injunction directing a promotion, establishment of an affirmative action plan, partition of property, recission of a contract, etc. The comparison calls for a qualitative rather than quantitative assessment by the court which may not take account of the subjective non-quantitative assessment made by the parties. The rule, as currently amended, provides no guidelines and additional litigation will likely be necessary to determine whether the offer or the judgment on a non-monetary claim is more favorable.

We suggest that the rule clearly state whether it is applicable to equitable as well as legal claims, and further, whether it applies to non-monetary claims. In addition, we suggest that the rule should be applied to equitable non-monetary claims so as to have uniform enforcement of the rule in all cases. However, some guidelines should be provided to assist courts in assessing the qualitative merits of offers and awards

made for these claims. Finally, the court should have discretion to determine that a particular non-monetary offer and award are not subject to qualitative comparison as provided by the rule, and, therefore, the offer of settlement procedure is inapplicable in that case.

3. Application to the United States as a Party.

The litigating bar of the District of Columbia finds itself in constant litigation with the agencies and attorneys of the United States, due no doubt, to its physical location within the nation's governmental capital and its concomitant propensity to handle litigation matters involving the United States as a party. In addition, many members of our Bar and the Litigation Division are Government attorneys. Accordingly, we have great interest in considering the utilization of Rule 68 offers of settlement and costs and fees sanctions by and against the federal government.

Of first importance is the question whether the amended rule is intended to apply to the United States as a party. Unlike Fed. R. Civ. P. 54(d) where express provision is made regarding "costs against the United States, its officers and agencies," amended Rule 68 contains no such express provision. There is, however, a reference in the Committee Note that many offerees, i.e., insurers or the government, require additional time to consider an offer of settlement, hence the amended 30 day provision to respond to a Rule 68 offer. From

this one reference, must the assumption be made that the rule is intended to have application to the United States in the same manner as to all other parties? We suggest that express provision is needed to clarify its application to the United States.

If Rule 68 is intended to apply to the United States, a second and critical question arises. Is the rule as amended legally enforceable against the United States? We suggest that it may not be for the following reasons.

The Federal Rules of Civil Procedure enabling act delegates power to the Supreme Court to prescribe rules of procedure for use in the courts. 28 U.S.C. § 2072. This statute specifically provides that, "such rules shall not abridge, enlarge or modify any substantive right." The Supreme Court considered this provision in light of the doctrine of sovereign immunity in United States v. Sherwood, 312 U.S. 584 (1940). The Court held that the "United States, as sovereign, is immune from suit save as it consents to be sued," and that the authority conferred by Congress on the courts to prescribe rules of procedure in civil actions is not authority to "modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of the federal courts" to try actions involving the United States.

> The matter is not one of procedure but of jurisdiction whose limits are marked by the government's consent to be used .... The jurisdiction thus limited is unaffected by

> the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

Sherwood, 312 U.S. at 591.

The issue then is whether the proposed Rule 68 requirement that the United States pay its opponent's costs, expenses and attorneys fees, if it loses in the favorable offer/ judgment comparison, enlarges jurisdiction against the United States beyond the bounds to which it has consented. We suggest that it does and refer to Fed. R. Civ. P. 54(d) and 28 U.S.C. § 2412 for support.

Rule 54(d) governs the award of costs against the United States on behalf of the prevailing party following entry of judgment in a civil case. The rule provides that costs against the government "shall be imposed only to the extent permitted by law." Sections 2412(a) and (b) of Title 28 constitute the related statutory consent and they provide that costs and attorneys' fees may be awarded against the United States in favor of a prevailing party to the extent any other party would be liable under the common law or a statute that specifically provides for such an award. Section 2412(d) (the Equal Access to Justice Act) gives additional statutory consent to the award of costs and fees to a prevailing party against the United States in special circumstances and/or when the position of the United States is not "substantially justified."

There is no statutory consent related to the proposed Rule 68 offer of settlement provision for award of costs, expenses and attorneys' fees against the government. The absence of such consent may preclude application of proposed Rule 68 against the United States.

Of course, the doctrine of sovereign immunity does not preclude utilization of Rule 68 offers of settlement by the government against private litigants. However, the inequity of permitting the government to force a private litigant into settlement under the threat of paying governmental attorneys' fees, when the private litigant is not afforded the use of similar settlement pressure against the government, is obvious. Thus, if the costs and fees provision of proposed Rule 68 is not applicable against the United States, the rule should clearly provide that it may not be utilized in behalf of the United States.

Finally, we consider whether the proposed rule, if validly applicable to the United States, should be so applied in every case where the U.S. is a party. The Committee Note suggests that the reason for the amendment to include attorneys' fees is to up the monetary ante to motivate parties to settle, and to eliminate a defendant's motivation to retain the monetary sums at issue to take advantage of favorable interest rates. These considerations have little relevance in cases litigated by the federal government, not for monetary considerations, but for public interest principles or political policy reasons.

