COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Asheville, North Carolina

December 17-19, 1992

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Asheville, North Carolina
December 17 - 19, 1992

I. Introduction of the Chairman.

A. Announcements and Remarks.

B. Report on the Judicial Conference proceedings.

1. Action taken on proposed amendments to rules of practice and procedure.
2. Reactivation of an Advisory Committee on Rules of Evidence.

II. Report of the Advisory Committee on Appellate Rules.

III. Project to compile bibliography of material on rules of practice and procedure.

IV. Status Report of the Advisory Committee on Civil Rules.

V. Draft of proposed changes to entire set of Civil Rules under review by the Subcommittee on Style.

VI. Items of Joint Interest to Advisory Committees.

A. Proposed amendments to Evidence Rule 412.

B. Proposed amendments governing technical rules amendments and conformance of local rules with national rules of procedure. E.g., Civil Rules 83 and 84.

C. Response to courts that fail to adopt rules or numbering system consistent with national rules.

VII. Report of the Subcommittee on Substantive and Numerical Integration of Federal Rules of Procedure.

VIII. Philosophy of the Task of Rules Committees. (See Judge Stotler's letter of July 31, 1992.)

IX. Report of the Advisory Committee on Bankruptcy Rules.

Proposed amendments to Bankruptcy Rules 8002, 8006, and to several Official Forms for publication.

X. Report of the Advisory Committee on Criminal Rules.

Proposed amendments to Criminal Rules 16, 29, 32, and 40 for publication.

XI. Report of the Subcommittee on Long Range Planning.

XII. Preparation of report to the Judicial Conference.

XIII. Next meeting.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
F THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

Section I
Agenda Study 12/92

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 22, 1992

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All of the following matters which require the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

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At its September 22, 1992, session, the Judicial Conference:

* * *

Committee on Rules of Practice and Procedure

Endorsed a request to the Chief Justice that he reactivate an Advisory Committee on the Federal Rules of Evidence with the suggestion of some overlapping membership with the Advisory Committees on the Federal Rules of Civil and Criminal Procedure, and further that the Chief Justice appoint a reporter to serve the reactivated Evidence Rules Committee.

Approved proposed amendments to Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34 of the Federal Rules of Appellate Procedure and to Forms 1, 2, and 3; and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

Approved proposed new Rule 26.3 and amendments to Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58 of the Federal Rules of Criminal Procedure; and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant law.

Approved a proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings; and agreed to transmit it to the Supreme Court for its consideration with the recommendation that it be approved by the Court and transmitted to Congress pursuant to law.

Approved proposed new Bankruptcy Rule 9036, and proposed amendments to Bankruptcy Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019; and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

Approved proposed amendments to Official Bankruptcy Forms 5, 9B, 9D, 9F, and 9H.

Approved a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure and the proposed adoption of Forms 1A and 1B as modified by alternative language proposed by the Committee regarding the extraterritorial service of process, and the proposed abrogation of Form 18-A; and agreed to transmit these proposals to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

Approved new Civil Rule 4.1; proposed amendments to Civil Rules 1, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76; proposed new Form 35; and proposed amendments to Forms 2, 3, 34, and 34A; and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

Declined to approve proposed amendments to Civil Rule 56.

Approved proposed amendments to Rules 101, 705, and 1101 of the Federal Rules of Evidence, and agreed to transmit them to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 5, 1992

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to the Federal Rules of Bankruptcy Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

The changes recommended by the Conference include: proposed new Bankruptcy Rule 9036, and proposed amendments to Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Bankruptcy Procedure.

L. Ralph Mecham

Enclosures

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 17, 1992

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to the Federal Rules of Appellate Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

The proposed amendments recommended by the Judicial Conference are to Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34, and to Forms 1, 2, and 3.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

L. Ralph Mecham

Enclosures

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 17, 1992

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to the Federal Rules of Criminal Procedure and a proposed amendment to the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

The changes recommended by the Conference include: proposed new Criminal Rule 26.3, and proposed amendments to Criminal Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58; and a proposed amendment to Rule 8 of the Rules Governing Section 2255 Proceedings.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

L. Ralph Mecham

Enclosures

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 27, 1992

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed amendments to the Federal Rules of Civil Procedure and proposed amendments to the Federal Rules of Evidence. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

The changes recommended by the Conference include: proposed new Civil Rule 4.1; proposed amendments to Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76; proposed new Forms 1A, 1B, and 35; proposed abrogation of Form 18-A; proposed amendments to Forms 2, 33, 34, and 34A; and proposed amendments to Evidence Rules 101, 705, and 1101.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

L. Ralph Mecham

Enclosures

Agenda Book
Standing 12/92
Section II

REPORT

OF THE

ADVISORY COMMITTEE

ON

APPELLATE RULES

TO THE

COMMITTEE

ON

RULES OF PRACTICE AND PROCEDURE

Asheville, North Carolina
December 17 - 19, 1992

OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: The Honorable Robert E. Keeton and Members of the Committee on Rules of Practice and Procedure

FROM: Judge Kenneth F. Ripple, Chair of the Advisory Committee on Appellate Rules KFR

DATE: December 1, 1992

SUBJECT: Report of the Advisory Committee on Appellate Rules

The Advisory Committee on Appellate Rules has approved changes in Fed. R. App. P. 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, and 41, and requests publication of the proposed amendments for comment by the bench and bar. The Advisory Committee also has approved the addition of a new appellate rule, Rule 49, that would authorize the courts of appeals to use special masters. The committee requests publication of the proposed rule.

A summary of the proposals is offered for your convenience.

The amendments to Rules 3, 5, 5.1, 13, 25, 26.1, 27, 30, 31, and 35 deal with the number of copies of documents that must be filed with a court of appeals. The Local Rules Project noted that a number of circuits have local rules requiring a party to file a different number of copies of a document than the national rules require. The Local Rules Project also pointed out that the Appellate Rules were inconsistent regarding the authority of a court of appeals to alter the number by local rule or by order in an individual case. The Project suggested that the rules be amended either to require a uniform number in all circuits, or to consistently authorize local rulemaking. The Advisory Committee decided to authorize local variations and to make the language in the national rules consistent. Rule 25 is the general rule on filing and service and it has been amended to provide that whenever the national rules require a party to file or furnish a number of copies a court "may require the filing of a different number by local rule or by order in a particular case." The amendments to Rules 5, 5.1, 26.1, 27, 30, and 31 are identical and implement the Committee's decision. Each of those rules states that an original and a certain number of copies must be filed "unless the

court requires the filing of a different number by local rule or by order in a particular case."

Amended Rules 3, 13, and 35, differ from the others in that they do not establish a baseline number that should be filed. The amended Rules 3 and 13 require an appellant to file sufficient copies of a notice of appeal to enable the district court to serve each party with a copy. Amended Rule 35, governing in banc hearings, provides that the number of copies will be prescribed by local rule. Because the number of copies needed is directly related to the number of judges on the court, establishing the number by local rule is the most sensible approach.

Rule 9 governing review of a release decision in a criminal case has been completely rewritten. The amended rule recognizes the government's ability to appeal release decisions. The amendments also require a party seeking review to supply the court with certain basic documents: a copy of the district court's order regarding release and its statement of reasons; and, if the appellant questions the factual basis for the district court's order, a transcript of the release proceedings in the district court. In addition, subdivision (b) clarifies those instances in which review may be sought by motion rather than by notice of appeal.

Rule 21 governing writs of mandamus has been amended. The amended rule provides that a petition for mandamus should not bear the judge's name. The rule also presumes that the judge will not wish to appear and that the judge will be represented *pro forma* by counsel for the party opposing the relief.

In addition to the amendment regarding the number of copies to be filed, Rule 25 has been amended to provide that a clerk may not refuse to file any paper solely because the paper is not presented in proper form. The amendment parallels similar language in Civil Rule 5(e) and Bankruptcy Rule 5005.

Rule 28 has been amended to require that briefs include a summary of argument.

Rule 32 governs the form of documents; it has been amended in a number of ways. The amended rule requires that a brief or appendix prepared by any method other than the standard typographic process must be printed with no more than 11 characters per inch. The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. The number of a case must appear at the top center of a brief or appendix, and the title of the document must include the name of the party or parties on whose behalf the document is filed. The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix; the new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner. Only a pro se party proceeding in forma pauperis may file carbon copies.

Rule 33 governing appellate conferences has been completely rewritten. The amended rule makes a number of changes: 1) it permits the court to require parties to attend the conference in appropriate cases; 2) it includes settlement of the case among the possible conference topics; 3) it allows persons other than judges to preside over a conference; 4) it requires an attorney to consult with his or her client before a settlement conference and obtain as must authority as feasible to settle the case; and, 5) it provides that statements made during settlement discussions are confidential.

Rule 41 has been amended to provide that a motion for a stay of mandate must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

Rule 49 is a proposed new rule authorizing the use of special masters in the courts of appeals.

Rule 3. Appeal as of Right - How Taken

(a) *Filing the Notice of Appeal.*-- An appeal permitted by law as of right from a district court to a court of appeals ~~shall~~ must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy ~~shall~~ must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

* * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

Rule 5. ~~Appeals~~ Appeal by Permission under 28 U.S.C. § 1292(b)

* * *

(c) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 5.1. ~~Appeals~~ Appeal by Permission under 28 U.S.C. § 636(c)(5)

* * *

(c) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * *

Committee Note

Subdivision (c). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

~~Rule 9. Release in criminal cases~~

~~(a) *Appeals from orders respecting release entered prior to a judgment of conviction.* An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.~~

~~(b) *Release pending appeal from a judgment of conviction.* Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.~~

~~(c). *Criteria for release.* The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.~~

Rule 9. Release in a Criminal Case

(a) *Appeal from an Order Regarding Release Before Judgment of Conviction.* -- The district court shall state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, shall file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order shall file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) *Review of an Order Regarding Release After Judgment of Conviction.* -- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction or the terms of the sentence. Both the order and the review are subject to the terms of this Rule 9(a). In addition, the papers filed by the applicant for review must include a record of the offense or offenses of which the defendant was convicted and the date and terms of the sentence.

(c) Criteria for Release. The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. §§ 3142 and 3143.

Committee Note

Rule 9 has been entirely rewritten. The basic structure of the rule has been retained; subdivision (a) governs appeals from bail decisions made before sentencing, subdivision (b) governs review of bail decisions made after sentencing and pending appeal.

Subdivision (a). The subdivision applies to appeals from "an order regarding release or detention" of a criminal defendant before judgment of conviction, *i.e.*, before sentencing. The old rule applied only to a defendant's appeal from an order "refusing or imposing conditions of release." The new broader language is needed because the government is now permitted to appeal bail decisions in certain circumstances. 18 U.S.C. §§ 3145 and 3731. For the same reason, the rule now requires a district court to state reasons for its decision in all instances, not only when it refuses release or imposes conditions on release.

The rule requires a party appealing from a district court's decision to supply the court of appeals with a copy of the district court's order and its statement of reasons. In addition, an appellant who questions the factual basis for the district court's decision must file a transcript of the release proceedings if possible. The Advisory Committee believes those papers must be presented to a court of appeals in all cases. The rule also permits a court to require additional papers. A court must act promptly to decide these appeals; lack of pertinent information can cause delays. The old rule left the determination of what should be filed entirely within the party's discretion; it stated that the court of appeals would hear the appeal "upon such papers, affidavits, and portions of the record as the parties shall present."

Subdivision (b). This subdivision applies to review of a district court's decision regarding release made after judgment of conviction. Implicit in the first sentence, but less clear than in subdivision (a), is the requirement that the initial decision regarding release after sentencing must be made by the district court. As in subdivision (a), the language has been changed to accommodate the government's ability to seek review.

The word "review" is used in this subdivision, rather than "appeal" because review may be obtained, in some instances, upon motion. Review may be obtained by motion if the party has already filed a notice of appeal from the judgment of conviction or from the terms of the sentence. If the party desiring review of the release decision has not filed such a notice of appeal, review may be obtained only by filing a notice of appeal from the order regarding release.

The requirements of subdivision (a) apply to both the order and the review. That is,

the district court must state its reasons for the order. The party seeking review must supply the court of appeals with the same information required by subdivision (a). In addition, the party seeking review must also supply the court with information about the conviction and the sentence.

Subdivision (c). This subdivision has been amended to include references to the correct statutory provisions.

Rule 13. Review of a Decisions of the Tax Court

(a) *How Obtained; Time for Filing Notice of Appeal.*– Review of a decision of the United States Tax Court ~~shall~~ must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision. At the time of filing the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after ~~the decision of the Tax Court is entered.~~ entry of the Tax Court's decision.

* * *

Committee Note

Subdivision (a). The amendment requires a party filing a notice of appeal to provide the court with sufficient copies of the notice for service on all other parties.

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) *Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition directed to a judge or judges shall ~~be made by filing~~ file a petition therefor with the clerk of the court of appeals with proof of service on the ~~respondent~~ judge or judges and on all parties to the action in the trial court. The petition shall be titled simply, In re _____, Petitioner. All parties below other than the petitioner are respondents for all purposes. The petition ~~shall~~ must contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record ~~which~~ that may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial, Order Directing Answer.* - If the court ~~is of the opinion~~ concludes that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that the respondents ~~an~~ answer ~~to~~ the petition ~~be filed by the respondents~~ within the time fixed by the order. Two or more respondents may answer jointly. The ~~order~~ clerk shall ~~be served by the clerk~~ serve the order on the judge or judges ~~named respondents~~ to whom the writ would be directed if granted, and on all other parties to the action in the trial court. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to~~

~~appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ To the extent that relief is requested of a particular judge, unless otherwise ordered, counsel for the party opposing the relief, who shall appear in the name of the party and not of the judge, shall represent the judge pro forma. If briefs or oral argument are required, ~~T~~the clerk shall advise the parties, ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

* * *

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may direct that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a) is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief who appears in the name of the party and not of the judge. That is, arguments made on behalf of the party opposing the relief shall be treated as if also made on behalf of the judge. However, this provision does not create an attorney client relationship between the attorney and the judge, nor does it give rise to any right to compensation from the judge. A judge who wishes to appear may seek an order permitting the judge to appear.

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the

number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 25. Filing and Service

(a) *Filing.* - ~~Papers~~ A paper required or permitted to be filed in a court of appeals ~~shall~~ must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing ~~shall not be~~ is not timely unless the clerk receives the papers ~~are received by the clerk~~ within the time fixed for filing, except that briefs and appendices ~~shall be deemed~~ are treated as filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief ~~which~~ that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the ~~date of~~ filing date and shall thereafter ~~transmit~~ send it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

* * *

(e) *Number of Copies.*-- Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed. R. Civ. P. 5(e) and Fed. Bankr. R. 5005.

The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with the rules and, if the party is willing to correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Subdivision (e). Subdivision (e) is a new subdivision. It makes it clear that whenever these rules require a party to file or furnish a number of copies a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in these national rules. The Committee believes it would be helpful if each circuit either: 1) included a chart at the beginning of its local rules showing the number of copies of each document required to be filed with the court along with citation to the controlling rule; or 2) made available such a chart to each party upon commencement of an appeal; or both. If a party fails to file the required number of copies, the failure does not create a jurisdictional defect. Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate . . ."

Rule 26.1 Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public. The statement shall be filed with a party's principal brief or upon filing a motion, response, petition or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement shall be included in the front of the table of contents in a party's principal brief even if the statement was previously filed.

Committee Note

The amendment requires a party to file three copies of the disclosure statement whenever the statement is filed before the party's principal brief. Because the statement is included in each copy of the party's brief, there is no need to require the filing of additional copies at that time. A court of appeals may require the filing of a greater or lesser number of copies by local rule or by order in a particular case.

Rule 27. Motions

* * *

(d) *Form of Papers; Number of Copies.*— All papers relating to a motions may be typewritten. ~~Three copies shall be filed with the original, but the court may require that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Rule 28. Briefs

(a) *Appellant's Brief.*– The brief of the appellant must contain, under appropriate headings and in the order here indicated:

~~* * *~~

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

~~(5)~~ (6) An argument. ~~The argument may be preceded by a summary.~~ The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief.*–The brief of the appellee must conform to the requirements of paragraphs (a)(1)-~~(5)~~ (6) , except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case:

(4) the statement of the standard of review.

Committee Note

Subdivision (a). The amendment adds a requirement that an appellant's brief contain a summary of the argument. A number of circuits have local rules requiring a summary and the courts report that they find the summary useful. *See*, D.C. Cir. R. 11(a)(5); 5th Cir. R. 28.2.2; 8th Cir. R. 28A(i)(6); 11th Cir. R. 28-2(i); and Fed. Cir. R. 28.

Subdivision (b). The amendment adds a requirement that an appellee's brief contain a summary of the argument.

Rule 30. Appendix to the Briefs

(a) *Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies.*-- The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with the brief. Ten copies of the appendix ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented, unless the court ~~shall~~ requires the filing or service of a different number by local rule or by order in a particular case ~~direct the filing or service of a lesser number~~.

* * *

Committee Note

Subdivision (a). The only substantive change is to allow a court to require the filing of a greater number of copies of an appendix as well as a lesser number.

Rule 31. Filing and Service of a Briefs

* * *

(b) *Number of Copies to Be Filed and Served.*-- Twenty-five copies of each brief ~~shall~~ must be filed with the clerk, ~~unless the court by order in a particular case shall direct a lesser number,~~ and two copies ~~shall~~ must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies ~~shall~~ must be filed with the clerk, and one copy ~~shall~~ must be served on counsel for each party separately represented.

* * *

Committee Note

Subdivision (b). The amendment allows a court of appeals to require the filing of a greater, as well as a lesser, number of copies of briefs. The amendment also allows the required number to be prescribed by local rule as well as by order in a particular case.

Rule 32. Form of a Briefs, ~~the~~ an Appendix, and Other Papers

(a) *Form of a Briefs and ~~the~~ an Appendix.* -- ~~Briefs and appendices~~ A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be submitted without the court's permission ~~of the court~~, except in behalf of pro se parties ~~allowed to proceed~~ proceeding in forma pauperis.

A brief or appendix produced by the standard typographic process must be printed in 11 point type or larger; those produced by any other process must be printed with not more than 11 characters per inch with double spacing between each line of text. Quotations and footnotes must appear in the same size type as the text. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced except that footnotes that are not limited to citations must be spaced the same as the text.

All printed matter must ~~appear in at least 11 point type~~ be on opaque, unglazed paper. ~~Briefs and appendices~~ A brief or appendix produced by the standard typographic process ~~shall~~ must be bound in volumes having pages 6-1/8 by 9-1/4 inches and type matter 4-1/6 by 7-1/6 inches. Those produced by any other process ~~shall~~ must be bound in volumes having pages not exceeding 8-1/2 by 11 inches and type matter not exceeding 6-1/2 by 9-1/2 inches~~, with double spacing between each line of text~~. A brief or appendix must be stapled or bound in any manner that is secure, does not obscure the text, and that permits it to lie flat when open. ~~In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents.~~

Copies of the reporter's transcript and other papers reproduced in a manner

authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

~~If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available,~~ Except for pro se parties, the cover of the appellant's brief ~~of the appellant should~~ must be blue; ~~that of the appellee~~ the appellee's, red; ~~that of~~ an intervenor's or amicus curiae's, green; ~~that of~~ and any reply brief, gray. The cover of ~~the appendix, if separately printed, should~~ a separately printed appendix must be white. The front ~~covers of the briefs and of appendices, if separately printed, shall~~ cover of a brief and of a separately printed appendix must contain:

(1) the name of the court and the number of the case; the number of the case must be centered at the top of the front cover;

(2) the title of the case (see Rule 12(a));

(3) the nature of the proceeding in the court (*e.g.*, Appeal, Petition for Review) and the name of the court, agency, or board below;

(4) the title of the document including the name of the party or parties for whom the document is filed (*e.g.*, Brief for Appellant J. Doe ~~, Appendix~~); and

(5) the ~~names~~ name, ~~and~~ office addresses , and telephone number of counsel representing the party ~~on whose behalf~~ for whom the document is filed.

(b) *Form of Other Papers.*-- ~~Petitions~~ A petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion must ~~shall~~ be produced in a manner prescribed by subdivision (a).

~~Motions and other papers~~ A motion or other paper may be produced in like manner,

or ~~they~~ it may be typewritten ~~upon~~ on opaque, unglazed paper 8-1/2 by 11 inches in size. Lines of typewritten text ~~shall~~ must be double spaced. Consecutive sheets ~~shall~~ must be attached at the left margin. Carbon copies may ~~be used for filing and service if they are legible~~ not be filed or served without the court's permission except by pro se parties proceeding in forma pauperis. A motion or other paper addressed to the court ~~shall~~ need not have a cover but must contain a caption ~~setting forth~~ that includes the name of the court, the title of the case, the ~~file~~ case number, and a brief descriptive title indicating the purpose of the paper.

Committee Note

Subdivision (a). A number of stylistic and substantive changes have been made in subdivision (a). A new paragraph has been added governing the printing of a brief or appendix. The old rule simply stated that a brief or appendix produced by the standard typographic process must be printed in at least 11 point type or, if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computers. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. D.C. Cir. R. 11(a); 5th Cir. R. 32.1; 7th Cir. R. 32; 10th Cir. R. 32.1; 11th Cir. R. 32-3; and Fed. Cir. R. 32(a). The Advisory Committee believes that some standards are needed both to insure that all litigants have an equal opportunity to present their material and to insure that the documents are easily legible. The standard adopted in this rule for documents produced by any method other than the standard typographic process is that the text, including quotations and footnotes, must be printed with no more than 11 characters per inch. That standard is identical to that used by the Seventh Circuit and was chosen for its ease of administration. The rule permits single spaced and indented quotations but requires textual footnotes to be spaced the same as the text, *i.e.*, double spaced unless the brief has been produced by the standard typographic process.

The rule allowing a party proceeding in forma pauperis to file carbon copies has been limited to pro se parties proceeding in forma pauperis. Because photocopying is inexpensive and widely available, the Committee believes that it is appropriate to prohibit parties represented by assigned counsel from filing carbon copies unless the court orders otherwise.

The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open.

Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is more than a minor advantage. The Federal Circuit already has such a requirement, Fed. Cir. R. 32(b) and the Fifth Circuit rule states a preference for it, 5th Cir. R. 32.3.

The rule requires that the number of the case be centered at the top of the front cover of a brief or appendix. This will aid in identification of the document and again the idea was drawn from a local rule. 2d Cir. R. 32. The rule also requires that the title of the document include the name of the party or parties on whose behalf the document is filed. In those instances in which there are multiple appellants or appellees, this information is very useful to the court.

Having amended the national rule to provide additional detail, it is the Committee's hope that there will be little need for local variation and that many of the existing local rules will be repealed. It is the Committee's further hope that before a circuit adopts a local rule governing the form or style of papers, the circuit will carefully weigh the advantage of the proposed local rule against the difficulties and inefficiencies local variations create for national practitioners.

Subdivision (b). The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner.

With regard to motions or other papers, the only substantive change is to restrict the use of carbon copies to pro se parties who are proceeding in forma pauperis. This change parallels the change in subdivision (a).

~~Rule 33. Prehearing conference~~

~~The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.~~

Rule 33. Appeal Conferences

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys shall consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement. Except to the extent disclosed in the conference order, statements made in settlement discussions held pursuant to this rule are confidential and may not be disclosed to any judge of the court, any other court personnel, or any other person who is not a party or a representative of a party.

Committee Note

Rule 33 has been entirely rewritten. The new rule makes several changes.

The caption of the rule has been changed from "Prehearing Conference" to "Appeal Conferences" to reflect the fact that occasionally a conference is held after oral argument.

The rule permits the court to require the parties to attend the conference in appropriate cases. The Committee does not contemplate that attendance of the parties will become routine, but in certain instances the parties presence can be useful. The Committee realizes that when the party is a corporation or government agency, the party can attend only through agents. The language of the rule is broad enough to allow a court to determine that an executive or employee (other than the general counsel) with authority over the matter at issue, constitutes "the party."

The rule includes the possibility of settlement among the possible conference topics.

The rule recognizes that conferences are often held by telephone.

The rule allows a judge or other person designated by the court to preside over a conference. A number of local rules permit persons other than judges to preside over conferences. 1st Cir. R. 47.5; 6th Cir. R. 18; 8th Cir. R. 33A; 9th Cir. R. 33-1; and 10th Cir. R. 33.

The rule requires an attorney to consult with his or her client before a settlement conference and obtain as much authority as feasible to settle the case. An attorney can never settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority "as feasible."

The rule requires that statements made during settlement discussions are confidential. Information learned during settlement discussions may not be revealed to the court and may not be revealed to third parties such as the press.

Rule 35. Determination of Causes by the Court in Banc

* * *

(d) *Number of Copies.*-- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

Committee Note

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

Rule 41. Issuance of Mandate; Stay of Mandate

* * *

(b) *Stay of Mandate Pending Application for Certiorari.* ~~A stay of mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties.~~ A party who files a motion requesting a stay of mandate pending application to the Supreme Court for a writ of certiorari shall file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay ~~shall~~ cannot exceed 30 days unless the period is extended for cause shown ~~. If~~ or unless during the period of the stay ~~there is filed with the clerk of the court of appeals~~ , a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ ~~in that court~~, in which case the stay ~~shall~~ will continue until final disposition by the Supreme Court. ~~Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.~~ The court of appeals shall issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security ~~may be required~~ as a condition to the grant or continuance of a stay of the mandate.

Committee Note

Subdivision (b). The amendment requires a party who files a motion requesting a

stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will issue a mandate. *See, e.g.,* Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan, 112 S.Ct. 1 (Scalia, Circuit Justice 1991).

Rule 49. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Committee Note

This rule authorizes a court of appeals to appoint a special master to make recommendations concerning ancillary matters. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an enforcement order. *See Polish National Alliance v. NLRB, 159 F.2d 38 (7th Cir. 1946); NLRB v. Arcade-Sunshine Co., 132 F.2d 8 (D.C. Cir. 1942); NLRB v. Remington Rand, Inc., 130 F.2d 919 (2d Cir. 1942).* There are other instances when the question before a court of appeals requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee's intent to alter that practice. However, when factual issues arise in the first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.

Advisory Committee on the Federal Appellate Rules

Table of Agenda Items -- Revised November 1992

FRAP Item	Proposal	Source	Current Status
86-10	Amendment of Rule 4(a)(4) to give court of appeals discretion to waive requirement that new notice of appeal be filed after denial of motion to amend or alter judgment.	Hon. Francis D. Murnaghan, Jr.	Tabled indefinitely 12/83 Change adopted in substance; Reporter to work out language 4/85 Language to be circulated to circuits for comment 12/86 Further study requested 4/88 Approved in substance, Reporter to redraft 10/89 Further redrafting requested 10/90 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmiission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92
86-19	Amendment of Rule 38 to afford appellant opportunity to respond to proposed award of damages or costs.	Standing Committee & Chicago Council of Lawyers	Drafts considered by Committee, Chair to contact Circuits re current practices and possible possible committee action 10/89 Further research requested 10/90 Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92
86-23	Accommodation by rule the difficulty prisoners have in receiving notice of a magistrate's report in time to file their objection.	Hon. Dolores Sloviter (CA-3)	Under study by reporter Held over for further discussion 10/92
86-24	Rule to permit sanctioning of attorneys for bringing frivolous appeals.	Chief Justice Vincent McKusick (ME)	See notes under item 86-19

FRAP Item	Proposal	Source	Current Status
86-25	Amendment of Rule 28 to require statement of standard of review.	FRAP Committee	Reporter to work out language 12/86 Circuits' opinions to be solicited when jurisdictional statement rule is reviewed 4/88 Further consideration to be given 10/90 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92
86-26	Amendment of Rule 4(b) to clarify whether a notice of appeal filed after conviction but before sentencing ripens into an effective notice at the time judgment is entered.	Hon. Edward Becker (CA-3)	See notes under item 86-10 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92
88-10	Amend FRAP 34(c) by deleting requirement that the opening argument shall include a statement of the case.	Hon. Howard T. Markey (Fed. Cir.)	Committee opinion divided 6/89; approved in substance; reporter to redraft 10/89 Draft approved 10/90 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92

FRAP Item	Proposal	Source	Current Status
88-13	Amend FRAP 35(a) to provide that a majority of judges eligible to participate have the power to grant in banc review.	Walter H. Beckham, Jr. on behalf of the American Bar Association	Committee opinion divided 6/89; approved in substance, to be redrafted 10/89 Draft approved 10/90 Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Advisory Committee voted to withdraw the proposal 4/92 Standing Committee approved withdrawal 6/92
89-2	Amend filing rules to accommodate Houston v. Lack.	Hon. Joseph Weis, Jr. (CA-3)	Reporter asked to redraft to cover persons in mental institutions; Chair to contact prison officials re procedures 10/89 Additional information requested from reporter, clerks, and Justice Department 10/90 Approved in substance; redraft as 4(c), for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92
89-3	Review of Local Circuit Rules.	Pub.L.No. 100-702	Local Rules Project
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92

FRAP Item	Proposal	Source	Current Status
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an in banc to a "petition" for an in banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5
90-4	Amendment of Rule 3(c) in light of of Torres.	Hon. Gilbert S. Merritt (CA-6) and Public Citizen Litigation Group	Awaiting initial Committee discussion Approved for submission to Standing Committee 12/91 Approved for shortened publication period by Standing Committee 1/92; published 2/92 Revised for resubmission to Standing Committee 5/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92
90-5	Technical amendment to Rule 10(b)(3).	Mr. Greacen (CA-5)	Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication to bench and bar 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92
91-1	Change "Magistrate" to "Magistrate Judge" in all relevant rules.	Judicial Improvements Act of 1990	Approved for submission to Standing Committee 4/91 Approved by Standing Committee for publication 7/91; published 8/91 Revised for resubmission to Standing Committee 4/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92

FRAP Item	Proposal	Source	Current Status
91-2	Amend rules 40(a) and 41(a) to lengthen time for filing a petition for rehearing in civil cases involving the U.S.	Solicitor General, Kenneth Starr	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92
91-3	Final decision by rule.	Federal Courts Study Committee Judicial Improvement Act of 1990	Discussion on-going 4/91
91-4	Typeface, re: rule 32.	Mr. Greacen (CA-5)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92
91-5	Use of special masters in courts of appeals.	Hon. Kenneth Ripple Hon. Gilbert Merritt Hon. Delores Sloviter	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92
91-6	Amendment of Rule 39 to allocate word processing equipment costs between producing originals and producing "copies." Martin v. United States, 931 F.2d 453 (7th Cir. 1991).	Hon. Kenneth Ripple	Further discussion requested 12/91
91-7	To allow appeal of remand orders in removal cases.	Craig R. Nelson, Esq.	Awaiting initial Committee discussion No further action deemed appropriate 10/92
91-8	Amendment of Rule 25 so that whenever service is accomplished by mailing, the proof of service shall include the addresses to which the papers were mailed.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92

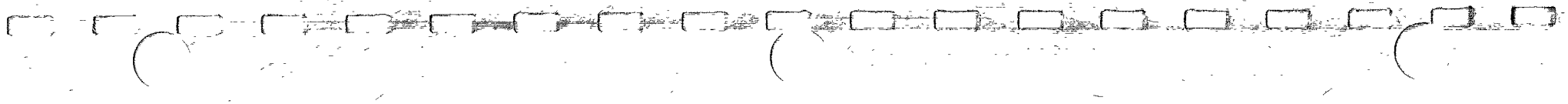
FRAP Item	Proposal	Source	Current Status
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92
91-10	Amendment of FRAP 15 to require payment of the docketing fee.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for shortened publication period 1/92; published 2/92 Approved by Standing Committee for submission to Judicial Conference 6/92 Approved by Judicial Conference 9/92
91-11	Amendment of Rule 42 re: authority of clerks to return or refuse documents that do not comply with federal or local rules.	Local Rules Project	Reporter asked to prepare draft 12/91 Approved for submission to Standing Committee 10/92
91-12	Amendment of Rule 33.	Local Rules Project	Judge Hall, Judge Logan, Mr. Kopp, & Reporter asked to develop drafts 12/91 Approved for submission to Standing Committee 10/92
91-13	Amendment of Rule 41 to provide a uniform standard for granting a stay of a mandate.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92

FRAP Item	Proposal	Source	Current Status
91-14	Amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.	Local Rules Project	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92
91-15	Uniform effective date for local rules.	Local Rules Project	Further study recommended 12/91
91-16	National procedures for death penalty cases.	Local Rules Project	Further study recommended 12/91 Judge Boggs, Judge Hall, & Judge Jolly -- subcommittee formed 3/92 No further action deemed appropriate 10/92
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
91-18	Amendment of Rule 5.1 to require additional information or to authorize courts of appeals to require additional information by rule or order.	Local Rules Project	For future discussion 12/91
91-19	Uniform format and filing time for docketing statements.	Local Rules Project	For future discussion 12/91
91-20	Expand requirements of Rule 26.1 or limit local rulemaking in area.	Local Rules Project	For future discussion 12/91
91-21	Uniform appendix	Local Rules Project	For future discussion 12/91

FRAP Item	Proposal	Source	Current Status
91-22	Amend Rule 9(a) or (b) to specify the type of information that should be presented to a court.	CA-5 in response to Local Rules Project	Adopted in substance, Reporter asked to draft language 12/91 Approved for submission to Standing Committee 10/92
91-23	Single brief for each side in consolidated or multi-party appeals.	CA-4 in response to Local Rules Project	For future discussion 12/91
91-24	Page limits for and contents of amicus briefs.	CA-5 in response to Local Rules Project	For future discussion 12/91
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing in banc.	CA-5 in response to Local Rules Project	For future discussion 12/91
91-26	Amendment of Rule 28 to require a summary of argument, any claim for attorney's fees with statutory basis & amendment of Rule 32	Advisory Committee in response to Local Rules Project	For future discussion 12/91 Mr. Kopp and Mr. Strubbe asked to assist reporter 12/91 Summary of argument -- approved for submission to Standing Committee 10/92 Attorney fees -- no further action deemed appropriate 10/92
91-27	Number of copies.	Local Rules Project	Reporter asked to draft language 12/91 Mr. Kopp, Mr. Strubbe, & Mr. Spaniol asked to study chart question 12/91 Approved for submission to Standing Committee 10/92
91-28	Updating Rule 27	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92

FRAP Item	Proposal	Source	Current Status
92-1	Amendment of Rule 47 to require that local rules follow uniform numbering system and delete repetitious language.	Standing Committee	Draft requested 1/92 Approved for submission to Standing Committee 4/92 Standing Committee referred to Committee of Reporters 6/92 New draft approved 10/92
92-2	Amendment permitting technical amendments without full procedures.	Standing Committee	Draft requested 1/92 Draft discussed 4/92; discussion ongoing New draft approved 10/92
92-3	Study Rule 4(b) in light of § 3731.	Advisory Committee	For future discussion; Mr. Kopp asked to consult with the Solicitor General 4/92 Held over 10/92
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking in banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter
92-5	Amendment of Rule 25 re "most expeditious form . . . except special delivery".	Advisory Committee	Awaiting initial Committee discussion
92-6	Amendment of Rule 25 to eliminate the mailbox rule for briefs and appendices.	Mr. Greacen	Awaiting initial Committee discussion
92-7	Amendment of Rule 30(a)(3) to require a copy of the notice of appeal.	Hon. Jon Newman (CA-2)	Awaiting initial Committee discussion

FRAP Item	Proposal	Source	Current Status
92-8	Amendment of Rule 38 re: 1) defining "frivolous"; 2) whether responsibility falls on the client or the attorney; 3) requiring a court to state reasons.	Alan B. Morrison, Esq.	Awaiting initial Committee discussion



MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
OCTOBER 20 & 21, 1992

Judge Kenneth F. Ripple called the meeting to order at 8:30 a.m. in the Civil Rights Reading Room at Notre Dame Law School. In addition to Judge Ripple, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Cynthia Hall, Judge Grady Jolly, Judge James Logan, Chief Justice Arthur McGiverin, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of the Solicitor General. Judge Robert Keeton, Chair of the Standing Committee was present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe, the Secretary, and Mr. John Rabiej, Chief of the Rules Support Office, were present, along with Mr. William Eldridge of the Federal Judicial Center. Mr. Kent Hull from Northern Indiana Legal Services was present as an observer (on October 20 only).

Judge Ripple began the meeting by informing the Committee that the proposed amendments to the appellate rules that had been approved by the Standing Committee at its June meeting were subsequently approved by the Judicial Conference at its fall meeting. Those amendments will be forwarded to the Supreme Court.

Judge Ripple then turned the Committee's attention to the items on the agenda for the meeting.

Item 91-4

Fed. R. App. P. 32 provides that at least 11 point type must be used in briefs and appendices. That direction is outmoded. Because most documents are now printed by computers and computer capabilities are constantly changing, the Advisory Committee had previously discussed the possibility of delegating authority to the Judicial Conference to specify acceptable typefaces. The Committee had thought that delegating authority to the Judicial Conference could be more efficient and flexible than repeated use of the Rules Enabling Act procedures. The Committee had asked the Reporter to prepare a draft giving the Judicial Conference that authority.

Professor Mooney prepared two drafts for the meeting. She noted that her memorandum raised questions about the appropriateness of authorizing the Judicial Conference to change the list of acceptable typefaces from time to time, thereby changing the content of the rule without following the procedures outlined in the Rules Enabling Act. In light of those questions the first draft takes a different approach. Draft one authorizes the courts of appeals to adopt local rules governing typeface but in order to provide some level of uniformity, the local rules must be based upon a list of acceptable typefaces prepared by the Judicial Conference. Draft two follows the Committee's earlier suggestion and

incorporates by reference into FRAP a list of acceptable typefaces prepared by the Judicial Conference.

Judge Jolly began the discussion by suggesting that a rule limiting the number of characters per page would work better. Judge Williams asked who would count to insure compliance.

Judge Hall asked whether footnotes and quotes should be specifically addressed. She noted that excessive use of footnotes and quotes -- which are often in smaller type and single spaced -- can make a brief very difficult to read.

Mr. Strubbe pointed out that the Seventh Circuit recently changed its rule so that briefs and appendices must be prepared using a typeface that has no more than 11 characters per inch.

Judge Williams suggested using either draft one or draft two and incorporating a characters per inch standard.

Judge Ripple stated that the Committee should consider ease of administering the rule and the need for some flexibility, so that the standard can keep ahead of the bar. He suggested amending FRAP to include a characters per inch standard but allowing the local court to provide otherwise.

Judge Jolly stated that he would prefer to leave the rule unchanged unless the Committee could agree on a uniform standard.

Judge Hall noted that the Ninth Circuit is concerned about keeping briefs short and readable. She thought a standard based upon the number of characters per inch would be helpful but, in order to control the readability of documents, it would be necessary to have the flexibility to add other specifications, such as requiring that all material be double spaced.

Mr. Kopp stated that the rules should go as far as possible to establish a uniform standard. Whenever the circuits differ in their treatment of issues, especially issues of form, the bar is tempted to argue that a practice that is acceptable in the First Circuit should be acceptable in the Eighth.

Chief Justice McGiverin agreed that the rule should provide the standard.

Judge Ripple noted that a consensus was developing that the rule should include a standard akin to the number of characters per inch and that neither of the drafts should be used. The Committee agreed. Judge Ripple requested that Judges Jolly and Hall, and Mr. Strubbe assist the Reporter in developing a new draft after the meeting.

Item 91-5

Item 91-5 is a proposal to add a rule authorizing the courts of appeals to use special masters.

At the Advisory Committee's December 1992 meeting, the Committee briefly considered a draft rule authorizing the courts of appeals to use special masters. That draft was modeled upon Fed. R. Civ. P. 53. The Committee consensus was that a shorter, simpler rule would be preferable.

Judge Logan expressed approval of the new, shorter draft. The only question he had about the draft was whether a party should be given an opportunity to react to a master's recommendations.

With regard to effect of a master's findings, Judge Boggs thought that a panel would not want to be held to a clearly erroneous standard. Mr. Kopp stated that he liked the language used in the draft. The draft states that a master would make a recommendation to the court. Mr. Kopp thought that the word "recommendation" avoids the sensitive question of the scope of review and leaves to the judge's discretion the weight to be given to a master's recommendation.

Mr. Kopp expressed the further opinion that a master should not be involved in matters of mixed law and fact, as permitted in the draft, but that a master's scope of operation should be limited to matters of fact.

Judges Hall and Logan asked Mr. Kopp whether a master should be permitted to make determinations in matters involving fees or attorney discipline. Mr. Kopp replied that it would be appropriate to use a master for such questions because such questions are separate from the adjudication of the case.

One of the questions raised by the reporter's memorandum was whether only court officers should be masters, in which case the provision for compensation could be omitted from the draft. Judge Hall noted that the Ninth Circuit is trying to find a way to provide uniform treatment of fee questions without using judges to determine fee questions. One possibility they have considered is using a master for fee questions. The circuit had hoped to use retired magistrates for that purpose but that has proven difficult. Some of the district courts use retired state court judges. In short, she thought that the rule should allow the use of persons other than federal court officers.

Judge Ripple agreed that because there may not be enough court officers available to act as masters, it would be a good idea to permit use of non-court officers. He further noted, however, that it also may be important that the public perceive that the court of appeals controls the process.

Mr. Froeb asked whether the term "court officer" includes only judges or also other persons employed by the court. He also noted that the draft contemplates compensating non-court officers, whereas in the state courts such services are often provided *pro bono*.

Judge Logan stated that a person is always free to waive compensation. He opposed changing the language of the rule to state that "the court shall determine the master's compensation, if any." Adding "if any" could make a person believe that he or she must donate their services.

Judge Keeton asked if a "court officer" is different than an "officer of the court." Judge Logan suggested changing the language to "judge or court employee." Judge Ripple took a vote on that suggestion; seven members approved it and none opposed it. Judge Ripple then asked for a vote on lines 9 and 10 as amended, and there was unanimous approval of the sentence.

Judge Ripple then returned the discussion to Mr. Kopp's question about whether a master should hear matters of mixed fact and law or only factual matters. Judge Hall stated that if a master merely makes a recommendation to the court, there should not be any difficulty with a master hearing mixed matters. Judge Williams noted that characterization of an issue as a "factual matter" is itself a slippery matter and that limiting a master's scope to factual determinations would not provide hard and fast limits.

Judge Boggs once again asserted his opinion that the appropriate breadth of a master's inquiry is interrelated with the weight to be given to the master's determination. If no deference must be given to a master's determination, then there is no need to limit the scope of the master's inquiry. Judge Boggs noted that the current draft gives the court discretion to accord a master's recommendation complete deference or to review it with great scrutiny.

Judge Logan asked if limiting a master's scope of inquiry to factual matters would limit a court's ability to use masters to make recommendations about sanctions or attorney's fees.

Judge Williams stated that in 99 cases out of 100 when a factual issue is unresolved, the court of appeals remands the case to the district court or agency. He would not want the adoption of the rule to signal a change of that policy. Judge Logan agreed. Masters are needed to address factual issues arising in the first instance in a court of appeals, such as attorney discipline or fees for representation on appeal. The consensus was that the Committee Note should address that concern.

Judge Ripple suggested amending the draft to state that a master may "make recommendations as to factual findings and disposition."

Mr. Kopp expressed concern about authorizing a master to make recommendations about "disposition." He noted that in another 10 or 15 years the rule could be used to delegate decisions that are currently, and appropriately, made by judges. He argued that the rule should authorize the use of masters only for "auxiliary matters."

Judge Ripple suggested adding the following introductory clause to the beginning of the first sentence: "In adjudicating matters ancillary to the appeal." One of the members asked whether the term "appeal" would cover disbarment of an attorney, or mandamus, or bail matters. The question prompted changing the language to "ancillary to proceedings in the court" and moving it to the end of the first sentence so that the first sentence would read as follows: "A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court."

Judge Ripple then asked the Committee whether the rule should provide a mechanism for a party to respond to a master's recommendation or whether the rule should remain silent and permit the court to tailor such procedures in individual cases. The Committee decided not to include any such provision in the rule.

The rule as amended was unanimously approved for submission to the Standing Committee with a request for publication.

The amended rules reads as follows:

Rule 49. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Item 91-7

In August 1991, Mr. Craig Nelson wrote to Judge Keeton suggesting amendment of the United States Code or of the Federal Rules to provide an appeal as a matter of right from an order remanding a case to the state court from which it had been removed. That suggestion was circulated to all of the advisory committees for their consideration.

The consensus of the Committee was that no further action should be taken. Making a change (which would need to be statutory) would make a difference in only a very small number of cases yet would require review of a far greater number. Any change would be premised upon exercise of bad faith by district judges, an assumption that cannot be operative.

Item 91-11

Seven circuits have local rules that permit the clerk to return or refuse to file documents if the clerk determines that the documents do not comply with the federal or local rules. The Local Rules Project recommended amendment of Fed. R. App. P. 45 to state that a clerk does not have authority to return or refuse documents.

Both the Civil Rules and the Bankruptcy Rules have recently added provisions to that effect. In both instances the prohibition is contained in the rules on filing and service. Fed. R. Civ. P. 5 and Bankr. R. 5005. The reporter drafted a similar amendment to Fed. R. App. P. 25(e) for the Committee's consideration. It provided: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices."

Item 91-11 is interrelated with the Solicitor General's suggestion in Item 91-26 dealing with briefs and appendices. The Solicitor General suggested that when a party submits a brief or appendix that, in the opinion of the clerk, does not comply with the requirements of Rule 32, the clerk should be able to inform the party of the nature of the noncompliance and specify a date by which the party may correct the noncompliance, all without the necessity of judicial intervention. If the party refuses to take the suggested action or fails to do so, the clerk must then refer the matter to the court for a ruling.

The suggested language was as follows:

Rule 32. Form of a Brief, an Appendix, and Other Papers

* * *

(c) *Nonconforming Brief or Appendix.*-- The clerk of a court of appeals may notify a party when, in the clerk's judgment, the party has filed a brief or appendix that does not comply with these rules. In such event, the clerk shall inform the party of the nature of the noncompliance and specify a date by which the party may correct the noncompliance. If the party corrects the noncompliance by the date specified, the corrected brief or appendix will be treated as filed on the original filing date, unless the court orders otherwise. The time for filing any responsive document to a corrected brief or appendix runs from the original filing date unless the court orders a different time. If in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Judge Hall commented that the Solicitor's suggestion provides a party with an easy way to get an extension that the party couldn't get any other way.

Mr. Strubbe stated that all of the court of appeals clerks thought they had authority to reject non-conforming filings and that such screening was a relatively major part of their jobs. With regard to the proposed amendment to Rule 25(e), he asked what is covered by a defect in "form."

Judge Keeton reported that the reason for the change in Civil Rule 5(e) was that there was a sense that substantive rights were being prejudiced by clerks refusing documents.

Judge Boggs asked whether the practice in the Sixth Circuit of stamping documents as "received and tendered for filing" would be acceptable under the rule. Judge Keeton replied that in his opinion, such action would constitute "acceptance for filing."

Judge Keeton also pointed out that the amendment to Rule 25 would not preclude the clerk from screening documents and attempting to handle them informally in a manner similar to that outlined in the Solicitor's suggested addition to Rule 32.

Judge Logan noted that the only jurisdictional document filed with the courts of appeals is a petition for rehearing. He also stated that his court has a rule permitting the clerk to refuse non-conforming documents; however, the actual practice of the clerk conforms rather closely with the Solicitor's suggestion. He also noted that the proposed amendment to Rule 25 apparently would permit the court to prohibit filings from certain troublesome parties. Rule 25 deals generally with "papers required or permitted to be filed" and the language precluding the clerk from refusing a documents states that the clerk may not refuse a paper "solely because it is not presented in proper form."

Mr. Strubbe noted that the provision in the Solicitor's draft that the time for filing responsive documents runs from the original date of tender has two effects: 1) the appellant receives a non-approved extension of time, and 2) the appellee's time for preparing a response is shortened. The clerks think that the *de facto* extension of time is problematic.

Judge Ripple summarized the options before the Committee. First, the Committee could decide to take no action. Second, the Committee could approve the amendment to Rule 25 which conforms it to Civil Rule 5(e). Third, the Committee could also approve the amendment to Rule 32 stating that a clerk may inform a party about formal defects in a brief or appendix and set a date by which a corrected document should be presented to the court. Fourth, the Committee could incorporate the Solicitor General's suggestion into Rule 25 either in the language of the rule itself or in the Committee Note.

Judge Logan and Mr. Froeb favored the amendment to Rule 25 on the basis of consistency with the other rules.

Judge Jolly stated that he was not aware of any party who had been denied any right by tendering a non-conforming document and therefore the Committee should not amend the rules.

Mr. Kopp stated that at least in theory there is a concern about the filing of a petition for rehearing because it is a jurisdictional document.

Judge Hall expressed the opinion that there is a difference between a district court and a court of appeals in handling papers.

Judge Williams suggested that the reporter take the Solicitor General's proposal, altered so that it is not so generous about extensions of time, and include it in the Committee Note to Rule 25. Judge Williams then moved approval of the proposed amendment to Rule 25 as written. The motion was unanimously approved and there was consensus that the Note be amended to reflect the ability of the clerk to continue to screen documents and to work with parties.

Judge Ripple then asked the Committee to return to consideration of proposed Rule 32(c). Judge Logan favored the proposal but expressed some hesitation about the provision governing the running of time for responsive briefs. In favor of that provision, he noted that in most instances the document initially offered for filing would contain most of the information needed to prepare a response.

Mr. Kopp responded to the earlier comment about the ability of a party to get an extension by a bad faith filing of a non-conforming document. Mr. Kopp believed that the proposal gives the court the flexibility to deal with such a party.

Judge Ripple asked if the Committee thought the rule should contain a time limit for resubmission of a corrected document and, if so, what limit. Judge Logan suggested that issue should be left to local practice. In a circuit covering a wide geographic area a longer time would be needed than in a smaller circuit. Judge Logan also noted the time needed depends upon the type of defect. Use of the wrong type of cover can be quickly corrected whereas a missing appendix takes more time to produce.

Judge Hall expressed some doubts about the coordination of this proposal with the change in Rule 25 just approved. Judge Logan stated that he saw no inconsistency; the clerk must file any document presented but if a document is non-conforming, the clerk may send it back and ask for correction. Judge Logan further stated that ordinarily there are three types of documents filed with a court of appeals; briefs, petitions for rehearing, and motions. Only briefs create any problem with regard to the time for filing a responsive document. Typically there is no response to a petition for rehearing and the court normally sets the time for filing a response to a motion.

Judge Jolly questioned the need for any provision in Rule 32 regarding non-conforming filings. The amendment to Rule 25 will insure that a party's rights are not prejudiced because the document will be filed. If the Note to Rule 25 makes it clear that a clerk may continue to screen documents, the amendment to Rule 32 would be unnecessary and perhaps confusing.

Judge Ripple called for a vote on the proposed addition of subdivision 32(c). Four members voted in favor of it; four opposed it. The proposal failed to carry.

Judge Ripple announced that the subcommittee working on item 91-12 had asked that the discussion of that item be postponed until the following day so that the subcommittee would have an opportunity to meet and hopefully combine their two proposals.

Item 91-13

Fed. R. App. P. 41 is silent as to the standard that should be used to determine the appropriateness of a stay of mandate. Ten circuits have local rules that establish standards to be used in determining whether to stay a mandate. The Local Rules Project suggested that the Advisory Committee consider amending Rule 41 to include standards for granting a stay of mandate.

Judge Ripple opened the discussion by noting that the local rules articulate a variety of standards and that the Supreme Court also has articulated rather detailed standards that it uses in determining whether to issue a stay. He additionally pointed out that when this topic was last discussed Chief Judge Sloviter had advised caution because articulating such standards comes close to the substance/procedure line.

The Reporter had prepared a draft amendment that would require a motion for a stay to "show that a petition for certiorari would present a substantial question and that there is good cause for a stay." She also offered five variations, the last of which most closely tracked the Supreme Court's standards.

Judge Logan expressed dislike for the fifth option in death cases although he admitted that the formulation would eliminate the widely varying local rules and the language is consistent with the Supreme Court standards.

Judge Keeton noted that the main draft is directed to parties, not to the courts, and it does not specify the standard the court must apply.

Mr. Kopp stated that although he usually favors elimination of local rules and establishment of a national rule, the standards have been developed by case law and the lack of consensus makes this a difficult rule to draft.

A motion was made to approve the main draft on page 6 of the Reporter's memorandum. It was approved by a vote of 6 to 2.

Judge Keeton raised a question about the Committee Note. He asked if the note should state that the standard to be applied by a court must be developed by case law and any local rule that sets a standard is invalid. Judge Logan noted that if the note suggests that a circuit can have any standard it wants, that invites motions for stays. He suggested that the note simply state that the Supreme Court has set forth its standards in Barnes. The purpose of the rule is to tell lawyers what they should do to conform with the Supreme Court's standards. The Note should alert counsel to the type of showing that needs to be made to satisfy the Supreme Court standard.

The Committee adjourned for lunch at 12:00 noon.

The Committee reconvened at 2:15 p.m.

Item 91-14

Fed. R. App. P. 21 provides that in mandamus actions the judge should be named as a party and be treated as a party with respect to service of papers. Nine circuits have local rules stating that a petition for mandamus should not bear the name of the judge. Six of those rules also provide that unless otherwise ordered, if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief and that the lawyer appears in the name of the party and not of the judge. Although Rule 21 anticipates that a judge may not wish to appear in the proceeding, the rule requires the judge to so advise the clerk and all parties by letter. Six of the local rules reverse the presumption and require a judge who wishes to appear to seek an order permitting the judge to appear. The Local Rules Project suggested that the Advisory Committee consider amending Rule 21 to reflect the local rules.

Chief Justice McGiverin noted that the proposed draft tracks several of the local rules. He stated that Iowa had changed its rule in a similar manner and he favored the change. Judge Logan also supported the change.

To get a sense of the Committee's reaction Judge Ripple asked for a vote on the substance of the amendment, as distinguished from the exact language; it was unanimously approved.

The Committee then turned its attention to the language of the proposal and made several amendments. Particular attention was paid to the use of the term *pro forma*. Judge Williams suggested that the Committee Note explain what the Committee means. The amended draft reads as follows:

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) *Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.* - ~~Application~~ A party applying for a writ of mandamus or of prohibition directed to a judge or judges shall ~~be made by filing~~ file a petition therefor with the clerk of the court of appeals with proof of service on the ~~respondent~~ judge or judges and on all parties to the action in the trial court. The petition shall be titled simply, In re _____, Petitioner. All parties below other than the petitioner are respondents for all purposes. The petition ~~shall~~ must contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record ~~which~~ that may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) *Denial, Order Directing Answer.* - If the court ~~is of the opinion~~ concludes that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that the respondents ~~an~~ answer ~~to~~ the petition ~~be filed by the respondents~~ within the time fixed by the order. The ~~order~~ clerk shall ~~be served by the clerk~~ serve the order on the judge or judges ~~named respondents~~ to whom the writ would be directed if granted, and on all other parties to the action in the trial court. ~~All parties below other than the petitioner shall also be deemed respondents for all purposes.~~ Two or more respondents may answer jointly. ~~If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted.~~ To the extent that relief is requested of a particular judge, unless otherwise ordered, counsel for the party opposing the relief, who shall appear in the name of the party and not of the judge, shall represent the judge pro forma. If briefs or oral argument are required, ~~T~~ the clerk shall advise the parties, ~~of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.~~ The proceeding ~~shall~~ must be given preference over ordinary civil cases.

* * *

(d) *Form of Papers; Number of Copies.*-- All papers may be typewritten. ~~Three copies shall be filed with the original, but the court may direct that additional copies be furnished.~~ An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Item 91-22

Fed. R. App. P. 9(a) governs appeals from orders respecting release pending trial and 9(b) governs motions for release pending appeal. Both subdivisions state that review of bail determinations shall be made "without the necessity of briefs . . . upon such papers, affidavits and portions of the record as the parties shall present." The rule leaves to the discretion of the parties which papers and information will be presented to the court.

Seven circuits have local rules that specify the type of information the courts want a party to present in the "papers." Several of the local rules require submission of a memoranda. The Local Rules Project classified all of the local rules as in conflict with the federal rule. The Fifth Circuit urged the Advisory Committee to consider amending Rule 9 to specify the type of information that should be presented. At the Advisory Committee's December 1991 meeting the Committee asked the reporter to prepare drafts for the Committee's consideration.

Judge Ripple noted that the drafts prepared for the meeting address two separate issues: amendment of the rule to accommodate the government's ability to obtain review of bail determinations; and amendment of the rule to specify the type of information that should accompany a request to review a bail decision.

Judge Keeton observed that under section 3143 there are three times during which release decisions may be made: pre-trial; after verdict but before sentencing; and, after sentencing pending appeal. Judge Keeton suggested combining subdivisions (a) and (b).

Judge Williams stated that subdivision (a) governs appeals prior to judgment of conviction (the first two of the times identified by Judge Keeton) and that subdivision (b) might simply note that when review is sought pending appeal, *i.e.*, when the party seeking review of the release decision has already filed an appeal, review of the release decision can be obtained by motion. Subdivision (b) might then simply state that in all other respects the review process is handled in the same way as when review is sought prior to judgment of conviction.

With regard to the information that should be presented to the reviewing court, Judge Logan stated that the proposed drafts identify the basic materials and the rule should require a party to present those materials. Judge Hall noted that because a court is often asked to review release decisions on an emergency basis, clearly requiring the presentation of essential materials will be helpful. Judge Hall expressed a preference for Draft One.

The Committee began consideration of Draft One but after some discussion decided that some redrafting should be undertaken. A subcommittee consisting of Judge Jolly, Judge Keeton, and Judge Williams agreed to confer and attempt to prepare a new draft for the Committee's consideration on Wednesday morning.

One of the recurring issues raised by the courts of appeals in their responses to the Local Rules Project's Report on Appellate Rules was that the Committee should consider amending Fed. R. App. P. 28 which governs the contents of briefs, to require some of the items the circuits require in their local rules. At the December 1991 meeting the consensus of the Committee was that Rule 28 should be amended to require a summary of the argument and, if a party intends to claim attorney fees for the appeal, a statement to that effect with citation to the statutory basis therefor.

Several members of the Committee expressed approval of requiring a summary of argument. Judge Jolly noted that the summary is helpful when determining whether oral argument is warranted. When Judge Ripple asked for a vote on the substance of the proposal, it received unanimous approval.

The Committee then turned its attention to the language of the draft. After brief consideration, the Committee consensus was that the requirement should not be included in the "argument" paragraph, but that there should be a separate paragraph requiring a "summary of argument." The Committee unanimously approved the following proposal:

Rule 28. Briefs

(a) *Appellant's Brief.*-- The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * *

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

~~(5)~~ (6) An argument. ~~The argument may be preceded by a summary.~~ The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

~~(6)~~ (7) A short conclusion stating the precise relief sought.

(b) *Appellee's Brief.*-- The brief of the appellee must conform to the requirements of paragraphs (a)(1)- ~~(5)~~ (6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the standard of review.

With regard to the proposal that if a party intends to seek attorney fees for the appeal, the party's brief must contain a statement so indicating, Mr. Froeb noted that it might be better to present that claim in a motion at a later time when both parties are better able to argue their position.

Judge Hall noted that awarding attorneys fees is mandatory in many instances. Only when they are discretionary is there any need for argument about them.

Judge Logan wondered whether adding such a requirement would encourage fighting over attorneys fees. The requirement would make a lawyer who might not win the appeal feel that the brief must claim attorneys fees. Judge Logan also noted that something may occur in a reply brief that prompts the appellee to seek attorneys fees. Judge Logan moved to delete the proposal. Judge Williams seconded the motion and it was approved by a vote of six in favor, two opposed.

Before the meeting adjourned at 5:00 p.m., Judge Ripple advised the Committee that the first item of business in the morning would be consideration of the preemption question in Rule 32.

The meeting reconvened on Wednesday, October 21, at 8:30 a.m. All members in attendance the preceding day were in attendance once again.

91-26

The discussion returned to Rule 32. This time the Committee focused on the proposal that a new subdivision, subdivision (d), be added to Rule 32. The proposed subdivision stated that Rule 32 preempts all local rules concerning the form of briefs.

Mr. Kopp introduced the topic. He noted that Rule 32 and the local rules supplementing it are filled with a number of minor matters. Because the rules cover subject matters like binding and type style, the sensitivity about the ability to have a local rule is presumably not as high as with many other subject matters. When formulating the proposed draft, the Solicitor's Office reviewed all of the local rules and included any matter that seemed important in the draft. Mr. Kopp stated that he held no brief for the particulars of the draft; for example, it is not important whether the rule requires staples to be covered, but it is important that the rule addresses the binding issue. The heart of the Solicitor's proposal is that the rule should address the issues and preempt local rules.

Judge Logan made a motion to adopt the preemption provision. The motion was seconded by Chief Justice McGiverin. Discussion followed.

The first speaker asked about the enforcement technique. Although most circuits would probably conform, the members noted that questions about the timing of the repeal of local rules might arise. The rule might also give rise to disputes concerning whether a local rule added to or subtracted from the national rule.

Judge Ripple noted that the local rules have been used for experimentation and innovation. In fact, the last several additions to Rule 28 have been modeled upon successful local experiments. The local variations have been minor, such as requiring a summary of argument, but having proven useful, those ideas have percolated up and improved the national rules. On the other hand Judge Ripple stated that in this case, as in all instances of local variation, the Committee needs to be concerned about the burden local rules place upon national practitioners. A rule forbidding all local variations may be too rigid, however, if national uniformity is needed only to ease a practitioner's administrative burdens rather than to prevent confusion.

Judge Boggs suggested that the Committee Note contain hortatory language asking the circuits to limit their additional requirements to those that have been carefully considered in light of the desirability of national uniformity.

Judge Jolly suggested amending the language of proposed subdivision (d) to state that the requirements of Rule 32 concerning form "shall prevail over local rules."

Mr. Strubbe once again asked what exactly is included within the term "form."

Judge Williams noted that the scope of the draft is constrained by the fact that it states that "the requirements of this rule" preempt local rules. Judge Logan noted that Rule 32 covers only typeface, cover colors, binding, and the information that must be included on a cover.

Judge Ripple suggested that the Committee consider Judge Boggs' suggestion that the Committee Note include an admonition to the circuits asking them to exercise restraint when considering local variations. Judge Ripple also suggested that there may be some non-rule methods of addressing the issue such as a report in F.R.D. or working with the clerks' committee on rules.

Mr. Kopp stated that when the Committee discussed the Local Rules Project, the Committee talked about some sort of screening process for local rules. Judge Keeton pointed out that under § 2071(c)(2) the Judicial Conference has responsibility for monitoring the local rules adopted by the circuits and that function, no doubt, would be referred to the Advisory Committee on Appellate Rules.

Judge Ripple called for a vote as to whether the Committee wished to include a preemption provision in Rule 32. One member favored a preemption provision, six opposed the idea.

Judge Ripple asked members to consider Judge Boggs' suggestion and alternate ways of communicating to the clerks and circuits about engaging in responsible experimentation. Judge Ripple asked the same members who were considering the typeface issue as well as Mr. Kopp and Judge Boggs to consult with the Reporter.