Litigation of these interests is not likely to be changed by the cost considerations set up by the proposed amendment. Following directly from this conclusion, is the inequity to the private litigant who finds itself unequally matched with the deep pocket of the United States. The U.S. may be willing to go the long haul for principle or political policy and pay its opponent's attorneys fees if it guesses wrongly on the offer of settlement. The private litigant, on the other hand, may be unwilling or unable to risk such expense. As discussed below, these concerns demonstrate the need for express provision in the rule granting the court greater discretion to set or reject an award.

4. Application to private (non-governmental) parties.

New Rule 68 could, in practice, apply unequal amounts of pressure on certain parties to settle particular cases. To be sure, where the litigants are of equal wealth and business stature, and the matter involved is strictly commercial in nature, the rule would operate fairly and effectively in encouraging the parties to reach a reasonable compromise short of complex, lengthy litigation. Beyond that circumstance, however, the sanction of paying the opposing party's attorneys' fees would become a tool of the so-called deep-pocket litigant exclusively beneficial to

it against a less wealthy opponent.[2] In addition, the threat of high costs if the suit is unsuccessful could very well have a "chilling effect" and preclude novel and important matters from adjudication.

Where, for example, a party is barely able to afford its own legal representation, as is the case with many public interest organizations and small business concerns, there would be enormous pressure to compromise an otherwise valid claim in order to insure against the imposition of staggering attorneys' fees incurred by a relatively rich adverse party. In many such cases, the actual relief sought has a substantial non-monetary value, and the prospects for success are less than substantial.

Another example of unequal standing under Rule 68 is contingent fee litigation. Whether or not one favors this type of fee-arrangement, it does permit people who otherwise would be unable to afford a lawyer access to the courts. Most of these cases involve personal injuries. Insurance companies and other corporate defendants could use the offer of settlement procedure to dispose of many meritorious cases for values that do not fully compensate the victims. Further, the contingent-fee attorney and his or her client could come into significant conflict since any offer of settlement not only affects the financial interests of both, but the consequences attending the

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2. Of course, if the offeree against whom Rule 68 expenses would be awarded is judgment-proof, he would have no incentive to settle regardless whether the offeror is a deep pocket, middle income or another judgment-proof litigant.

decision to accept or reject an offer could put an unwarranted strain on the ability of the lawyer to fairly, adequately and objectively evaluate the merits of a particular case. These factors combined could spell the demise of contingent fee litigation and thereby cut off certain classes of potential litigants and meritorious claims from the courts.[3]

As currently drafted, there are no concrete standards, guidelines or exceptions stated in proposed Rule 68. On its face, it works best in the hands of experienced, relatively rich and tenacious litigants. When such parties square off in litigation, the proposed rule would operate fairly. In situations like those discussed above, a less wealthy offeree could be at a significant bargaining disadvantage.

To remedy these concerns, the new rule should be more flexible. As drafted, the amendment gives no discretion to the court other than to reduce an "excessive or unjustified" award. Thus, the award of costs, expenses and attorneys' fees is mandatory against the offeree who miscalculates the ultimate judgment. We recommend that the court be given discretion to decline making an award altogether under appropriate circumstances. Further, we suggest that the criteria for rejection or reduction of an award where "excessive or unjustified" be expressly set forth in the rule. These criteria should include

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3. This problem may, indeed, be of constitutional dimension if the rule deprives persons of access to the federal courts. See Boddie v. Connecticut, 401 U.S. 371 (1971).

the factors set forth in the Committee Note. As a practical matter, awards should only be made when fair, just and reasonable.

5. Multi-Party Litigation and Joint Offers of Settlement

Rule 68 is currently written in the context of "a [single] party" serving an offer of judgment upon "the adverse party." Accordingly, while joint offers of judgment or offers of judgment directed to a group of plaintiffs have been utilized,[4] there is confusion about whether such offers are in fact valid.[5] The Committee's proposed rule clearly contemplates the use of the offer of settlement in some multi-party litigation, as evidenced by the Committee Note regarding use of court discretion to reduce an award in "multi-party litigation" involving joint tort feasors, but it is not clear whether application of the rule is proper in all multi-party litigation.

We suggest that so long as both claimants and defendants are able to use the offer of settlement procedure, any group of defendants should be able to direct an offer of settlement to any group of plaintiffs, and vice versa. If an individual recipient in one of the groups feels prejudiced or pressured by

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4. See e.g., Waters v. Heublein, 485 F. Supp. 110 (N.D. Cal. 1979); Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980).