The discussion then shifted to consideration of the other amendments to Rule 32 proposed by the Solicitor General's office and Mr. Strubbe. The Committee turned to the draft beginning on page 11 of the Reporter's memorandum. On line 6, the draft proposed limiting the carbon copy exception for parties proceeding in forma pauperis to *pro se* parties. Because photocopying is inexpensive, some courts have local rules prohibiting counsel representing a party proceeding in forma pauperis to use carbon copies. Judge Williams moved for approval of the change; Mr. Froeb seconded it. The change was unanimously approved.

At lines 17 and 18, the draft proposed adding the following sentence: "A brief or appendix must be stapled or bound on the left side in any manner that is secure and does not obscure the text." The Committee discussed several variations found in the local rules and concluded that in some instances top binding, especially of an appendix, is appropriate and that it would be better to delete the requirement that the documents be bound on the left. Judge Jolly also moved that the sentence be amended to require binding in a manner that permits a brief to lie flat when open. The Committee unanimously favored both suggestions. The amended sentence reads as follows: "A brief or appendix must be stapled or bound in any manner that is secure and does not obscure the text and that permits it to lie flat when open.

The Committee unanimously favored deleting the sentence providing a special exception concerning the size of briefs in patent cases. The Federal Circuit's local rules do not permit briefs in patent cases to exceed the usual size so there is no further need for the exception in the national rule.

At lines 23 and 24, the rule provides that "[i]f a brief is produced by a commercial printing or duplicating firm, or if produced otherwise and the covers to be described are available, the cover" must be a certain color depending upon the role of the party filing the brief. Judge Logan suggested deleting the "are available" language. That language essentially makes the rule unenforceable. It was suggested that all language through the words "are available" on line 24 be stricken and replaced by the words, "Except for *pro se* parties." It was also suggested that on line 25 the word "blue" should be followed by a semicolon and that on line 26 the word "any" should be preceded by the word "and." Judge Ripple asked for a vote on lines 23 through 26 as amended. The changes were approved unanimously.

At lines 30 and 31 the draft proposed that the cover should include the number of the case, centered at the top of the front cover. That proposal was approved unanimously.

Currently Rule 32(b) makes the rule applicable to a petition for rehearing as well as to a brief or appendix. At lines 38 and 39 the draft proposed that the Rule 32 requirements also should apply to "a suggestion for rehearing in banc and any response to such petition or suggestion." That proposal was approved unanimously. At lines 40 through 42 the draft proposed that the cover of a petition for rehearing or of a suggestion for rehearing in banc, as well as any response to either, should be yellow. The Committee voted unanimously to strike that change.

The Committee voted unanimously to amend lines 45 and 46 to provide: "Carbon copies may not be filed or served except by *pro se* parties." The Committee also voted unanimously to amend lines 47 and 48 to state that "A motion or other paper addressed to the court need not have a cover but must contain a caption that includes the name of the court . . ." Lastly the Committee agreed to make the materials on lines 42 through 49 dealing with motions a single and separate paragraph.

91-27

The Local Rules Project identified several local rules that conflict with the federal rules because the local rules require a party to file a different number of copies of a document than the federal rules require. The Committee had previously decided that rather than prohibit local variation it would be better to authorize it and make parties aware that a local rule may alter the number set by a national rule. The Committee asked the reporter to prepare draft amendments to each of the rules indicating that the number of copies may be altered by local rule or order in a particular case.

The Committee unanimously approved identical changes to Rules 5, 5.1, 21, 25, 27, and 30. Each of those rules will state that an original and a certain number of copies must be filed "unless the court requires the filing of a different number by local rule or by order in a particular case."

The draft language in Rules 3 and 13 differed from that approved in the first category because rather than setting a base line number the drafts require an appellant to file enough copies for the court to serve each party with a copy. By unanimous consent of the Committee Rules 3 and 13 will both include language stating: "At the time of filing [a notice of appeal] the appellant shall furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of [this] Rule 3." The Committee also unanimously approved amending Rule 35 to provide that "The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case."

Mr. Kopp prepared sample charts showing the number of copies of a given document required by each of the circuits. He suggested that it would be desirable to have such a chart at the beginning of each set of local rules. Mr. Kopp suggested that a statement in the Committee Note about the desirability of such charts might be all that is needed to encourage

the use of them. Judge Ripple suggested sending out a letter to the circuits enclosing the charts and suggesting their use. Judge Williams suggested that the charts show the required number of copies with citation to the controlling rule -- whether federal or local. Mr. Kopp pointed out that the charts as drafted currently do that. The Committee unanimously approved sending the charts to the circuits. The Committee also suggested that the Committee Note accompanying Rule 25 include a statement that the circuits should consider making readily available to practitioners charts showing the number of copies to be filed and citing the controlling rule.

91-22

The Committee returned to the bail question and considered the new draft prepared by Judge Keeton, Judge Williams, Judge Boggs, and Judge Ripple. The new draft did three things: 1) retained the existing structure of the rule but updated the text in light of the Bail Reform Act; 2) made it clear in subdivision (b) that the requirements in (a) apply to post-sentencing review and that there is an additional requirement -- that information about the conviction must be provided; and, 3) made clear those instances when review may be sought by motion.

The draft provided:

Rule 9. Release in a Criminal Case.

(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -- The district court shall state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. To obtain review of such an order, the appellant, within fourteen days after filing a notice of appeal with the district clerk, shall file with the appellate clerk a copy of the district court's order and its statement of reasons and if the appellant questions the factual basis for the district court's order, a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require not including briefs unless the court for good cause so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) Appeal from an Order Regarding Release After Judgment of Conviction.-- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal with the district clerk, or by filing a motion with the appellate clerk if the party has already filed a notice of appeal of the judgment of conviction or the terms of the sentence. Both the order and the review are subject to the terms of Rule 9(a). In addition, the papers filed by the applicant for review must include a record of the offense or offenses of which the defendant was convicted and the date and terms of the sentence.

24
25

(c) Criteria for Release.-- The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. sec. 3142 and sec. 3143.

The Committee discussion resulted in a number of changes in the draft.

1. The draft would have required an appellant to file with the court of appeals, within fourteen days after filing a notice of appeal, a copy of the district court's order and its statement of reasons for the order. The fourteen day requirement was deleted and replaced by a requirement that the documents be filed as soon as practicable after filing the notice of appeal. As soon as practicable was thought sufficient because the appellant would be interested in a speedy resolution and retaining the fourteen day time frame might give rise to an inference that there is no need for a court to act until the expiration of the fourteen days.

2. The terms district clerk and appellate clerk were changed to district court and court of appeals.

3. In the second sentence of subdivision (a) "the" appellant was changed to "an" appellant.

4. The opening language of the second sentence was changed. Rule 3 says that the only thing a party must do to obtain review is file a notice of appeal; therefore, it would be inappropriate to begin the sentence by stating that "to obtain review" a party must file other papers in addition to the notice of appeal. The sentence was changed to state that "[a] party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, shall file . . ."

5. The second sentence was divided into two separate sentences. The first one ending with the words "statement of reasons." The resulting third sentence was altered to read: "An appellant who questions the factual basis for the district court's order shall file a transcript . . ."

6. The sentence beginning with "[i]t must be heard" (the old fourth and now fifth sentence) was divided into two sentences, the first of which ends with the word "require." The resulting sixth sentence was then altered so that it states "[b]riefs need not be filed unless the court so orders."

7. The heading of subdivision (b) was changed from "appeal from" to "review of" an order regarding release. The change reflects the fact that review may be obtained either by appeal or, in appropriate cases, by motion.

8. The first sentence of subdivision (b) was altered by inserting the words "from that order" after the words "notice of appeal" in the first clause. The change was necessary to make it clear that if a party files a notice of appeal only from the conviction, the party must file a motion to obtain review of the bail determination.

9. In the second sentence of subdivision (b), the words "appeal or" were deleted as unnecessary.

The amended draft read as follows:

Rule 9. Release in a Criminal Case.

(a) Appeal from an Order Regarding Release Before Judgment of Conviction. -- The district court shall state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, shall file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order shall file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) Review of an Order Regarding Release After Judgment of Conviction.-- A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal of the judgment of conviction or the terms of the sentence. Both the order and the review are subject to the terms of Rule 9(a). In addition, the papers filed by the applicant for review must include a record of the offense or offenses of which the defendant was convicted and the date and terms of the sentence.

(c) Criteria for Release.-- The decision regarding release must be made in accordance with applicable provisions of Title 18 U.S.C. sec. 3142 and sec. 3143.

The Committee also agreed that the Committee Note should explain that even after judgment of conviction the initial application for release must be filed with the district court. The statement that all the requirements of (a) apply to (b) means, among other things, that before review may be sought in the court of appeals, the district court must, after entry of the judgment of conviction, enter an order regarding release.

The amended draft was unanimously approved for submission to the Standing Committee.

Item 91-12

At the time of the review of local rules by the Local Rules Project, five circuits had rules allowing attorneys, as well as judges, to preside at prehearing conferences. The Project suggested that the Advisory Committee consider amending Rule 33 to permit attorneys to preside at prehearing conferences. The Advisory Committee decided to review Rule 33 in its entirety and Judge Ripple appointed a subcommittee consisting of Judges Hall and Logan and the Solicitor General's office to assist the Reporter in developing drafts. Two drafts were prepared prior to the meeting and on Tuesday evening the subcommittee met and prepared a consolidated draft for the full Committee's consideration. The consolidated draft presented to the Committee read as follows:

Rule 33. Appellate Conference

The court may direct the attorneys, and in appropriate cases the parties, to participate in a conference to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or an attorney designated by the court for that purpose. Before a conference, attorneys shall consult with their clients and obtain as much authority as feasible to settle the case and resolve procedural matters. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement. Except to the extent disclosed in the conference order, statements made in discussions held pursuant to this rule are confidential.

Judge Logan introduced the draft. He noted that the current rule states that a conference is conducted by a court or judge and most circuits now want the flexibility to use non-judges as presiders. Judge Logan also pointed out that the current rule is the appellate equivalent of a pre-trial hearing and does not anticipate that settlement of the case might be the subject of a conference.

Judge Logan explained some of the specific differences between the draft and existing Rule 33.

1. The caption is "Prehearing Conference" rather than "Appellate Conference" in recognition of the fact that occasionally a conference is held after oral argument.
2. The draft allows the court to require that "parties" attend the conference. Sometimes it is educational for the client to attend the conference and the client's presence may aid in settlement of the case.
3. The draft allows the court to require the parties to attend the conference only "in appropriate cases." There are a variety of situations when it is not appropriate to require the party to attend, most notably one cannot require the entire government to attend a conference.
4. The draft uses the singular form, "a" conference, but the subcommittee intended to have the Committee Note explain that a conference may be ongoing and may be reconvened a number of times.

5. The draft includes the "possibility of settlement" among possible conference topics.
6. The draft recognizes that conferences are often held by telephone.
7. The draft allows an attorney designated by the court to preside over a conference.
8. The draft requires an attorney to consult with his or her client before the conference and obtain as much authority as feasible to settle the case and resolve procedural matters.
9. The draft states that statements made in conference are confidential.

Judge Logan noted that conferences may have two different objectives: the first, to simplify the issues, or to direct attention of the parties to the issues the court wants discussed, or to settle procedural matters; the second, to settle the case. Judge Ripple asked whether the rule should have separate provisions for the two different types. Judge Logan observed that although a conference is often begun as a scheduling conference or one dealing with simplification of the issues, it often progresses to settlement discussions. Therefore, too stark a separation between the two types may be a disadvantage.

With regard to confidentiality Judge Logan raised questions. He noted that statements made in a settlement conference should not be revealed to a judge who will hear the case. However, there may be need to discuss with a party or with co-counsel information that is revealed during the conference. The language that statements made during a conference "are confidential" may be too broad.

Mr. Kopp stated that the government has two significant concerns which he thought could be adequately dealt with in a note. The first concern arises from the court's authority to require "parties" to attend a conference. He stated his opinion that the limitation to "appropriate cases" is important. For instance, Mr. Kopp stated that he did not think that it would be appropriate to require the Secretary of HHS to appear at a settlement conference. Judge Williams asked what such a principle would mean in the corporate context. A corporation cannot appear except through agents; but would it be appropriate to require attendance of a corporate officer? The Committee concluded that the term "parties" is sufficiently broad to allow a court to determine that an executive of General Motors or some other employee with authority, including the general counsel, constitutes "the party."

Mr. Kopp also focused upon the language requiring a lawyer to consult with his or her client before a conference and obtain as much authority "as feasible." Again, he expressed the opinion that the "as feasible" language is important to the government. He also noted that there are others, such as foreign governments, who might have difficulty obtaining authority to settle.

Mr. Kopp stated that if both those issues are adequately clarified by the Committee Note, the Department of Justice would be satisfied with the rule.

Judge Williams expressed his opinion that the government may not deserve individual mention because there are many entities that have similar problems. Judge Hall agreed that the government, as a party, should not be given different treatment. Mr. Kopp pointed out that the language of the rule is open ended enough to allow the court to determine the proper course of action.

A number of changes were made in the draft.

1. The caption was changed to "Appeal Conferences." The caption "Appellate Conference" was reminiscent of "judicial conference."

2. The language of the first sentence was changed from the singular -- "a conference" -- to "one or more conferences" (the language used in the criminal rules).

3. The second sentence was amended to state that a conference may be conducted by "a judge or other person" designated by the court for that purpose. The "other person" language encompasses a broad range of possibilities including a senior district judge, a former state court judge, magistrate, or attorney.

4. The third sentence was amended to state that "[b]efore a settlement conference" an attorney must consult with his or her client and obtain as much authority as feasible to settle the case. The language requiring the lawyer to consult with the client about procedural matters was dropped because a court may issue an order governing the procedure in a case (with or without the consent of the parties) and even when a procedural matter is the subject of negotiation, it is not usually a matter about which a lawyer must consult his or her client.

5. The confidentiality provision was limited to statements made in settlement discussions so that orders and agreements as to procedural matters need not be held confidential.

The confidentiality provision was further amended. The purpose of stating flatly that statements made during settlement discussions are confidential was intended to make it clear that such statements may not be communicated to anyone -- not to the court and not to third parties such as the press. Obviously disclosure to the client or co-counsel may be necessary. Moreover, the bar needs to have confidence that the information will be held confidential within the court. The sentence was amended to read: "Except to the extent disclosed in the conference order, statements made in settlement discussions held pursuant to this rule are confidential and may not be disclosed to any judge of the court, any other court personnel, or any other person who is not a party or a representative of a party."

The amended draft was unanimously approved. The amended draft read as follows:

Rule 33. Appeal Conferences

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys shall consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an other controlling the course of the proceedings or implementing any settlement agreement. Except to the extent disclosed in the conference order, statements made in settlement discussions held pursuant to this rule are confidential and may not be disclosed to any judge of the court, any other court personnel, or any person who is not a party or a representative of a party.

Items 92-1 and 92-2

The Reporter told the Committee that at the last Standing Committee the Reporters from all of the Committees were asked to work together to draft rules governing technical amendments and uniform numbering of local rules.

It is contemplated that each set of rules will have a rule requiring local court rules to be numbered to correspond to the national rules. The Advisory Committee had considered and approved a draft rule last spring for presentation at the Standing Committee's summer meeting. Each of the other advisory committees had also approved drafts. Because the drafts differed, the Standing Committee asked the reporters to confer and attempt to find a common solution so that the language in each set of rules would be uniform. The Reporter made several small changes in the Committee's earlier proposal so that it would more closely resemble the other drafts. Those changes were explained and the draft approved by the Committee. The Committee understood that approval of the draft did not guarantee that the final product would be identical to the draft. The approved draft read as follows:

Rule 47. Rules ~~by~~ of a Courts of Appeals

After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ that are consistent with, but not duplicative of, ~~these~~ rules adopted under 28 U.S.C. § 2072. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals shall send the Administrative Office

of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all matters not provided for by rule, a court of appeals may regulate its practice in any manner consistent with rules adopted under 28 U.S.C. § 2072 and under this rule.

Similarly, it is contemplated that each of the sets of rules will contain a rule governing the procedures for making technical amendments of the rules. The rule would allow the Judicial Conference to make a technical amendment of a rule without the need for publication and review by the Supreme Court and Congress.

Last spring the Advisory Committee considered a draft prepared by the Style Committee and expressed some reluctance to endorse the draft because its breadth was broader than the Advisory Committee felt prudent given the delicate relationship between the Congress and the judicial rulemaking process.

The Committee again considered the Style Committee's draft and a narrower draft prepared by the Reporter.

Judge Keeton noted that the Reporter's draft was very narrow because it eliminated the possibility of making changes essential to conforming the rules with statutory amendments. Judge Ripple pointed out that the emphasis in the Reporter's draft was upon the error correcting function of technical amendments. Judge Ripple also noted that the language authorizing changes to conform to statutory amendments creates a broad range of possible changes. Some changes are very narrow and technical, such as changing "magistrate" to "magistrate judge," yet other changes involve substantial rewriting of a rule, such as changing Rule 9 to conform to changes made by the Bail Reform Act. Judge Keeton responded that the amendments to Rule 9 (concerning the government's ability to appeal a bail decision) which the Advisory Committee had just approved should not be considered technical.

Judge Ripple then stated that one of his concerns had been whether a broad technical amendment rule could be used to achieve numerical or substantive integration of the rules, a proposal that has been discussed several times in the Standing Committee. Judge Keeton assured the Committee that such changes would require the use of the full procedures, including publication and Supreme Court and Congressional review.

The Committee discussion then focused upon the Style Committee's draft and made changes to it. One of the matters specifically discussed was whether it is appropriate to treat changes in style as technical amendments. The Committee agreed that it would be better to omit any language authorizing style changes. The amended draft read as follows:

Rule 50. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors or inconsistencies in grammar, spelling, cross-references, or typography, to make nonsubstantive changes essential to conforming these rules with statutory

amendments, or to make other similar technical changes.

The draft was approved by a vote of six to one. With regard to "nonsubstantive changes" essential to conforming with statutory amendments, the Committee agreed that the change from "magistrate" to "magistrate judge" might be used as an example of a nonsubstantive change in the rules.

Judge Ripple then turned the Committee's attention to the "Discussion Items" on the agenda. Because of time constraints, Judge Ripple took the items out of order.

Item 91-16

At the Committee's December 1992 meeting a subcommittee consisting of Judges Boggs, Hall and Jolly was created to consider the desirability of developing national procedures for handling death penalty cases.

Judge Jolly conducted an informal survey of the judges in his circuit. The judges stated that the problems the courts experience in handling death penalty cases do not originate from the federal rules and that the federal rules cannot solve the problems. The primary procedural problems are delays and last minute appeals and these emanate from the state courts and the district courts. Judge Jolly concluded that it is unlikely that a federal appellate rule could substantially improve the situation. A substantial portion of the local rules governing death cases really deal with internal operating procedures such a panel selection and whether the panel stays with a case throughout its life. The only topic as to which a national rule might be useful is stays and the Supreme Court has pretty much set the guidelines. Judge Jolly also expressed the opinion that even if there were a need for a federal appellate rule governing death penalty cases, the topic is so controversial that this Committee would be inextricably involved in conflict and would be unable to handle the rest of its work.

The subcommittee consensus was that the Advisory Committee should take no further action. The Advisory Committee concurred.

Item 91-6

Fed. R. App. P. 39(c) allows a prevailing party to recover the cost of "producing necessary copies of briefs." The cost of producing the "original" is not recoverable but the cost of producing the copies is recoverable. The Seventh Circuit opinion in Martin v. United States, 931 F.2d 453 (7th Cir. 1991) suggests that Rule 39 might be amended "to provide for some arbitrary allocation of the costs of word processing equipment between producing the originals and producing the copies."

The Committee expressed some interest in pursuing that suggestion. Judge Hall asked

who would determine how much amortization is appropriate. Judge Williams stated that it should be possible to fashion an easily administered bright line rule. Judge Ripple asked Mr. Strubbe to consult with the other clerks and the Administrative Office about the feasibility of such a rule.

Item 86-23

The proposal was prompted by the difficulty a prisoner may have in filing timely objections to a magistrate judge's report because a prisoner's receipt of mail is often delayed. Judge Ripple noted that the problem is the converse of the one addressed by the Committee in response to Houston v. Lack. Houston v. Lack addressed the problem that a *pro se* prisoner has in timely filing documents because a prisoner has no control over when prison officials place the prisoner's mail in the United States mail -- a problem with outgoing mail. The focus of this proposal is that an incarcerated person also does not have control over when mail is delivered -- a problem with incoming mail.

Judge Ripple also asked Mr. Strubbe to consult with his colleagues about this issue.

Discussion of items 91-17 (uniform plan for publication of opinions) and 91-28 (updating Rule 27 on motions practice) was held over until the next meeting.

Item 92-3

At the April 1992 meeting Judge Logan noted that there is a conflict between Rule 4(b) and 18 U.S.C. § 3731. Judge Ripple stated that the question for the Committee is whether to ask the Standing Committee, and thereafter the Judicial Conference, to ask Congress to amend the statute to conform with the rule. The Committee received a letter from the Solicitor General asking the Committee to put the question on hold.

Judge Logan had raised this issue at the last meeting because he had the question before him. The Solicitor said that the question should arise only rarely and Judge Logan agreed. Judge Logan also agreed with the Solicitor that it might be a good idea to add a comment to the Committee Note accompanying the rule pointing out that the issue has been litigated and referring the reader to the Sasser opinion. The Committee responded that a Committee Note cannot be amended without publication, etc. The conclusion was that the item should remain on the agenda for further discussion at a later meeting.

As the time for the meeting closed, Mr. Froeb asked that the record reflect his appreciation and commendation to Judge Ripple, Professor Mooney, and their staffs for an excellent meeting. The Committee concurred.

As the meeting concluded Judge Ripple made a number of announcements.

1. Judge Ripple indicated that he would circulate a memorandum about the Eleventh Circuit's response to the Local Rules Project indicating that the issue is "dead listed" unless some member of the Committee has objection.

2. The Advisory Committee's general assessment of the local rules project is still on-going.

3. Judge Ripple announced that the Standing Committee at its summer meeting referred back to the Advisory Committee for further consideration its proposal (items 89-5 and 90-1) to include in the appellate rules a warning that a request for a rehearing in banc does not toll the time for filing a petition for certiorari.

4. With regard to item 91-3, Judge Ripple announced that in addition to giving the Rules Committees authority to define a final decision by rule, Congress recently added authority to expand by rule the instances in which interlocutory appeal is permitted. Judge Ripple will write to the circuits seeking their counsel.

5. With regard to item 92-4, the Solicitor General's proposal to amend Rule 35 to include intercircuit conflict as a ground for seeking rehearing in banc, Judge Ripple stated that the Federal Judicial Center is proceeding with their study which will include questions pertinent to this item and he expressed his hope that at the spring meeting the Committee will have the benefit of that information.

The meeting adjourned at 2:00 p.m.

Respectfully submitted

Carol Ann Mooney
Reporter

Agenda Book Sec. III
Standing 12/92

MATERIAL AVAILABLE AT THE MEETING.

Standing Agenda 12/92
Section IV

REPORT

OF THE

ADVISORY COMMITTEE

ON

CIVIL RULES

TO THE

COMMITTEE

ON

RULES OF PRACTICE AND PROCEDURE

Asheville, North Carolina
December 17 - 19, 1992

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

November 20, 1992

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed are proposed amendments to Rules 83 and 84 of the Federal Rules of Civil Procedure and to Rule 412 of the Federal Rules of Evidence. With the accompanying Committee Notes, these have been considered and approved by the Advisory Committee on Civil Rules for submission to the Standing Committee under rule 3c of the governing procedures with a request for publication and public comment. For your convenience, I also am enclosing a "clean" copy of these three rules, reflecting the text as it would appear if the changes were approved. We have attempted to conform to the conventions recommended by your Style Subcommittee.

Earlier versions of proposed Fed. R. Civ. P. 83 and 84 were submitted to the Standing Committee in the Summer of this year, but returned for further study in the light of similar proposals being considered by the other Advisory Committees. Some modifications have been made to the proposed revisions of Rule 83 and 84 in the hope of arriving at uniform language within the several sets of Rules containing similar provisions. I suggest that, after the Standing Committee reviews the proposals by the several Advisory Committees and perhaps makes alterations to achieve total uniformity, the several proposals be published at the same time, with a call for comments during the same period, and with any hearing to be conducted jointly before representatives of each of the Advisory Committees presenting such proposals.

I call your attention to the elimination of what was subdivision (b) in the earlier version of Rule 83. That subdivision contained provisions authorizing the use--with Judicial Conference approval and for a limited period of time--of local rules inconsistent with the national rules. This proposal had generated significant controversy, and the Advisory Committee has concluded that consideration of any such proposal should be deferred until after evaluation of the experience with diverse local rules under the Civil Justice Reform Act.

The proposed change to Evidence Rule 412 is drawn from language considered by the Advisory Committee on Criminal Rules. with some modifications in the text and more extensive changes in the explanatory note. I assume that the reconstituted Advisory Committee on Evidence Rules would be charged with responsibility for further action on

this rule, including consideration of comments and conducting any public hearings.

Extra copies of this letter and the enclosures are being sent to the Secretary of the Standing Committee to facilitate redistribution to members of the Standing Committee.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Secretary, Standing Committee
Members, Reporter, and Secretary
of Advisory Committee on Civil Rules
Chairmen, other Advisory Committees

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 83. Rules by District Courts; Orders

(a) **Local Rules.** Each district court ~~by action of~~, acting by a majority of ~~the~~ its judges ~~thereof~~, may ~~from time to time~~, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be ~~not in~~consistent with Acts of Congress, consistent with -- but not duplicative of ~~--~~ ~~these~~ rules adopted under 28 U.S.C. §§ 2072 and 2075, and conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule ~~so adopted shall~~ takes effect ~~upon~~ the date specified by the district court and ~~shall~~ remains 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~~ must, 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~~ matters 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 ~~these~~ rules ~~or~~ adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules ~~these~~ of the district in which they act.

(c) **Enforcement.** Local rules and orders imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the local requirement.

COMMITTEE NOTE

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 carefully 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 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 on 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--although not encourage--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 requirements relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of--or forgetting--a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The subdivision assures that negligence in conforming to a local requirement relating to a matter of form will not deprive the party of some right; it does not, however, preclude the court from

appropriately sanctioning the attorney for such inattention, as by requiring attendance at a seminar covering the local rules of court.

The proscription of the subdivision is narrowly drawn--covering only violations attributable to negligence and only those involving local rules or standing orders directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or repeatedly violates a local rule, even one involving merely a matter of form. Nor does the subdivision affect the court's power to enforce local rules or standing orders that involve more than mere matters of form--for example, a local rule precluding evidence from a witness not identified in a pretrial listing of witnesses.

Although, as indicated above, subdivision (c) is quite limited in its scope, it reflects a broader concern; namely, that, particularly with the proliferation of local rules and standing orders, litigants can be unfairly prejudiced by rigorous enforcement of diverse local requirements not addressed by the national rules. Excesses in promulgating and enforcing local requirements can result in attorneys, otherwise qualified, being unwilling to appear in the particular federal forum, and in parties being forced into extra expenditures because of a fear of proceeding without local counsel familiar with the intricacies of local practice. Revised Rule 84(c) should, therefore, be viewed, notwithstanding its narrow explicit reach, as expressing a more general admonition to courts to ensure that their local requirements are enforced in a manner that appreciates the potential for error when counsel practice in a number of courts with different, sometimes inconsistent, local rules.

Rule 84. Forms; Technical Amendments

(a) **Forms.** The forms ~~contained~~ in the Appendix ~~of Forms are sufficient~~ suffice under the rules and ~~are intended to indicate~~ illustrate 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

9 style.

COMMITTEE NOTE

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. It is anticipated, however, that a general re-write of the rules to improve language, style, and format throughout the rules--which, though unintentional, might result in substantive changes--would be submitted to the Supreme Court and Congress.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 412. ~~Sex Offense Cases; Relevance of~~ Victim's Past Sexual Behavior or Predisposition

(a) Evidence Generally Inadmissible; Exceptions. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.~~

~~(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code,~~ Eevidence of ~~a victim's~~ the past sexual behavior ~~other than reputation or opinion evidence~~ or predisposition of an alleged victim of sexual misconduct ~~is also not admissible, unless such evidence other than reputation or opinion evidence is~~ may be admitted only if it is otherwise admissible under these rules and is--

~~(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or~~

~~(2) admitted in accordance with subdivision (c) and is evidence of--~~

~~(A)~~ (1) evidence of specific instances of ~~past~~ sexual behavior with ~~persons~~ someone other than the person accused, of the sexual misconduct, when offered ~~by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim,~~ to prove that the other person

was the source of semen, other physical evidence, or injury; ~~or~~

(B2) evidence of specific instances of ~~past~~ sexual behavior with the ~~accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged~~ person accused of the sexual misconduct, when offered to prove consent by the victim; ~~.~~

(3) evidence of specific instances of sexual behavior or other evidence of sexual behavior or predisposition, when offered in a criminal case in circumstances where exclusion of the evidence would violate the constitutional rights of the defendant; or

(4) evidence of specific instances of sexual behavior or other evidence -- including evidence in the form of reputation or opinion -- concerning the sexual behavior or predisposition of the victim, when offered in a civil case in circumstances where the evidence is essential to a fair and accurate determination of a claim or defense.[1]

(b) **Procedure to Determine Admissibility.** Evidence must not be offered under this rule unless the proponent obtains leave of court by a motion filed under seal, specifically describing the evidence and stating the purposes for which it will be offered. The motion must be served on the alleged victim as well as the parties and must be filed at least 15 days before trial unless the court directs an earlier

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1. **Public comment should also be solicited respecting the following alternative language in subdivision (a)(4): ". . . when offered in a civil case in circumstances where its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim." Some minor modifications of the Committee Note would be needed if this language were adopted.**

filing or, for good cause shown, permits a later filing. After giving the parties and the alleged victim an opportunity to be heard in chambers, the court must determine whether, under what conditions, and in what manner and form the evidence may be admitted. The motion and the record of any hearing in chambers must remain under seal in the trial and appellate courts.

~~(c)(1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.~~

~~(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. 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 scheduled for such purpose, shall accept evidence on the issue of whether such condition in fact is fulfilled and shall determine such issue.~~

~~(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.~~

~~(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.~~

COMMITTEE NOTE

This revision is intended to clarify ambiguities and confusing references contained in the former rule and to expand its protection to all persons who are shown to be possible victims of sexual misconduct. As revised, the rule calls for exclusion in civil as well as criminal cases of evidence of an alleged victim's sexual history--whether involving specific acts or reputation or opinion testimony--unless the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment frequently associated with public exposure of a person's sexual history. The revised rule applies in all cases in which there is evidence that someone was the victim of sexual misconduct, without regard to whether the alleged victim or person accused is a party to the litigation. The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred, and not to connote any requirement that the misconduct be alleged in the pleadings. Similarly, the reference to a person "accused" is used in a non-technical sense; there is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense.

Subdivision (a). The amended rule combines former subdivisions (a) and (b) and eliminates the introductory clauses--"notwithstanding any other provision of law"--which were confusing because of the lack of any indication in the text or legislative history regarding what laws were intended to be overridden. The revised rule applies in all cases in which a litigant seeks to offer evidence concerning the past sexual behavior or predisposition of a person who is asserted to be the victim of sexual misconduct. The general proscription against this type of evidence applies whether the evidence is offered as substantive evidence or for impeachment purposes, and whether offered during the victim's testimony or during examination of other witnesses.

The former rule inappropriately restricted its protection in criminal cases to charges brought under chapter 109A of title 18 of the United States Code. The need for protection against this type of evidence is, however, equally as great in other criminal cases. For example, in a prosecution for kidnapping in which the victim was sexually assaulted, evidence of the victim's prior sexual behavior should not be permitted. Although a court might exclude evidence of the victim's sexual history under the existing rules of evidence, the Advisory Committee believes that Rule 412 should be amended to explicitly call for rejection of such evidence.

The revision also extends the protection of the rule to civil actions. A person's privacy interests do not disappear merely because the litigation involves a claim for damages or injunctive relief, even when the claim is initiated by that person. As a matter of public policy, victims of sexual misconduct should not be intimidated from bringing those claims because of fear of inquiry into their entire sexual history that has only marginal relevance to the issues in the case.

The conditional clause "otherwise admissible under these rules" is included in subdivision (a) to emphasize that evidence described in paragraphs (1) through (4) is not automatically to be admitted. To be admitted, the evidence not only must meet one of the four listed exceptions, but also must satisfy the requirements for admissibility contained in the other rules of evidence. Thus, in determining admissibility, the court would also have to consider Rules 402 and 403, and perhaps other rules such as Rules 404 and 405.

Paragraphs (1) and (2) restate provisions of the prior rule, with appropriate changes to accommodate for the extension of the general proscription to the broader range of cases. These exceptions apply in both criminal and civil cases.

Paragraph (3) expands in part the language--but not the concept--of the former rule, permitting admissibility when essential to the protection of constitutional rights of a defendant in a criminal case. The language of the prior rule addressed only the possibility that the constitutional rights of an accused might in some criminal cases require admission of evidence of a victim's prior sexual behavior. *See 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). The revision provides that, if other types of evidence relating to the

sexual activities or predisposition of a victim would be required by the constitution, the rules of evidence should not preclude admissibility. This change is not intended to imply that reputation or opinion evidence concerning a victim of sexual misconduct would ever be constitutionally required, but the rule is reworded to accommodate that possibility.

Paragraph (4) is new. It provides a civil analogue to paragraph (3), recognizing that there can be civil cases in which exceptions (1) and (2) would not apply but admission of the evidence might be essential to a fair and accurate determination of a claim or defense. One example might be a case in which the plaintiff claims defamation and this type of evidence might be essential to show the statements were true or the plaintiff suffered no injury to her reputation. The exception alters for this type of evidence the normal standard of relevancy prescribed in Rule 402 by specifying that the evidence must be essential to an accurate determination of an issue. In specifying that the evidence must be essential to a "fair" determination of an issue, the exception also calls for the court to consider the legitimate privacy interests of the alleged victim, a concern that may not be adequately covered by Rule 403, particularly if the victim is not a party to the action.

Subdivision (b). This subdivision makes some changes in the special procedures to be followed before this type of evidence is received, as well as making stylistic changes for clarity.

The rule assures that the alleged victim, if not a party to the action, has the right to be heard in chambers with respect to the admissibility of the evidence. Depending on the circumstances, the trial court may determine to hear from the parties and victim separately or at the same time, but a record is to be made of the hearing. The motion and the record of the hearing must remain under seal even if the evidence is received, since often the hearing will refer to matters that are not received or are received in another form.

The revised rule eliminates the provision contained in former subdivision (c)(2) that had the effect of keeping from the jury evidence that the trial judge did not believe--a provision that was of questionable constitutional validity. *See* 1 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual*, 396-97 (5th ed. 1990). Under Rule 104(b), however, the judge can exclude evidence that reasonable jurors could not find credible.

Also eliminated is a provision contained in former subdivision (c)(3) which altered the standard prescribed in Rule 403 for weighing probative value against the danger of unfair prejudice. The Advisory Committee believes that, with respect to evidence described in subdivisions (a)(1)-(3), it is appropriate to apply the normal standards stated in Rule 403. The catch-all exception for civil cases in subdivision (a)(4) may, however, be subjected to the more stringent requirement that the proffered evidence be essential to a fair and accurate determination of a material issue in the case.

The revision authorizes the court to require that a motion for admission of evidence

under Rule 412 be filed more than 15 days before the trial begins. It preserves the power of the court to permit late filing of such a motion--even during trial--but prescribes a more general standard than before, "for good cause shown." In determining whether to permit late filing, the court may take into account the conditions previously contained in the rule; namely, whether the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence, and whether the issue to which such evidence relates has newly arisen in the case.

Rule 83. Rules by District Courts; Orders

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

(b) Orders. In matters not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner consistent with Acts of Congress, with rules adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules of the district in which they act.

(c) Enforcement. Local rules and orders imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the local requirement.

Rule 84. Forms; Technical Amendments

(a) Forms. The forms in the Appendix suffice under the rules and illustrate the simplicity and brevity 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.

PROPOSED REVISION OF THE FEDERAL RULES OF EVIDENCE

Rule 412. Victim's Past Sexual Behavior or Predisposition

(a) Evidence Generally Inadmissible; Exceptions. Evidence of the past sexual behavior or predisposition of an alleged victim of sexual misconduct may be admitted only if it is otherwise admissible under these rules and is--

(1) evidence of specific instances of sexual behavior with someone other than the person accused of the sexual misconduct, when offered to prove that the other person was the source of semen, other physical evidence, or injury;

(2) evidence of specific instances of sexual behavior with the person accused of the sexual misconduct, when offered to prove consent by the victim;

(3) evidence of specific instances of sexual behavior or other evidence of sexual behavior or predisposition, when offered in a criminal case in circumstances where exclusion of the evidence would violate the constitutional rights of the defendant; or

(4) evidence of specific instances of sexual behavior or other evidence -- including evidence in the form of reputation or opinion -- concerning the sexual behavior or predisposition of the victim, when offered in a civil case in circumstances where the evidence is essential to a fair and accurate determination of a claim or defense.[1]

(b) Procedure to Determine Admissibility. Evidence must not be offered under this rule unless the proponent obtains leave of court by a motion filed under seal, specifically describing the evidence and stating the purposes for which it will be offered. The motion must be served on the alleged victim as well as the parties and must be filed at least 15 days before trial unless the court directs an earlier filing or, for good cause shown, permits a later filing. After giving the parties and the alleged victim an opportunity to be heard in chambers, the court must determine whether, under what conditions, and in what manner and form the evidence may be admitted. The motion and the record of any hearing in chambers must remain under seal in the trial and appellate courts.

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1. Public comment should also be solicited respecting the following alternative language in subdivision (a)(4): ". . . when offered in a civil case in circumstances where its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim." Some minor modifications of the Committee Note would be needed if this language were adopted.

Agenda Sect. IV
Study 12/92

FEDERAL RULES

OF

CIVIL PROCEDURE

As Revised by

The Style Subcommittee

of the

Standing Committee on Rules of Practice and Procedure

Judicial Conference of the United States

29 October 1992

Charles Alan Wright, Chair
Judge Robert E. Keeton
Judge George C. Pratt
Judge Alicemarie H. Stotler
Joseph F. Spaniol, Jr.

Booklet prepared by Bryan A. Garner
Consultant to the Style Subcommittee

12/92 Standing Agenda Sec VII A.

RECOMMENDATIONS OF THE ADVISORY COMMITTEES

ON CRIMINAL AND CIVIL RULES

REGARDING THE LANGUAGE OF EVIDENCE RULE 412

ARE SHOWN

SIDE-BY-SIDE ON THE FOLLOWING PAGES.

EXCERPTS FROM THE RESPECTIVE COMMITTEE REPORTS

ON THIS ITEM ARE ALSO INCLUDED.

RECOMMENDATION OF THE ADVISORY COMMITTEE ON CRIMINAL RULES ON EVIDENCE RULE 412

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 an alleged victim of sexual misconduct may be admitted 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) 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 accurate determination of a claim or defense.

(c) 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 the victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence maybe admitted. The court may permit a motion to be made under seal during the trial for good cause shown. The motion and the record of any in camera proceeding must remain under seal during the course of all proceedings both in the trial and appellate courts.

RECOMMENDATION OF THE ADVISORY COMMITTEE ON CIVIL RULES ON EVIDENCE RULE 412

PROPOSED REVISION OF THE FEDERAL RULES OF EVIDENCE

Rule 412. Victim's Past Sexual Behavior or Predisposition

(a) **Evidence Generally Inadmissible; Exceptions.** Evidence of the past sexual behavior or predisposition of an alleged victim of sexual misconduct may be admitted only if it is otherwise admissible under these rules and is--

(1) evidence of specific instances of sexual behavior with someone other than the person accused of the sexual misconduct, when offered to prove that the other person was the source of semen, other physical evidence, or injury;

(2) evidence of specific instances of sexual behavior with the person accused of the sexual misconduct, when offered to prove consent by the victim;

(3) evidence of specific instances of sexual behavior or other evidence of sexual behavior or predisposition, when offered in a criminal case in circumstances where exclusion of the evidence would violate the constitutional rights of the defendant; or

(4) evidence of specific instances of sexual behavior or other evidence -- including evidence in the form of reputation or opinion -- concerning the sexual behavior or predisposition of the victim, when offered in a civil case in circumstances where the evidence is essential to a fair and accurate determination of a claim or defense.[1]

(b) **Procedure to Determine Admissibility.** Evidence must not be offered under this rule unless the proponent obtains leave of court by a motion filed under seal, specifically describing the evidence and stating the purposes for which it will be offered. The motion must be served on the alleged victim as well as the parties and must be filed at least 15 days before trial unless the court directs an earlier filing or, for good cause shown, permits a later filing. After giving the parties and the alleged victim an opportunity to be heard in chambers, the court must determine whether, under what conditions, and in what manner and form the evidence may be admitted. The motion and the record of any hearing in chambers must remain under seal in the trial and appellate courts.

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1. Public comment should also be solicited respecting the following alternative language in subdivision (a)(4): ". . . when offered in a civil case in circumstances where its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim." Some minor modifications of the Committee Note would be needed if this language were adopted.

Recommendation

of the Advisory Committee on

Criminal Rules

Pertaining to Evidence Rule 412

FEDERAL RULES OF EVIDENCE

Rule 412 is deleted and replaced with the following:]

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 an alleged victim of sexual misconduct may be admitted 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) evidence of reputation or opinion evidence in a civil case in which exclusion would deprive the trier

FEDERAL RULES OF EVIDENCE

of fact of evidence which is essential to a fair and accurate determination of a claim or defense.

(c) 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 the victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. 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 both in the trial and appellate courts.

COMMITTEE NOTE

The changes to Rule 412 are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to all 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 always is associated with public exposure of intimate details of sexual history.

FEDERAL RULES OF EVIDENCE

The amendment eliminates three parts of existing 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 reducing 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 402, 404 (b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires.

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 prosecution 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.

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.

Recommendation

of the Advisory Committee on

Civil Rules

Pertaining to Evidence Rule 412

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 412. ~~Sex Offense Cases; Relevance of~~ Victim's Past Sexual Behavior or Predisposition

(a) Evidence Generally Inadmissible; Exceptions. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.~~

~~(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code,~~ Evidence of ~~a victim's~~ the past sexual behavior ~~other than reputation or opinion evidence~~ or predisposition of an alleged victim of sexual misconduct ~~is also not admissible, unless such evidence other than reputation or opinion evidence is~~ may be admitted only if it is otherwise admissible under these rules and is--

~~(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or~~

~~(2) admitted in accordance with subdivision (c) and is evidence of--~~

(A) evidence of specific instances of ~~past~~ sexual behavior with ~~persons~~ someone other than the person accused, of the sexual misconduct, when offered ~~by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim,~~ to prove that the other person

was the source of semen, other physical evidence, or injury; ~~or~~

~~(B)~~ (2) evidence of specific instances of ~~past~~ sexual behavior with the ~~accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged~~ person accused of the sexual misconduct, when offered to prove consent by the victim; ~~.~~

(3) evidence of specific instances of sexual behavior or other evidence of sexual behavior or predisposition, when offered in a criminal case in circumstances where exclusion of the evidence would violate the constitutional rights of the defendant; or

(4) evidence of specific instances of sexual behavior or other evidence -- including evidence in the form of reputation or opinion -- concerning the sexual behavior or predisposition of the victim, when offered in a civil case in circumstances where the evidence is essential to a fair and accurate determination of a claim or defense.[1/]

(b) **Procedure to Determine Admissibility.** Evidence must not be offered under this rule unless the proponent obtains leave of court by a motion filed under seal, specifically describing the evidence and stating the purposes for which it will be offered. The motion must be served on the alleged victim as well as the parties and must be filed at least 15 days before trial unless the court directs an earlier

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1. Public comment should also be solicited respecting the following alternative language in subdivision (a)(4): ". . . when offered in a civil case in circumstances where its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim." Some minor modifications of the Committee Note would be needed if this language were adopted.

filing or, for good cause shown, permits a later filing. After giving the parties and the alleged victim an opportunity to be heard in chambers, the court must determine whether, under what conditions, and in what manner and form the evidence may be admitted. The motion and the record of any hearing in chambers must remain under seal in the trial and appellate courts.

~~(c)(1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.~~

~~(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. 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 scheduled for such purpose, shall accept evidence on the issue of whether such condition in fact is fulfilled and shall determine such issue.~~

~~(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.~~

~~(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.~~

COMMITTEE NOTE

This revision is intended to clarify ambiguities and confusing references contained in the former rule and to expand its protection to all persons who are shown to be possible victims of sexual misconduct. As revised, the rule calls for exclusion in civil as well as criminal cases of evidence of an alleged victim's sexual history--whether involving specific acts or reputation or opinion testimony--unless the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment frequently associated with public exposure of a person's sexual history. The revised rule applies in all cases in which there is evidence that someone was the victim of sexual misconduct, without regard to whether the alleged victim or person accused is a party to the litigation. The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred, and not to connote any requirement that the misconduct be alleged in the pleadings. Similarly, the reference to a person "accused" is used in a non-technical sense; there is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense.

Subdivision (a). The amended rule combines former subdivisions (a) and (b) and eliminates the introductory clauses--"notwithstanding any other provision of law"--which were confusing because of the lack of any indication in the text or legislative history regarding what laws were intended to be overridden. The revised rule applies in all cases in which a litigant seeks to offer evidence concerning the past sexual behavior or predisposition of a person who is asserted to be the victim of sexual misconduct. The general proscription against this type of evidence applies whether the evidence is offered as substantive evidence or for impeachment purposes, and whether offered during the victim's testimony or during examination of other witnesses.

The former rule inappropriately restricted its protection in criminal cases to charges brought under chapter 109A of title 18 of the United States Code. The need for protection against this type of evidence is, however, equally as great in other criminal cases. For example, in a prosecution for kidnapping in which the victim was sexually assaulted, evidence of the victim's prior sexual behavior should not be permitted. Although a court might exclude evidence of the victim's sexual history under the existing rules of evidence, the Advisory Committee believes that Rule 412 should be amended to explicitly call for rejection of such evidence.

The revision also extends the protection of the rule to civil actions. A person's privacy interests do not disappear merely because the litigation involves a claim for damages or injunctive relief, even when the claim is initiated by that person. As a matter of public policy, victims of sexual misconduct should not be intimidated from bringing those claims because of fear of inquiry into their entire sexual history that has only marginal relevance to the issues in the case.

The conditional clause "otherwise admissible under these rules" is included in subdivision (a) to emphasize that evidence described in paragraphs (1) through (4) is not automatically to be admitted. To be admitted, the evidence not only must meet one of the four listed exceptions, but also must satisfy the requirements for admissibility contained in the other rules of evidence. Thus, in determining admissibility, the court would also have to consider Rules 402 and 403, and perhaps other rules such as Rules 404 and 405.

Paragraphs (1) and (2) restate provisions of the prior rule, with appropriate changes to accommodate for the extension of the general proscription to the broader range of cases. These exceptions apply in both criminal and civil cases.

Paragraph (3) expands in part the language--but not the concept--of the former rule, permitting admissibility when essential to the protection of constitutional rights of a defendant in a criminal case. The language of the prior rule addressed only the possibility that the constitutional rights of an accused might in some criminal cases require admission of evidence of a victim's prior sexual behavior. *See 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). The revision provides that, if other types of evidence relating to the

sexual activities or predisposition of a victim would be required by the constitution, the rules of evidence should not preclude admissibility. This change is not intended to imply that reputation or opinion evidence concerning a victim of sexual misconduct would ever be constitutionally required, but the rule is reworded to accommodate that possibility.

Paragraph (4) is new. It provides a civil analogue to paragraph (3), recognizing that there can be civil cases in which exceptions (1) and (2) would not apply but admission of the evidence might be essential to a fair and accurate determination of a claim or defense. One example might be a case in which the plaintiff claims defamation and this type of evidence might be essential to show the statements were true or the plaintiff suffered no injury to her reputation. The exception alters for this type of evidence the normal standard of relevancy prescribed in Rule 402 by specifying that the evidence must be essential to an accurate determination of an issue. In specifying that the evidence must be essential to a "fair" determination of an issue, the exception also calls for the court to consider the legitimate privacy interests of the alleged victim, a concern that may not be adequately covered by Rule 403, particularly if the victim is not a party to the action.

Subdivision (b). This subdivision makes some changes in the special procedures to be followed before this type of evidence is received, as well as making stylistic changes for clarity.

The rule assures that the alleged victim, if not a party to the action, has the right to be heard in chambers with respect to the admissibility of the evidence. Depending on the circumstances, the trial court may determine to hear from the parties and victim separately or at the same time, but a record is to be made of the hearing. The motion and the record of the hearing must remain under seal even if the evidence is received, since often the hearing will refer to matters that are not received or are received in another form.

The revised rule eliminates the provision contained in former subdivision (c)(2) that had the effect of keeping from the jury evidence that the trial judge did not believe--a provision that was of questionable constitutional validity. *See* 1 S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual*, 396-97 (5th ed. 1990). Under Rule 104(b), however, the judge can exclude evidence that reasonable jurors could not find credible.

Also eliminated is a provision contained in former subdivision (c)(3) which altered the standard prescribed in Rule 403 for weighing probative value against the danger of unfair prejudice. The Advisory Committee believes that, with respect to evidence described in subdivisions (a)(1)-(3), it is appropriate to apply the normal standards stated in Rule 403. The catch-all exception for civil cases in subdivision (a)(4) may, however, be subjected to the more stringent requirement that the proffered evidence be essential to a fair and accurate determination of a material issue in the case.

The revision authorizes the court to require that a motion for admission of evidence

under Rule 412 be filed more than 15 days before the trial begins. It preserves the power of the court to permit late filing of such a motion--even during trial--but prescribes a more general standard than before, "for good cause shown." In determining whether to permit late filing, the court may take into account the conditions previously contained in the rule; namely, whether the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence, and whether the issue to which such evidence relates has newly arisen in the case.

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

Memorandum

TO: Honorable Robert E. Keeton, Members of the Committee on Rules of Practice and Procedure, Chairmen of the Advisory Committees, and Reporters

FROM: Daniel R. Coquillette
Mary P. Squiers

RE: Proposed Drafts of Federal Rules Amendments Concerning Local Rules and Technical Amendments

DATE: December 2, 1992

At the last Standing Committee meeting, it was decided that there is a need for a uniform amendment of the Federal Rules permitting technical rule changes without the full procedure. It was also decided that there is a need for a rule mandating uniform numbering of local rules. Each of the Advisory Committees was asked to consider these changes. Their suggested draft rules are attached as appendices to this report.

We were asked by our Chairman to compile the following draft rules in light of the Advisory Committee recommendations. They are attached for your review. There is also a brief discussion of each proposed amendment.

These proposals will be the subject of discussion at the Standing Committee meeting in Asheville on December 17-19, 1992.

Procedure for Making Technical Amendments

Proposed Rule:

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

Discussion

The five rules from the Advisory Committees cover essentially three topics: 1) technical amendments to conform to statutory changes; 2) technical amendments to correct misuses in language; and, 3) technical amendments to cover other matters of form and style. There are several variations among these five rules. We attempted to provide one rule that addresses all these variations.

The first issue, concerning the correction of the Federal Rules to conform with statutory changes, was expressed by the Advisory Committees draft rules in three different ways. The variation was in the language saying that amendments cover only nonsubstantive issues. The language "to conform to statutory changes" was rejected because it could be interpreted to refer to substantive changes. The language "to make nonsubstantive changes" was rejected in favor of the more positive "form and style" language.

All of the draft rules used almost identical language to discuss the use of technical amendments to correct misuses of language. Inserting the word "inconsistencies" along with "errors" was preferred since its addition made the meaning broader.

All of the draft rules also used broad language to encompass all other technical amendments that can be anticipated. The use of "form and style" in this phrase was preferred to provide consistency with the first phrase.

Two of the draft rules provided that "explanatory notes," along with rules, be subject to this amendment. These words were added to the proposed rule to avoid confusion in the event a rule is amended and the Note no longer agrees with that rule.

Three of the sets of Federal Rules have Official Forms. The Advisory Committee on Criminal Rules provided a draft rule on the amendment of forms:

> The Judicial Conference of the United States may authorize additional forms and may revise or delete forms.

The Bankruptcy Rules have an analogous provision. We suggest such a rule be considered by the Advisory Committee on Appellate Rules.

Uniform Numbering of Local Rules

Proposed Rule:

> Option I: Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.
>
> Option II: Any local rule that relates to a topic covered by the [insert as appropriate: Federal Rules of Appellate Procedure, Federal Rules of Criminal Procedure, or Federal Rules of Bankruptcy Procedure] must be numbered to correspond to the related federal rule.

Discussion

Option I is from the draft in the Federal Rules of Civil Procedure. It is appropriate as an amendment for the civil rules because the Judicial Conference has, in fact, recommended that a particular numbering system be adopted by the district courts. At this time, Option I would be of little value as an addition to the other Federal Rules since there is no actual or pending Judicial Conference suggestion with respect to those rules.

Option II is preferred for the bankruptcy, criminal, and appellate rules. It requires that local rules be numbered to correspond to their related Federal Rule. This arrangement is, in essence, what the Judicial Conference recommended concerning local rules of civil practice.

Procedure When There is No Controlling Law

Proposed Rule: [90]. Orders Regulating Practice Before a Court

> Each judge may regulate practice before the court in any manner consistent with Acts of Congress, with rules adopted under [insert enabling statutes for all Federal Rules], with Official Forms appended to the rules, and with local rules of the district in which the judge acts. All generally applicable directions to parties or their lawyers regarding practice before a court must be in the local rules rather than internal operating procedures, standing orders, or other internal directives.

Discussion

This rule is the same for all of the Federal Rules. The enabling legislation, however, is different and that is noted. Magistrate judges may need to be specifically mentioned in the Civil and Criminal Rules. This is not necessary in the Bankruptcy and Appellate Rules. The second part to this rule is taken almost verbatim from the Federal Rules of Appellate Procedure. It reinforces the requirement that formal regulation of practice must occur through the local rulemaking procedure of Title 28, involving notice and an opportunity to comment.

Appendix I

Draft rules of the Advisory Committee on Civil Rules

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 in~~consistent 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) 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.

(c) 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* ~~these~~ rules ~~or~~ *adopted under 28 U.S.C. §§ 2072 and 2075, and with local rules* ~~those~~ of the district in which they act.

(d) 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.

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 (b). 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, with subdivisions (c) and (d) being renumbered. 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). 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.

Subdivision (c). 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 (d). 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.

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.

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 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 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.

Appendix II

Draft rules of the Advisory Committee on Bankruptcy Rules

Exhibit A

Rule 9029. Local Bankruptcy Rules

Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Local rules made by a district court or by bankruptcy judges pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the court may regulate its practice in any manner ~~not inconsistent~~ consistent with the Official Forms ~~or~~ and with these rules or those of the district in which the court acts.

COMMITTEE NOTE

This rule is amended to prohibit local rules that are merely duplicative of, or a restatement of, the Federal Rules of Bankruptcy Procedure. This restriction is designed to prevent possible conflicting interpretations arising from minor

inconsistencies between the wording of national and local rules, and to lessen the risk that any significant local practices may be overlooked by inclusion in local rules that are unnecessarily long. The prohibitions contained in this rule apply to local rules that are inconsistent with, or duplicative of, the Federal Rules of Civil Procedure that are incorporated by reference or made applicable by these rules.

This rule is amended further to require that local rules be numbered or identified in conformity with any uniform numbering system that may be prescribed by the Judicial Conference. A uniform numbering or identification system would make it easier for the bar that is increasingly national in scope to locate a local rule that is applicable to a particular procedural issue.

The change in the phrase "not inconsistent with" to "consistent with" is stylistic and conforms to similar amendments to Rule 8018 and F.R.Civ.P. 83, and to the language in 28 U.S.C. § 2071.

Exhibit B

Rule 8018. Rules by Circuit Councils and District Courts

Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court, ~~not inconsistent~~ consistent with, but not duplicative of, the rules of this Part VIII. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals. Local rules made pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner ~~not inconsistent~~ consistent with, but not duplicative of, these rules.

COMMITTEE NOTE

This rule is amended to prohibit local rules that are merely duplicative of, or a restatement of, Part VIII of the Federal Rules of Bankruptcy Procedure. This rule is amended further to require that local rules be numbered or identified in conformity with any uniform numbering system that may be prescribed by the Judicial Conference. See the Committee Note to Rule 9029.

The change in the phrase "not inconsistent with" to "consistent with" is stylistic and conforms to similar amendments to Rule 9029 and F.R.Civ.P. 83, and to the language in 28 U.S.C. § 2071.

Exhibit C

Rule 9037. Technical Amendments.

The Judicial Conference of the United States may amend these rules to make them consistent in form and style with statutory changes and to correct errors in grammar, spelling, cross-references, typography, and other similar technical matters of form and style.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court or Congress with such changes. This delegation of authority will lessen the delay and administrative burdens that can encumber the rule-making process on minor non-controversial, non-substantive matters. For example, this authority would have been useful to make the change in the Rule 2005 that became necessary when the new title of "Magistrate Judge" replaced the title "Magistrate" as a result of a statutory change.

Appendix III

Draft rules of the Advisory Committee on Criminal Rules

RULES OF CRIMINAL PROCEDURE

Rule 57. Rules by District Courts

(a) IN GENERAL. Each district court by action of a majority of the district judges thereof may from time to time, after giving appropriate notice and an opportunity to comment, make and amend rules governing its practice that are not ~~inconsistent~~ consistent with, but not duplicative of, ~~these rules~~ the rules adopted under 28 U.S.C. § 2072 and § 2075. Any local rule must be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States. In all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner consistent with the rules adopted under 28 U.S.C. § 2072 and § 2075 and those of the district in which they act.

(b) EFFECTIVE DATE AND NOTICE. A local rule so adopted 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 court is located. Copies of the 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

RULES OF CRIMINAL PROCEDURE

and shall be made available to the public. ~~In all cases not provided by rule, the district judges and magistrate~~ judges ~~may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.~~

COMMITTEE NOTE

Rule 57 provides flexibility to district courts to promulgate local rules of practice and procedure. But experience has demonstrated several problems. The amendments are intended to address those problems. First, as originally written, Rule 57 only prohibited rules which were inconsistent with the rules of criminal procedure. No mention was made of local rules which might attempt to paraphrase or merely duplicate an existing rule of criminal procedure. Such duplication can confuse practitoners where it is not entirely clear whether the national or local rule should prevail. Duplication can also obscure any local variations or special requirements. The amendment now specifically prohibits such. The prohibition would also apply to local rules which merely attempt to paraphrase a rule of criminal procedure.

Second, the absence of any uniform numbering of local rules can become an unnecessary trap for unwary counsel who may be unaware of applicable local provisions. To remedy that problem, the amendments require that local rules conform in numbering with any uniform system of numbering devised by the Judicial Conference of the United States.

RULES OF CRIMINAL PROCEDURE

Rule 59. Effective Date; Technical Amendments

(a) These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

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

COMMITTEE NOTE

The amendment is intended to streamline the process of correcting clerical or other technical matters which appear from time to time in the Rules. For example, recent technical amendments were required in Rule 54 to reflect superseding statutes which affected the prosecution of cases in Guam and the Virgin Islands by indictment or information. Currently such changes are formally reviewed by the Supreme Court and Congress pursuant to the Rules Enabling Act.

ORAL PRESENTATION

FEDERAL RULES OF EVIDENCE

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code. The Judicial Conference of the United States may amend these rules or explanatory notes to conform to statutory changes, to correct errors in grammar, spelling, cross-references, or typography and to make other similar technical changes of form or style.

COMMITTEE NOTE

The amendment streamlines the process of correcting or changing clerical or technical matters which appear from time to time in the Rules. For example, a purely technical change was made recently to the statutory reference in Rule 1102 to reflect statutory changes in the statutes governing the procedure for promulgating rules of procedure and evidence. Currently such technical changes are formally reviewed by the Supreme Court and Congress pursuant to 28 U.S.C. § 2071, et. seq..

Appendix IV

Draft rules of the Advisory Committee on Appellate Rules

Rule 47. Rules ~~by~~ of a Courts of Appeals

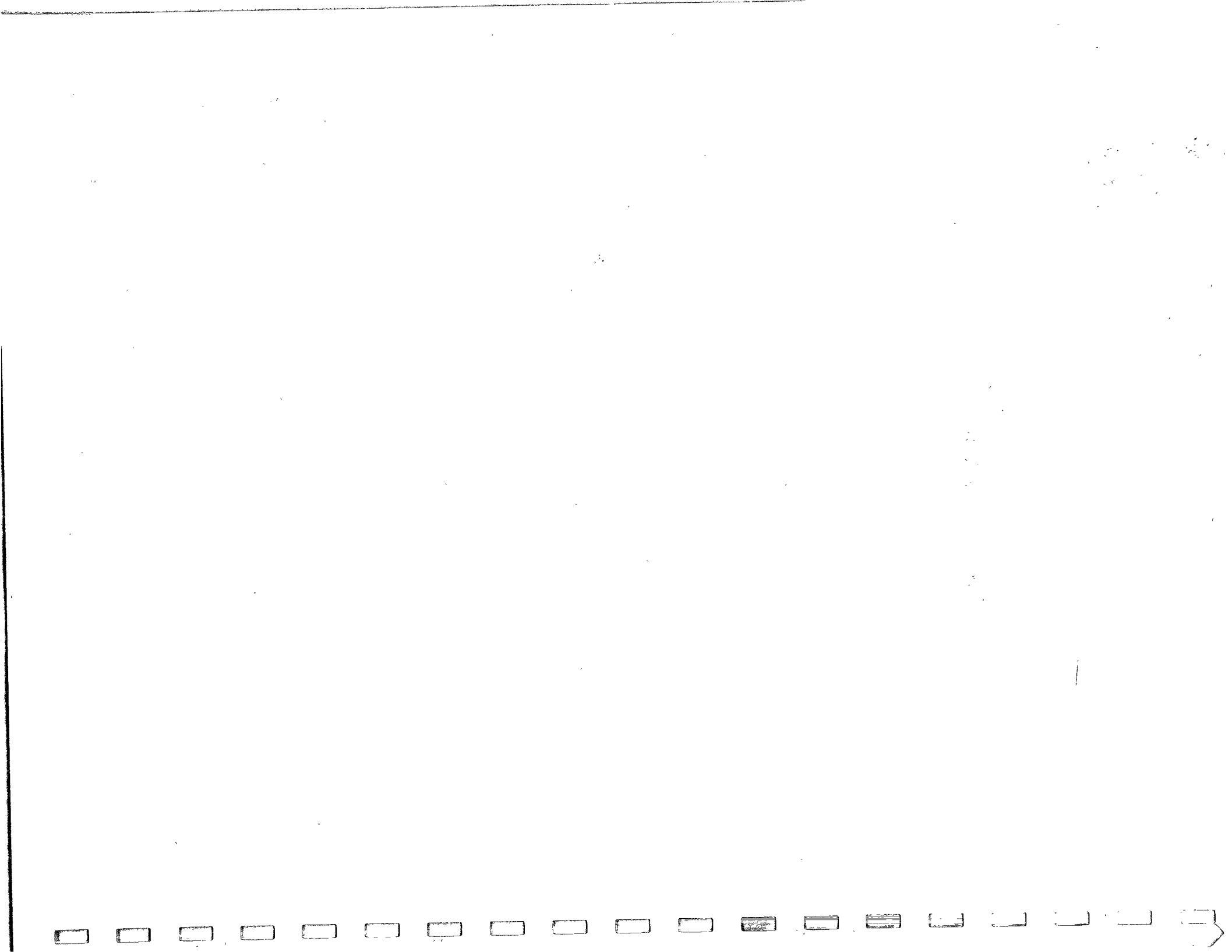
After giving appropriate public notice and opportunity for comment, ~~E~~ each court of appeals by action of a majority of the circuit judges in regular active service may ~~from time to time~~ make and amend rules governing its practice ~~not in~~ that are consistent with, but not duplicative of, ~~these~~ rules adopted under 28 U.S.C. § 2072. ~~In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.~~ All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure must be numbered to correspond to the related federal rule. ~~Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.~~ The clerk of each court of appeals shall send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. In all matters not provided for by rule, a court of appeals may regulate its practice in any manner consistent with rules adopted under 28 U.S.C. § 2072 and under this rule.