5. See, e.g., Fairchild & Co. v. Excavation Constr. Inc., Civil Action No. 473-76 (S.Ct. of the District of Columbia 1982) (holding that offer of judgment to multiple plaintiffs are invalid.)

being treated in the same fashion as his co-parties, he can simply respond with an individual counteroffer of settlement to any number of his adversaries, which should be able to neutralize the objectionable aspects of the joint offer.

Alternatively, it would be fair to limit joint offers to instances in which defendants were jointly and severally liable or where the claims involved arose out of the same transaction or occurrence. Absent those situations, the burden could be placed on the offeror to specify the party and the claim which it desired to settle. This subject would benefit by further comment in the Committee Note.

6. Congressional Policy or Judicial Procedure.

Much controversy will be generated by the Rule 68 proposal to include the offeror's attorneys fees as part of the incentive to reach settlement because the proposal attempts to change public policy and the substantive rights of litigants in federal court. In effect, the proposed amendment attempts a shift from the American rule that each party absorb its own attorneys' fees, to the English rule which awards attorneys' fees to the prevailing party.[6]

Such a substantive policy may be more appropriate for legislative enactment than judicial rule-making. As outlined

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6. Notwithstanding that the amendment provides that an award of attorneys fees is calculated only from the date of the offer, an offer made early in the suit could result in near full payment of an opponent's attorneys fees.

above, the delegation of rule-making power to the courts by the Federal Rules of Civil Procedure enabling act, 28 U.S.C. § 2072, specifically provides that, "such rules shall not abridge, enlarge or modify any substantive right." The Supreme Court discussed this provision in detail in Sibbach v. Wilson & co., 312 U.S. 1, 14 (1940), and determined that, "the test must be whether a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of [substantive law]."

Rule 68, amended to provide for payment of an opponent's attorneys fees, may do more than attempt to regulate procedure of an action; it may go beyond an attempt to control the process of litigation (e.g., monetary sanctions, including attorneys fees, for discovery abuse). It attempts to create a substantive right in the settlement offeror to recover a litigation bonus, his litigation expenses and attorneys' fees. Similar substantive rights based on recovery of attorneys' fees have been frequently enacted by Congress, see, e.g., Civil Rights Act of 1964, 41 U.S.C. § 2000e-5(k) (1976); Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1980), Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976). We suggest that the proposal to include attorneys fees as an expense in Rule 68 is also more appropriate for action by

Congress because it is a policy decision which affects the substantive rights of litigants who eschew settlement for resolution of their dispute by the federal courts.[7]

7. Summary of Specific Suggestions

In the foregoing discussion we have suggested that the proposed amendment to Rule 68 providing for award of costs, expenses and attorneys' fees to motivate litigants to settle, is fraught with troublesome considerations, and indeed, may be properly a matter for congressional action rather than judicial rule-making.

Nonetheless, in the event the amendment is adopted in the essential form proposed, we offer the following specific suggestions to ameliorate some of the troublesome areas discussed in detail above.

1. Clarify, either expressly in the rule or in the Committee Note, whether the rule applies to cases involving non-monetary claims. If deemed applicable, then criteria regarding qualitative assessment should be included in the Committee Note.

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7. We also note the law of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), that in diversity cases matters of substantive law are controlled by the law of the State where the cause of action arose, would preclude enforcement of the proposed amendment, as it relates to attorneys' fees, in diversity cases.

2. Expressly state in the rule, similar to the provision in Fed. R. Civ. 54(d), that the application of costs, expenses and attorneys' fees shall be imposed against the United States only to the extent permitted by law, and further, that to the extent it is not permitted, the United States is similarly limited in use of the rule to its benefit.

3. Incorporate in the rule the following provision regarding discretion of the court to make an award for costs, expenses and fees:

> If the judgment finally entered is not more favorable to the offeree than an unaccepted offer that remained open 30 days, the offeror may petition the court to order the offeree to pay the costs and expenses, including reasonable attorneys fees . . . The court shall have discretion to enter such order based on whether (1) the offeree's refusal was reasonable at the time, (2) the recovery was less favorable to the offeree than the offer by only a narrow margin, (3) the offer is a sham and was made solely for the purpose of recovering attorneys' fees if it should be refused, (4) the offeror incurred excessive attorneys' fees or other expenses after making the offer, (5) the offeree has made a reasonable counteroffer, or (6) the award would be unduly burdensome or otherwise against the interest of justice.

4. Further comment should be made in the Committee Note regarding joint offers of settlement in multi-party litigation.

F. Rule 83. Rules by District Courts.

We address three points raised by the proposed amendment regarding district court rule-making.

First, and perhaps most importantly, the proposed amendment provides the public, i.e., practitioners and legal scholars, the opportunity to review and comment upon proposed local rules prior to their adoption. We heartily endorse this proposal as a means by which local courts may have available to them a wider and more representative source of expert suggestion and advice from which, inter alia, more considered, deliberate, concise, simple and practical rules might be drawn. Such a result can only benefit the courts and all who come before them.