Rule 50. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors or inconsistencies in grammar, spelling, cross-references, or typography, to make nonsubstantive changes essential to conforming these rules with statutory amendments, or to make other similar technical changes.

Sec. VII C.
Study 12-92

ORAL PRESENTATION



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

Sct. VII Standing 12/92

Memorandum

TO: Robert E. Keeton, Members of the Standing Committee, Chairmen of the Advisory Committees, and Reporters

FROM: George C. Pratt, Chair
Subcommittee on Numerical and Substantive Integration

RE: Renumbering and Reintegration of the Federal Rules

DATE: November 25, 1992

Attached please find a copy of a Memorandum discussing possible renumbering and reintegration of the Federal Rules. This Memorandum was distributed to our Subcommittee October 29, 1992. The Subcommittee plans to meet to discuss this document while we are in Asheville. We intend to report on our discussion at the Standing Committee meeting.

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

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

MEMORANDUM

TO: Subcommittee on Numerical and Substantive Integration

FROM: Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

DATE: October 29, 1992

RE: Renumbering and Reintegration of the Federal Rules

Judge Pratt has asked that the attached Memorandum by distributed to you for your review and comment. We invite your reactions to this document.

As you may recall, the Standing Committee is interested in examining the feasibility and desirability of renumbering and reintegrating the Federal Rules at its December 1992 meeting in Asheville, North Carolina, with guidance from your Subcommittee. At the June 1992 Standing Committee meeting, we were instructed to prepare options on federal rule renumbering for the Subcommittee. The attached document consists of four options based in large part on suggestions and prior memoranda from both Judge Keeton and Judge Pratt. After consideration of the various options by the Subcommittee, we plan to submit its views and final recommendation to the Standing Committee comfortably in advance of the December 17 meeting.

Judge Pratt has requested that any comments about the renumbering and reintegration be directed to him by memorandum, with copies to the other members of the Subcommittee. After receiving these comments, he will communicate with the Subcommittee.

If you have any questions, please call either of us directly at (617) 552-4340 (Dan) or (617) 552-8851 (Mary).

cc: Hon. Robert E. Keeton
Joseph F. Spaniol, Jr.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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MEMORANDUM

TO: Subcommittee on Numerical and Substantive Integration

FROM: Daniel R. Coquillette, Reporter
Mary P. Squiers, Consultant

DATE: October 29, 1992

RE: Renumbering and Reintegration of the Federal Rules

INTRODUCTION

At the Standing Committee meeting of June 18, 1992, we were instructed to prepare options on federal rule renumbering for the Subcommittee. The objective is to discuss these options and to express a preference to the Standing Committee before the December 17 Committee meeting in Asheville, North Carolina. Judge Pratt has requested that you send your comments on these options to him, with copies to the rest of the Subcommittee. We will then draft a report expressing the Subcommittee's recommendations to the Standing Committee in November.

We have tried to keep in mind some of the purposes that can be achieved with a unified system. Most importantly, we want to be sure that all the rules, and cases interpreting rules, are as accessible as possible to practitioners and the bench, both through traditional methods and through the various computer services. In addition, we hope to highlight accidental differences among similar rules, with a view toward ultimately eliminating these differences.

Substantive integration could reduce the volume of rules. There is some needless repetition. There is also value in an internally consistent package of directives. Regulations will be more acceptable to all if they are better organized. Of course, this purpose can be partly achieved just by better numbering .

Several issues deserve attention at the outset. The first is whether the computer services will be able to accommodate changes proposed by the Subcommittee. We consulted with both Lexis and Westlaw. Representatives from both companies were understandably reluctant to make any firm commitment until they knew exactly what the Subcommittee would propose. They were, however, eager to comment and suggested that we submit to them the preferred Subcommittee Options. They were very appreciative of our contacting them at this initial stage.

Westlaw can make programmatic changes so that users can retrieve information, even if our system is not Westlaw's ideal choice. We asked about the use of periods, hyphens, and spacing. Interestingly, a space in the numbering could lead to problems for Westlaw. For example, simply adding an A in front of all civil rules, separated by a space, could be problematic. Rule 16 would become: A 16. This search request in the Westlaw system would retrieve any A adjacent to any 16, resulting in a huge number of items being retrieved, most of which are inapplicable. If a user wanted to only search for A 16 as a unit, she would have to use parentheses: "A 16". Westlaw explained that it could prompt the user with additional instructions at that point to tell her to insert the parentheses, but it is an extra, and potentially cumbersome step.

Lexis explained that it did not see any particular problems with hyphens, spaces, and periods and that, generally, the Lexis system could accommodate any numbering change.

Another issue concerns the work of the Local Rules Project. Many individual jurisdictions have now been persuaded to renumber their local rules in conformance with the suggestions of the Project and the Standing Committee. The Project has suggested, for example, that a local rule concerning pretrial practice that was originally numbering "27" be renumbered as "LR16.1," following the structure of the Federal Rules of Civil Procedure. If the Civil Rules change numbers, these local rules will also have to be changed. This may not present an insurmountable problem, but it does suggest an argument for retaining the structure of the existing rule numbering.

A third issue concerns exactly what rules will be subject to renumbering or substantive integration. There are many possibilities. For example, the Civil and Criminal Rules can be renumbered and integrated, without including the other Federal Rules. The Civil and Criminal Rules concern courtroom activities at the trial level undertaken by the majority of trial attorneys. This reasoning could also lead to incorporating the Rules of Evidence. One could justify exclusion of the Bankruptcy Rules. These are only used by bankruptcy practitioners and not by most attorneys in federal court. On the other hand, the Bankruptcy Rules rely to a great extent on the Federal Civil Rules, so there may be strong justification for integrating the Bankruptcy Rules with all of the other rules relating to trial in the federal system. One may want to include Appellate Rules in this integration, particularly if those are the only remaining unintegrated Rules. Alternatively, one may conclude that these Rules address a sufficiently different set of circumstances and that they should remain distinct.

A fourth issue concerns the on-going work of the Subcommittee on Style. This Subcommittee has been extensively involved in a stylistic rewriting of the existing Federal Rules of Civil Procedure. It is our understanding that they will soon move on to tackle the other rules in similar fashion. Additional changes to the Federal Rules, such as renumbering and reintegration, may meet with resistance if undertaken at the same time. On the other hand, the entire job could be completed simultaneously.

Lastly, one may want to consider integrating certain directives found in the United States Code that are applicable to trial and appellate practice. For example, there are numerous provisions in Title 28 that bear on a civil trial or appeal in the federal system. There are other related provisions in Title 18 (criminal), Title 21 (drugs), and Title 26 (IRS). On the other hand, such an endeavor may be perceived as too cumbersome. It also may be problematic that these provisions were enacted by Congress in a manner distinct from the rulemaking process so that integrating them may appear to be a usurpation of Congressional authority. If they are only being moved for ease in retrieval, perhaps that can be better achieved by the publishing companies when they compile texts for

practitioners, as is currently the case. With all these arrangements, it is important that the package does not become so large as to be burdensome to a practitioner. If a civil practitioner has to consult numerous pages of criminal, appellate, and bankruptcy directives just to move between two civil rules, then efficiency may be lost. The options outlined below do not involve any U.S. Code provisions.

OPTIONS

We are including four options that draw heavily on suggestions and prior memoranda from both Judge Keeton and Judge Pratt. In particular, we draw your attention to the memorandum of July 6, 1992 to this Subcommittee (Judge Pratt) and the memorandum of May 27, 1992 to the Standing Committee (Judge Keeton). If any wish additional copies of those memoranda, please simply call (617) 552-4340.

The four options vary from the least ambitious renumbering scheme ("Option 1, A Letter or Number Prefix") to the most ambitious ("Option 3, Throw Out the Existing Rules and Start Over"), with Option 4 added as a discussion point ("Do Nothing"). As a practical matter, we predict that most discussion will center on Option 1 ("A Letter or Number Prefix") and Option 2 ("Integration of Like Rules"). For this reason, we have provided Appendix A, which begins to explore in specific terms how Option 2 might work. In our opinion, both Option 1 and Option 2 are perfectly feasible, and Option 1 could be easily achieved.

Option 1. A Letter or Number Prefix. This option involves renumbering of the Rules only. There are at least four different ways to insert a prefix:

1) A letter prefix with no prefix for the Civil Rules. "A" could be inserted before Appellate Rules, "B" could be inserted before the Bankruptcy Rules, "C" could be inserted before the Criminal Rules, and "E" could be inserted before the Rules of Evidence. For example, Criminal Rule 29 becomes "C.29" or "C-29" or "C29".

2) A letter prefix with one for the Civil Rules. This is basically the same as 1), above, except that "C" could be inserted before the Civil Rules and "D" could be inserted before the Criminal Rules. For example, Criminal Rule 29 becomes "D.29" or "D-29" or "D29".

3) a) A number prefix with nothing for the Civil Rules. The numbers "1" through "4" could be inserted before each of the sets of Rules, with no prefix for the Civil Rules. For example, Criminal Rule 29 becomes "2.29" or "2-29" or "229".

b) A number prefix with nothing for the Civil Rules. The numbers "2" through "9" can be used in the following arrangement: "2" is the prefix for the Criminal Rules; "3" is the prefix for all Evidence Rules now numbered below 401; the Evidence Rules numbered 401 through 806 remain the same; Evidence Rules 901 through the end become the 800 series; "9" is the prefix for the Appellate Rules; and, the Bankruptcy Rules retain their present numbers.

4) A number prefix with one for the Civil Rules. The numbers "1" through "5" could be inserted before each of the sets of Rules. For example, Criminal Rule 29 becomes "3.29" or "3-29" or "329".

An advantage of these options is that the basic number of each of the Rules does not change. Thus, a practitioner does not have to relearn a new system of numbering. Another advantage is that, with 1) and 3), above, the numbering of the local rules of the district courts will not need to be changed. Another possible advantage is that a practitioner will not need lengthy instruction, or even additional instruction, to retrieve the material from a computer base.

An advantage of 3.b) is that if, in the future, rulemakers prefer having a set of provisions common to all rules, that can be accomplished without changing the other rules:

They can leave the Civil Rules as they are now and use the 101 through 200 series for the common provisions; or,

They can use the 1 through 100 series for the common provisions and the 101 through 200 series for the Civil Rules by adding a "1" prefix for the Civil Rules.

A disadvantage with 2) and 4) above, is that the numbering of the local district court rules would need to be altered. There is also no particular internal consistency expressed by any of these arrangements. As they only involve renumbering, the quantity of rules is not diminished. Further, minor but troublesome variations among like rules are not highlighted.

Option 2. Integration of Like Rules. This option involves integrating like rules. Similar rules can be integrated and then placed at the beginning of a list of rules. For example, Civil Rule 1, concerning the scope of the civil rules, could be integrated with Criminal Rule 1, concerning the scope of the criminal rules. This particular rule needs a title or designation or prefix to distinguish it from other rules. (*E.g.*, General Rule 1, Rule 1.1, Rule A.1) The other rules can be renumbered in one of at least two ways. First, the remaining rules can be completely renumbered, consistent with the integrated rules. (*E.g.*, Civil Rule 1, 2, 3, Rule 2.1, 2.2, 2.3, Rule B.1, B.2, B.3) Another suggestion is to use one of the possibilities outlined in Option 1, above, keeping the numbers as they are now and simply deleting those rules that are being integrated in the first portion of the rules. So, there would be no Rule 1 in the civil rules section and the civil rules would begin with Rule 2, concerning one form of action, for which there is no criminal equivalent.

A Boston College law student, Joseph Centeno, has been very helpful to us in preparing Appendix A which is attached to this Memorandum. Essentially, Appendix A is an initial screening of the Federal Rules to determine how much integration may be possible. Specifically, Mr. Centeno was charged with reviewing the Civil and Criminal Rules to determine what overlap existed in general subject matter. He was not asked to determine whether the rules that were similar in title, but which varied in substance, should be substantively integrated. As you can see, there are more than forty existing Civil Rules that have a potential cognate rule in the Criminal Rules. All of these rules are not exactly identical with each other, nor are they intended to be so in all cases. There may be a large number, however, that probably should be identical in language and function.

One advantage of this option is that it would organize those Federal Rules which are intended to govern all litigants in one place in the Federal Rules. This would

reduce the actual number of rules and the overall length of the rules. It would also provide some consistency and logic to the arrangement of the rules.

A disadvantage of this option is that it requires renumbering of most, if not all of the rules. All practitioners and judges would need to relearn a numbering system. In addition, a civil litigant would need to look in two places to determine if there were an applicable rule—in the portion of the rules that are applicable in both criminal and civil cases, and in the portion of the rules that are only for civil practice.

Option 3. Throw Out the Existing Rules and Start Over. The existing numbering system can be removed and the rules arranged and integrated with no attempt to preserve any of the existing format and structure. This is similar to Option 2 but it assumes that there is no interest in maintaining the existing rules in the same form as they currently exist. For example, there can be a section of rules applicable to all litigants as in Option 2. The remaining rules can become subparts under broad headings or rules. All rules relating to the commencement of an action, for instance, can be in part 2 of the rules and either numbered sequentially (regardless of whether they are criminal, civil, bankruptcy...), or organized under broad titles with subparts for different subcategories (*e.g.*, Rule 3: Motions; subsection a. Civil Motions; subsection b, Summary Judgment Motions; subsection c, Criminal Motions, subsection d, Post Trial Motions; subsection e, Form of Written Motions and Supporting Memoranda, subsection f, Motions Made at Trial).

One advantage to this system is that everyone would be starting fresh. Preconceived notions would be inapplicable. Also, rulemaking bodies have fifty years of experiences with the existing system and would have the opportunity to use what has been learned over the years in formulating the new structure. Another advantage is that the evidence rules can be easily integrated into the trial rules. The new system could promote one coherent and logical method and organization for all existing rules, including local rules.

The obvious disadvantage of this system is that it would meet political resistance. No one would know the numbers for the rules without new effort and training. In addition, cases decided under the old rules would be difficult to retrieve directly under the applicable new rules, a problem confronted by the change from the ABA Model Code of Professional Conduct to the ABA Model Rules.* Lastly, the rulemaking process is quite slow, and the benefit of this system may be outweighed by the administrative time and energy needed to complete the task.

Option 4. Do Nothing. This is the "if it isn't broken, don't fix it" position. Some believe that the current system, although imperfect, is not sufficiently flawed to require "fixing." Even if this option is adopted, the on-going work represented by Appendix A may be helpful to the rulemaking committees. It provides a useful starting point for the Advisory Committees to review systematically those rules that are so similar that perhaps they should be identical.

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* This is not an insurmountable problem. The ABA has developed parallel indexes and citation systems that link precedents under the old Code with the new Model Rules.

Appendix A

What follows is a brief comparison of the Federal Rules of Civil and Criminal Procedure. First, each of the Civil Rules is listed by number and title with a comment as to whether there is a cognate Criminal Rule. The second portion of this Appendix lists each of the Criminal Rules with a comment where there is an equivalent Civil Rule.

FEDERAL RULES OF CIVIL PROCEDURE

I. Scope of Rules

Rule 1: Scope of Rules
- Criminal Rule 1: Scope

Rule 2: One Form of Action
- No corresponding Criminal Rule.

II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3: Commencement of Action
- No corresponding criminal rule.

Rule 4: Process
- Criminal Rule 3: The Complaint
- Criminal Rule 4: Arrest Warrant or Summons upon Complaint
- Criminal Rule 6: The Grand Jury.
- Criminal Rule 9: Warrant or Summons Upon Indictment or Information.

Rule 5: Service and Filing of Pleadings and Other Papers
- Criminal Rule 49: Service and Filing of Papers

Rule 6: Time
- Criminal Rule 45: Time.

III. Pleadings and Motions

Rule 7: Pleadings Allowed; Form of Motions
- Criminal Rule 12: Pleadings and Motions Before Trial
- Criminal Rule 47: Motions

Rule 8: General Rules of Pleading
- Criminal Rule 12: Pleadings and Motions Before Trial

Rule 9: Pleading Special Matters
- No corresponding criminal rule.

Rule 10: Form of Pleadings
- No corresponding criminal rule.

Rule 11: Signing of Pleadings, Motions, and Other Papers; Sanctions
- No corresponding criminal rule.

Rule 12: Defenses and Objections
- No corresponding criminal rule.

Rule 13: Counterclaim and Cross-Claim
- No corresponding criminal rule.

Rule 14: Third-Party Practice
- No corresponding criminal rule.

Rule 15: Amended and Supplemental Pleadings
- No corresponding criminal rule.

Rule 16: Pretrial Conferences; Scheduling; Management
- Criminal Rule 17.1: Pretrial Conference

IV. Parties

Rule 17: Parties Plaintiff and Defendant; Capacity
- No corresponding criminal rule.

Rule 18: Joinder of Claims and Remedies
- No corresponding criminal rule.

Rule 19: Joinder of Persons Needed for Just Adjudication
- No corresponding criminal rule.

Rule 20: Permissive Joinder of Parties
- No corresponding criminal rule.

Rule 21: Misjoinder and Non-Joinder of Parties.
- No corresponding criminal rule.

Rule 22: Interpleader
- No corresponding criminal rule.

Rule 23: Class Actions
- No corresponding criminal rule.

Rule 23.1: Derivative Actions by Shareholders
- No corresponding criminal rule.

Rule 23.2: Actions Relating to Unincorporated Associations
- No corresponding criminal rule.

Rule 24: Intervention
- No corresponding criminal rule.

Rule 25: Substitution of Parties
- No corresponding criminal rule.

V. Depositions and Discovery

Rule 26: General Provisions Governing Discovery
- Criminal Rule 16: Discovery and Inspection.

Rule 27: Depositions Before Action or Pending Appeal
- Criminal Rule 15: Depositions

Rule 28: Persons Before Whom Depositions May be Taken
- Criminal Rules 15(a) and 15(d): Depositions.

Rule 29: Stipulations Regarding Discovery Procedure
- Criminal Rule 15(g): Depositions by Agreement not Precluded.

Rule 30: Depositions upon Oral Examination
- Criminal Rule 15(a): Depositions

Rule 31: Depositions upon Written Questions
- Criminal Rule 15: Depositions

Rule 32: Use of Depositions in Court Proceedings
- Criminal Rule 15(e): Depositions

Rule 33: Interrogatories to Parties
- No corresponding criminal rule.

Rule 34: Production of Documents and Things and Entry upon Land
- Criminal Rule 16(a)(1)(C): Government Documents and Tangibles.
- Criminal Rule 16(b)(1)(A): Defendant Documents and Tangibles.

Rule 35: Physical and Mental Examination of Persons
- Criminal Rule 16(b)(1)(B): Reports of Examinations and Tests.

Rule 36: Requests for Admission
- No corresponding criminal rule.

Rule 37: Failure to Make or Cooperate in Discovery: Sanctions
- Criminal Rule 16(c): Continuing Duty to Disclose
- Criminal Rule 16(d)(2): Failure To Comply With Requests

VI. Trials

Rule 38: Jury Trial of Right
- Criminal Rule 23(a): Trial by Jury

Rule 39: Trial by Jury or by the Court
- Criminal Rule 23: Trial by Jury or By the Court.

Rule 40: Assignment of Cases for Trial
- No corresponding criminal rule.

Rule 41: Dismissal of Actions
- Criminal Rule 48: Dismissal.

Rule 42: Consolidation; Separate Trials
- Criminal Rule 8: Joinder of Offenses and Defendants
- Criminal Rule 13: Trial Together of Indictments or Informations.

Rule 43: Taking of Testimony
- Criminal Rule 26: Taking of Testimony

Rule 44: Proof of Official Record
- Criminal Rule 27: Proof of Official Record

Rule 44.1: Determination of Foreign Law
- Criminal Rule 26.1: Determination of Foreign Law

Rule 45: Subpoena
- Criminal Rule 17: Subpoena

Rule 46: Exceptions Unnecessary
- Criminal Rule 51: Exceptions Unnecessary

Rule 47: Selection of Jurors
- Criminal Rule 24: Trial Jurors.

Rule 48: Number of Jurors - Participation in Verdict
- Criminal Rule 23(b): Jury of Less Than Twelve

Rule 49: Special Verdicts and Interrogatories
- No corresponding criminal rule.

Rule 50: Judgment as a Matter of Law in Actions Tried by Jury
- No corresponding criminal rule.

Rule 51: Instructions to Jury: Objection
- No corresponding criminal rule.

Rule 52: Findings by the Court; Judgment on Partial Findings
- No corresponding criminal rule.

Rule 53: Masters
- No corresponding criminal rule.

VII. Judgment

Rule 54: Judgments; Costs
- Rule 32(b) corresponds to Judgments, but there is no criminal rule for costs.

Rule 55: Default
- No corresponding criminal rule.

Rule 56: Summary Judgment
- Criminal Rule 29(a): Motion for Judgment of Acquittal.

Rule 57: Declaratory Judgments
- No corresponding criminal rule.

Rule 58: Entry of Judgment
- No corresponding criminal rule.

Rule 59: New Trials; Amendment of Judgments
- Criminal Rule 33: New Trials.
- Criminal Rule 32.1: Revocation or Modification of Probation or Supervised Release.
- Criminal Rule 35: Correction of Sentence.

Rule 60: Clerical Mistakes and Relief from Judgment or Order
- Criminal Rule 36: Clerical Mistakes

Rule 61: Harmless Error
- Criminal Rule 52: Harmless Error.

Rule 62: Stay of Proceedings to Enforce a Judgment
- No corresponding criminal rule.

Rule 63: Inability of Judge to Proceed
- Criminal Rule 25: Judge; Disability

VIII. Provisional and Final Remedies

Rule 64: Seizure of Person or Property
- No corresponding criminal rule.

Rule 65: Injunctions
- No corresponding criminal rule.

Rule 65.1: Security - Proceedings Against Sureties
- No corresponding criminal rule.

Rule 66: Receivers Appointed by Federal Courts
- No corresponding criminal rule.

Rule 67: Deposit in Court
- No corresponding criminal rule.

Rule 68: Offer of Judgment
- No corresponding criminal rule.

Rule 69: Execution
- No corresponding criminal rule.

Rule 70: Judgment for Specific Acts; Vesting Title
- No corresponding criminal rule.

Rule 71: Process in Behalf of an Against Persons Not Parties
- No corresponding criminal rule.

IX. Special Proceedings

Rule 71A: Condemnation of Property
- No corresponding criminal rule.

Rule 72: Magistrates; Pretrial Orders
- Rule 5 and 40(a) correspond in the criminal rules.

Rule 73: Magistrates; Trial by consent and Appeal Options
- No corresponding criminal rule.

Rule 74: Method of Appeal from Magistrate to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)
- No corresponding criminal rule.

Rule 75: Proceedings on Appeal from Magistrate to District Judge Under Rule 73(d)
- No corresponding criminal rule.

Rule 76: Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs
- No corresponding criminal rule.

X. District Courts and Clerks

Rule 77: District Courts and Clerks
- Criminal Rule 56: District Courts and Clerks

Rule 78: Motion Day
- Criminal Rule 12(c): Pleadings and Motions Before Trial.

Rule 79: Books and Records Kept by the Clerk and Entries Therein
- Criminal Rule 55: Records.

Rule 80: Stenographer; Stenographic Report or Transcript as Evidence
- No corresponding criminal rule.

XI. General Provisions

Rule 81: Applicability in General
- Criminal Rule 1: Scope.

Rule 82: Jurisdiction and Venue Unaffected
- Criminal Rule 57: Rules by District Courts.

Rule 83: Rules by District Courts
- Criminal Rule 57: Rules by District Courts.

Rule 84: Forms
- No corresponding criminal rule.

Rule 85: Title
- Criminal Rule 60: Title.

Rule 86: Effective Date
- Criminal Rule 59: Effective Date.

FEDERAL RULES OF CRIMINAL PROCEDURE

I. Scope, Purpose, and Construction

Rule 1: Scope
- Civil Rule 1: Scope
- Civil Rule 81: Applicability in General

Rule 2: Purpose and Construction

II. Preliminary Proceedings

Rule 3: The Complaint
- Civil Rule 4: Process

Rule 4: Arrest Warrant or Summons upon Complaint
Civil Rule 4: Process

Rule 5: Initial Appearance Before the Magistrate
- Civil Rule 72: Magistrates; Pretrial Orders

Rule 5.1: Preliminary Examination

III. Indictment and Information

Rule 6: The Grand Jury
- Civil Rule 4: Process

Rule 7: The Indictment and the Information

Rule 8: Joinder of Offenses and of Defendants
- Civil Rule 42: Consolidation; Separate Trials

Rule 9: Warrant or Summons Upon Indictment or Information
- Civil Rule 4: Process

IV. Arraignment and Preparation for Trial

Rule 10: Arraignment

Rule 11: Pleas

Rule 12: Pleadings and Motions Before Trial; Defenses and Objections
- Civil Rule 7: Pleadings Allowed; Form of Motions
- Civil Rule 8: General Rules of Pleading
- Civil Rule 78: Motion Day

Rule 12.1: Notice of Alibi

Rule 12.2: Notice of Insanity Defense or Expert Testimony of Defendant's Mental condition:

Rule 12.3: Notice of Defense Based Upon Public Authority

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

Sept. VIII standing 7/92

M E M O R A N D U M

TO: Members of the Standing Committee
Chairmen of the Advisory Committees

FROM: Robert E. Keeton

DATE: November 12, 1992

SUBJECT: Standing Committee: Philosophy of Task

Attached is a copy of Judge Stotler's letter of July 31, 1992 to me on the subject of this memorandum. I was immediately attracted to the idea of placing this on the agenda of our December meeting. I decided to defer sending the letter to you until a time near enough to the meeting that it would go on your front burner and you might be inspired to send something in writing to John Rabiej for distribution among us before we arrive for the meeting.

This item will be on our agenda at a time on Thursday or Friday (probably Thursday afternoon), when we might hope to have the maximum number of Advisory Committee Chairmen with us to participate in the discussion.

Robert E Keeton

Enclosure

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 798-2055

July 31, 1992

Judge Robert E. Keeton
U. S. District Court
Room 306, John W. McCormack
Post Office & Courthouse
Boston, Massachusetts 02109

Re: Standing Committee: Philosophy of Task

Dear Judge Keeton:

In light of June's three-day labor, I have reflected on the contribution the committee members are expected to make. Several times members referred to keeping their eye on the good of the order but then felt constrained to reflect the practices in their court or circuit.

Perhaps persons holding an established judicial philosophy already have a clear sense of mission as we traipse, sometimes broadly, sometimes nit-pickily, through the rules and, true to that philosophy, always know how their vote will be cast. As I commented to John Rabiej, this committee may be as close as I ever come to jury duty; and, as is reported from that experience, the deliberations are most troubling in the close calls.

Perhaps the December agenda will be too laden to engage in any discussion of the philosophy of this committee's task(s), but if time permits, I would like to see the members, or at least and especially you, Charlie Wright, and Joe Spaniol expound on how you view the following topics. (I would also enjoy hearing how the long term advisory committee chairs and their reporters also view the Standing Committee's role.)

1. Editing.

Presumably we all agree in the abstract that the standing committee meeting is not the place to re-write rules (or, not the place except when the disagreement can be fixed then and there).

On the other hand, these "amendments by consensus" leave me uncomfortable and unsure about what we have in fact voted for. Is there a cure, such as, longer meetings to allow for revision by staff or, with advanced technology, a way where we could view on an enlarged monitor the changes being proposed?

Along the same line, do the members view a rule proposed to be circulated for comment as requiring less care because it can be cleaned up later, or do they believe that greater care is required because the circulation itself sends an important message to the legal profession and must be well formulated in the first instance?

2. Deference to Advisory Committee.

My thought has been that these esteemed committees, their reporters, members, and commentators deserve a presumption of correctness. Don't they?

3. Constituency.

I note that the Committee Self-Evaluation report to Judge Gerry (cover letter of July 13) indicates "no" to the question about whether membership is "appropriately representative" and laments the absence of more practicing members of the bar. Do I have a duty to canvass the Article III district judges to ascertain their sentiments about the Rules and thus "represent" my constituency?

In keeping with the national craze (judicial) over Long Range Planning (LRP) (mind you, I leave in two days for the Ninth Circuit Judicial Conference to head the first day's program on --guess what -- LRP!), it occurs to me that my questions might more properly be directed to Professor Baker. Before you choose that course, however, I wish to call to mind the renewed interest among every minority group extant (and surely members of this committee constitute a distinct minority) in "story-telling." If there is worth in that endeavor from early civilization to now in the great places of learning, couldn't we indulge ourselves with some "oral history" about the philosophy, practices, and procedures of the Standing Committee? Maybe my letter all comes down to Judge Ellis' repeated references: "the memory of person runneth not to the contrary." (Say what?)

Please understand, I commit this interesting topic to your sound discretion and if we never hear a word from you about the philosophy and history of this outfit, then so be it!

Best regards.

Sincerely,

ALICEMARIE H. STOTLER
U. S. District Judge

cc: Professor Wright
Mr. Spaniol

Section IX
standing 12/92

REPORT

OF THE

ADVISORY COMMITTEE

ON

BANKRUPTCY RULES

TO THE

COMMITTEE

ON

RULES OF PRACTICE AND PROCEDURE

Asheville, North Carolina
December 17 - 19, 1992

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

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
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SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

TO: Hon. Robert E. Keeton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Edward Leavy, Chair
Advisory Committee on Bankruptcy Rules

RE: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

DATE: November 16, 1992

On behalf of the Advisory Committee on Bankruptcy Rules, I have the honor to submit proposals to amend Rules 8002(b) and 8006 of the Federal Rules of Bankruptcy Procedure.

(1) Rule 8002. Time for filing Notice of Appeal

At its meeting in September of this year, the Advisory Committee adopted a proposal to amend Bankruptcy Rule 8002(b) to conform to the proposed amendments to F.R.App.P. 4(a)(4) in two respects: (1) to add a motion for relief from a judgment or order pursuant to F.R.Civ.P. 60 (made applicable by Bankruptcy Rule 9024) to the list of postjudgment motions that toll the time for filing a notice of appeal, and (2) to provide that a notice of appeal filed prior to disposition of a postjudgment motion does not become a nullity, but is suspended until such disposition.

The proposed amendments to Bankruptcy Rule 8002(b) differ from the proposed amendments to Appellate Rule 4(a)(4) in one respect that is worth noting. Instead of requiring that the motion for relief from a judgment under Rule 9024 be "served" within 10 days after entry of the judgment in order to toll the appeal time, the proposed amendment to Bankruptcy Rule 8002(b) requires that it be "filed" within that 10-day period. The reason for recommending this difference is that a requirement that the motion be filed will enable any party to determine with certainty, by looking at the docket on the morning of the eleventh day, whether such a motion is pending. This certainty is more important in bankruptcy cases, where there is only a 10-day appeal period and parties often rely on finality of orders

before closing transactions, than it is in district court civil actions where the time to appeal is 30 days.

(2) Rule 8006. Record and Issues on Appeal.

The proposed amendment to Rule 8006 is related to the proposed amendment to Rule 8002(b). The purpose of the amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made that suspends the time for filing a notice of appeal under Rule 8002(b).

Publication for Comment.

The Advisory Committee requests that the proposed amendments to Rules 8002(b) and 8006 be circulated to the bench and bar and that views and comments be solicited. However, the Advisory Committee recommends that the publication period be limited so that the deadline for submitting comments is no later than April 15, 1993, and that there be no public hearings. The Advisory Committee believes that a shortened comment period is necessary to permit it to consider comments in time to make a final recommendation to the Standing Committee in June 1993. If the Standing Committee is unable to act on these rules at its June 1993 meeting, it will delay the effectiveness of any amendments until late 1995.

The Advisory Committee is concerned that, if the proposed amendments to Appellate Rules 4(a)(4) and 6 are promulgated by the Supreme Court and become effective on December 1, 1993, a delay in the effectiveness of the proposed amendments to Bankruptcy Rule 8002(b) may, after December 1, 1993, create a trap for practitioners who become familiar with Appellate Rules 4(a)(4) and 6 (as amended). In essence, the rules applicable to appeals to the court of appeals will provide that a postjudgment motion merely suspends a filed notice of appeal so that there is no need to file a new one after the motion is decided, but the rule applicable to appeals from the bankruptcy court will still provide that the filed notice of appeal becomes a nullity so that a new one must be filed after disposition of the postjudgment motion.

The Advisory Committee believes that a shortened comment period without public hearings is justified because only two rules are being amended and the proposed amendments to Rule 8002(b) conform substantially to proposed amendments to the Appellate Rules that have been approved by the Standing Committee and the Judicial Conference earlier this year. In addition, the Committee's recommendation regarding these rules is unanimous and it is highly unlikely that the proposed amendments will be controversial.

Copies of the relevant rules showing the proposed amendments and Advisory Committee Notes are enclosed.

Rule 8002. Time For Filing Notice of Appeal

* * * * *

(b) EFFECT OF MOTION ON TIME FOR APPEAL. If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion: ~~is filed by any party:~~

(1) ~~under Rule 7052(b)~~ to amend or make additional findings of fact under Rule 7052, whether or not ~~an alteration of~~ granting the motion would alter the judgment ~~would be required if the motion is granted~~;

(2) ~~under Rule 9023~~ to alter or amend the judgment under Rule 9023; ~~or~~

(3) ~~under Rule 9023~~ for a new trial under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed within 10 days after the entry of judgment.~~, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed.~~

A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule

8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * * * *

COMMITTEE NOTE

These amendments are intended to conform to the 1993 amendments to F.R.App.P. 4(a)(4) and 6(b)(2)(i).

This rule as amended provides that a notice of appeal filed before the disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel.

Because a notice of appeal will ripen into an effective appeal upon disposition of a postjudgment motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. The appeal may be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a postjudgment motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the rule does not require an additional notice of appeal in that situation.

The amendment provides that a notice of appeal filed before the disposition of a postjudgement tolling motion is sufficient to bring the judgment, order, or decree specified in the original notice of appeal to the district court or bankruptcy appellate panel. If the judgment is altered upon disposition of a postjudgement motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an

amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Subdivision (b) is also amended to include, among motions that extend the time for filing a notice of appeal, a motion under Rule 9024 that is filed within 10 days after entry of judgment. The addition of this motion conforms to a similar amendment to F.R.App.R. 4(a)(4) made in 1993, except that a Rule 9024 motion does not toll the time to appeal unless it is filed within the ten-day period. This amendment eliminates the difficulty of determining whether a postjudgment motion made within 10 days after entry of the judgment is a Rule 9023 motion, which tolls the time for filing an appeal, or a Rule 9024 motion, which historically has not tolled the time.

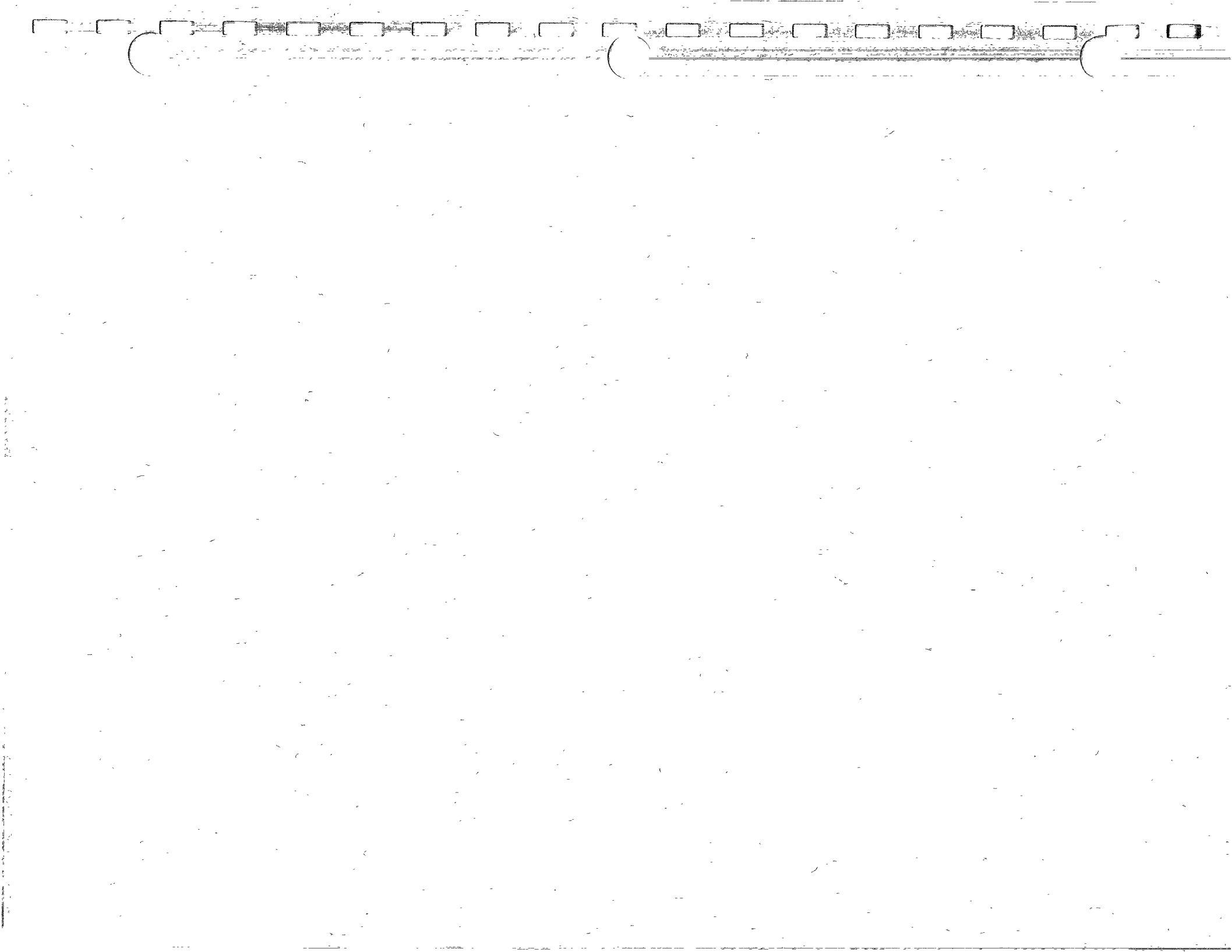
Rule 8006. Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided in Rule 8001(a), ~~or~~ entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the statement of the cross appellant, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the expense of the party. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall immediately after filing the

designation deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

COMMITTEE NOTE

This amendment is made together with the amendment to Rule 8002(b) which provides, in essence, that certain specified postjudgment motions have the effect of suspending a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 8002(b). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered.



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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BANKRUPTCY RULES

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

RE: Proposed Amendments to the Official Bankruptcy Forms

DATE: November 20, 1992

On behalf of the Advisory Committee on Bankruptcy Rules, I submit proposals to amend several of the Official Bankruptcy Forms.

The proposed amendments consist of conforming amendments required by a recent statutory enactment, clarifications of instructions, and changes designed to facilitate the administration of cases. In view of the technical and conforming nature of the proposed amendments to the forms, the Advisory Committee recommends that they be made without publication for comment by the bench and bar.

The complex format of the forms makes it impractical to show deletions and additions in the manner customarily used when presenting proposed amendments to the rules. Providing the attached hand-marked copies of the present forms showing the proposed changes, however, seems to be an effective way to indicate to the Standing Committee the proposed amendments.

In addition to amending the title page of the Official Bankruptcy Forms for the purpose of conforming the listing of Form No. 9 to the headings used on Forms 9A - 9I, the proposed amendments include the following:

(1) Form 1 (Voluntary Petition). This form is amended to require that the debtor not represented by an attorney provide the debtor's telephone number so that court personnel, the

trustee, other parties in the case, and their attorneys can contact the debtor concerning matters in the case.

(2) Form 4 (List of Creditors Holding 20 Largest Unsecured Claims). This form is amended to delete reference to the specific subsection of § 101 of the Code in connection with the definition of the term "insider." Section 101 is the general definition section of the Code and is amended from time to time to add definitions. This amendment to the form will avoid the necessity of further amendments to the form whenever § 101 is amended in the future.

(3) Form 6E (Schedule E -- Creditors Holding Unsecured Priority Claims). This form is amended to conform to the recent statutory amendment to § 507(a) that added a new priority for claims arising from a commitment to maintain the capital of an insured depository institution.

(4) Form 7 (Statement of Financial Affairs). Administrative proceedings have been added to the types of legal actions to be disclosed in Question 4. In addition, the second paragraph of the instructions is amended for clarification.

(5) The title page to Form 9 (Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates). The title page to Form 9 is amended to conform to the headings used on the Forms 9A - 9E. In addition, the title page to Form 9 is amended to add references to two new alternative versions of Form 9E and Form 9F.

(6) Form 9E(Alt.) (Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Individual or Joint Debtor Case)), and Form 9F(Alt.) (Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates (Corporation/Partnership Case). These new alternative versions of Form 9E and 9F have been added for use in courts that, prior to the time that the notice is mailed to creditors, fix the time for filing claims in a chapter 11 case. The alternative versions provide a box labeled "Filing Claims" so that the deadline for filing claims may be indicated.

(7) Form 10 (Proof of Claim). This form has been amended to conform to the recent statutory amendment to § 507(a) that added a new priority for claims based on a commitment to maintain the capital of an insured depository institution, and to clarify that only prepetition arrearages and charges are to be included in the amount of the claim.

Copies of the relevant Official Bankruptcy Forms showing the proposed amendments, and the proposed Advisory Committee Notes, are attached.

OFFICIAL BANKRUPTCY FORMS

1. Voluntary Petition
2. Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership
3. Application and Order to Pay Filing Fee in Installments
4. List of Creditors Holding 20 Largest Unsecured Claims
5. Involuntary Petition
6. Schedules
7. Statement of Financial Affairs
8. Chapter 7 Individual Debtor's Statement of Intention
9. Notice of ~~Filing~~ Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates
10. Proof of Claim

11A. General Power of Attorney

11B. Special Power of Attorney

12. Order and Notice for Hearing on Disclosure Statement
13. Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof
14. Ballot for Accepting or Rejecting Plan
15. Order Confirming Plan

16A. Caption

16B. Caption (Short Title)

16C. Caption of Adversary Proceeding

17. Notice of Appeal to a District Court or Bankruptcy Appellate Panel from a Judgment or Other Final Order of a Bankruptcy Court.
18. Discharge of Debtor

Official Forms

[NOTE: These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 9009.]

Title Page

COMMITTEE NOTE

The list of Official Bankruptcy Forms has been amended to conform the title of Form 9 to the headings used on Forms 9A -9I.

FORM B1
(6/90)

FORM 1. VOLUNTARY PETITION

United States Bankruptcy Court

District of

VOLUNTARY PETITION

IN RE (Name of debtor—If individual, enter: Last, First, Middle)	NAME OF JOINT DEBTOR (Spouse) (Last, First, Middle)
ALL OTHER NAMES used by the debtor in the last 6 years (include married, maiden, and trade names.)	ALL OTHER NAMES used by the joint debtor in the last 6 years (include married, maiden, and trade names.)
SOC. SEC./TAX I.D. NO. (If more than one, state all.)	SOC. SEC./TAX I.D. NO. (If more than one, state all.)
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code)	STREET ADDRESS OF JOINT DEBTOR (No. and street, city, state, and zip code)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS
MAILING ADDRESS OF DEBTOR (If different from street address)	MAILING ADDRESS OF JOINT DEBTOR (If different from street address)
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from addresses listed above)	VENUE (Check one box) ☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. ☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

INFORMATION REGARDING DEBTOR (Check applicable boxes)

TYPE OF DEBTOR
- ☐ Individual
- ☐ Joint (Husband & Wife)
- ☐ Partnership
- ☐ Other: _____
- ☐ Corporation Publicly Held
- ☐ Corporation Not Publicly Held
- ☐ Municipality

NATURE OF DEBT
- ☐ Non-Business/Consumer
- ☐ Business — Complete A & B below

A. TYPE OF BUSINESS (Check one box)
- ☐ Farming
- ☐ Professional
- ☐ Retail/Wholesale
- ☐ Railroad
- ☐ Transportation
- ☐ Manufacturing/Mining
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Construction
- ☐ Real Estate
- ☐ Other Business

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED (Check one box)
- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Sec. 304—Case Ancillary to Foreign Proceeding

FILING FEE (Check one box)
- ☐ Filing fee attached
- ☐ Filing fee to be paid in installments. (Applicable to individuals only.) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b); see Official Form No. 3.

NAME AND ADDRESS OF LAW FIRM OR ATTORNEY

Telephone No.

NAME(S) OF ATTORNEY(S) DESIGNATED TO REPRESENT THE DEBTOR (Print or Type Names)

- ☐ Debtor is not represented by an attorney. Telephone No. of Debtor not represented by an attorney ( )

STATISTICAL/ADMINISTRATIVE INFORMATION (28 U.S.C. § 604) (Estimates only) (Check applicable boxes)

THIS SPACE FOR COURT USE ONLY

- ☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

ESTIMATED NUMBER OF CREDITORS

1-15	16-49	50-99	100-199	200-999	1000-over
☐	☐	☐	☐	☐	☐

ESTIMATED ASSETS (In thousands of dollars)

Under $0	$0-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

ESTIMATED LIABILITIES (In thousands of dollars)

Under $0	$0-99	100-499	500-999	1000-9999	10,000-99,000	100,000-over
☐	☐	☐	☐	☐	☐	☐

EST. NO. OF EMPLOYEES—CH. 11 & 12 ONLY

0	1-19	20-99	100-999	1000-over
☐	☐	☐	☐	☐

EST. NO. OF EQUITY SECURITY HOLDERS—CH. 11 & 12 ONLY

0	1-19	20-99	100-499	500-Over
☐	☐	☐	☐	☐

Name of Debtor _____

Case No. _____ (Court use only)

FILING OF PLAN

For Chapter 9, 11, 12 and 13 cases only. Check appropriate box.

☐ A copy of debtor's proposed plan dated _____ is attached.

☐ Debtor intends to file a plan within the time allowed by statute, rule, or order of the court.

PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS (If more than one, attach additional sheet)

Location Where Filed	Case Number	Date Filed

PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THIS DEBTOR (If more than one, attach additional sheet.)

Name of Debtor	Case Number	Date
Relationship	**District**	**Judge**

REQUEST FOR RELIEF

Debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

SIGNATURES

ATTORNEY

X _____ _____

Signature Date

INDIVIDUAL/JOINT DEBTOR(S)

I declare under penalty of perjury that the information provided in this petition is true and correct.

X _____

Signature of Debtor

_____

Date

X _____

Signature of Joint Debtor

_____

Date

CORPORATE OR PARTNERSHIP DEBTOR

I declare under penalty of perjury that the information provided in this petition is true and correct, and that the filing of this petition on behalf of the debtor has been authorized.

X _____

Signature of Authorized Individual

_____

Print or Type Name of Authorized Individual

_____

Title of Individual Authorized by Debtor to File this Petition

_____

Date

EXHIBIT "A" (To be completed if debtor is a corporation requesting relief under chapter 11.)

☐ Exhibit "A" is attached and made a part of this petition.

TO BE COMPLETED BY INDIVIDUAL CHAPTER 7 DEBTOR WITH PRIMARILY CONSUMER DEBTS (See P.L. 98-353 § 322)

I am aware that I may proceed under chapter 7, 11, or 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7 of such title.

If I am represented by an attorney, exhibit "B" has been completed.

X _____ _____

Signature of Debtor Date

X _____ _____

Signature of Joint Debtor Date

EXHIBIT "B" (To be completed by attorney for individual chapter 7 debtor(s) with primarily consumer debts.)

I, the attorney for the debtor(s) named in the foregoing petition, declare that I have informed the debtor(s) that (he, she, or they) may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____ _____

Signature of Attorney Date

COMMITTEE NOTE

The form has been amended to require a debtor not represented by an attorney to provide a telephone number so that court personnel, the trustee, other parties in the case, and their attorneys can contact the debtor concerning matters in the case.

Form B4
6/90

Form 4. LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

[Caption as in Form 16B]

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

Following is the list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P. 1007(d) for filing in this chapter 11 [or chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. § 101(30), or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims.

(1)	(2)	(3)	(4)	(5)
Name of creditor and complete mailing address including zip code	*Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	*Nature of claim (trade debt, bank loan, government contract, etc.)*	*Indicate if claim is contingent, unliquidated, disputed or subject to setoff*	*Amount of claim [if secured also state value of security]*

Date: _____

_____
Debtor

[Declaration as in Form 2]

COMMITTEE NOTE

The form has been amended to delete reference to the specific subsection of 11 U.S.C. § 101 in connection with the definition of the term "insider." Section 101 of the Bankruptcy Code contains numerous definitions, and statutory amendments from time to time have resulted in the renumbering of many of its subsections. The more general reference will avoid the necessity to amend the form further in the event of future amendments to § 101.

FORM B6E
(6/90)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE E—CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H—Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ Extensions of credit in an involuntary case

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ Wages, salaries, and commissions

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees, up to a maximum of $2000 per employee, earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ Contributions to employee benefit plans

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ Certain farmers and fishermen

Claims of certain farmers and fishermen, up to a maximum of $2000 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ Deposits by individuals

Claims of individuals up to a maximum of $900 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

☐ Taxes and Certain Other Debts Owed to Governmental Units

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(7).

☐ Commitments To Maintain the Capital of an Insured Depository Institution

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to _____ continuation sheets attached maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(8).

COMMITTEE NOTE

Schedule 6E (Creditors Holding Unsecured Priority Claims) has been amended to conform to the statutory amendment that added subsection (a)(8) to § 507 of the Bankruptcy Code. Pub. L. No. 101-647 (Crime Control Act of 1990). The Code amendment created a new priority for claims based on certain commitments to maintain the capital of an insured depository institution.

FORM 7
(6/90)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In Re: _____ Case No. _____
(Name) (If Known)

Debtor

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 15 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 16 - 21. ~~Each question must be answered.~~ If the answer to any question is "None," or the question is not applicable, mark the box labeled "None." If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the two years immediately preceding the filing of the this bankruptcy case, any of the following: an officer, director, managing executive, or person in control of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any person in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101(30).

---

1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE (If more than one)

2. Income other than from employment or operation of business

None ☐ State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the two years immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

3. Payments to creditors

None ☐ a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within 90 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐ b. List all payments made within one year immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

4. Suits, executions, garnishments and attachments and administrative proceedings

None ☐ a. List all suits to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.) and administrative proceedings

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT AND LOCATION (OR AGENCY)	STATUS OR DISPOSITION

THERE ARE NO CHANGES TO THE

REMAINING 8 PAGES OF THIS FORM

COMMITTEE NOTE

The form has been amended in two ways. In the second paragraph of the instructions, the third sentence has been deleted to clarify that only a debtor that is or has been in business as defined in the form should answer Questions 16 - 21. In addition, administrative proceedings have been added to the types of legal actions to be disclosed in Question 4.a.

Form B9
6/90

Form 9. NOTICE OF ~~FILING~~ COMMENCEMENT OF CASE UNDER THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES

9A.....Chapter 7, Individual/Joint, No-Asset Case

9B.....Chapter 7, Corporation/Partnership, No-Asset Case

9C.....Chapter 7, Individual/Joint, Asset Case

9D.....Chapter 7, Corporation/Partnership, Asset

9E.....Chapter 11, Individual/Joint Case

9F.....Chapter 11, Corporation/Partnership Case

9G.....Chapter 12, Individual/Joint Case

9H.....Chapter 12, Corporation/Partnership Case

9I.....Chapter 13, Individual/Joint Case

← 9E (Alt.)... Chaptee 11, Individual/Joint Cas

9F (Alt.)... Chaptee 11, Coppeation/Paetnership Case

FORM B9E(Alt.) United States Bankruptcy Court
District of
Case Numbers:

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor Case)

In re (Name of Debtor)	Address of Debtor Date Filed (or Converted)	Soc. Sec./Tax ID Nos.
Addressees:	Address of the Clerk of the Bankruptcy Court	
Name and Address of Attorney for Debtor Telephone Number	Name and Address of Trustee Telephone Number	

This is a converted case originally filed under chapter ___ on _____

FILING CLAIMS

NEW BOX

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE OF DEBTS
_____ is the Deadline to File a Complaint Objecting to the Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts.

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under § 1141(d)(3)(C) of the Bankruptcy Code, timely action must be taken in the bankruptcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedules of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____
Clerk of the Bankruptcy Court

_____
Date

FORM B9F (NH) United States Bankruptcy Court District of Case Number:	NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES (Corporation/Partnership Case)	
In re (Name of Debtor)	Address of Debtor Date Filed or Converted	Soc. Sec./Tax ID Nos.
Addressees:	Address of the Clerk of the Bankruptcy Court	
[ ] Corporation [ ] Partnership		
Name and Address of Attorney for Debtor Telephone Number	Name and Address of Trustee Telephone Number	
This is a converted case originally filed under chapter ___ on ___		

FILING CLAIMS

NEW Box

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5), is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

(Close Space)

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ Clerk of the Bankruptcy Court _____ Date

COMMITTEE NOTE

The title of Form 9 has been amended to conform to the headings used on Forms 9A - 9I. Alternate versions of Form 9E and Form 9F have been added for use in chapter 11 cases by those courts that, prior to the time that the notice is mailed to creditors, fix the time for filing claims. When a creditor receives the alternate form in a case, the box labeled "Filing Claims" will contain information about the time within which proofs of claim may be filed as follows: "Dead line for filing a claim: ___(date)___." If no deadline is set in a particular case, either the court will use Form 9E or Form 9F, as appropriate, or the alternate form will be used with the following sentence appearing in the box labeled "Filing Claims": "When the court sets a deadline for filing claims, creditors will be notified."

FORM B10
(6/90)

FORM 10. PROOF OF CLAIM

United States Bankruptcy Court _____ District of _____	PROOF OF CLAIM
In re (Name of Debtor)	Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C § 503.

Name of Creditor *(The person or other entity to whom the debtor owes money or property)*	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
Name and Address Where Notices Should be Sent Telephone No.	☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if this address differs from the address on the envelope sent to you by the court.
ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated: _____

THIS SPACE IS FOR COURT USE ONLY

1. BASIS FOR CLAIM

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other (Describe briefly)
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensations (Fill out below)

  Your social security number _____

  Unpaid compensation for services performed from _____ (date) to _____ (date)

2. DATE DEBT WAS INCURRED

3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another. CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ **SECURED CLAIM** $ _____

Attach evidence of perfection of security interest

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

at time case filed

Amount of arrearage and other charges included in secured claim above, if any $ _____

☐ **UNSECURED NONPRIORITY CLAIM** $ _____

A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ **UNSECURED PRIORITY CLAIM** $ _____

Specify the priority of the claim.

- ☐ Wages, salaries, or commissions (up to $ 2000), earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier) - 11 U.S.C. § 507(a)(3)
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4)
- ☐ Up to $ 900 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(5)
- ☐ Taxes or penalties of governmental units - 11 U.S.C. § 507(a)(7)
- ☐ Other - Specify applicable paragraph of 11 U.S.C. §507(a) ~~(Describe briefly)~~

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: $ _____ (Unsecured) $ _____ (Secured) $ _____ (Priority) $ _____ (Total)

☐ Check this box if claim includes ~~prepetition~~ charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)

THIS SPACE IS FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

This form has been amended to accommodate inclusion of the priority afforded in § 507(a)(8) of the Code, which was added by Pub. L. No. 101-647 (Crime Control Act of 1990), and to avoid the necessity of further amendment to the form if other priorities are added to § 507(a) in the future. In addition, sections 4 and 5 of the form have been amended to clarify that only prepetition arrearages and charges are to be included in the amount of the claim.

Section X Standing Cmte

REPORT

OF THE

ADVISORY COMMITTEE

ON

CRIMINAL RULES

TO THE

COMMITTEE

ON

RULES OF PRACTICE AND PROCEDURE

Asheville, North Carolina
December 17 - 19, 1992

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

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: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure and Rules of Evidence

DATE: November 15, 1992

I. INTRODUCTION

At its October 1992 meeting, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed amendments to Rules 32 and 40 and Federal Rule of Evidence 412. The Advisory Committee recommends that the Standing Committee approve the proposed amendments for circulation to the bench and bar for public comment. This report briefly addresses the proposed amendments and the recommendations to the Standing Committee. The minutes of the Committee's meeting and copies of the proposed amendments and the accompanying Committee Notes are attached.

II. RULES PENDING COMMENT BY THE BENCH AND BAR

At its June 1992 meeting, the Standing Committee approved amendments to two rules, Rule 16(a)(1)(A) governing disclosure of statements by organizational defendants, and Rule 29(b), concerning delayed rulings on judgment of acquittal motions. Publication of these rules was delayed pending the move of the Rules Committee Support Office into its new offices this Fall.

III. PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

The Advisory Committee recommends that the following amendments be approved by the Standing Committee. The proposed amendments are attached.

A. **Rule 32. Sentence and Judgment.** The Committee has proposed that Rule 32 be amended in its entirety. As noted in the introductory paragraph of the Committee's Note accompanying the proposed amendment, the Committee intended to accomplish two primary objectives. First, the amended rule incorporates elements of the "Model Local Rule for Guideline Sentencing" which was proposed in 1987 by the Judicial Conference's Committee on Probation Administration. That model local rule focuses on the preparation of the presentence report as a method of identifying and narrowing the sentencing issues. The second objective was to reorganize the rule, which over the years had become a hodge podge of provisions. As rewritten, the rule should more closely approximate the sequential order of sentencing procedures. Much of the current rule remains in the amended version.

B. **Rule 40. Committment to Another District.** The Committee perceived a potential gap in a magistrate's authority to set conditions of release for a probationer or supervised releasee arrested in a district other that the district having jurisdiction. After reviewing Rules 32.1 (Revocation or Modification of Probation or Supervised Release), Rule 46 (Release From Custody), and Rule 40 (Committment to Another District), the Committee adopted a suggested change to Rule 40. The proposed amendment to Rule 40(d) should now make it clear that a magistrate considering the case of a probationer or supervised releasee under Rule 40(d) should have the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1).

IV. PROPOSED AMENDMENTS TO THE RULES OF EVIDENCE

The Committee considered proposed amendments to Federal Rules of Evidence 412 and 804 and recommends that the Standing Committee approve Federal Rule of Evidence 412 and publish it for public comment on an expedited basis.

A. **Rule 412. Victim's Past Sexual Behavior or Predisposition.** The Advisory Committee, at the suggestion of Judge Keeton, considered proposed amendments to Federal Rule of Evidence 412. Given Congress' high interest in the topic of violence against women, the Committee believed that it would be appropriate to propose changes to Rule 412

through the Rules Enabling Act procedures and publish the proposed amendment for public comment. The proposed change would extend the rule to all civil and criminal cases. Although the amendment retains the general rule that evidence of a person's sexual past is not admissible, it also recognizes several exceptions which generally mirror the current rule. Copies of the proposed amendment have been sent to both the Appellate and Civil Rules Committees.

B. **Rule 804. Hearsay Exceptions; Declarant Unavailable.** At its July 1992 meeting the Standing Committee considered the Advisory Committee's proposed changes to Federal Rule of Evidence 804. The Standing Committee referred the rule back to the Advisory Committee for further consideration. At its October meeting, the Committee reviewed the proposed amendments and the Standing Committee's suggestions and decided that in view of the pending formation of an Evidence Advisory Committee to defer any further action on Rule 804.

Attach.

[Rule 32 is deleted and replaced with the following]

Rule 32. Sentence and Judgment

(a) IN GENERAL; TIME FOR SENTENCING. When a presentence investigation and report is ordered pursuant to subdivision (b), sentence must be imposed by the end of 70 days from the finding of guilt unless the court either advances or continues the sentencing hearing for good cause.

(b) PRESENTENCE INVESTIGATION.

(1) *When Made*. Unless the court finds that there is sufficient information in the record to enable the meaningful exercise of sentencing authority under 18 U.S.C. 3553, and the court explains this finding on the record, the court shall direct the probation officer to make a presentence investigation and report to the court before the imposition of sentence.

(2) Presence of Counsel. Upon request, the defendant's counsel is entitled to be present at any interview of the defendant by the probation officer in the course of the presentence investigation.

(3) *Submission to the Court*. Except with the written consent of the defendant, the report must not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(4) *Report.* The report of the presentence investigation must contain--

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. 994(a), that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. 994(a)(2);

(D) information containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) any other information required by the court.

(5) *Disclosure and Objections.*

(A) Not less than 35 days before the sentencing hearing, unless this minimum period is waived by the defendant, the probation officer shall provide the defendant, the defendant's counsel and the attorney for the Government, with a copy of the report of the presentence investigation, including the information required by subdivision (b)(4) and any report and recommendation resulting from a study ordered by the court under 18 U.S.C. 3552(b), but not including any diagnostic opinions which, if

disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. In addition, the court may, by local rule or in individual cases, direct the probation officer, in making disclosure of the presentence report, to withhold the probation officer's recommendation, if any, as to sentence.

(B) Within 14 days after receiving the report of the presentence investigation, the parties shall communicate in writing to the probation officer and to each other, any objections either may have as to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the report of the presentence investigation. After receiving any such objections the probation officer may require the defendant, the defendant's counsel, and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues and may conduct a further

investigation and make appropriate revisions to the presentence report.

(C) Not later than 7 days before the sentencing hearing the probation officer shall submit the presentence report to the court together with an addendum setting forth any unresolved objections, the grounds for such objections, and the probation officer's comments concerning such objections. Any revisions made to the presentence report, and the addendum, shall be furnished by the probation officer at the same time to the defendant, the defendant's counsel and the attorney for the Government.

(D) Except for any objection made under subdivision (b)(5)(B) that has not been resolved, the report of the presentence investigation may be accepted by the court at the sentencing hearing as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before the imposition of sentence.

(c) SENTENCE

(1) *Sentencing Hearing*. At the sentencing hearing the court shall afford counsel for the defendant and the attorney for the Government an opportunity to comment on the probation officer's determination and on

other matters relating to the appropriate sentence; shall determine the unresolved objections to the presentence report, if any, and may, in the discretion of the court, permit the parties to introduce testimony or other evidence concerning such objections. The court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations must be appended to any copy of the presentence investigation report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing*. Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence*. Before imposing sentence, the court shall --

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation

report made available under subdivision (b)(5)(A) but if the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (b)(5)(A), the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon;

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceeding*. The court's summary, if any, made under subdivision (c)(3)(A) may be made to the parties in camera. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera the statements by the defendant, counsel for the defendant, or the

attorney for the Government under subdivision (c)(3)(B), (C) and (D).

(5) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. The courts has no duty to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file immediately a notice of appeal on behalf of the defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture must authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(e) PLEA WITHDRAWAL. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. 2255.

COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule, and the accompanying report, were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of 1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, Federal Sentencing Law and Practice, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. See U.S.S.G. § 6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a) includes several changes. First, instead of the general requirement that the sentence be imposed "without unnecessary delay," the rule now contains a 70-day provision. The purpose of the 70-day time period is to provide a sufficient overall window of time for the probation officer to complete and disclose to the parties the presentence report, for the submission of objections by the parties, for resolution of those objections, if possible, by the probation officer before the sentencing hearing, and for a report to the court concerning unresolved objections so that the court can prepare for the hearing in an orderly way. Under the rule, however, the sentencing judge may either shorten or extend that time for good cause.

The second change to subdivision (a) is that the remainder of the provision, which addressed the sentencing hearing, is now located in subdivision (c).

Subdivision (b) (formerly subdivision (c)) which addresses the presentence investigation, has been modified in several respects. First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to be present at any interview of the defendant conducted by the probation officer. Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. *See, e.g., United States v. Herrera-Figureroa*, 918 F.2d 1430, 1437 (9th Cir. 1990)(court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992)(court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant.

Subdivision (b)(5), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's

presentence report. Subdivision (b)(5)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(5)(A). Under that new provision (formerly subdivision (c)(3)(A)), the court now has the discretion (in an individual case or in accordance with a local rule) to decide whether to direct the probation officer to disclose any final recommendation concerning the sentence. But the prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5)(A).

New subdivisions (b)(5)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with a written list of objections to the report within 14 days of receiving the report; (2) permitting the probation officer to schedule compulsory conferences, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, *supra*, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

Subdivision (c) addresses the imposition of sentence and makes no changes in current practice. The provision consists largely of material formerly located in subdivision (a). Language formerly in (a)(1) referring to the court's disclosure to the parties of the probation officer's

determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(5) and (c)(1). Likewise, the brief reference in former (a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3). The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b). Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

The Committee considered, but rejected, a provision which would have permitted victim allocution at sentencing. Although the Committee was sensitive to the interest of some victims in the sentence to be imposed, it also recognized a number of difficulties which the Committee ultimately concluded outweighed any value to the victim in personally addressing the court. First, under guideline sentencing (which takes victim impact into account), the court has very limited sentencing discretion once the applicable guideline range has been determined, and the guideline range is usually below the maximum sentence allowed by statute. In most cases, therefore, the views of the victim would have little or no impact upon the sentence thereby producing a likelihood of victim frustration rather than victim satisfaction. Additionally, if the victim's allocution persuaded the court to consider a possible departure from the guideline sentencing range, due process might require notice and an opportunity to contest that result under *Burns v. United States*, ____ U.S. ____, 111 S.Ct. 2182 (1991). This could substantially complicate and delay the sentencing hearing. There is also a problem in the federal system in identifying victims who would have the right to allocution. While a single victim of a violent crime is easily identified, federal criminal law covers a broad range of violent as well as non-violent conduct which often results in numerous victims. In such cases, it simply would not be feasible to extend the right of allocution to all of the victims. Finally, the Committee also took into account existing law and procedure which keeps victims informed of the progress of the case, *see, e.g.*, 42 U.S.C. § 10601, et seq. (enumerated "victims' rights include, inter alia, the right to be notified of court proceedings, the right to be present at all public court proceedings, and the right to confer with the attorney for the Government) court

proceedings permits the victim to be present at all stages of the judicial proceeding including sentencing, and provides an opportunity for direct input in the preparation of the presentence report. See subdivision (b)(4)(D).

Rule 40. Committment to Another District

* * * * *

(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

* * * * *

COMMITTEE NOTE

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides guidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

FEDERAL RULES OF EVIDENCE

Rule 412 is deleted and replaced with the following:]

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 an alleged victim of sexual misconduct may be admitted 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) evidence of reputation or opinion evidence in a civil case in which exclusion would deprive the trier

FEDERAL RULES OF EVIDENCE

of fact of evidence which is essential to a fair and accurate determination of a claim or defense.

(c) 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 the victim to be heard in camera on the motion and shall determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. 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 both in the trial and appellate courts.

COMMITTEE NOTE

The changes to Rule 412 are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to all 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 always is associated with public exposure of intimate details of sexual history.

FEDERAL RULES OF EVIDENCE

The amendment eliminates three parts of existing 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 reducing 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 402, 404 (b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires.

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 prosecution 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.

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.

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

October 12 & 13, 1992
Seattle, Washington

The Advisory Committee on the Federal Rules of Criminal Procedure met in Seattle, Washington on October 12 and 13, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges, Chair of the Committee, called the meeting to order at 9:00 a.m. on Monday, October 12, 1992 at the Stouffer Madison Hotel in Seattle, Washington. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. Harvey E. Schlesinger
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designate of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were: Judge Robert Keeton and Mr. Bill Wilson, chairman and member respectively, of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe, Mr. David Adair, and Mr. John Rabiej of the Administrative Office of the United States Courts; and Mr. William Eldridge of the Federal Judicial Center. Judge DeAnda was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed the attendees and noted the absence of Judge DeAnda, who had expressed his disappointment at not being able to attend what would have been his last meeting as a member of the Committee, due to his retirement.

II. APPROVAL OF MINUTES

Judge Keenan moved that the minutes of the Committee's April 1992 meeting in Washington, D.C., be approved. Mr. Karas seconded the motion which carried by a unanimous vote.

III. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and by Congress

The Reporter informed the Committee that there were currently no proposed amendments which had been approved by the Supreme Court and forwarded to Congress.

B. Rules Approved by the Standing Committee and Forwarded to the Judicial Conference

The Reporter also informed the Committee that at its June 1992 meeting the Standing Committee had approved the following rules and had forwarded them to the Judicial Conference, which had in turn approved and forwarded them to the Supreme Court:

1. Rule 12.1, Production of Statements.
2. Rule 16(a), Discovery of Experts.
3. Rule 26.2, Production of Statements.
4. Rule 26.3, Mistrial.
5. Rule 32(f), Production of Statements.
6. Rule 32.1, Production of Statements.
7. Rule 40, Commitment to Another District.
8. Rule 41, Search and Seizure.
9. Rule 46, Production of Statements.
10 Rule 8, Rules Governing § 2255 Proceedings.
11 Technical Amendments to other rules.

C. Rules Approved by the Standing Committee to be Circulated for Public Comment

The Committee was informed that at its June 1992 meeting in Washington, D.C., the Standing Committee had approved amendments to two rules, Rule 16(a)(1)(A) governing disclosure of statements by organization defendants, and Rule 29(b), concerning delayed ruling on judgment of acquittal. The proposed amendments had not yet been published for public comment, however, pending the move of the Rules Committee Support Office into its new quarters and the possibility of an expedited comment period on other pending rules.

The Committee generally discussed the problems associated with the delays in the Rules Enabling Act, which may account for several years from the time of the initial

draft in the Advisory Committee to final enactment. Mr. Pauley observed that the necessary delays in the process had, in the past, prompted the Department of Justice to seek amendments directly from Congress. Judge Hodges observed that perhaps the problem associated with the lengthy process was worth further discussion by the Standing Committee.

D. Rules Under Consideration by the Advisory Committee

1. Rule 5(a), Appearances for Persons Arrested for UFAP Offenses.

Judge Hodges gave a brief overview of a proposed amendment to Rule 5 concerning release of defendants arrested for violating 18 U.S.C. § 1073 (unlawful flight to avoid prosecution). Magistrate Judge Crigler had raised the issue, noting that for all practical purposes, UFAP offenses are rarely prosecuted. But Rule 5 requires federal authorities to bring an arrested defendant promptly before a federal magistrate. He noted that all of the participants need to know how to fairly handle UFAP cases and that the problem may be more practical than theoretical. Judge Hodges noted that the prevalent practice is to arrest UFAP defendants, using federal authorities, who then turn them over to state officials for prosecution for the underlying state offense.

Following some additional discussion about the background of the problem Judge Jensen moved that Rule 5 be amended to specifically exempt UFAP defendants from the prompt appearance requirement. Mr. Pauley seconded the motion.

Mr. Pauley noted that of approximately 2,800 UFAP arrests only 6 were actually prosecuted in federal court. He added that Congress enacted § 1073 knowing that most arrestees would not be prosecuted under that provision. He added that there are a variety of practices within the districts and that any proposed solution should provide some flexibility in Rules 5 and 40 for dealing with UFAPs. In response to a question from Judge Hodges, Mr. Pauley indicated that he did not know how many UFAP warrants are sought.

Magistrate Judge Crigler observed that a defendant may not even be aware of pending state charges and that Rule 5 does a good job of protecting a defendant. Mr. Karas agreed with that observation and added that state public defenders may not be permitted to represent Ufos. Mr. Marek echoed Mr. Karas' statements and noted that there is a real danger that a UFAP defendant could be turned over to state

authorities and nothing would happen in the case. Mr. Pauley responded that the defendant's interests would be protected by *Riverside*'s requirements of a prompt appearance before a magistrate to determine if probable cause exists for pretrial confinement.

In the ensuing discussion, the Committee noted a variety of potential problems with amending Rule 5 to meet the UFAP problem. Judge Keeton noted that it might be easier to simply amend the statute to permit federal authorities to arrest a state defendant without relying upon a separate, rarely prosecuted, substantive federal crime. Several members raised the issue of jurisdiction to arrest a UFAP defendant and the most appropriate forum for complying with Rule 5. Judge Hodges thereafter appointed a subcommittee consisting of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley, to consider the proposed amendment and report to the Committee at its next meeting. No vote was taken on the motion to amend.

2. Rules 10 and 43, In Absentia Arraignments.

Judge Hodges provided a brief overview of a proposal from the Federal Bureau of Prisons to provide for teleconferencing arraignments and recognized the presence of Mr. Phillip S. Wise from the Bureau who would be available to answer questions from the Committee. He noted that the gist of the proposal was to provide some contact between the defendant, counsel, and the court without the necessity of the defendant's actual appearance before the court.

Judge Jensen moved to amend Rules 10 and 43 to provide for teleconferencing of arraignments. Mr. Pauley seconded the motion.

Judge Hodges observed that the proposal had been previously considered and rejected by the Committee and Mr. Marek questioned whether the proposed amendments would be limited to arraignments. Mr. Wise answered that the Bureau's preference would be that as many pretrial proceedings as possible, e.g., pretrial detention hearings, be covered. He further explained the two-way technology used in some state courts; the defendant can see the judge and the witness box and the judge can see the defendant. The defense counsel may or may not be with the defendant. Professor Saltzburg indicated that although he favored teleconferencing for arraignment, he would be opposed to such a procedure wherever evidence would be considered.

Mr. Marek expressed concern that the amendment would lead to a slippery slope and that he opposed any

teleconferencing, even for arraignments. He noted that there was a false assumption that nothing happens at an arraignment; the defendant should see the dynamics of the situation. There are significant issues to be decided at pretrial sessions, such as setting bail and determining competency of the defendant. He noted that although the Bureau of Prisons might save money by not transporting defendants to court, the court would incur additional expenses in terms of equipment and operating costs. In his view, the proponents had not made a case for overriding the important interests associated with personal appearances.

Judge Hodges indicated that it might be beneficial to treat Rules 10 and 43 separately and raised the question of whether it would make a difference if the defendant had the option of deciding to waive a personal appearance. Mr. Marek indicated that the right should not be waivable and Mr. Karas added that if a waiver provision were added, only those who could afford counsel, would appear.

A brief discussion ensued on the problems associated with prison overcrowding and the logistical problems associated with transporting defendants to court, especially in larger metropolitan areas. Judge Jensen noted that even in such areas of congestion, there is no authority under the rules for experimenting.

On a vote to amend Rule 10 to provide for teleconferencing of arraignments, the motion was defeated by a vote if five to four with one abstention. Judge Jensen thereafter withdrew his motion concerning a similar amendment to Rule 43; Mr. Pauley consented to the withdrawal.

The Committee then engaged in a brief discussion on the possibility of providing for some experimentation with teleconferencing. Mr. Eldridge indicated that it might be difficult to devise any pilot programs but would be more than willing to work with the Committee. Following a straw poll of the Committee, Judge Hodges appointed a subcommittee consisting of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg. The subcommittee was directed to study the issue of amending Rules 10 and 43 to provide for experimental teleconferencing where the defendant has consented to such.

3. Rule 11, Advising Defendant of Impact of Negotiated Factual Stipulations.

Judge Hodges briefly introduced the topic of advising a defendant who is entering a guilty plea of the impact of a negotiated factual stipulation. He noted that the issue had

been addressed at some length in an article by David Adair and Toby Slawsky of the Administrative Office but that the authors had not recommended any particular amendment to the rules of criminal procedure.

Judge Keenan moved that the Committee discuss the concept to amend Rule 11 to require that factual stipulations be addressed in the judge's colloquy with the defendant and that the defendant be apprised of the fact that the court would not be bound by the stipulated facts. Judge Jensen seconded the motion.

Judge Keenan indicated that he assumed that the court would be required to insure that the plea was not a sham. Mr. Adair briefly indicated that his research had indicated that several cases had equated factual stipulations with binding Rule 11(e)(1)(C) agreement regarding the sentence. Judge Keeton replied that the court has an obligation to reject a stipulation which is not true and Mr. Marek observed that the truth in the stipulation is not always easily determined. He noted that if it appears that there is a problem with an 11(e)(1)(C) agreement, the defendant should be able to withdraw the guilty plea. Judge Keeton added that some United States Attorneys are being instructed not to use 11(e)(1)(C) agreements. Following brief discussion on the use of written pretrial agreements, the motion to consider an amendment to Rule 11 was withdrawn by Judge Keenan with the consent of Judge Jensen. No further motions were made on the issue.

4. Rule 16, Disclosure of Materials Implicating Defendant.

Judge Hodges introduced a proposal from Judge O'Brien and Professor Charles Ehrhardt which would amend Rule 16. The proposed amendment would require the government to either (1) identify any documents which directly name the defendant or (2) make available to the defendant any existing indexing system which would facilitate examination of the documents. In a brief discussion of the issue, Mr. Pauley indicated that the Department of Justice was strongly opposed to any requirement which would either reveal the theory of the case or attorney work product. Mr. Doar thereafter moved that the Committee adopt the first option. That motion failed for lack of a second and there were no further motions concerning either of the proposals.

5. Rule 16, Disclosure of Witness' Identity.

Mr. Wilson proposed that the Committee consider amendments to Rule 16 which would expand federal criminal discovery. He observed that under current practice there is

not any meaningful discovery under the rule and that in a complex case a defendant cannot get a fair trial. He also expressed concern that the Department of Justice continues to resist additional discovery.

Professor Saltzburg indicated that he too was concerned about Rule 16 vis a vis names of government witnesses. He noted that there are really two key issues at stake: First, he agreed that in a complex case there could not be a fair trial without more complete discovery. And second, he recognized that in some cases there may be a danger to witnesses if their identity is revealed to the defense. But he emphasized that it is not necessary to take an all or nothing approach. He suggested that some middle ground could be found and in support of that position observed that the Model Code of Arraignment requires the prosecutor to disclose the names of its witnesses unless the prosecution submits in writing reasons why doing so would present a danger to the witnesses. The court's decision on whether to disclose those witnesses is not reviewable.

Judge Hodges noted that in the past most prosecutors had provided an "open file" to the defense but that in some districts that was no longer the policy. Judge Keenan added that although the Committee had previously considered the issue, he believed it should be reviewed. Mr. Pauley responded that if the "open file" system is no longer as commonly in effect, it is probably due to the increase in drug prosecutions where there is often danger to government witnesses. He noted that the prosecution is in the best position to decide whether there is a danger to witnesses.

Mr. Marek expressed confidence that an amendment could be devised which would permit the court to decide, under all of the facts and circumstances, if production of a witness' name was required.

Judge Hodges asked Professor Saltzburg to assist Mr. Wilson in drafting language for Rule 16 which would address the disclosure of government witnesses to the defense.

6. Rule 32, Amendments to Entire Rule.

Judge Hodges provided background information on the proposed amendments to Rule 32, which had been discussed at the Committee's last meeting. He noted that at the time of the enactment of the Sentencing Guidelines, the Sentencing Commission had sketched out a some procedural guidelines for preparing presentence reports. The Probation and Criminal Law Committee of the Judicial Conference, however, prepared a more detailed model local rule for preparation and consideration of presentence reports under guideline

sentencing. The chair of that Committee, Judge Tjoflat, circulated that model local rule to the district courts along with an accompanying report. In addition, the Judicial Center had begun a study of the implementation of the model rule and guideline sentencing. He believed that the time was thus ripe for considering major changes to Rule 32 which would more closely reflect actual practice. Asking for the sense of the Committee as to whether it believed that some amendments were needed, Judge Hodges determined that a majority of the members believed the amendments should be considered.

The Committee's discussion focused on a draft of an amendment proposed, and circulated, by Judge Hodges. He noted that several members had made suggested changes to that draft and that he included them for discussion and any necessary votes by the Committee at large. Turning first to the issue of timing, Judge Hodges observed that it would probably be better to set a fixed deadline for sentencing and noted that probation officers had indicated that 35 days would be necessary to complete a presentence report. Several members questioned whether it might not be better to simply leave the language as general as possible and leave it to the court to accelerate or delay the proceedings. Following comments from Judge Keeton that it would be preferable to state any specific time limits in the rule in 7-day increments, Mr. Pauley moved that Rule 32 be amended to provide that (1) the sentence be imposed within 70 days; (2) the probation officer provide a copy of the presentence report to the parties at least 35 days before sentencing; (3) the parties must provide any objections to the report to the probation officer within 14 days of receipt; and (4) not less than 7 days before the sentencing hearing, the probation officer must submit the report to the court (thereby allowing 14 days after receipt of the objections by the probation officer for the probation officer to attempt to resolve them). Judge Schlesinger seconded the motion which carried by a vote of 8 to 0, with two abstentions.

In response to comments by Judge Jensen, Judge Hodges suggested a slight revision to the proposed amendment which would permit the court to accept the presentence report as its findings of fact, except for any objection to the report which had not been resolved. The Committee agreed with the change.

Judge Hodges indicated that the proposed amendments included, at Mr. Marek's suggestion, a provision for defense counsel's presence at any interview of the defendant conducted by the probation officer. Mr. Adair indicated that at least in the Ninth Circuit, that was already in

practice. The proposed language was approved by a vote of 8 to 0 with 2 abstentions.

Following a brief discussion on the issue of disclosing certain information in the presentence report (e.g., confidential information), Judge Schlesinger moved that the proposed amendment be changed to reflect language suggested by Mr. Marek which would permit the court to disclose, pursuant to local rule or in its discretion, the probation officer's recommendation concerning a sentence and other specified information; any matter not disclosed, but relied upon in sentencing, would have to be summarized. Professor Saltzburg seconded the motion. Mr. Pauley indicated disagreement with the proposed language and Judge Hodges noted that as a practical matter a court would not consider evidence not disclosed. Following a discussion on the benefits and costs of disclosing information in the report, especially the recommendation concerning sentence, the motion was withdrawn. Thereafter, Judge Keenan moved to adopt the language in Judge Hodges' draft; the motion was seconded by Judge Crow and carried by a vote of 6 to 4. Following additional brief discussion on the matter, the Committee agreed with Judge Hodges' proposal that the rule provide that certain information not be disclosed but that the court, either by local rule or in individual cases could withhold any recommendation concerning the sentence. The Committee agreed to that change.

Mr. Marek moved to delete the provision which would permit the probation officer to require the defendant, the defendant's counsel, and the attorney for the government to meet with the probation officer to discuss objections to the report. Magistrate Judge Crigler seconded the motion. In a very brief discussion about the benefits of the proposal, it was noted that it seems to work in those districts which have implemented it. The motion was withdrawn.

On the issue of proposed victim allocution at sentencing in Judge Hodges' draft, Judge Keenan expressed opposition to the idea. He noted that under guideline sentencing the victim's testimony would have little, if any, impact on the sentence and that victims could thus become even more frustrated with the criminal justice system. Judge Hodges noted the political pressure on Congress to permit victims to personally appear in sentencing hearings. Mr. Pauley observed that the proposed language in the rule would strike a good compromise; it would be limited to a very narrow class of victims and that that step would provide valuable experience in determining whether victim allocution is feasible. Mr. Wilson noted that the amendment would provide some comfort to victims and would not unnecessarily impede the sentencing procedures. Both Judge

Jensen and Mr. Karas believed that the right of allocution should be extended to any victim.

The Committee voted by a margin of 8 to 2 to exclude any reference in the amendments to victim allocution.

Judge Jensen then moved to amend existing language in the rule which requires the probation office to "verify" victim impact evidence and to present it in "nonargumentative style." Mr. Doar seconded the motion which carried by a unanimous vote. Professor Saltzburg moved to amend the rule by giving victims an opportunity to see the presentence report. That motion failed for lack of a second.

Following a few brief comments, the Committee voted unanimously to approve the amendments to Rule 32 and to forward them to the Standing Committee for publication and comment by the public. Judge Hodges noted that the Reporter had suggested the possibility of using these major amendments to reorganize Rule 32. Through the years, the rule had become a hodge podge of provisions; for example, the provision for presentence reports currently follows provisions dealing with the sentencing hearing. Judge Hodges indicated that once the Committee's changes had been incorporated into the proposed amendment, he and the Reporter would work on a possible reorganization of the rule and circulate it to the Committee.

7. Rule 40(d), Conditional Release of Probationer.

The Reporter briefly introduced a proposal from Magistrate Judge Robert Collings that Rule 40(d) be amended to permit explicitly a magistrate to set terms of release for probationers or supervised releasees who are arrested in a district other than the one imposing the probation or supervised release. Mr. Pauley indicated that the proposed amendment might create jurisdictional problems if the originating district is not inclined to transfer jurisdiction to the district where the arrest occurred. Magistrate Judge Crigler expressed agreement with the proposal, noting that there is a real question about the ability of a magistrate to set conditions for release of a probationer in the circumstances outlined by Magistrate Judge Collings. Magistrate Judge Crigler thereafter moved that the proposed amendment be made to Rule 40(d), i.e., that the following language be added to Rule 40(d): "The person may be released under Rule 46(c)," and that the amendment be forwarded to the Standing Committee for publication. The motion was seconded by Mr. Marek.

Judge Jensen expressed concern that the proposed amendment did not include changes to Rule 46 and several other members discussed the possibility of making cross-references in Rule 46 to Rules 32.1 and 40(d). The Committee thereafter approved the motion by a vote of 5 to 3 with 2 abstentions.

8. Rule 43(b), Sentencing of Absent Defendant.

Mr. Pauley explained the Justice Department's proposal that Rule 43(b) be amended to provide that sentencing could proceed even where a defendant was absent. He noted that absent defendants could delay sentencing for years and that under guideline sentencing it is difficult to make findings of fact where the defendant is absent. He added that such delays can result in changes in counsel and the court and that the proposal simply places rule 43 on the same plane as other portions of the trial. In his view, a defendant can voluntarily relinquish the right to be present at sentencing. Judge Hodges observed that the combination of guideline sentencing and the finality of sentences under Rule 35, there may be a dilemma; once the defendant returns after a sentence is imposed, no changes could be made in the sentence.

Mr. Pauley moved that Rule 43 be amended to provide for in absentia sentencing and Professor Saltzburg seconded the motion.

Mr. Marek noted that there is pressure from prosecutors and probation officers to sentence absent defendants but that under current practice, the sentencing proceeding need not come to a complete halt. For example, the presentence report can be prepared, and it does not necessarily follow that evidence will be forever lost if the defendant absconds. He agreed with Judge Hodges' observation that once a sentence has been imposed, it cannot be changed.

Mr. Pauley noted that there is an inconsistency in Rule 43; a trial may proceed even where the defendant is absent but sentencing may not. He observed that it was an historical accident that in absentia sentencing was not included in Rule 43. He added that the courts have some flexibility in deciding whether to proceed with an in absentia trial and that the same rules should apply to sentencing. In additional discussion on the issue, Professor Saltzburg noted that the Supreme Court is currently considering the issue of whether an absent defendant forfeits the right to appeal. Mr Pauley noted that the Court is also reviewing the issue of in absentia trials. He thereafter withdrew his motion and substituted a motion to table the proposal with the understanding that it

would be considered at the first meeting following the Supreme Court's decisions on these cases. The Committee unanimously consented to that motion. At Mr. Pauley's request, Judge Hodges indicated that he would inform the Committee on Criminal Law and Probation of the proposal and seek its comments on the issue as well as urging that the Committee consider recommending to the Probation Service that presentence reports be prepared for absconding defendants.

9. Rule 53, Cameras in the Courtroom.

The Reporter informed the Committee that a coalition of news organizations was proposing that Rule 53 be amended to permit the Judicial Conference to decide whether to establish a pilot program for cameras in criminal trials. Professor Saltzburg provided some additional background information on the proposal. Judge Keeton observed that the Judicial Conference had already approved a pilot program for civil cases and would probably resist any further amendments at this point. Judge Hodges indicated that the proposal would appear on the agenda for the Committee's next meeting.

IV. EVIDENCE RULES UNDER CONSIDERATION

A. Proposal to Create Separate Rules of Evidence Advisory Committee

Judge Keeton informed the Committee that at its June 1992 meeting, the Standing Committee had discussed extensively the problem of handling proposed amendments to the Federal Rules of Evidence and had finally voted to recommend to the Judicial Conference that the Chief Justice appoint a free-standing Evidence Advisory Committee which would include some cross-over members from both the Criminal and Civil Rules Advisory Committees; the Evidence Committee would have its own Reporter. Because of that action, a number of proposed amendments to the Rules of Evidence had been placed on hold, with the exception of Federal Rule of Evidence 412. Judge Keeton also reported that the Judicial Conference had approved that proposal at its meeting in September and that the Chief Justice had agreed that a Committee should be appointed.

B. Evidence Rules Under Consideration by the Criminal Rules Committee1

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1. The initial discussion on Rule 412 occurred on the morning of the first day of the meeting; final discussion and a vote on the proposed amendments occurred on the second day.

1. Federal Rule of Evidence 412.

Judge Hodges noted that Congress had failed to act on Senator Biden's proposed Violence Against Women Act but that the bill would almost certainly be re-introduced in the next session of Congress. That bill included proposed amendments which would, inter alia, make Federal Rule of Evidence 412 applicable to both civil and criminal proceedings and would include a right of the victim to appeal the court's evidentiary ruling. Judge Hodges noted that a subcommittee, chaired by Professor Saltzburg, had prepared a draft amendment to Rule 412 which had been considered by the Committee at its April 1992 meeting. Based upon assurances by Judge Stanley Marcus (Chair of Judicial Conference's Ad Hoc Committee on Gender-Based Violence) to Senator Biden that Rule 412 would be given early and prompt consideration under the Rules Enabling Act, Judge Keeton suggested that any proposed amendments be forwarded to the Standing Committee for its consideration. He also envisioned that if the Standing Committee approved the amendments, they would be published on an abbreviated comment period.

Following a brief general discussion about the likelihood of Congress considering Senator Biden's proposed changes to the rules of evidence, Professor Saltzburg distributed copies of the subcommittee's most recent proposed amendments to Rule 412 and explained the two key issues raised in the amendment. First, he noted that the Committee would have to decide whether to make Rule 412 applicable to both civil and criminal trials. As amended, the Rule would essential treat all cases the same, for example in the balance to be struck between the offered evidence's probative value and prejudicial dangers. Second, there were some differences in the provision concerning admissibility of specific instances of sexual behavior on what is now currently referred to as "constitutional" grounds for admission in a criminal case. Professor Saltzburg noted that the proposed amendment would permit introduction of such acts in a civil case if it would necessary to insure a "fair trial." In a criminal case, such evidence would be admitted if the constitution would require it.

Judge Hodges indicated that the subcommittee's report would be treated as a motion (and second) to amend Rule 412.

The Committee's discussion of the proposed amendment reflected concern that application of the rule to both civil and criminal cases could be accomplished. Judge Keenan noted the difficulty of translating the rule from criminal to civil practice and Judge Crigler expressed concern that the rule could be meaningfully applied. Mr. Pauley stated

the Department of Justice's strong concern that the current constitutional standard in criminal cases not be diluted by the proposed "fair trial" test and that the latter would be necessarily subjective and lead to disparate results. Judge Jensen observed that the proposed amendment focused on sexual behavior and propensities of "victims." But in a civil case, the victim might be the plaintiff and the defendant might be a business. Professor Saltzburg responded that the solution might rest in referring the person alleged to be a victim. He also noted the potential interplay between Rule 412 and Rule 404 which generally prohibits propensity evidence. Several participants questioned the interplay between those rules and the possibility that separate rules would be required for civil and criminal rules. Professor Saltzburg noted that the subcommittee had decided not to include an appeal provision in its draft, primarily because it would unnecessarily delay the proceedings.

Later in the meeting, the subcommittee offered several changes in its draft, based upon the foregoing discussions. First, language concerning the catchall provision for admitting specific instances of sexual conduct (proposed subdivision (b)(3)) was modified to reflect the differences in criminal and civil cases. Second, the rule recognizes the possible interplay of Rule 412 with other character evidence rules.

Judge Keenan moved that the Committee accept the subcommittee's proposed amendment and forward it to the Standing Committee for publication. Judge Schlesinger seconded the motion, which carried unanimously.

2. Federal Rule of Evidence 804.

The Reporter indicated that the Standing Committee had considered, and remanded, the Committee's proposed amendment to Federal Rule of Evidence 804(a) which would have added an "unavailability" provision for hearsay declarants of tender years. After a brief discussion on the proposed amendment and the issues raised by the Standing Committee, the chair observed that there was a clear consensus that the proposed amendment should be tabled pending consideration by the new evidence Advisory Committee.

3. Federal Rule of Evidence 1102.

The Reporter briefly indicated that the Reporter for the Standing Committee would be coordinating proposed amendments to the various procedure rules, and Federal Rule of Evidence 1102, concerning the authority of the Judicial Conference to make technical changes.

V. MISCELLANEOUS AND DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee publicly expressed its compliments to Judge Hodges and personnel the Administrative Office for choice of the location and the hotel accommodations. Judge Hodges announced that the next meeting of the Committee would be held in Washington, D.C. on April 22 and 23, 1993.

Section IX Standing 11/92

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

November 2, 1992

MEMORANDUM TO ALL MEMBERS OF THE RULES COMMITTEES

SUBJECT: Long-Range Planning Issues

Judge Keeton requested that I send to you the attached copy of a letter to him from Judge Otto R. Skopil, Jr., chairman of the Judicial Conference's Committee on Long-Range Planning. The letter requests assistance from the Committee in identifying and selecting appropriate long-range planning issues for future development.

John K. Rabiej

Attachments

United States Court of Appeals
Ninth Circuit
The Pioneer Courthouse
Portland, Oregon 97204
503-326-3543

Chambers of
Otto R. Skopil, Jr.
United States Circuit Judge

29 OCT RECD

October 26, 1992

The Honorable Robert E. Keeton
Committee on Rules of Practice and Procedure
306 McCormack Post Office & Courthouse
Boston, Massachusetts 02109

Dear Mr. Chairman:

I am writing to you in my capacity as chair of the Judicial Conference Long Range Planning Committee. I ask for your committee's assistance in developing appropriate long range planning goals that will guide our efforts to improve the courts and to maintain an independent, effective, and robust judiciary.

As you know, my committee has been directed by the Chief Justice to develop a long range plan for the judiciary. We are convinced that the substance of this plan should be developed by judges and others serving on Judicial Conference committees. These individuals have in-depth knowledge and foresight to establish appropriate strategic goals for matters within their jurisdiction.