The second point relates to the effective date of newly adopted local rules. The amendment provides that a local rule becomes effective upon the date specified by the district court, but the Committee Note suggests that the Judicial Council of the Circuit, established by 28 U.S.C. § 332, subsequently review the rule and set it aside if inconsistent with the Federal Rules. We suggest that a better and more reliable means of accomplishing review and abrogation for inconsistency by the Judicial Council of the Circuit is incorporation of a provision similar to the 90-day enactment procedure set forth in the Federal Rules of Civil Procedure enabling act, 28 USC § 2072.

For example, the new rule could provide that, "a local rule shall not take effect until it has been reported to

the Judicial Council of the Circuit and until the expiration of ninety days after it has been so reported." Such a provision is not inconsistent with the power of the Judicial Council of the Circuit to abrogate a rule at any time. Further, it would automatically trigger consideration and review by the Judicial Council, similar to the trigger of Congressional review of procedural rules. Finally, although difficult to contemplate, if an emergency situation occurs requiring immediate issuance of a local rule, it might better be issued as a "standing order" (as defined by the Committee Note), effective immediately upon issuance, but subject to the notice, comment and review provisions outlined by the amendment, within a fixed period following issuance.

The third point raised by the proposed amendment is the most troublesome. It relates to the provision that a district court may adopt a local rule inconsistent with the Federal Rules for a period of two years. We, as litigators who prosecute and defend cases in federal courts all over the United States, find this provision mind-boggling in its potential effect. Even with the current consistency requirement of Rule 83, district court local rules vary to such a degree in detail and complexity that the unwary litigant may frequently find itself in grave peril. This peril would be compounded geometrically should the local courts be permitted to adopt rules <u>inconsistent</u> with the Federal Rules.

The purpose of this provision, to set up a "useful mechanism for carefully testing and evaluating procedural

proposals," is laudable. However, the method is draconian. We strongly believe that the Supreme Court's statement in Miner v. Atlass, 363 U.S. 641, 650 (1959) that, pursuant to the statutory rule-making powers delegated by Congress,[8] "basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords," are just as important today as when originally made.

If experimentation with rules inconsistent with the Federal Rules must be had in the district courts, in contravention of the policy set up in 28 USC §§ 331 and 2072 and as interpreted by the Supreme Court in Miner, then the experimentation should properly be limited to one district court. Otherwise, the litigating bar would be subjected to a panoply of inconsistent rules in each and every local district court in the federal court system. We strongly urge the Advisory Committee to avoid this result by deleting from the proposed amendment the provision for inconsistent rulemaking by local district courts.

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8. 28 U.S.C. § 331 (establishing advisory function of Judicial Conference) and 28 U.S.C. § 2072 (providing report of proposed rule to Congress).

G. B, C and E, Supplemental Rules for Admiralty and Maritime Claims.

There being little admiralty and maritime litigation pursued by the members of this Bar, we do not provide detailed comments regarding the proposed amendments to these rules.

However, we do note that the proposed amendments, establishing pre-arrest and pre-attachment hearings involving vessels or other property at issue in a maritime action, appear to shift in favor of the interests of vessel and maritime property owners and against the interests of maritime suppliers. It appears that this shift favors deep pocket interests of the maritime industry and thus, should be carefully considered prior to adoption.

This shift may not be warranted by the constitutional concerns raised in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and subsequent Supreme Court cases regarding pre-judgment attachment proceedings in general civil actions. The Courts of Appeal for the Ninth Circuit and the Fourth Circuit have recently analyzed the constitutionality of Rules B and C, respectively, in light of Sniadach and its progeny, and concluded that said rules, when applied to protect the unique interests of the maritime industry, fully comport with the requirements of due process under the Constitution. Polar Shipping, Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 635-642 (9th Cir. 1982); Amstar Corp. v. S.S. Alexandros I, 664 F.2d 904 (4th Cir. 1981). Indeed these courts opined that a

requirement for pre-arrest and pre-attachment hearings could gravely injure the maritime claimant's interest.

In addition, to the extent that a pre-arrest and pre-attachment hearing may be avoided on the grounds that a plaintiff claims "exigent circumstances," the proposed amendment is meaningless. Indeed, arrest and attachment of vessels and maritime property are generally resorted to only in exigent circumstances. Further, the proposed requirement that a plaintiff or its attorney certify to the exigency of circumstances is redundant of the current requirements in Rules B and C that a plaintiff file a verified complaint setting forth the reasons for arrest and attachment.

It is also noted that the Polar Shipping, Ltd. and Amstar Corp. decisions conditioned approval of the constitutionality of Rules B and C upon the fact that prompt post-arrest and attachment hearings were available. This condition is fully implemented by the proposed amendment to Rule E(4)(f) which we fully endorse.