The Long Range Planning Committee has invested considerable effort to identify strategic issues that might be addressed in a long range plan. The committee has reviewed recommendations from the Federal Courts Study Committee, the Bork Committee, and the Hruska Commission. In addition, we have analyzed hundreds of letters sent by judges and others to the Federal Courts Study Committee. Beyond that, to ensure that issues and suggestions are current, I sent letters to circuit, district, bankruptcy and magistrate judges, and others within the judiciary, asking them to identify long range issues they believe are of greatest importance to the judiciary. The hundreds of responses I received have also been reviewed and analyzed.

As a result of our research, we have compiled a list of strategic issues. We have not attempted, however, to fashion solutions for these issues. We believe the other Conference committees are better able to make those determinations.

I have attached for your review a list of the issues which we believe are appropriate for consideration by your committee. In some instances, the list will indicate that an issue has been referred to more than one Conference committee. I have also included a master list that contains all of the issues referred to all of the Conference committees.

We believe these issues are long range in scope and national in character and thus could appropriately be included in a national plan. Nevertheless, we have indicated highest and next highest priorities. You are free, of course, to establish your own priorities and to add to the issues list. Your committee's knowledge and understanding of these matters is undoubtedly more complete and comprehensive than ours. We ask that you treat the attached lists as an indicator of our thinking, not as a prescription that limits the strategic goals that you believe should be established.

I respectfully ask that your committee undertake the following tasks. First, please review the list of planning issues at your next meeting. I would appreciate receiving your recommendations on the appropriate priorities for the strategic planning issues we have identified, as well as your recommendations of other issues that should be addressed. Second, I ask that your committee decide whether it is willing to examine these issues and then to recommend how they should be treated in the judiciary's long range plan. It is our hope that your committee will be willing to develop that portion of the judiciary's long range plan that deals with the identified issues within your jurisdiction.

The process of issue selection and the development of appropriate solutions need not be carried out by your committee alone. The Planning Committee is willing to work with you during this process. Our designated liaison or a member of our subcommittee who worked on the issues assigned to you will be available to assist in any way possible.

We would appreciate your decision as soon as possible on whether your committee is willing to examine these issues, and subsequently to recommend how the issues should be treated in the long range plan. That will allow the Planning Committee to decide at its January 1993 meeting how best to proceed. We hope to complete work on the first draft of a long range plan as quickly as possible.

Thank you for considering this request. I look forward to your reply and to working with you and the members of your committee as we fashion a plan for the future of the federal courts.

Sincerely,

Otto R. Skopil, Jr.

cc: Members of Long Range Planning Committee
Charles Nihan, Administrative Office

Enclosures

Table of Planning Topics of Interest to the Rules Committee

Highest Priority

Topic	Additional Committee(s) to which Issues have been Assigned
Subcommittee Three Topics	
Issues Related to Handling Both Civil and Criminal Cases	
Handling Appeals -Standards of Review	Court Administration
Handling Civil Cases Once In the System	
Case Management -Appellate Case Management	Court Administration
Civil Discovery	Court Administration Magistrate Judges
Sanctions and Incentives	Court Administration
Standards for awarding fees	Court Administration
Handling Criminal Cases Once in the System	
Criminal Cases (Impact of)	Criminal Law Defender Services
Bankruptcy Issues	
Bankruptcy Administration	Bankruptcy
Jurisdiction of Bankruptcy Court	Bankruptcy Judicial Branch Court Administration Federal-State Jurisdiction

Topic	Additional Committee(s) to which Issues have been Assigned
Bankruptcy Appeals	Bankruptcy

Next Priority

Subcommittee Three Topics

Issues Related to Handling Both Civil and Criminal Cases

Juries	
-Selection	Court Administration
-Juror Competence (civil)	Court Administration
-Right to civil jury trial	Court Administration
-Provision in Criminal Cases	Defender Services Court Administration Criminal Law

Role(s); Staffing; Functions

Judicial Performance	
-Opinion Writing	Judicial Branch

Table of Planning Topics of Interest to Judicial Conference Committees

Subcommittee One: Court Structure, Governance, and Resources. Issues include relationships between courts of appeals and district courts; structure of circuits and districts; administrative autonomy of judges; size of judicial workforce; space and facilities; automation; budgeting; roles and functions of administrative personnel; and security.

Members: Judge Wilfred Feinberg (212-791-0901 FAX 212-791-8738)
Judge Elmo B. Hunter (816-426-3260 FAX 816-426-2819)

Subcommittee One Topics

Highest Priority

Topic	Committee(s)to which Issues have been Assigned
Quality of Judicial Professional Life	
Adequate judicial salaries and fringe benefits	Judicial Branch
A mechanism on judicial pay	Judicial Branch
Sabbaticals and exchange programs	Judicial Branch
Salary differential between trial and appellate judges	Judicial Branch
Treatment of senior judges, including chambers and voting rights	Judicial Branch
Encouragement of lifetime tenure and service	Judicial Branch
Life and health insurance for judge and family	Judicial Branch

Whether Judicial Conference powers should be strengthened by statute	Executive
Privatization of administrative functions	Court Administration Judicial Resources
Discipline, including impeachment, of judges	National Commission on Judicial Discipline

Structure of the Federal Courts

National Court of Appeals or intercircuit tribunal	Court Administration
Proposal for a national en banc court as an *ad hoc* measure to resolve cases presenting a conflict between circuits	Court Administration
Proposals for an intermediate appellate level court with or without special jurisdiction	Court Administration
Proposals for jumbo circuits, and for break-up of existing mega-circuits	Court Administration
Intra and intercircuit conflicts	Court Administration
Intra and intercircuit conflicts decided by neutral circuit	Court Administration
Merger of Courts of Appeals	Court Administration
Certification procedure to allow Congress to resolve legislative issue of statutory interpretation, such as whether a private cause of action is intended	Judicial Branch
Proposals for a unified circuit/district bench permitting alternating assignments between the trial and appellate bench	Court Administration
Periodic "redistricting" of district courts based on number of filings, allocating additional sitting judges and new judgeships to areas where workload is greatest	Court Administration Judicial Resources

The role of courts in a federal system	Federal-State Jurisdiction Long Range Planning
National Law Revision Commission to flag conflicts and bring them to the attention of Congress for legislative resolution	Court Administration
Appropriate or best administrative unit for administration (e.g. space, personnel, contracting)	Court Administration

Adequate and Cost-effective Funding for the Judicial Branch

Decentralizing budget completely	Budget
Direct appropriation of expenditures required by Constitution and/or statute, e.g., expenses for jury trials	Budget
User fees for some cases, including charge to government agencies	Court Administration

Proposals for Specialization

Specialized appellate panels	Court Administration Federal-State Jurisdiction
Specialized courts	Court Administration Federal-State Jurisdiction
Specialized courts for entitlement programs	Court Administration Federal-State Jurisdiction
Creation of a separate court for review of appeals from ALJ decisions in Social Security disability cases	Court Administration Federal-State Jurisdiction
Tax appeals placed in one Circuit court of Appeals	Court Administration Federal-State Jurisdiction
Article III Tax Court -- purpose, role, and functions	Federal-State Jurisdiction
Article III Tax Court -- giving jurisdiction over disability decisions	Federal-State Jurisdiction

Next Priority

Non-Judicial Workforce

Barriers, if any, to advancement of women, minorities, and handicapped persons in federal court workplace	Judicial Resources Court Administration
Decentralizing and court staffing patterns	Judicial Resources
Dynamics of multi-cultural and/or multilingual minorities in federal court workplace	Judicial Resources
Generalist employees in clerk's office instead of too narrowly defined positions	Judicial Resources
Impact of trends in demography, worker education and skills level on future employment pool	Judicial Resources
Regionalized pay scales	Judicial Resources
Privatization of administrative functions	Judicial Resources
Resources to handle drug-related federal criminal cases	Criminal Law
Whether judiciary will be able to compete in changing employment pool for skilled employees	Judicial Resources

Proposals and Mechanisms to Increase Judicial Security

Court staff and family security	Judicial Security

Administrative Office

Privatization of various functions	Administrative Office
Reallocation of budgeting and fund control at the local level	Administrative Office Budget
Regional offices	Administrative Office

Relocation of circuit-specific service staff to circuit	Administrative Office
Automation and Technology	
Automation and staffing for it in district courts	Automation and Technology Judicial Resources
Building design, including built-in cameras and video court reporting	Space and Facilities
Expanded statistical data base	Judicial Resources Administrative Office
Information resources management (IRM)	Automation and Technology
Judicial input in automation and maximum use of technology to improve court efficiency	Automation and Technology
Library services and review of federal library system	Automation and Technology
Impact of technology on the adjudicative process	Automation and Technology
Public and Media Access	
Access to courts for the poor	Court Administration
Decentralization of courthouses to provide access	Court Administration Space and Facilities
Dispersal of large urban courthouses and functions	Court Administration
Electronic media and access to courts	Court Administration Automation and Technology
Space and Facilities	
Building design , including built-in cameras and video court reporting	Space and Facilities

Decentralization of courthouses to provide access	Space and Facilities
Dispersal of large urban courthouses and functions	Space and Facilities
Lead time in space and facilities process	Space and Facilities
Process of acquiring space and other capital goods	Space and Facilities
Relations with GSA and real property authority	Space and Facilities
Space and facilities requirements	Space and Facilities

Subcommittee Two: Role and Relationships. Issues include identifying what cases should come into the system; jurisdiction; access; size of Article III judiciary; and relation to the states, other branches of government, litigants, and the bar.

Members: Judge Harlington Wood, Jr. (217-492-4742 FAX 217-492-4931)
Judge James Lawrence King (305-536-5000 FAX 305-536-3095)
Judge A. Thomas Small (919-856-4604 FAX 919-856-4259)

Subcommittee Two Topics

Highest Priority

Topic	Committee(s)to which Issues have been Assigned
Jurisdiction of Federal Courts	
Defining the federal crime and determining in which system to prosecute	Federal-State Jurisdiction Criminal Law
Defining federal civil action elements	Federal-State Jurisdiction
Federal appellate court jurisdiction	Court Administration Federal-State Jurisdiction
Diversity	Federal-State Jurisdiction
Shifting cases to state and federal courts	Federal-State Jurisdiction Criminal Law
Reforming habeas in federal courts	Federal-State Jurisdiction
Determining appealability	Federal-State Jurisdiction
Resolving intercircuit conflicts	Federal-State Jurisdiction
Determining to which courts to send appeals	Federal-State Jurisdiction
Limiting certiorari to Supreme Court	Federal-State Jurisdiction
Article III status for bankruptcy judges to rectify jurisdictional deficiencies	Bankruptcy Court Administration

Adequate budgeting and funding	Budget
Judicial assessment of legislative impact of court legislation	Court Administration
Process of selecting Article III judges	Judicial Branch
Executive Branch performance of quasi-judicial functions:	
-Supervised-release violation	Criminal Law
-Bankruptcy administration	Bankruptcy
-Parole Commission or successor	Criminal Law
Provision of adequate legal assistance:	
-Civil legal services	Court Administration
-Indigent criminal defense services	Defender Services
-Bankruptcy pro bono	Bankruptcy
Eliminating bias	Court Administration
Pro se litigants' needs	Court Administration Bankruptcy
Courts' role in attorneys' fee determination	Court Administration Bankruptcy
Admissions standards for lawyers practicing in federal court	Court Administration
Federal court role in state justice system improvement:	
-Cases which otherwise would go to federal court	Federal-State Jurisdiction
-Use of federal penal structure in state courts	Federal-State Jurisdiction Criminal Law
National policy on federal-state court facility joint use	Space and Facilities
Expanded use of joint federal-state court sittings, discovery, and scheduling	Court Administration

Shifting appeals from and to state and federal courts	Federal-State Jurisdiction
Election and exhaustion of remedies in overlapping state-federal cases	Federal-State Jurisdiction
Relations with public and media: Informing public, improving court-media relations, fostering public confidence, providing opportunities for public comment	Court Administration

Next Priority

Jurisdiction of Federal Courts

Shifting Indian cases	Federal-State Jurisdiction

Relationships of the courts with others

Evaluation of court filing fees	Court Administration

Subcommittee Three: Output. Issues include handling of civil and criminal cases and appeals; workload; mass filings; ADR; bankruptcy; case management; role of Magistrate Judges; rules; probation and pretrial services; pro se litigation; prisoner filings; sentencing; provision of counsel; awards of fees; and juries and the right to trial by jury.

Members: Judge Edward R. Becker (215-597-9642 FAX 215-597-7217)
Judge Sarah Evans Barker (317-226-7455 FAX 317-226-5245)
Judge Virginia M. Morgan (313-226-4082 FAX 313-226-6053)

Subcommittee Three Topics

Highest Priority

Topic	Committee(s)to which Issues have been Assigned
Diverting Cases from Article III Trial Courts	
ADR	Court Administration
Role of Magistrate Judges -Utilization -Jurisdiction	Magistrate Judges
Issues Related to Handling Both Civil and Criminal Cases	
Provision of Counsel -Provision in Civil Cases (pro se)	Court Administration
-Court Supervision	Court Administration
-Criminal Cases	Defender Services Criminal Law
Handling Appeals -Standards of Review	Court Administration Rules

Handling Civil Cases Once In the System

Case Management -Appellate Case Management	Court Administration Rules
Civil Discovery	Rules Court Administration Magistrate Judges
Complex litigation	Court Administration Federal-State Jurisdiction
Habeas Corpus	Criminal Law Court Administration Federal-State Jurisdiction
Mass torts	Court Administration Federal-State Jurisdiction
Pro Se Filings	Court Administration Bankruptcy
Sanctions and Incentives	Rules Court Administration
Standards for awarding fees	Court Administration Rules

Handling Criminal Cases Once in the System

Criminal Cases (Impact of)	Criminal Law Defender Services Rules
Federal Defenders (provision of counsel in criminal cases)	Defender Services Criminal Law
Pretrial Detention	Criminal Law
Probation	Criminal Law
Sentencing	Criminal Law

Role(s); Staffing; Functions	
Autonomy (Decisional; Logistics; etc.)	Bankruptcy Magistrate Judges Judicial Branch
Judicial Performance	Judicial Branch Court Administration
Workload (including specific problems)	Judicial Branch Federal-State Jurisdiction
Bankruptcy Issues	
Bankruptcy Administration	Bankruptcy Rules
Jurisdiction of Bankruptcy Court	Bankruptcy Judicial Branch Court Administration Federal-State Jurisdiction Rules
Bankruptcy Appeals	Bankruptcy Rules

Next Priority

Issues Related to Handling Both Civil and Criminal Cases	
Provision of Counsel -Quality of counsel	Court Administration
Juries -Selection	Court Administration Rules
-Juror Competence (civil)	Court Administration Rules

-Right to civil jury trial	Court Administration Rules
-Provision in Criminal Cases	Defender Services Court Administration Criminal Law Rules
Handling Civil Cases Once In the System	
Pleading	Civil Advisory
Summary Dispositions	Civil Advisory Court Administration
Role(s); Staffing; Functions	
Staffing (Vacancies; Assignment Flexibility; Retention)	Judicial Branch Court Administration Intercircuit Assignments
Judicial Performance -Opinion Writing	Judicial Branch Rules

Office of the Attorney General
Washington, D. C. 20530

November 24, 1992

Refer to Pat

The Honorable William H. Rehnquist
Chief Justice
Supreme Court of the United States
1 First St., N.E.
Washington, D.C. 20543

Dear Chief Justice Rehnquist:

I am writing to you in your capacity as the presiding officer of the Judicial Conference of the United States. I would like to call to your attention a problem caused by the local rules of a number of federal courts for attorneys representing the interests of the United States under the direction of the Attorney General. These rules are promulgated under the authority of 28 U.S.C. 2071(a). By statute, the Judicial Conference of the United States has the power to modify or abrogate rules of the federal courts of appeals if they are inconsistent with federal law. See 28 U.S.C. 331 and 2071(c)(2). Thus, the Judicial Conference is well-positioned to resolve our problem.

A number of federal courts require attorneys who practice before them to join their local bars, and many of these courts require the payment of admission fees. See, for example, D.C. Circuit Rule 6, Second Circuit Rule 46, Ninth Circuit Rule 46.1, and Tenth Circuit Rule 46.2. These rules do not, as far as we are aware, include any exception for government attorneys. Certain other circuits, however, exempt government attorneys from the requirement of paying the admission fee or joining the bar of the court. See First Circuit Rule 46.1, and Federal Circuit Rule 46(d).

We believe that those court rules that require attorneys appearing at the direction of the Attorney General solely in order to represent the interests of the United States to join federal court bars and to pay a fee to do so are not consistent with federal law. Several sections of Title 28 set out the authority of the Attorney General to assign attorneys to appear in court to represent the interests of the United States. Section 515(a) provides that "[t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when

Thank you for your attention to this matter. If you or members of the Judicial Conference would like to discuss it with me or my staff, please contact me.

Sincerely,

WILLIAM P. BARR
Attorney General

specifically directed by the Attorney General, conduct any kind of legal proceeding * * * which United States attorneys are authorized by law to conduct * * *." (The powers of United States Attorneys are then broadly set out in 28 U.S.C. 547.) Further, Section 517 states that any officer of the Department of Justice "may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States * * *." Finally, Section 518(b) provides that "[w]hen the Attorney General considers it in the interests of the United States" he may "direct the Solicitor General or any officer of the Department of Justice" to "conduct and argue any case in a court of the United States in which the United States is interested * * *."

Thus, federal law clearly states that the Attorney General may direct any Department of Justice attorney to appear in federal court on behalf of the United States. The circuit rules mentioned above appear to conflict with these statutory provisions insofar as they actually require court bar membership and payment of fees by attorneys acting under the direction of the Attorney General.

Although district court rules on this point vary widely, a number of district courts also require payment of bar admission fees. I recognize that the Judicial Conference does not have direct supervision over district court rules (see 28 U.S.C. 331). However, these rules also must be in conformance with Acts of Congress (see 28 U.S.C. 2071(a)), and the judicial council in each circuit may modify or abrogate them if appropriate (see 28 U.S.C. 2071(c)(1)). Consequently, if the Judicial Conference requires the circuit rules to conform to federal law, I am confident that the district courts will either voluntarily make the necessary modifications, or that various circuit judicial councils will do so.

In sum, I respectfully request that the Judicial Conference of the United States consider our view that imposition of local bar admission fees on attorneys representing the United States is inconsistent with federal law, and modify any of the various circuit rules so that attorneys assigned by the Attorney General (or his legal designee) to represent the interests of the United States are not required to pay bar admission fees imposed by those rules.

Revised
12-19-92

Rule 32. Sentence and Judgment.

(a) IN GENERAL; TIME FOR SENTENCING. When a presentence investigation and report are made under subdivision (b), sentence should be imposed by the end of 70 days from the finding of guilt. The time for imposing sentence, and the other time limits prescribed in this rule, may be either advanced or continued for good cause.

(b) PRESENTENCE INVESTIGATION AND REPORT.

(1) *When Made.* The probation officer shall make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. 3553; and

(B) the court explains this finding on the record.

(2) *Presence of Counsel.* On request, the defendant's counsel is entitled to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the Presentence Report.* The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. 994(a), as the probation officer determines to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. 994 (a)(1); and the probation officer's explanation of any factors that may suggest a different sentence — within or without the applicable guideline — that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. 3552(b); and

(G) any other information required by the court.

(5) *Exclusions.* The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) *Disclosure and Objections.*

(A) Not less than 35 days before the sentencing hearing — unless the defendant waives this minimum period — the probation officer shall furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government.

The court may, by local rule or in individual cases, direct the probation officer, in disclosing the presentence report, to withhold the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may require the defendant, the defendant's counsel, and the attorney for the Government to meet with the probation officer to discuss unresolved factual and legal issues. The probation officer may also

conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer shall submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer shall furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(5)(B), the court may, at the presentencing hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) SENTENCE

(1) *Sentencing Hearing.* At the sentencing hearing, the court shall afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and shall rule on any unresolved objections to the presentence report.

The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections.

For each matter controverted, the court shall make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account or will not affect sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) *Production of Statements at Sentencing Hearing.* Rule 26.2(a)-(d), (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of Sentence.* Before imposing sentence, the court shall:

(A) determine that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(5)(A). If, however, the court believes that the presentence report contains information that should not be disclosed

under subdivision (b)(5)(A), the court — in lieu of making that part of the report available — shall summarize it, orally or in writing, if the information will be relied on in determining sentence. The court shall also give the defendant and the defendant's counsel an opportunity to comment on that information.

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(4) *In Camera Proceeding.* The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements — made under subdivision (c)(3)(B), (C), and (D) — by the defendant, the defendant's counsel, or the attorney for the Government.

(5) *Notification of Right to Appeal.* After imposing sentence, the court shall advise the defendant of the right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall immediately prepare and file a notice of appeal on behalf of the defendant.

(d) JUDGMENT.

(1) *In General.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

(e) PLEA WITHDRAWAL. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. After the sentence is imposed, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. 2255.

FEDERAL RULES OF EVIDENCE

Rule 412. Sex Offense Cases; Relevance of Victim's Past Sexual Behavior or Predisposition

(a) Evidence Generally Inadmissible. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.~~ 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 subdivisions (b) and (c).

(b) Exceptions. ~~Notwithstanding any other provision of law, in a criminal case in which a person is accused of~~ an offense under chapter 109A of title 18, United States ~~Code,~~ Evidence ~~evidence~~ of ~~a victim's~~ the past sexual behavior ~~other than reputation or opinion evidence~~ or predisposition of an alleged victim of sexual misconduct ~~is also not admissible, unless such evidence other than reputation or opinion evidence is~~ may be admitted only if it is otherwise admissible under these rules and is--

(1) ~~admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted;~~ or

(2) ~~admitted in accordance with subdivision (c) and is evidence of~~

FEDERAL RULES OF EVIDENCE

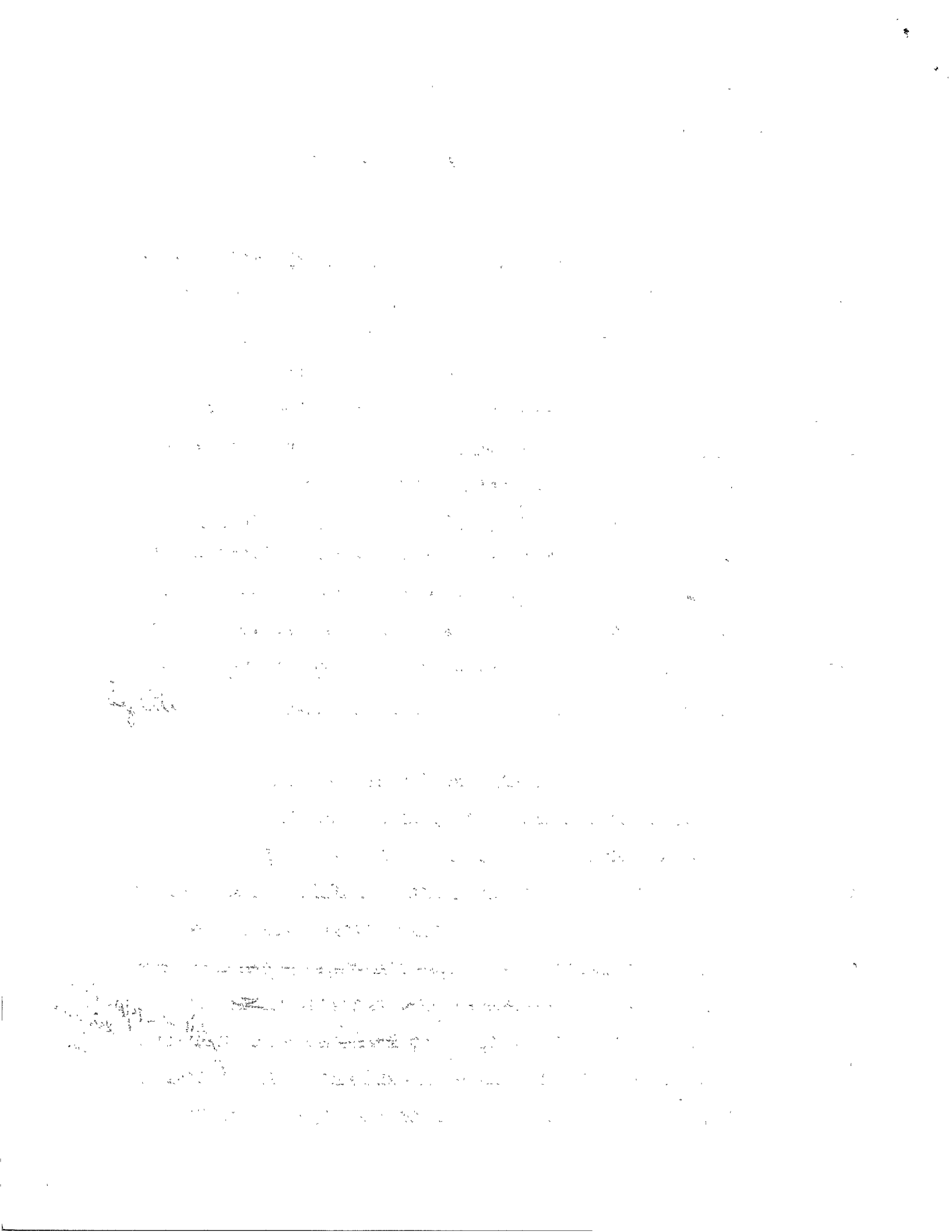
~~(A)~~(1) evidence of specific instances of ~~past~~ sexual behavior with ~~persons~~ someone other than the person accused, of the sexual misconduct, when offered ~~by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim,~~ to prove that the other person was the source of semen, other physical evidence, or injury; ~~or~~

~~(B)~~(2) evidence of specific instances of ~~past~~ sexual behavior with the accused and is offered ~~by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged~~ person accused of the sexual misconduct, when offered to prove consent by the alleged victim;

(3) evidence of specific instances of sexual behavior when offered in a criminal case in circumstances where exclusion of the evidence would violate the constitutional rights of the defendant; or

(4) evidence of specific instances of sexual behavior [or other evidence, ~~including evidence in the form of reputation or opinion,~~ concerning ~~the~~ sexual behavior or predisposition ~~of the victim,~~] when offered in a civil case in circumstances where the evidence is essential to a fair and accurate determination of a

either type of evidence is



claim or defense.

(c) Procedure to Determine Admissibility. Evidence must not be ~~admitted~~ offered under this rule unless the proponent obtains leave of court by a motion filed under seal, specifically describing the evidence and stating the purposes for which it will be offered. The motion must be served on the alleged victim as well as the parties and must be filed at least 15 days before trial unless the court directs an earlier filing or, for good cause shown, permits a later filing. After giving the parties and the alleged victim an opportunity to be heard in chambers, the court must determine whether, under what conditions, and in what manner and form the evidence may be admitted. The motion and the record of any hearing in chambers must, unless otherwise ordered, remain under seal ~~in the trial and appellate courts.~~

~~(c)(1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which suc evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date,~~

FEDERAL RULES OF EVIDENCE

including during trial if the court determines that the ~~evidence is newly discovered and could not have been~~ obtained earlier through the exercise of due diligence ~~or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this~~ paragraph shall be served on all other parties and on ~~the alleged victim.~~

~~(2) The motion described in paragraph (1) shall~~ be accompanied by a written offer of proof. If the ~~court determines that the offer of proof contains evidence described in subdivision (b), the court shall~~ order a hearing in chambers to determine if such ~~evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and~~ offer relevant evidence. 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 scheduled for such purpose, shall accept evidence on the issue of whether such condition in fact is fulfilled and shall determine such issue.~~

~~(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence~~

FEDERAL RULES OF EVIDENCE

which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be ~~admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.~~

~~(d) For purposes of this rule, the term "past sexual~~ behavior" means sexual behavior other than the sexual ~~behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.~~

COMMITTEE NOTE

The changes to Rule 412 are intended to diminish some of the confusion engendered by the rule in its current form and expand the protection afforded to all 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 always is associated with public exposure of intimate details of sexual history.

The revised rule applies in all cases in which there is evidence that someone was the victim of sexual misconduct, without regard to whether the alleged victim or person accused is a party to the litigation. The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred, and not to connote any requirement that the misconduct be alleged in the pleadings. Similarly, the reference to a person "accused" is used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense.

FEDERAL RULES OF EVIDENCE

The amendment eliminates three parts of existing 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 reducing 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 402, 404 (b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires.

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 prosecution 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.

The conditional clause, "otherwise admissible under these rules," is included in subdivision (a) to emphasize that evidence described in subdivisions (b)(1) through (b)(4) is not automatically admissible. To be admitted, the evidence must not only meet one of the four listed reasons, but also must satisfy the requirements for admissiblity contained in other rules of evidence. For example, in determining admissibility, the court would have to consider Rules 402 and 403, and perhaps other Rules such as Rules 404 and 405.

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.

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) is new and 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.

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. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. 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 in chambers 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 out a balancing test. The Advisory Committee intends that the court will 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.

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

December 4, 1992

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

I am enclosing a draft of the stylistic revision of Rule 35, which I failed to include in the earlier mailing. I ask that the Fines/Doty/Holmes group review this rule.

Also enclosed is a replacement page for Rule 71A, that incorporates change in the rule now pending before the Supreme Court. I should have waited to send this out with the other rules that have changes pending, but since it was included we can go forward with the review as part of this package.

Sincerely,

Sam C. Pointer, Jr., Chairman
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Rule 35. Physical and Mental Examinations of Persons	RULE 35. PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS[1]
(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.	(a) **Order for Examination.** The court may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The order must: (1) be made on motion for good cause shown and upon notice to all parties; and (2) specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.
(b) **Report of Examiner.** (1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial. (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition. (3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.	(b) **Examiner's Report.** (1) The party examined must, on request, be provided a copy of the examiner's detailed written report setting forth the examiner's findings, including results of any tests, diagnoses, and conclusions, and like reports of all earlier examinations respecting the same condition.[2] (2) By requesting and receiving a report or by deposing the examiner, the party examined (A) waives any privilege — in that action or any other involving the same controversy — regarding all prior or later examinations respecting the same condition, and (B) must, if requested, deliver reports of all such examinations to the party who moved for the examination. (3) The court on motion may order — on just terms — that a party deliver a report, and, if an examiner fails to provide the report, it may exclude the examiner's testimony at trial. (4) This subdivision applies to examinations made by agreement of the parties, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

1. I have made substantial--though hopefully not substantive--changes, including separation of some provisions into new subdivision (c), in the language suggested by TSS. --SCP
2. Is this a requirement to provide copies of earlier examinations made by the examiner . . . relied upon by the examiner . . . or what? --SCP

(c) [Deleted].	(c) **Person in Party's Custody or Control.** The court may order a party to produce for examination a person who is in its custody or under its legal control and whose mental or physical condition is in controversy. The person to be examined must be served a copy of the motion seeking the examination and, on request, be provided a copy of the examiner's report. The party having custody or control of the person examined is excused from producing under (b)(2)(B) reports of other examinations which it shows are unavailable.

[414 words in original]

[328 words in revision — 21% reduction]

(3) Service of Notice. **(A) Personal Service.** Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.[1] **(B) Service by Publication.** Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners." Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.	**(3) Service of Notice.** **(A) Personal Service.** When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without copies of the complaint) must accord with Rule 4. **(B) Service by Publication.** **(i)** When the plaintiff's attorney files a certificate stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed the defendant's place of residence cannot be ascertained — or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule — this defendant must be served by publication in a newspaper published in the county where the property is located. If there is no such newspaper, then notice must be published — once a week for no fewer than three successive weeks — in a newspaper having general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to a defendant who cannot be personally served under (A) but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners." **(ii)** Service by publication is complete upon the date of the last publication. The plaintiff's attorney proves publication and mailing by certificate, to which must be attached a printed copy of the published notice bearing the name and dates of the newspaper.
(4) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.[2]	**(4) Return; Amendment.** Rule 4 applies to proof of service and any amendment of the notice or proof.

1. This language incorporates the changes now pending before the Supreme Court. -- SCP

2. This language incorporates the changes now pending before the Supreme Court. -- SCP